PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

Mine Safety Appliances Company v. Century Indemnity Company, et al., Wettick, A.J. .....Page 73
Declaratory Relief—Failure to Defend and Provide Coverage—Future Claims—Interested Parties

Moon Area School District v. Board of Property Assessment Appeals and Review (Interested Parties: Maronda Homes, Inc., Moon Township and Allegheny County), Wettick, A.J. .....Page 75
Assessments of Acreage or Unimproved Property—Second Class County Code

Target National Bank/Target Visa v. Liz G. Samanez and Target National Bank v. John R. Celesti, Wettick, A.J. .....Page 76
Preliminary Objections—Sufficiency of Complaint

Richard Colella v. Borough of Wilkinsburg and Civil Service Commission of the Borough of Wilkinsburg, O'Reilly, J. .....Page 80
Statutory Appeal—Fire Department Promotion

Mark A. Lukacs v. Plum Borough School District, Dawn Caruso, Kevin Dowdell, Linda Eazor, Dan Lioy, Jeffrey Matthews, Tom McCough, Paul Olijar, Kris Traficanti, Loretta White, O'Reilly, J. .....Page 82
Preliminary Objections—Sunshine Law—Schools—Suspensions and Terminations

Marshall Pappert and Julia Pappert, his wife v. Donald Snyder and Cheryl Snyder, his wife, and Theodore Jones, a/k/a Ted A. Jones, O'Reilly, J. .....Page 83
Motion for New Trial—Evidence of Prior Lawsuit—Prejudice

Appeal of: Chartiers Valley Industrial & Commercial Development Authority, Maurice A. Nernberg and Nancy N. Nernberg, Lessees, of the real estate tax assessment made by the Board of Property Assessment, Appeals and Review of the property located at 301 Smithfield Street, Block and Lot 1-H-351; Interested parties: Allegheny County, City of Pittsburgh and City of Pittsburgh School District.

In re: Maurice A. Nernberg and Nancy N. Nernberg v. Board of Property Assessment, Appeals and Review, City of Pittsburgh School District and City of Pittsburgh, Wettick, J. .....Page 84
Assessment Appeals—Uniformity Clause of Pennsylvania Constitution—Meaningful Sub-Classification of Property

Michael Evanovich v. Sandino Molinari and Beemer's Inc., Friedman, J. .....Page 86
Third Party Criminal Activity—Involuntary Nonsuit—Excessive Verdict

G. Gray Garland, Jr. and Margaret G. Garland v. Alfonso C. D'Orazio and Theresa Donahue D'Orazio, Friedman, J. .....Page 88
Easement—Impermissible Interference—Obstacles Placed on Easement

Henderson Brothers, Inc. v. Paul R. Schaaf and Peoples First Insurance, Wecht, J. .....Page 89
Preliminary Injunction—Confidential Information—Nonsuit

Commonwealth of Pennsylvania v. Keith Navaro Carter, Manning, J. .....Page 92
Criminal Law—Amendment to Criminal Information—Pa. Rule of Criminal Procedure 564—Evidence—Harmless Error—Jury Charge—Transferred Intent

Commonwealth of Pennsylvania v. Andre Basking, Mariani, J. .....Page 95
Supression of Drugs and Weapons—Authority to Consent to Search

CAPSULE SUMMARY

M.M.H. v. L.B.H., Hertzberg, J. .....Page 102
Protection from Abuse

PLJ

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Mine Safety Appliances Company v. Century Indemnity Company, et al.

Declaratory Relief—Failure to Defend and Provide Coverage—Future Claims—Interested Parties

1. Century Indemnity Company is the successor in interest to the issuers of insurance policies issued to MSA and it failed to reimburse MSA for settlements and defense costs which it had paid in numerous personal injury lawsuits.

2. Century Indemnity Company sought declaratory relief as to tort claims that have been resolved and future claims that had not yet been filed against MSA.

3. Claimants with pending claims have interests which will be affected by the declaration.

4. An insured or insurance company cannot pursue a declaratory judgment in Pennsylvania state courts where there are a large number of claimants with outstanding claims or whenever there are claimants outside of Pennsylvania jurisdiction who will not voluntarily participate.

5. The Court has no subject matter jurisdiction where claimants with pending and unresolved claims are indispensable parties and have not been joined.

(Mary Ann C. Acton)

George L. Stewart, II and *Michael H. Sampson* for Plaintiff.
Nicholas A. Pascioullo and *Melvin R. Shuster* for Defendant.

No. GD 06-013611. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION AND ORDER OF COURT

Wettick, A.J., November 29, 2007—The issue that I consider in this Opinion and Order of Court is whether *Vale Chemical Co. v. Hartford Accident Indemnity Co.*, 516 A.2d 684 (Pa. 1986), and its progeny apply when an insurance company, without joining any persons having past, current, or future claims against the insured, seeks declaratory relief as to defense and coverage issues, only as to claimants whose claims have been resolved and potential claimants who have not yet raised claims against the insured.

Mine Safety Appliance Company sued Century Indemnity Company, as successor in interest to the issuers of insurance policies issued to Mine Safety, raising breach of contract and bad faith counts for failure to defend and provide coverage. Mine Safety alleges that it has been sued in numerous personal injury lawsuits and Century has not reimbursed Mine Safety for settlements and defense costs which it has paid.[1]

Mine Safety's breach of contract counts are based on breaches of a 1961 policy, a 1964 policy, a 1969 policy, a 1970 policy, and a policy identified as a *Cal Union Policy*. The relief which Mine Safety seeks is a judgment in the sum Mine Safety has paid for defense costs and settlements. The final count is a claim for breach of the duty of good faith and fair dealing under which Mine Safety seeks consequential and punitive damages.

Century's Second Amended Answer, New Matter and Counterclaims includes a five-count counterclaim. In Count I (Declaration of Rights and Obligations—"Other Insurance"), Century seeks a declaration that Century's total obligation to Mine Safety for any of the underlying claims against Mine Safety that have been settled or otherwise fully resolved and for any future claims that have yet to be filed against Mine Safety is limited to Century's obligations under the 1970 policy (i.e., Century has no obligations under the 1961, 1964, and 1969 policies).

In Count II (Declaration of Rights and Obligations—Number of Occurrences), Century seeks a declaration that the underlying claims against Mine Safety that have been settled or otherwise finally resolved, and any future claims that have yet to be filed against Mine Safety result from or arise out of a single occurrence.

In Count III (Declaration of Rights and Obligations—Obligation to Defend or Pay Defense Costs), Century seeks a declaration that Century's obligation to pay defense costs incurred by or on behalf of Mine Safety and reflected in invoices provided to Century during the period June 15, 2005 to December 31, 2005 is limited to the payment of the agreed-upon share of such defense costs and Century has no obligation to defend any underlying claims that have not been forwarded to the law firm designated by Century for defense.

In Count IV (Declaration of Rights and Obligations), Century requests this court to enter an award consistent with Century's contentions at paragraphs 15-19. Paragraph 15 is an incorporation provision. Paragraph 16 states that to the extent the court determines that Century is liable for any portion of the costs of the defense and/or indemnity of any of the underlying claims that have been settled or otherwise fully resolved, Century is entitled to a determination of the proper allocation of such costs, if any, as between Mine Safety and Century. Paragraph 17 states that to the extent that the court determines that Century is liable for the costs of defense and/or indemnity of any of the underlying claims that have been settled or otherwise fully resolved, Century is entitled to a determination that it could only be obligated to pay its pro rata or proportionate share of such costs that were properly settled and which fall within the terms, conditions, and exclusions of the insurance policies. Paragraph 18 states that until the applicable Century policies are exhausted, Mine Safety will demand that Century pay 100% of all costs of defense and indemnity associated with underlying claims that will in the future be alleged against Mine Safety. Paragraph 19 states that Century seeks a determination that it could only be obligated to pay its pro rata or proportionate share of the costs associated with the underlying claims that will in the future be alleged against Mine Safety that fall within the terms, conditions, and exclusions of the policies.

In Count V (Contribution, Allocation, or Set-Off), Century requests the court to enter an award consistent with its contentions at paragraphs 20-23. Paragraph 23 is the only applicable paragraph. It provides that to the extent Century is obligated to pay more than its proportionate share of the defense and indemnity costs demanded by Mine Safety, Century is entitled to apportionment, contribution, indemnification, payment, reimbursement, and/or setoff from Mine Safety to the extent appropriate under applicable law, in the amounts of its respective proportionate share of the defense and indemnity costs incurred in connection with the underlying claims.

Mine Safety seeks dismissal of Counts I-III based on *Vale Chemical Co. v. Hartford Accident Indemnity Co., supra*. In an underlying lawsuit, Vale Chemical was sued in Illinois by a woman who claimed that her cancer was caused by her mother's use of a product manufactured by Vale Chemical during her mother's pregnancy. Vale Chemical then sued in the Pennsylvania state courts under Pennsylvania's Declaratory Judgments Act, 42 Pa.C.S. §§7531-7541, to determine whether its insurance contracts with Transamerica and Hartford required them to defend Vale Chemical and indemnify it against the Illinois plaintiff's claim.

The trial court in the Pennsylvania proceedings ruled that both companies were required to provide a defense. The Superior Court affirmed in an opinion that adopted the multiple trigger theory of liability. The Pennsylvania Supreme Court reversed on the ground that the Common

Pleas Court lacked jurisdiction to enter a declaratory judgment because an interested party (i.e., the injured Illinois plaintiff) was not joined. The Court held that failure to join the Illinois plaintiff was a fatal defect because she had an interest in seeing that an insurance company paid a judgment entered against its insured. *Vale, supra*, 516 A.2d at 686-87. The Court's opinion cited 42 Pa.C.S. §7540(a) which provides, in relevant part, that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."

Century contends that *Vale* does not apply because Century does not seek declaratory relief as to persons with pending claims. Instead, Century seeks declaratory relief only as to tort claims that have been resolved and future claims that have yet to be filed against Mine Safety.

According to Century, *Vale* does not bar a request for declaratory relief for underlying claims against Mine Safety that have been settled or otherwise fully resolved because these claimants have no interest which could be affected by a declaration that Century has no obligations under the 1961 policy, 1964 policy, and 1969 policy and that any future claims are limited to those obligations under the 1970 policy.

Century claims that it is entitled to seek declaratory relief as to future claims that have not yet been filed against Mine Safety, including declarations that (i) any future claims only involve Century's obligations under the terms of the 1970 policy and (ii) any future claims arise from or out of a single occurrence. Century relies on *J.H. France Refractories v. Allstate*, 555 A.2d 797 (Pa. 1989), where the Court ruled that Vale does not require a joinder of claimants who assert their claims after the declaratory judgment action is filed.

Century relies on the ruling of the Common Pleas Court of Philadelphia in *Kvaerner U.S., Inc. v. OneBeacon Insurance Co.*, No. 0940 April Term 2003, 2003 WL22282606 (C.P. Phila. Sept. 29, 2003), which found merit to the arguments that Century is raising in the present case. In that case, Kvaerner instituted a declaratory judgment action seeking a finding that the insurance policies the defendants issued to Kvaerner obligated the defendants to defend Kvaerner against asbestos-related bodily injury claims and to indemnify Kvaerner for all damages payable by it with respect to asbestos claims. The only parties to the litigation were the insured (Kvaerner) and its insurance companies. Kvaerner did not join any of the tort claimants in the underlying litigation against Kvaerner.

In its complaint, Kvaerner sought declaratory relief as to all asbestos-related claims. In response to Century's preliminary objections raising a lack of subject matter jurisdiction, the Court limited Kvaerner's claims for declaratory relief to claimants who had settled their claims with Kvaerner and future asbestos-related claimants. With respect to claimants who had settled their claims, the Court stated:

> Any effect which the declaratory judgment would have upon the parties that settled is highly speculative and would only be incidental to the issues in the instant action. The settled claimants are not essential to the merits of this issue and justice can be accomplished without violating due process rights. Accordingly, this court finds that claimants that have settled with Kvaerner in the underlying actions do not have an interest in this action. *Id.* at *2.

With respect to future asbestos claims, the Court, citing *J.H. France*, stated that future asbestos-related claimants are not indispensable parties to the present action.[2]

I am not following *Kvaerner* because it denies interested parties the protections which *Vale* intended to furnish and would render *Vale* meaningless.

Any ruling as to the coverage available to claimants whose claims have been resolved and as to future claimants would in this case—and in almost all cases—involve the same issues that will be addressed in coverage disputes as to existing claimants. In other words, if Century's counterclaim also sought declaratory relief as to claimants with existing and unresolved claims, the issues would not change. Since the issues would not change, any rulings favorable to the insurance company would eventually apply in litigation involving coverage for claimants with existing and unresolved claims. The applicable doctrines by which this would occur include a requirement that one Common Pleas Court judge follow the legal rulings made by another judge of the same court; Common Pleas Court judges must follow opinions of the appellate courts; and one Superior Court panel must follow the rulings of an earlier Superior Court panel.[3]

I recognize that §7540(a) of the Declaratory Judgment Act provides that no declaration shall prejudice the rights of persons not parties to the proceeding. However, at the most, this only means that a person is not bound by a declaration entered in a proceeding in which he or she was not a party.[4] It does not mean that the legal rulings made in the first proceeding do not control the second proceeding. It would be an absurd result to construe §7540(a) to mean that in the second proceeding, the insurance company could not cite and the Common Pleas Courts and the Superior Court could not follow (or even refer to) an opinion of the Pennsylvania Supreme Court entered in the first proceeding.

Century devotes most of its brief to arguing the obvious-claimants whose claims have been fully resolved have no interest in Century's counterclaim. However, Century never explains why claimants with pending claims do not have interests which would be affected by the declaration and how a court could make a declaration which did not "prejudice the rights of persons not parties to the proceeding." 42 Pa.C.S. §7540(a).

It is recognized that an insured or an insurance company cannot pursue a declaratory judgment action in the Pennsylvania state courts whenever there are a large number of claimants with outstanding claims or whenever there are claimants outside the jurisdiction of the Pennsylvania courts who will not voluntarily participate in the Pennsylvania proceedings. If this is an undesirable result, the cure is not to allow proceedings in which claimants with the most to lose are not required to be joined in litigation that will affect their interests. Instead, the cure should be to permit a declaratory judgment action to proceed if the interests of those whom it is impossible or not feasible to join are adequately represented by the present parties. See discussion in *Zurich Insurance Co. v. Baxter International, Inc.*, 655 N.E.2d 1173, 1177-80 (Ill. App. Ct. 1995) (discussion of no precedential value); *Zurich Insurance Co. v. Baxter International, Inc.*, 670 N.E.2d 664, 668 (Ill. 1996); and *Monsanto Co. v. Aetna Casualty and Surety Co.*, 565 A.2d 268 (Del. Super. Ct. 1989).

Also see *City of Philadelphia v. Commonwealth*, 838 A.2d 566 (Pa. 2003), where the Court said that §7540(a) is subject to reasonable limitations. The "guiding inquiry in any discussion of indispensability is whether justice can be done in the absence of the parties asserted to be necessary." *Id.* at 584. Thus, where there is a frontal constitutional attack on an act of the General Assembly, the Attorney General stands in a representative capacity for all non-Commonwealth parties having an interest in seeing the statute upheld. Also see *Commonwealth, Office of Attorney General v. Richmond Township*, 917 A.2d 397 (Pa.Cmwlth. 2007); *Stilp v.*

Commonwealth, 910 A.2d 775, 785-86 (Pa.Cmwlth. 2006).

For these reasons, I am granting Mine Safety's motion for judgment on the pleadings as to Counts I and II of Century's counterclaim.

I next consider the motion for judgment on the pleadings as to Count III in which Century seeks a declaration as to its obligation to defend. I also find a lack of subject matter jurisdiction for failure to join an indispensable party because of Century's failure to join claimants with pending and unresolved claims.

In *Vale*, the insured sought declaratory relief as to whether its insurance companies were required to defend the action filed against Vale and to indemnify it for liability. In holding that the jurisdictional requirements of the Declaratory Judgment Act with respect to joinder of indispensable parties had not been satisfied, the Pennsylvania Supreme Court did not distinguish between a duty to defend and a duty to provide coverage.

Also, the issues that will be addressed in a declaratory judgment count seeking a declaration as to the duty to provide a defense are very similar to the issues that will be addressed in a declaratory judgment action seeking a declaration as to the duty to indemnify a party making claims under the policy. See *General Accident Insurance Co. of America v. Allen*, 692 A.2d 1089, 1095 (Pa. 1997). Thus, where declaratory relief is sought only as to the duty to defend, a ruling that does not require joinder of any claimants would, in many cases, result in decisions that would detrimentally affect coverage claims for indemnification without any claimant's participation. Also, courts would be inviting piecemeal litigation if *Vale* could be avoided where the plaintiff sought only declaratory relief as to a duty to defend.[5]

I next consider Mine Safety's Motion for Judgment as to Counts IV and V of the counterclaim. I am dismissing Count IV—Full Declaration of Rights and Obligations—because it appears to be dependent upon requested rulings as to the declaratory relief that was sought in the earlier counts of the counterclaim which have been dismissed. Furthermore, any claims for declaratory relief sought in this court are dismissed for failure to join indispensable parties.

I am dismissing Count V because it appears to raise matters that are defenses to Mine Safety's claims. To the extent that declaratory relief is sought, it is barred by the failure to join indispensable parties.

ORDER OF COURT

On this 29th day of November, 2007, it is hereby ORDERED that plaintiff's motion for judgment on the pleadings with respect to the counterclaims of Century Indemnity Company is granted and each count within the counterclaim is dismissed.

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

[1] Mine Safety's complaint alleges that Mine Safety has been sued in numerous personal injury lawsuits across the country, the vast majority of which involve Mine Safety's respiratory protection products. The plaintiffs in these lawsuits are suffering from various respiratory diseases. At this time, Mine Safety is a defendant in approximately 23,000 underlying claims.

[2] I do not read *J.H. France* to allow declaratory relief as to coverage where no claimants are parties to the litigation. In *J.H. France*, the parties to the litigation included claimants with existing and unpaid claims whose interests were similar to the interests of future claimants and the issue was whether a court with jurisdiction to grant declaratory relief would lose its jurisdiction because of subsequent filings. In the present case, this court never had jurisdiction to grant declaratory relief.

[3] I recognize that rulings made in Mine Safety's breach of contract claims against Century may affect coverage for claimants with existing and unresolved claims and future claimants. However, there is no legislation which provides that in a breach of contract action all persons who have or may claim any interest that may be affected by the litigation must be made parties.

[4] I believe that this provision means that a court may not furnish declaratory relief whenever the declaration may prejudice the rights of persons not parties to the proceedings.

[5] The *Kvaerner* case rejected Kvaerner's attempts to distinguish between a duty to defend and a duty to indemnify. The Court said that since "the plaintiffs-claimants have an interest in coverage, this court finds that the underlying claimants have an interest in this action." *Kvaerner, supra*, 2003 WL 22282606, at *2.

Moon Area School District v. Board of Property Assessment Appeals and Review (Interested Parties: Maronda Homes, Inc., Moon Township and Allegheny County)

Assessments of Acreage or Unimproved Property—Second Class County Code

1. Taxing body is not prevented from appealing an assessment of acreage or unimproved property to demonstrate that the fair market value of the property is in excess of its current assessed value, notwithstanding provision of the Second Class County Code (72 P.S. Section 5452.13) which provides that land that is being developed shall continue to be assessed as acreage or unimproved property until lot is improved with a new building and is either sold or occupied for residential purposes.

2. Purpose of Section 13 of Second Class County Code, which is to encourage development of vacant and unimproved property for residential use by not requiring developer to pay real estate taxes based on the value of the improvements made on the property until the new building is constructed and either sold or occupied, is not applicable to prevent a taxing body from challenging the assessment on the ground that the assessment is less than the fair market value.

(Peter Clyde Papadakos)

M. Janet Burkardt for Moon Area School District.
Robert J. Reith for Allegheny County.
James G. McLean for Maronda Homes, Inc.

Nos. BV05-000618; BV05-000201; BV05-000203. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION AND ORDER OF COURT

Wettick, A.J., December 3, 2007—This litigation involves assessment appeals for three tax parcels for the years 2005-2007.

On January 31, 2002, Maronda Homes acquired a parcel consisting of unimproved property (Parcel 806-D-196) for $800,000. At the time of acquisition, the property had an assessed valuation of $176,000. No tax assessment appeals

were filed as to this parcel for tax years 2002, 2003, or 2004.[1]

On May 3, 2005, the School District filed a tax assessment appeal for 2005. On November 28, 2005, the Board of Property Assessment Appeals and Review kept the assessment at $176,700. The School District appealed to the Board of Viewers.

The second and third parcels that are the subject of this litigation (Parcel 808-S-194 and Parcel 808-P-271) are referred to as the *Foxwood Knolls Plan of Lots*. On May 17, 2001, the Foxwood Plan was acquired for $600,000. At the time of acquisition, Parcel 808-S-194 had an assessed valuation of $35,500, and Parcel 808-P-271 had an assessed valuation of $114,500. No tax assessment appeals were filed as to these parcels for tax years 2001, 2002, 2003, and 2004.[2]

On May 3, 2005, the School District filed a tax assessment appeal for both parcels. On September 19, 2005, the Board of Assessment Appeals and Review kept the assessed value of the two parcels at $35,500 and $114,500. The School District appealed the decision as to both parcels to the Board of Viewers.

The Board of Viewers has postponed any hearing pending a ruling by this court as to the applicability of Section 13 of the assessment legislation governing counties of the second class (72 P.S. §5452.13) to the assessments of these parcels.

This section reads, in relevant part, as follows:

> No land assessed as acreage or unimproved property, which is subsequently laid out in residential lots and the plan of such lots is recorded, shall be assessed in excess of the total assessment of the land as acreage or unimproved property until such time as the lots are actually improved with permanent construction of any new building and either sold to a bona fide purchaser or occupied for residential purposes.

Assessments in Allegheny County are based on 2002 values. Thus, under Section 13, assessments for years 2005-2007 must be based on the 2002 assessed value of the land as acreage or unimproved property. No assessment for years 2005-2007 may take into account increases in value attributable to the development of the property. However, neither Section 13 nor any other provision of the Second Class County and General Assessment Laws bars a taxing body from appealing an assessment of land that has been approved for residential development, or that is being developed, on the ground that the assessed value of the land as acreage or unimproved property is less than the fair market value as of 2002 of the land as acreage or unimproved property.

The purpose of Section 13 is to encourage the development of vacant and unimproved property for residential use by not requiring the developer to pay taxes based on improvements made to the property until a new building is constructed and the property is either sold or occupied. *In Re: Appeal from the Action of the Board of Property Assessment Appeals and Review of Allegheny County regarding the Assessments of Residential Property owned by various owners and situated in Allegheny County, Pennsylvania v. County of Allegheny and various Municipalities and School Districts*, 151 P.L.J. 9 (2002). Section 13 achieves this purpose by providing that land which is being developed shall continue to be assessed as acreage or unimproved property until a lot is improved with a new building and either sold or occupied for residential purposes. In these proceedings, the protections of Section 13 do not apply because the School District is claiming only that the 2002 fair market values of the properties as acreage or unimproved property is greater than their current assessed values.

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

ORDER OF COURT

On this 3rd day of December, 2007, it is ORDERED that the Board of Viewers shall hear the tax appeals in BV05-000618, BV05-000201, and BV05-000203 and shall make its decision based on the ruling made in this Opinion.

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

[1] On February 12, 2002, Maronda Homes filed an application for approval of a plan of lots with Moon Township. Approval was received on August 3, 2005.

[2] An application for approval of subdivision plan for Foxwood Plan was filed by Maronda Homes on February 12, 2002. On July 8, 2004, Maronda received final approval for the plan.

Target National Bank/Target Visa v. Liz G. Samanez and Target National Bank v. John R. Celesti

Preliminary Objections—Sufficiency of Complaint

1. Where a complaint does not describe an express agreement, the complaint must include sufficient documentation and allegations to permit the defendant to calculate the total amount allegedly due, by reading the documents attached to the complaint and the allegations in the complaint.

2. The defendant's failure to object to an invoice at the time it is received does not result in an implied agreement that the amount claimed to be owed is correct. The defendant may question the correctness of the claim regardless of whether he or she previously questioned the correctness of the invoices.

(Meg L. Burkardt)

Gregg L. Morris for Plaintiff.
Liz G. Samanez, *Pro Se.*
Thomas J. Dausch for John R. Celesti.

No. AR07-009777 and No. AR06-009418. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION AND ORDER OF COURT

Wettick, A.J., December 19, 2007—The subject of this Opinion and Order of Court is defendants' preliminary objections to plaintiffs' complaints raising noncompliance with the pleading requirements of Pa. R.C.P. 1019 because of the failure of plaintiffs to attach the monthly credit card statements upon which plaintiffs' claims are based, and plaintiffs' failure to attach writings that govern the defendants' obligations.

I. *Target National Bank/Target Visa v. Samanez*

The complaint filed by plaintiff ("Target") alleges that defendant opened an account with plaintiff for the purchase of goods and services. Plaintiff maintains accurate books of account recording all credits and debits for this account. Defendant received monthly statements setting forth the nature and amount of all charges made by defendant. Defendant refuses to pay a balance due and owing of $8,215.84.

The only writing attached to plaintiff's complaint is a July 25, 2007 closing statement showing a previous balance of $8,180.84, late charges of $35.00, a new balance of

$8,215.84, an amount past due of $1,814.34, and a minimum payment due of $8,215.84.

In *Worldwide Asset Purchasing, LLC v. Stern*, 153 P.L.J. 111 (2004), and in *FIA Card Services, N.A. v. Kirasic*, AR06-009360, 156 P.L.J. 39 (November 7, 2007), I addressed preliminary objections to complaints to recover credit card balances based on a failure to attach the writings setting forth the terms and conditions of the credit card agreement and documents to support balances allegedly due.

In *Worldwide Asset Purchasing*, Bank of America was the issuer of the credit card and suit was brought by Worldwide Asset Purchasing. I ruled that Worldwide Asset Purchasing was required to attach to the complaint the written assignment or assignments that traced ownership of the account from Bank of America to Worldwide Asset Purchasing.

In *Worldwide Asset Purchasing*, the credit card companies filed complaints which attached only one monthly statement showing the balance allegedly due. I ruled that the complaints failed to comply with the requirements of Rule 1019 that a plaintiff shall (1) set forth the material facts upon which a cause of action is based and (2) attach the writings when a claim is based on a writing. I said that whenever a claim involves one period of time in which the initial terms and conditions of the credit card agreement apply and other periods of time in which amended terms and conditions apply, the plaintiff must attach to the complaint both the original and amended terms and conditions with the dates on which they are applicable.[1]

I also ruled that a complaint in which a plaintiff seeks recovery of a specific amount of money that is allegedly due must include documentation or allegations supporting recovery of this amount. I said that a complaint must contain sufficient documentation and allegations to permit a defendant to calculate the total amount of damages that are allegedly due by reading the documents attached to the complaint and the allegations in the complaint.[2]

In *FIA Card Services*, the plaintiff's initial complaint alleged that the defendant received monthly statements which accurately stated all purchases and payments made during the month, interest charges imposed on the unpaid balance, and the amount due. The complaint stated that as of November 9, 2006, the remaining balance was $22,061.86. The defendant filed preliminary objections based on my ruling in *Worldwide Asset Purchasing* that requires a credit card company to attach writings showing the terms and conditions of the applicable credit card agreement(s) and the applicable monthly statements which support the amount that is claimed. Card Services filed an amended complaint which attached the monthly statements upon which it based its claim for $22,061.86. However, it did not attach any writings showing the terms and conditions of the credit card agreements applicable to the defendant during the relevant times. Consequently, I sustained the defendant's preliminary objections to the amended complaint with leave to amend.

Card Services filed a second amended complaint which stated that it was unable to attach a copy of the applicable writings governing interest rates and fees during the relevant times. However, in the second amended complaint, Card Services only sought payment of the amount of the cash advances and purchases identified in the invoices attached to the complaint, less payments made to the plaintiff as set forth in the invoices.

Card Services attached to its second amended complaint a November 2004 statement showing a balance of $0.00 for the beginning of the billing cycle. Card Services also attached to the complaint the monthly statements from November 2004 through August 2006. The total amount of the cash advances and purchases shown on these statements, less the total amount of payments shown on these statements, was $16,251.99. In this lawsuit, this was the only money that Card Services sought to recover.

I overruled the defendant's preliminary objections, stating that while the plaintiff cannot produce the writings that govern the defendant's obligations during the period in question, the defendant does not dispute that the credit card that is the subject of this litigation was issued by the plaintiff to the defendant in 1990. A fact-finder may assume that any writing governing the defendant's obligations to the plaintiff between 1990 and August 2006 included the obligation to pay the cash advances and purchases shown on the invoices. Thus, the writings that the plaintiff cannot produce would be needed only to establish finance charges, late fees, over limit fees, and the like that the plaintiff may have been permitted to impose. However, the claim raised in the second amended complaint does not include any of these items. Consequently, the writings that the plaintiff attached to the second amended complaint supported the claim that the plaintiff is raising.

I stated:

> In summary, in consumer credit transactions, the Pennsylvania Rules of Civil Procedure require a credit card issuer seeking to recover money allegedly due to attach to the complaint the writings which support the claim which the credit card issuer is making. Invoices showing cash advances or purchases support a claim for payment of these items. *Id.* @*4.

In the present case, Target contends that my rulings in *Worldwide Asset Purchasing* and *FIA Card Services* do not apply. According to Target, this is a lawsuit to recover an account stated. Target has alleged that defendant received monthly statements and never raised any objections to the contents of the statements. Consequently, according to Target, she has agreed to pay the balance set forth in the final statement so any writings describing the relationship between the parties and the monthly charges and credits set forth in prior statements are irrelevant.[3]

The law recognizes a lawsuit based on an account stated where the complaint describes discussions between the parties or other back and forth communications as to the amount that is due. Once an agreement is made as to the amount that will resolve the dispute, this account stated constitutes a new and independent cause of action superseding any antecedent cause of action.

There may be situations in which a party's silence will be deemed to be an agreement to make payment of the amount set forth in a statement, in which instance it is not necessary for the creditor to introduce documents concerning the underlying transaction or documents supporting the amount of damages set forth in the statement. However, the failure to object cannot be construed as assent to pay the amount set forth in the statement unless the creditor can plead facts in addition to the failure to object to the invoice which show an express or implied agreement to pay the amount set forth in the invoice.

Traditionally, an account stated was a promise by a debtor to pay a stated account of money which the parties had expressly agreed upon. Watter H.E. Jaeger, 15 *Williston on Contracts* §1862 (3d ed. 1972). The doctrine was expanded to include an implied promise by the debtor to the creditor: "To establish an account stated there must be a contract between the parties, that is, an express or implied promise by the debtor to the creditor." *Id.* at 566 (footnote omitted).

Black's Law Dictionary 18 (8th ed. 2004) defines *account stated* as follows:

> A balance that parties to a transaction or settlement agree on, either expressly or by implication. The phrase also refers to the agreement itself or to the assent giving rise to the agreement.

Standard Pennsylvania Practice (Second), Action on *account stated,* describes an *account stated* as follows:

> An account stated is an account in writing, examined and accepted by both parties.
>
> **Observation:** An account stated is an agreement between parties to an open account; it includes a promise by the debtor, express or implied, to pay that balance.
>
> To produce an account stated, the account must be rendered, and the other party must accept, agree to, or acquiesce in the correctness of the account. 4 Standard Pennsylvania Practice 2d §22:17 at 303 (2001) (footnotes omitted).

The creation of an account stated is discussed in Contracts, Sections 512 and 513 of the *Pennsylvania Law Encyclopedia (Second)*. The relevant portions of the discussion are set forth below:

> **§512. — General Considerations**
> An account stated has been defined as an account in writing, examined and expressly or impliedly accepted by both parties thereto, as distinguished from a simple claim or a mere summary of accounts.
>
> In an action upon an account stated, it is not necessary to show the nature of the original transaction or indebtedness or to set forth the items entering into an account in the pleadings. However, in an action of enforcement of accounts stated, the plaintiff must prove there is an account in writing, examined and accepted by both parties, of which acceptance need not be expressly so, but may be implied from the circumstances. There must also be evidence of an acceptance, at least from the circumstances, by the defendant. 13 P.L.E.2d Contracts §512 at 9-10 (2001) (footnotes omitted).
>
> **§513. — Assent of Parties as to Account**
> To produce an account stated, the account must be rendered, and the other party must accept, agree to, or acquiesce in the correctness of the account, under such circumstances as to import a promise of payment on the one side and acceptance on the other. In short, there must be a meeting of the minds, and there can be no account stated where the account rendered meets with general objection.
>
> Acceptance or acquiescence need not be manifested expressly, but may be implied from the circumstances. Where the debtor has had an opportunity to scrutinize the account, his silence is prima facie evidence of acquiescence in an account stated, but the rule is otherwise if the debtor makes a timely objection.
>
> Something more than mere acquiescence by failing to take exception to a series of statements of account received in the mail is required to create an account stated. 13 P.L.E.2d Contracts §513 at 11-12 (2001) (footnotes omitted).

I have reviewed the limited Pennsylvania case law discussing an action upon an account stated. The case law is accurately summarized in Sections 512 and 513 of the *Pennsylvania Law Encyclopedia*.

The opinions in the following cases appear to be the most recent Pennsylvania state court published opinions addressing the cause of action of an account stated: *Obermayer, Rebmann, Maxwell & Hippel v. Banta*, 28 Pa. D.&C.4th 225 (C.P. Phila. 1996), *aff'd in part, vacated in part*, 687 A.2d 866 (Pa.Super. 1996); *Rush's Service Center, Inc. v. Genareo*, 10 Pa. D.&C.4th 445 (C.P. Lawrence 1991); *C-E Glass v. Ryan*, 70 Pa. D.&C.2d 251 (C.P. Beaver 1975); and *Ryon v. Andershonis*, 42 Pa. D.&C.2d 86 (C.P. Schuylkill 1967).

In *Obermayer*, the Court stated that in the action of enforcement of accounts stated, the plaintiff must prove there is an account in writing examined and accepted by both parties. 28 Pa. D.&C.4th at 233. Acceptance by the defendant may be implied from the circumstances. *Id.* In this case, the Court found acceptance because the defendant expressed concern to the plaintiff about his ability to pay the fees recorded in the accounts. *Id.* at 233-34.

In *Rush's Service Center*, the Court stated that a complaint states a cause of action upon an account stated if it contains averments that there had been a running account, a balance remains due upon the account, the account has been rendered to the defendant, and the defendant has assented to the account. 10 Pa. D.&C.4th at 447. The Court overruled the defendant's preliminary objections because the complaint contained the necessary averments. *Id.* at 448. The opinion never described the allegations in the complaint which would support a finding that the defendant assented to the account.

In *C-E Glass*, the plaintiff alleged that it sent statements each and every month. 70 Pa. D.&C.2d at 252. It attached to the complaint a monthly statement of account showing the amounts allegedly due for each of four invoices and a total balance due. It did not include information about the goods purchased or the amounts charged. The Court held that these allegations did not state a cause of action on an account stated because "something more than mere acquiescence by failure to take exception to a series of statements of accounts received in the mail is required." *Id.* at 253.

In *Ryon*, an insurance broker sued for insurance premiums. 42 Pa. D.&C.2d at 87. The complaint alleged that an account had been stated and the defendant has refused and neglected to pay the account. The Court ruled that these allegations did not set forth a cause of action on an account stated: "[m]utual assent to the correctness of the computation is essential to an account stated. Here, there is no allegation that defendant assented to the correctness of the account submitted to him." *Id.* at 88 (citations omitted).

According to this legal authority which I have described, there cannot be an account stated without evidence showing an agreement (express or implied) that the defendant owes the amount set forth in the account. Plaintiff's complaint does not include any factual allegations that would support a finding of an express or implied agreement that the cardholder will pay the amount set forth in the statement attached to plaintiff's complaint.

It appears to be plaintiff's position that a recipient of an invoice is estopped from requiring the party submitting the invoice to prove the accuracy of the amount claimed in the invoice unless the recipient has contested the accuracy of the invoice upon which plaintiff's complaint is based. Even if there are situations in which this position may have merit, it is without merit in credit card transactions because it is based on the assumption that the recipient, upon review of an invoice, can readily determine whether this is an amount that he or she owes.

This is not an accurate assumption in credit card transactions. Credit cardholders who do not pay the full amount of the new balance usually do not know whether any charges, other than the charges for purchases and cash withdrawals, are correct. It is reasonable to assume that most credit cardholders have never attempted to read the entire initial cardholder agreement. Furthermore, even if they attempted to do so, it is unlikely that they would fully understand what they have read. Also, most agreements provide that they can be amended upon fifteen days notice, and frequently the monthly statements are accompanied by amendments to the initial agreement that cannot be understood unless the credit cardholder has access to and does review the initial agreement, subsequent amendments, and the newest amendment. This does not occur.

In the present case, for example, the annual percentage rates in the monthly statements from October 25, 2005 through September 25, 2007 frequently differed from month-to-month. In January 2006, the annual percentage rate for purchases was 20.99%; in May 2006, the annual percentage rate for purchases was 21.74%; in August 2006, the annual percentage rate for purchases was 22.24%; in December 2006, the annual percentage rate for purchases was 22.24%; and in March 2007, the annual percentage rate for purchases was 28.24%.

For several months, there was a late payment fee charge of $35.00.

While the credit cardholder, looking at the statement, can see the amount of the charges that were imposed, he or she is unlikely to know whether the charges are consistent with the writings governing the cardholder's obligations. Consequently, he or she is not in a position to either agree or disagree with the amount of the balance in any monthly statement that does not begin with a $0.00 balance.

The above description of the cardholder and issuer relationship is consistent with the findings in a September 2006 108-page report prepared by the United States Government Accountability Office titled *Credit Cards—Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers, www.gao.gov*, Document GAO-06-929 (9/2006) (the "Report").

The portion of the Report titled *Results in Brief*, states that disclosures are too complicated for many consumers to understand. *Id.* at 4-6. In addition, the disclosures are often poorly organized, burying important information in the text, and scattering information about a single topic in numerous places. *Id.* at 6. The design of the disclosures often makes the disclosures hard to read with large amounts of the text in small, condensed typefaces and poor, ineffective headings. *Id.* at 6. The cardholder is not in a position to agree or disagree with the charges on a monthly statement that are unrelated to the cash withdrawals and purchases shown on the monthly statement because the obligations imposed on the cardholder are not easily understood.

Prior to 1990, most issuers charged a fixed interest rate and imposed few other charges. Thus, furnishing an adequate disclosure was relatively easy. Today, credit cards feature complex pricing structures. *Id.* at 13. Most cards now assess one interest rate on balances from the purchase of goods, another on balances that are transferred from another credit card, and a third on balances that result from using the card to obtain cash. Also, the cards usually provide for payments to be allocated first to the balance assessed at the lowest interest rate. *Id.* at 14-15, 27.

In addition to having separate rates for the different transactions, the cards increasingly impose interest rates that vary periodically as market interest rates change. Issuers typically establish these variable rates by taking the prevailing level of a base rate, such as the prime rate, and adding a fixed percentage amount. They frequently reset the interest rates on a monthly basis. *Id.* at 15.

Most credit cards provide for a penalty fee, described as a late fee, which issuers assess when they do not receive at least a minimum required payment by the due date. Most of the cards have a tiered fee structure depending upon the amount of the balance held by the cardholder (e.g., $15.00 late fee where the balances are between $100.00 and $250.00; $25.00 to $29.00 fee on accounts with balances up to $1,000.00; and $34.00 to $39.00 fee where the balance exceeds $1,000.00). *Id.* at 19-20.

Most issuers also assess cardholders a penalty fee for exceeding the credit limit, with the over limit fee also involving the use of a tiered structure. *Id.* at 20-21. Cards frequently have total credit limits at a lesser limit for cash. *Id.* at 22. Also, issuers do not reject purchases during the sale authorization even though the transaction puts the cardholder over the card's credit limits, thereby exposing the cardholder to an over limit fee and a higher interest rate. *Id.* at 30.

Many cards provide for higher interest rates to be assessed if cardholders make late payments or exceed the credit limit. *Id.* at 24. Many cards also provide for increased rates when cardholders fail to make payments to other creditors. *Id.* at 24-25.

Most of the cards also provide for the cardholder to pay fees for certain services (e.g., 3% of cash advance amounts, 3% of transfer of a balance from another creditor, 3% of purchases made in a foreign country). *Id.* at 23.

The Report concluded that the disclosures which provide information about the costs and terms of using credit cards "had serious weaknesses that likely reduce their usefulness to consumers;… The disclosures…[were] written at a level too difficult for the average consumer to understand, and [had] design features, such as text placement and font sizes, that did not conform to guidance for creating easily readable documents. When attempting to use these disclosures, cardholders were often unable to identify key rates or terms and often failed to understand the information in [the] documents." *Id.* at 33.

The pricing structures depend upon the circumstances of the cardholder, and credit card disclosures are inadequate to inform cardholders as to the interest rates, fees, penalties, and other costs that may be imposed. The Report stated that the "disclosure documents were written such that understanding them required a higher reading level than that attained by many U.S. cardholders; …nearly half of the adult population in the United States reads at or below the eighth-grade level." *Id.* at 38. Accordingly, the Securities and Exchange Commission recommends that disclosure materials be written at a sixth-to eighth-grade level. *Id.* Disclosures of credit card issuers on average were written "at a reading level commensurate with about a tenth-to twelfth-grade education." *Id.* at 37. An understanding of the disclosures in the solicitation letters would require "an eleventh-grade level of reading comprehension, while understanding the cardmember agreements would require about a twelfth-grade education. *Id.* In addition, certain portions of the typical disclosure documents required even higher reading levels to be understandable. For example, information about annual percentage rates, grace periods, balance computation, and payment allocation methods required "a minimum of a fifteenth-grade education, which is the equivalent of 3 years of college education." *Id.* at 38.

The Report described additional problems that also prevented cardholders from understanding the transactions, even assuming that the relevant documents were available. The disclosure documents do not use effective organizational structures and formatting. *Id.* at 38. The typical credit

card disclosure lacks effective organization. *Id.* at 39. Many of the disclosure documents use font sizes that are difficult to read and thus hinder the consumer's ability to find information. *Id.* at 41. The typical disclosure documents are overly complex and present the relevant information in too much detail, "such as by using unfamiliar or complex terms to describe simple concepts." *Id.* at 46.

CONCLUSION

It is the position of Target that in litigation instituted by an issuer to recover money allegedly due, a cardholder cannot question the correctness of the claim unless the cardholder previously questioned the correctness of the invoices upon which the claim is based. If I were to accept Target's position, I would be creating a rule of law that imposes an obligation on the part of any person receiving an invoice to respond to the issuer of the invoice. There is no body of law which supports this position. If this were to become the law of Pennsylvania, every lawsuit to recover money allegedly due in which invoices were sent would include two counts—a breach of contract count and an account stated count based on the invoices that the plaintiff furnished the defendant.

The cause of action of an account stated is based on principles of contract law. There must be an express or implied agreement between the creditor and debtor that the debtor owes the amount set forth in the account. Where a complaint does not describe an express agreement, the complaint must include allegations which would support a finding that the cardholder has agreed that he or she owes the amount set forth in the writing. Plaintiff's complaint does not do so.

Cardholders do not know whether the finance charges, fees, penalties, and costs set forth in a monthly statement are permitted under the applicable credit card agreement. If cardholders cannot be expected to know whether the information in the monthly statement accurately states what they owe, there cannot be an express or implied agreement that their silence means that they have agreed that the amount claimed is correct.

For these reasons, I am sustaining defendant's preliminary objections.

II. *Target National Bank v. Celesti*

The complaint filed in this case is virtually identical to the complaint filed in the prior action.

Target alleges that defendant opened an account for the purchase of goods and services. Defendant made or authorized a number of purchases and as of July 25, 2006, defendant owes $8,121.05 on the account. Plaintiff maintains accurate books of account recording all credits and debits. Defendant has received monthly statements and has failed to object to any of these statements. The only document attached to the complaint is a July 25, 2006 statement showing a previous balance of $8,086.05, a late payment fee of $35.00, and a new balance of $8,121.05.

Defendant has filed preliminary objections based on my Opinion in *Worldwide Asset Purchasing*. For the reasons that I sustained defendant's preliminary objections in the action at AR07-009777, I am sustaining defendant's preliminary objections to the complaint filed in this action.

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

ORDER OF COURT
No. AR07-009777

On this 19th day of December, 2007, it is hereby ORDERED that defendant's preliminary objections to plaintiffs complaint are sustained and plaintiff may file an amended complaint within thirty (30) days.

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

ORDER OF COURT
No. AR06-009418

On this 19th day of December, 2007, it is hereby ORDERED that defendant's preliminary objections are sustained and within thirty (30) days plaintiff may file an amended complaint.

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

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[1] Most credit card agreements permit the issuer to change the terms and conditions of the cardholders' obligations regarding payment of interest, late fees, penalties, and costs and this is a common occurrence.

[2] The material facts on which the cause of action is based include a listing of the cash advances, purchases, and charges that form the basis of the amount for which a judgment is sought. Those material facts may be pled by attaching the monthly invoices to the complaint.

[3] At the argument on defendant's preliminary objections, counsel for Target, while contending that such writings are inapplicable and not relevant to a lawsuit to enforce an account stated, handed to me the monthly statements Target issued to plaintiff from October 25, 2005 through September 25, 2007. The November 25, 2005 statement begins with a $0.00 balance (i.e., it shows full payment of the previous balance of $265.40). Consequently, at a minimum, Target will be permitted to amend its complaint to attach these invoices and to seek recovery of the total amount of the cash advances and purchases shown on these statements less the total amount of payments shown on these statements. Furthermore, if Target, in an amended complaint, can attach writings that show the terms and conditions of the credit card agreements applicable to defendant during relevant times, plaintiff can also recover finance charges, late fees, and the like permitted under the agreements.

In this case, plaintiff is the issuer of the credit card. Consequently, this case does not involve the requirement imposed in *Worldwide Asset Purchasing* that the plaintiff attach writings to the complaint that trace ownership of the account from the issuer to the plaintiff.

Richard Colella v. Borough of Wilkinsburg and Civil Service Commission of the Borough of Wilkinsburg

Statutory Appeal—Fire Department Promotion

1. Highest scoring applicant's appeal was sustained with Borough directed to promote him to Captain of the fire department with seniority, lost earnings and benefits restored retroactively to date of appointment of second highest scoring applicant.

2. Under the rationale of *McGrath v. Staisey,* 249 A.2d 280 (Pa. 1968), the Borough did not have discretion under its Borough Code provisions to make its appointment from the top three candidates in a case of promotion to Fire Department Captain.

(I. M. Lundberg)

Patrick Sorek for Appellant.
Patricia L. McGrail for Borough of Wilkinsburg.
Michael B. Kaleugher for Civil Service Commission of the Borough of Wilkinsburg.

No. SA 07-22. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM

O'Reilly, J., December 20, 2007—This matter involves a Statutory Appeal by Richard Colella, ("Colella") relative to the action of Wilkinsburg Borough ("Wilkinsburg") in failing to appoint him as Captain of its Fire Department. He contends that as the candidate with the highest score, both written and oral, he should have received the appointment rather than Theodore, Hale, ("Hale"), the second highest scoring candidate. Hale was in fact appointed to the Captain's position on April 19, 2006, and this appeal followed.

I. FACTS

Analysis of the records shows Hale to be the only member of Wilkinsburg to be promoted twice, once as Lieutenant, and once as Captain, and each time he was *not* the candidate with the highest score. All other promotions in Wilkinsburg, Police or Fire Department, have strictly followed the scoring provided by the Civil Service Commission. The question is whether Hale's scoring second behind Colella eliminates him, under the law, from consideration for the one position available.

Counsel for Colella has filed an able and thought-provoking brief as has Counsel for Wilkinsburg, who relies on *Coles v. Judd,* 298 A.2d 687 (Pa.Cmwlth. 1973) for the proposition that a Borough has unfettered discretion to appoint from among the top three candidates for the Captain's spot.

Colella contends that *Coles* is not controlling, and presents a learned exegesis of the development of the law in this area. Obviously, the purpose of Civil Service is to substitute merit for favoritism or politics. Colella argues that the earlier case of *McGrath v. Staisey,* 249 A.2d 280, (Pa. 1968) is instructive as to how I should analyze the case herein.

The transcript before the Wilkinsburg Civil Service Commission has been filed of record and the following facts were established therein. Colella was a long-term employee of the Borough in its Fire Department, having been hired in 1993. At all material times, its Chief was Owen McAfee. Colella had been the Department's Chief Engineer since 1998. In the year 2000, he sought to improve his position by seeking appointment to the position of Captain. A co-worker, Joseph Peterson, also applied, and he had a higher score on the eligibility list, and was appointed Captain. (N.T. p. 13).

Later, on June 5, 2004, Colella was appointed by the Chief to be acting Captain for B Platoon of the Fire Department, but ten days later, that Order was rescinded, and Colella was sent back to being Chief Engineer, and Hale was appointed acting Captain, and was to serve in that capacity until June, 2006.

Colella grieved that action, but it appears that the grievance was not followed up to arbitration, and Hale remained acting Captain.

However, in January, 2005, the Chief changed Colella's assignment from Roaming Engineer to Chief Engineer on B Platoon. Colella again grieved this action, and this time it did go to arbitration, and as a result of the arbitrator's award, Chief McAfee entered a *written* order assigning Colella as Chief Engineer to B Platoon retroactive to January, 2005, and to terminate in January, 2006.

Nevertheless, in November, 2006, Colella was moved back as roaming Chief Engineer. Also, and as part of the aforesaid arbitration, Wilkinsburg agreed to establish new eligibility lists for vacancies about to occur, and in December 2005, a new Captain's examination was held. Colella took that examination and scored 78 on the written portion. He then took the oral examination held on January 17, 2006, and compiled a score of 82.29, highest score for the Captain spot. (N.T. p. 21), (Exhibit 10 to Transcript, See also N.T. p. 26). Hale also took the examinations, but was ranked number two, and his combined score was 75.5.

Then, in March, 2006, the Borough Council decided that an additional oral interview of the candidate was to be held with a Borough Council Personnel Committee, and on March 22, 2006, Colella participated in that interview, but nothing from that interview diminished his standing. Notwithstanding, and according to Colella, Chief McAfee in early April, 2006, told him that Council was not yet ready to make an appointment. However, on April 19, 2006, Council did indeed appoint Hale as Captain, and this appeal followed.

II. ANALYSIS

Wilkinsburg relies on *Coles* for the proposition that in cases of *promotion*, the Council is entitled to pick from a list of the top scoring three (3) candidates, and need not pick the highest scorer. It distinguishes *Coles* from that of *McGrath* because the Borough Code at Section 1184, specifically says, "…Council shall make an appointment from the 3 names certified." Judge Rogers, writing for the Court in *Coles* views the language "unless filled by promotion" as critical because it does not appear in the Borough Code Section 1184, but *does* appear in the County Code under which *McGrath* was decided. Hence, Judge Rogers found this to be a valid point of distinction.

Counsel for Colella makes a telling point, however, when he astutely notes that after *Coles* was decided in 1973, the Borough Code was amended in 1986 to add the word "original" before "position" so it *now* reads "every original position…shall be filled only in the following manner after which:…." There then follows the protocol of certifying three (3) names from which Council may make its appointment. This Amendment occurred in 1986, and added the aforesaid word "original" as well as subsections (b) and (c), not here relevant.

Conspicuous by its absence is the word "original" from Section 1188, which deals with promotions obviously of employees who were originally hired as "original" employees, but are now full-fledged employees seeking to better themselves by promotion. Section 1188 makes no reference to picking candidates to be promoted from a list of three.

Counsel for Wilkinsburg filed a supplemental brief in opposition to Counsel's argument based on the word "original," and focuses on the last sentence of Section 1184, to-wit, "As each subsequent vacancy occurs in the same or another position precisely the same procedure shall be followed." Wilkinsburg obviously is arguing that the "promotion" addressed in Section 1188 means the same as a "subsequent vacancy."

However, Section 1184, in the sentence *before* the last sentence, on which Wilkinsburg relies addresses what is to be done when an applicant is rejected by the Council for reasons of unfitness, criminal record, or the like under Section 1183. If there is such a rejection, then the next eligible person moves up the list, and so on. I believe that is what the last sentence relied on by Wilkinsburg applies to, and not to promotions.

It would make no sense for the legislature to use the word "promotion" in Section 1188, and yet make no reference to Section 1183, or 1184 if promotion was to equal "vacancy." Applying the rule of construction that legislative enactments are to be harmonized with each other so as to make sense of both, the most sensible approach is to distinguish between "vacancy" and "promotion." Thus, my reading of 1184 and 1188, and the emphasis on "original" is the most reasonable way to harmonize them and not have one word cancel out the other.

I am not impressed by Counsel's reference to the Civil

Service Rules and Regulations, which provide for the 1 out of 3 procedure for promotion. No Borough enactment can change the authorizing legislation, and in any event my harmonizing of Sections 1184 and 1188 prevails.

Further, the rationale of *McGrath* is fully applicable. Analysis of *McGrath*, and Section 1188, as amended, makes it clear that promotions are NOT subject to the selection of 1 out of 3, but rather must go to the highest scoring candidate. Accordingly, I sustain the appeal of Colella, and order him to be promoted to the position of Captain retroactive to April 19, 2006, and to be made whole for any loss of wages or fringe benefits, including seniority.

Colella has referred to me the opinion of my Colleague, the Honorable Judith L.A. Friedman involving what they believe to be an analogous case, to-wit, *Fraternal Order of Police, Lodge 91 v. North Versailles Township,* Case Nos. SA06-1235 & SA06-1271 (Allegheny C.P. July 11, 2007). In view of my ruling here, I need not consider that case. Further, the creation of the Borough Personnel Committee, which Counsel for Colella views as unwarranted and unauthorized, is of no moment here since nothing came of Colella's meeting with it and nothing has been offered to reduce Colella's standing as the highest scoring candidate.

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

Date: December 20, 2007

ORDER OF COURT

AND NOW, to-wit, this 20th day of December, 2007, for the reasons set forth in my Memorandum of this date, it is hereby ORDERED, ADJUDGED and DECREED that the Statutory Appeal filed by Richard Colella in this matter is SUSTAINED; and the Borough of Wilkinsburg is directed to promote Richard Colella to the position of Captain of its Fire Department, forthwith, and retroactive to April 19, 2006, and to be made whole for any loss of earnings or fringe benefits, as well as seniority.

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

Mark A. Lukacs v. Plum Borough School District, Dawn Caruso, Kevin Dowdell, Linda Eazor, Dan Lioy, Jeffrey Matthews, Tom McCough, Paul Olijar, Kris Traficanti, Loretta White

Preliminary Objections—Sunshine Law—Schools—Suspensions and Terminations

1. Provisions of Sunshine Law (65 Pa.C.S.A. Section 708(a)(1)) requiring public meeting and formally recorded votes do not apply to administrative actions of Assistant Superintendent of Schools in suspending School District's Director of Business Affairs without pay pending hearing before School Board.

2. School District's Preliminary Objections were sustained since decision by employee's direct supervisor to suspend him is an administrative action, which cannot be challenged under the open meeting provisions of the Sunshine Law.

3. Sole remedy for termination and suspension of School District employee is to seek review of actions in hearing before the School Board under the provisions of the Pennsylvania School Code.

(Peter Clyde Papadakos)

Bernard P. Matthews, Jr. for Plaintiff.
Anthony G. Sanchez and *Leslie D. Kitsko* for Defendants.

No. GD 07-009793. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

O'Reilly, J., December 27, 2007—This matter came before me in Motions Court on July 11, 2007, where I SUSTAINED the Preliminary Objections of the Defendants, Plum Borough School District, Dawn Caruso, Kevin Dowdell, Linda Eazor, Dan Lioy, Jeffrey Matthews, Tom McCough, Paul Olijar, Kris Traficanti, Loretta White, (collectively called "Plum") and DISMISSED Plaintiff, Mark A. Lukacs', ("Lukacs") Complaint.

In essence, Lukacs was an administrator for Plum, to-wit, Director of Business affairs, who was terminated by it on April 25, 2007. Lukacs has contested that discharge and has sought a hearing before the Board of Directors pursuant to the PA School Code, 24, PCSA 1-101, *et seq.*, and Section 10-1089. See also, *Knox v. Board of School Director Susquenita School District*, 888 A.2d 640, (Pa. 2005). This is his exclusive remedy for his termination. Lukacs, however seeks to invoke the Sunshine Act as an alternative means to regain his job.

The initiation of his termination began with the filing of charges against him on October 5, 2006, and his suspension pending resolution of the charges. The Assistant Superintendent of Plum issued the suspension after she had met with Lukacs, and his attorney. By its terms, the suspension letter suspends Lukacs, and the Assistant Superintendent states that she believes the allegations against Lukacs are "founded and are extremely serious in nature" and then suspends Lukacs without pay pending a formal hearing. Lukacs contends this suspension was contrary to the School Code, and the Sunshine Law. The letter and charges are attached to the Complaint as Exhibit "A."

Lukacs resorts to the Sunshine Law, and in particular, Section 708(a)(1) for the proposition that his suspension was effectuated without a public meeting at which formally recorded votes to suspend him were taken. He also asserts that the Board of Directors, without the proper Sunshine procedures, issued the "charges." Obviously, Lukacs believes that if he can show an invalid initiation of the charges against him, he may be able to reverse his suspension, and achieve re-instatement. If so, it would be short-lived because Plum would simply correct whatever errors may have been committed, and fire him again. He might, however, garner some back pay if successful in this attack under the Sunshine Law as well as some counsel fees.

I do not, however, see any errors by Plum in the handling of this matter.

Initially, I do not find anything untoward in the Assistant Superintendent suspending Lukacs. In my view, the immediate superior of Lukacs did and does have the power to suspend her subordinates. This is well within her authority as Lukacs' supervisor. Further, the allegations made against him, if true, make his continued employment as Business Office Director inappropriate since the charges allege ongoing financial improprieties and mismanagement that required an immediate defensive reaction. Thus, the suspension was necessary pre-emptive action to protect Plum. If wrong, then Lukacs is re-instated with back pay. But that is slight risk compared to the greater harm that could befall

Plum if he continued in this sensitive position.

As to the second string to Lukacs' bow, the issuance of the charges, this must also fall. As counsel for Plum aptly notes, the charges were initiated by the Administration against Lukacs. If he did not agree with the charges, his option is to deny the same, and ask for a hearing. This he did. Only after the hearing is conducted is the Board of Directors to make a decision. Thus, the issuance of the charges is *not* a Board function, but an Administration function. As succinctly put by Plum's counsel, "a judge doesn't issue an opinion to the public prior to rendering a final decision." See Plum's brief in Support of Preliminary Objection.

Lukacs' assertion that the deliberation by Plum had to be in public is not well taken and the quasi-judicial function of the Board of Directors make public deliberation inconsistent with the concept of "deliberation." Obviously, the vote is taken in public; and the hearings were conducted in public. There is nothing in the Sunshine Law, which requires public. "deliberation." Deliberation may involve discussion of the evidence and evaluations thereof. They may also involve simply thinking, cogitating, analyzing and evaluating in complete silence in the recesses of each Board Members mind.

As already noted, the analogy to *how* judges and juries make decisions and *how* they deliberate makes it abundantly clear that the Sunshine Law cannot be used to penetrate a Board members mind. Plum's reference to 65 Pa.C.S.A. 708(a)(5), and the clause that exempts "quasi-judicial deliberations" is fully applicable here.

Thus, I DISMISSED the Complaint as failing to state a cause of action.

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

Date: December 7, 2007

Marshall Pappert and Julia Pappert, his wife v. Donald Snyder and Cheryl Snyder, his wife, and Theodore Jones, a/k/a Ted A. Jones

Motion for New Trial—Evidence of Prior Lawsuit—Prejudice

1. Plaintiff sued defendants for damages arising when dog (owned by defendant Snyder) bit him on property owned by defendant Jones, claiming that injuries left him unemployable as a plumbing inspector. Following a jury trial, a $15,000.00 verdict was returned in favor of plaintiff, finding defendant Snyder to be 85% responsible and defendant Jones to be 15% responsible for plaintiff's injuries.

2. Plaintiff filed motion for new trial alleging that information concerning a former lawsuit filed by plaintiff against others for other injuries should not have been introduced into evidence and that this error led the jury to awarding a disproportionately low verdict.

3. Where plaintiff is claiming that damages sustained by him on account of dog bite rendered him unfit for employment, evidence of prior injuries and their extent are proper inquiries to the extent that they have bearing on how dog bite affected plaintiff's health and ability to work.

4. Evidence of a prior law suit filed by plaintiff is irrelevant in the determination of whether dog bit plaintiff, whether he suffered injury, whether the bite caused the injury and whether the injuries affected plaintiff's future employment prospects. Such evidence should not have been heard by jury and prejudiced the jury into awarding a low verdict, entitling plaintiff to a new trial.

(Peter Clyde Papadakos)

Anthony A. Seethaler for Plaintiffs.
Gary M. Zyra for Defendants Snyder.
Thomas J. Campbell for Defendant Jones.

No. GD 04-9379. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM ORDER

O'Reilly, J., January 8, 2008—I tried this matter with a jury from December 4, 2006, to December 6, 2006, in which the jury entered a Verdict for the Plaintiff, Marshall Pappert ("Pappert") in the amount of $15,000, and against Defendants, Donald Snyder and Cheryl Snyder, his wife, Sophie A. Staron, and Theodore Jones, a/k/a Ted Jones ("Jones"). The jury found Defendant, Donald Snyder and Cheryl Snyder, his wife, ("Snyder") to be 85% responsible for the injury, and Jones to be 15% responsible.

The matter involved a dog bite whereby Pappert was bitten by Snyder's German Shepard dog, which was in the front yard of the house rented by them from Jones. Pappert was walking past the Snyder house on October 16, 2003, when the dog lunged through the hedge bordering the property adjacent to the public sidewalk, and bit him about the knee and knocked him down causing damage to him. After the verdict, Pappert filed a timely Post Trial Motion and brief in support.

The issue is whether I committed error in permitting certain information to be presented to the jury about prior injuries suffered by Pappert, and a prior lawsuit. Specifically, Pappert had been severely injured when he was electrocuted due to faulty installation of an electric water heater. A homeowner called Pappert, who is a plumbing contractor, when a newly installed electric water heater began to leak. On stepping into the wet basement, Pappert turned on the light, and was flung against the wall, and suffered severe injury. The installer, obviously, knew neither plumbing nor electricity. Pappert sued all involved and got a substantial Verdict.

Although Pappert was severely injured, and not able to continue in his profession, as a plumber, he entered into a personal rehabilitation program which involved walking—miles and miles of walking. Gradually, Pappert's strength and endurance returned, and while still unable to return to his profession, he believed that he could perform the duties of an Allegheny County Plumbing Inspector, and, several months prior to the incident secured an application from an inspector he knew.

While continuing to engage in his walking regimen Pappert walked past the Snyder home and was bitten by their dog and suffered the aforementioned injuries.

He then filed this suit and contended that the dog bite, and the resultant injuries dashed his hopes of becoming an inspector. He presented evidence in support of his contention, and the jury rendered its verdict, finding negligence and causation, but for the extremely modest sum of $15,000, as set out above. The Defendants have *not* filed Post Trial Motions, and the only error assigned is that of my letting the defense allude to Pappert's prior injury, *and* lawsuit led the jury to award a disproportionately low verdict.

The entire transcript of the trial has not been reproduced, but only the relevant excerpts dealing with the issue at hand. That abbreviated transcript is attached to Pappert's brief, and I reference the page numbers given in that attachment. Counsel are to be commended for their agreement in this

regard and the putting together of this truncated transcript.

That record clearly shows that the defense was intent on presenting the entire prior lawsuit to the jury in this case. Pappert opposed the same, and there was lengthy argument on why the prior lawsuit was not relevant. I did, however, permit some limited questioning on filing the lawsuit. (53a, 54a and 61a).

The defense has argued that reference to the lawsuit was necessary to contradict Pappert, and demonstrate that in that lawsuit expert testimony was offered to say that Pappert was permanently disabled. Therefore, he must be lying when he says his walking regimen enabled him to rehabilitate himself.

Finally, Defendant, Jones questions the Rule 238 Delay Damages sought by Pappert, and the calculation thereof. In essence, the defense argument ignores the concept of joint and several liability, and attempts to reimpose the short-lived "fair share" legislation, which indeed attempted to repeal "joint and several," and substitute a percentage of liability on defendants as found by the fact-finder. See Act 57 of 2002, 42 Pa.C.S.A. 7102, and also *Deweese v. Weaver*, 880 A.23 54 (Pa.Cmwlth. 2005). Where the Commonwealth Court found the "fair share" Act to be unconstitutional. Here the percentages are relevant only as between Jones and Snyder, and Pappert's claim is against them both for the full amount. In view of my ruling *infra*, this argument is MOOT.

Analysis and Conclusion

After analysis, I am persuaded by Pappert's arguments that allusions to his prior lawsuit were indeed irrelevant, and prejudiced the jury against him as one who was going to the well again. While I restricted the degree of reference to the lawsuit, in a misguided effort to be fair and balanced, I did permit the defense to question both Pappert, and his wife on the lawsuit. (N.T. p. 53a, 54a, 61a). This was an error.

Pappert had been injured before. Questioning about those injuries was certainly appropriate. But, on sober analysis, and second thought, I see no connection between the prior lawsuit, and whether he was injured by the dog bite, and the degree thereof, or whether he was truthful. Thus, I will GRANT a new trial.

Reference to Pachel and Poulin, Pennsylvania Evidence, and Rule 401, teaches that "relevant evidence" is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Under this standard, reference to the lawsuit does absolutely *nothing* to aid in the determination of whether the dog bit Pappert, whether he suffered injury, whether the bite caused the injury, and whether the injuries had the far reaching effect on Pappert's future employment prospects. Further, prior expert testimony, if not hearsay, could have been offered by the defense without reference to the lawsuit. See generally, *Nestor v. George*, 46 A.2d 469 (1946).

One of the pitfalls of aggressive advocacy is that one can lose sight of the long-range implication of a short-range argument. Having won the one, you may lose the other. Such happened here, and it was my error to permit any reference to a prior lawsuit. Hence, my ruling.

ORDER OF COURT

AND NOW, to-wit, this 8th day of January, 2008, it is hereby ordered, adjudged and decreed a new trial is granted, and this case is to be re-listed to the next available list.

By The Court:
/s/O'Reilly, J.

Date: January 8, 2008

Appeal of: Chartiers Valley Industrial & Commercial Development Authority, Maurice A. Nernberg and Nancy N. Nernberg, Lessees, of the real estate tax assessment made by the Board of Property Assessment, Appeals and Review of the property located at 301 Smithfield Street, Block and Lot 1-H-351; Interested parties: Allegheny County, City of Pittsburgh and City of Pittsburgh School District.

In re: Maurice A. Nernberg and Nancy N. Nernberg v. Board of Property Assessment, Appeals and Review, City of Pittsburgh School District and City of Pittsburgh

Assessment Appeals—Uniformity Clause of Pennsylvania Constitution—Meaningful Sub-Classification of Property

1. The Uniformity Clause of the Pennsylvania Constitution requires that similar types of properties be assessed at the same percentage of market value.

2. Successful challenge to assessment based on violation of the Uniformity Clause of the Pennsylvania Constitution requires owner to establish that his property is assessed at a higher percentage of market value than similar types of properties, grouped into a meaningful sub-classification.

3. Owners of office building in downtown area of Pittsburgh, challenging their assessment based on violation of the Uniformity Clause, were required to show that their property was being assessed at a higher percentage of market value than similar types of office buildings in downtown Pittsburgh. Evidence of residential sales in another parts of the City was insufficient to establish the over-assessment of their property located in a separate sub-classification and owners' challenge to assessment failed.

4. Owners of residential property, challenging their assessment based on violation of the Uniformity Clause, were required to establish that their residence was being assessed at a higher percentage of market value than residences in a meaningful sub-classification. Evidence to establish such a sub-classification should show the boundaries of the area; the number of sales occurring in the area and testimony to establish why properties in an "area" should constitute a valid sub-classification. Evidence of various sales in area was not specific enough to establish valid sub-classification and owners' challenge to assessment failed.

(Peter Clyde Papadakos)

Maurice A. Nernberg for Nernbergs.
Michael J. Wojcik, *Craig C. Stephens* and *Robert J. Reith* for County of Allegheny.
George R. Specter and *Ronald H. Pferdehirt* for City of Pittsburgh.
Claude C. Council, Jr. and *Ira Weiss* for City of Pittsburgh School District.

Nos. BV05-000114 and BV05-000244. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION AND ORDER OF COURT

OFFICE BUILDING-BV05-000114

Wettick, J., January 15, 2008—This is an appeal by the owners of an office building for the years 2005-2007. For each of these three years, the assessed value was $306,300. This assessed value was based on a 2002 base year assessment of $306,300. Both the owners and the taxing bodies agree that the fair market value of the property as of 2002 is $306,300.[1]

The owners contend that the value of their property should be reduced because in 2005-2007 other properties within the County were assessed at less than 100% of fair market value.

The owners have listed fifteen property sales in 2004 (Attachment 1, page 1) in which the ratio of the total assessed values to total sales prices is 60.13%. The owners have listed fifteen sales in 2005 (Attachment 1, page 2) in which the ratio of the total assessed values to total sales prices is 64.64%. The owners have listed fifteen sales in 2006 (Attachment 1, page 3) in which the ratio of total assessed values to total sales prices is 59.05%. (See Comparable Properties Chart attached to Taxpayers' Pretrial Statement 8/3/07.) It is the position of the owners that the 2002 base year value of their property should be reduced so that the ratio of the total assessed value to actual value of the property, using 2002 assessed values, does not exceed 60.13% for 2004, 64.64% in 2005, and 59.05% for 2006.[2]

The office building is located in downtown Pittsburgh (First Ward). None of these forty-five sales for the years 2004-2006 involves properties located in downtown Pittsburgh which is comprised of the First and Second Wards. Most of the forty-five properties are single-family residential properties. Mr. Nernberg (an owner) testified that a person in his office selected the properties. He did not explain why these properties were selected.[3]

The taxing bodies presented an expert witness who described what she believed to be all arm's-length sales of commercial properties in the First and Second Wards of the City of Pittsburgh for 2004, 2005, 2006, and 2007 (ending June 2007). The exhibits that she prepared identified the address of the property, the sale date, the sale price, and the assessed value as of the date of the sale. In 2004, 2005, 2006, and 2007, the total sales prices of these properties exceeded their total assessed values.

The only method of assessing property that Allegheny County has used since 2002 is to assess all taxable properties at 100% of their 2002 actual values. Since the owners have stipulated that the fair market value of their property for the 2002 base year is its assessed value, the owners' property is valued in the same fashion as all other properties are intended to be valued.

In a county using a base year method of assessment, a taxpayer who contends that its property is unfairly assessed has two statutory remedies under the assessment laws. A taxpayer may file an appeal on the ground that the assessed value exceeds the fair market value, using the base year value. This remedy will not help the owners in this case because they have stipulated that the assessed value of their property does not exceed the actual fair market value for 2002.

A taxpayer may also seek a reduction in the assessed value by showing that the actual value of the property as reduced by the County's common level ratio is less than the 2002 base year value. See footnote 3, *supra*. In this case, the owners have not elected to challenge the assessed value on these grounds.

There is a third method of challenging an assessment, recognized in *Downingtown Area School District v. Chester County Board of Assessment Appeals*, 913 A.2d 194 (Pa. 2006). This challenge is based on the Uniformity Clause of the Pennsylvania Constitution.

In *Downingtown*, an owner of a neighborhood (strip) shopping center challenged the shopping center's assessment on the ground that the property was assessed at a higher percentage of fair market value than properties conducting similar kinds of business.

The parties stipulated that the subject property had a fair market value of $8.5 million or $101.81 per square foot. The property owner's commercial real estate appraiser had performed an analysis comparing the subject property with seven other shopping centers in the county which he deemed comparable. He determined that the assessments for the seven comparable shopping centers ranged from $47.87 to $89.62 per square foot and that the ratio of the assessed value to actual value of the comparables was in a range of 34% to 69%.

For the year in question, the common level ratio of the County was 85.2% of fair market value. The trial court ruled that the property owner's evidence concerning comparable properties was irrelevant because the pertinent class consists of all real estate in a taxing district. A divided Commonwealth Court affirmed. The Supreme Court reversed. The Court recognized that it has interpreted the Uniformity Clause as precluding real property from being divided into different classes for purposes of systemic property tax assessment. However, it concluded, "we do not find that this general uniformity precept eliminates any opportunity or need to consider meaningful sub-classifications as a component of the overall evaluation of uniform treatment in the application of the taxation scheme." *Id.* at 200. The Court stated that a scheme that permitted only a uniformity challenge based on a common level ratio would violate the Uniformity Clause because this approach "obviously yields substantial leeway for potential discrimination by local officials among similarly situated property owners who are underrepresented in the general population...." *Id.* at 201. Thus, the Court permitted uniformity challenges based on "meaningful sub-classifications." *Id.* at 200.

In the present case, the only sub-classification into which the owners' property might fall would involve office buildings. The City has introduced credible evidence showing that downtown office buildings are not underassessed. Consequently, the owners cannot contend that their office building is overassessed in comparison to other office buildings.

Furthermore, the owners did not rely on sales of similar kinds of businesses or properties. They, instead, relied on fifteen sales of mostly residential properties in 2004, 2005, and 2006. This evidence cannot support a claim that office buildings are a separate sub-classification that is overassessed.

In summary, the County has assessed the owners' property at 100% of its 2002 fair market value. The owners have not raised any valid grounds for challenging the assessment.

RESIDENTIAL PROPERTY-BV05-000244

The owners purchased property at 5706 Aylesboro Avenue in the Fourteenth Ward of the City of Pittsburgh (a single-family residence) in 2004 for $510,000. At the time of the purchase, the property's assessed value was $328,500, this being the 2002 assessed value. The School District filed an appeal for year 2005. The Board of Property Assessment, Appeals and Review increased the assessment to $510,000. The property owners appealed and the Board of View

reduced the assessment to $400,000 for years 2005, 2006, and 2007 based on a finding that the property had a fair market value of $400,000 for the year 2002.[4]

The objection of the property owners to the "Report of Special Master" which assessed the property at $400,000 for years 2005, 2006, and 2007 is the subject of this portion of my Opinion and Order of Court.

In their objections to the Report of the Special Master, the property owners state that the Master correctly found that the fair market value of the property for the base year 2002 was $400,000. They contend that the 2005, 2006, and 2007 assessments should be reduced because the Master failed to apply the "common level ratio" as required in *Downingtown Area School District v. Chester County Board of Assessment Appeals, supra*.

The property owners introduced ten sales for 2004 (Attachment 2) in which the ratio of the total 2002 assessed values to the total 2004 sales prices was 59.32%. They introduced ten sales in 2005 in which the ratio of the total 2002 assessed values to the total 2005 sales prices was 55.84% (Attachment 3). They introduced nineteen 2006 sales in which the ratio of the total assessed values to the total sales values was 64.62% (Attachment 4). Mr. Nernberg testified that these are all "North Forbes properties" (T. 32).[5] When asked on cross-examination if these properties are comparable to his, he responded that in one way or another all properties in the area are comparable and in one way or another none are comparable (T. 42-43). He also testified that these other properties were "random samplings" (T. 44).

There is no testimony as to the boundaries of the "North Forbes" area to which Mr. Nernberg testified. There is no testimony as to the number of sales which occurred in this "area." There is no testimony explaining why properties in this "area" should constitute a valid sub-classification.

Even assuming that single-family residential properties could in some instances be divided into sub-classifications under *Downingtown*, Mr. Nernberg's testimony that "North Forbes properties" have sold in 2004, 2005, and 2006 at substantially higher prices than their 2002 assessed values does not trigger a uniformity challenge. It is not surprising that sale prices in future years exceeded 2002 values. As the Court in *Downingtown* recognized, when property is not reassessed, under normal economic conditions the STEB-calculated CLR tends to diminish each year, reflecting ongoing inflation and real estate appreciation. 913 A.2d at 203. The statutory remedy described in footnote 3, *supra*, is intended to provide equality to the property owner whose property has not increased at the same rate as other properties. The property owners have elected not to pursue this remedy.

For these reasons, I enter the following orders of court:

ORDER OF COURT
NO. BV05-000114

On this 15th day of January, 2008, it is hereby ORDERED that the assessed value of the subject property for years 2005-2007 is $306,300.

BY THE COURT:
/s/Wettick, J.

ORDER OF COURT
NO. BV05-000244

On this 15th day of January, 2008, it is hereby ORDERED that appellants' objections to the Report of the Special Master are overruled and the assessed value of the property for years 2005-2007 is $400,000.

BY THE COURT:
/s/Wettick, J.

[1] Allegheny County assesses property at 100% of its 2002 fair market value (i.e., EPR of 100%).

[2] In 2002, Allegheny County's common level ratio (the ratio of assessed value to fair market value) was 97.5%. In 2006, the common level ratio was 87.3%.

[3] The owners are not basing their appeal on the statutory provisions allowing an owner to obtain an assessed value based on the actual value of the property as of the year of the assessment as reduced by the common level ratio. See *Daugherty v. County of Allegheny*, 920 A.2d 936 (Pa.Cmwlth. 2007).

[4] In the proceedings before the Board of View, the property owners produced expert testimony that the fair market value of the property was $400,000 for the base year 2002. I find this expert testimony to be more credible than the expert testimony offered by the taxing bodies.

[5] Mr. Nernberg also testified that "if you go through all of Squirrel Hill, you find all houses on average going to be assessed…somewhere between 55 and 65 percent of the selling price… (T. 44).

Opinion attachments have been omitted from this publication. To view a copy of the attachments, please contact the ACBA at 412-402-6684.

Michael Evanovich v. Sandino Molinari and Beemer's Inc.

Third Party Criminal Activity—Involuntary Nonsuit—Excessive Verdict

1. Defendant was employed as a bouncer on occasions with Beemer's.

2. The manager for Beemer's sought assistance from the bouncer at closing time since other bouncers had been excused early from work.

3. When bouncer's girlfriend became involved in an altercation, the bouncer struck Plaintiff, and caused facial and other injuries.

4. Defendant's request for remittur was properly denied where Plaintiff was badly injured in the face, required a lengthy recovery time, suffered a good deal of pain, and was unable to visit his young children for fear of frightening them with his appearance.

(Mary Ann C. Acton)

Peter J. Payne for Plaintiff.
Sandino Molinari, *pro se.*
Daniel Rivetti for Defendant Beemer's, Inc.

No. GD 05-18872. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Friedman, J., January 23, 2008—Defendant Beemer's Inc. appeals from this Court's Order dated November 16, 2007, denying its Motion for Post-Trial Relief. This Court

also entered a separate Order, dated November 19, 2007, awarding delay damages to the Plaintiff. That Order was clarified on December 19, 2007, to reflect that it was intended to fully and finally dispose of all outstanding issues. Defendant Sandino Molinari has not appealed.

Defendant Beemer's Inc. has raised numerous issues in its Statement of Matters Complained of on Appeal, some of which relate to rulings of the Honorable Robert P. Horgos of this Court, and some of which relate to rulings of the undersigned. We have summarized the issues relating to the undersigned as follows:

1. Whether we erred in denying Beemer's Motion for Involuntary Nonsuit and in denying Beemer's Motion for Post-Trial Relief, because Plaintiff failed to meet his burden of proof (a) that his harm was caused by the negligent conduct of Beemer's, (b) that Beemer's had a duty to protect or warn Plaintiff of third party criminal activity, and (c) that Beemer's had actual or constructive notice of prior acts committed by third parties which might cause injuries to patrons. (Statement of Matters ¶¶3 and 4.) Similar to this is whether we erred in refusing to give the jury Beemer's Proposed Points for Charge numbers 15 and 18, dealing with a business owner's duty to warn or protect a customer from criminal activity on the premises (number 15), and stating that a "business owner's mere knowledge that it served alcoholic beverages is not sufficient to place the owner on notice that a third party will assault another on its premises" (number 18). (Statement of Matters ¶5.) We will discuss these all together at Heading No. 1, below.

2. Whether we erred in not granting a new trial and/or remitting the jury award, because the award for pain and suffering was "plainly excessive and exorbitant and was so contrary to the evidence that it shocks one's sense of justice." (Statement of Matters ¶6.)

DISCUSSION

1. Plaintiff met his burden of proof on the issues pertinent to this dispute and the Court's charge on the law was correct.

The negligence asserted, and proven, was that Beemer's normally had a bouncer on duty, let him leave early, just before closing time, known to be the time when fights were most likely to break out and when a bouncer was most needed. As discussed further below, there was evidence that the manager of the business *asked* Plaintiff to help control *ongoing* assaultive behavior on the part of a third party and involving Molinari. This case had nothing to do with a business owner's duty to *warn* its customers of *possible* criminal activity. Beemer's sought to inject a non-issue, predictability of *future* criminal activity into the jury's deliberations. In the context of this case, that point would only have caused confusion. There was no basis for a charge involving facts not in evidence.

The pertinent part of the Court's charge begins at T.T. p. 218, l. 2. Beemer's proposed point 15 referred to Pennsylvania Suggested Standard Civil Jury Instruction 7.11, which is fully quoted below:

> Negligence or carelessness is the failure to use the ordinary care that a reasonable person would have used under the circumstances. Specifically, a business person has a duty to use reasonable care to find out if a customer is being harmed or is likely to be harmed by others on the premises and warn or protect him or her. The failure to do so is negligence. You must therefore decide whether the defendant knew or should have known that there was a likelihood of criminal activity occurring on [his] [her] premises and took reasonable steps to warn or protect the plaintiff against it. In making this decision, you may consider the location and nature of the defendant's business and the defendant's past experience.

Contrary to Beemer's assertions on appeal, this was covered by the Court's charge. See Trial Transcript p. 221, l. 8–p. 223, l. 3.

Defendant's proposed point 18, "business owner's mere knowledge that it serves alcoholic beverages is not sufficient to place the owner on notice that a third party will assault another on its premises," had no relevance to the issues before the jury. Again, the issue was not whether Beemer's was on notice of *future* assaultive conduct. In addition, the service of alcoholic beverages was not the *only* evidence against Beemer's. Furthermore, the "nature of Defendant's business and the Defendant's past experience" are part of Beemer's own proposed point 15.

Under Beemer's own proposed charge, the jury was *permitted* to consider Beemer's past experience and, on that subject, there was, *inter alia*, evidence that, if there were fights, they usually broke out at closing time (T.T. p. 44, l. 25–p. 45, l. 19) and that the bouncer on duty left "[a]s soon as last call was called." (T.T. p. 47, ll. 11-12.)

There was evidence from which the jury could have found that Beemer's manager asked the Plaintiff for assistance, that Plaintiff, although off-duty, was employed as a bouncer on other occasions by Beemers' so that Plaintiff would be accustomed to obeying the manager's instructions even though he had no obligation to do so, that the manager needed to ask for help because he had let the bouncer on duty leave the premises early even though the end of the evening was a time when altercations were likely to break out and when a bouncer would be needed to intervene.

The issue for the jury was not whether the bar should have *predicted* the altercation, based on "the business owner's mere knowledge that it served alcoholic beverages." The issue was whether the manager was negligent in discharging the bouncer early so that he had to call on Plaintiff for help *after* trouble occurred. In fact, the Court specifically told the jury that the mere fact that Plaintiff was injured was *not* sufficient to prove Beemer's negligence. (T.T. p. 220, ll. 5-7.)

Furthermore, Beemer's admits that there was no testimony that the assailant, Defendant Molinari, who neither presented a defense nor filed an appeal, was himself drunk.[1] The altercation arose because a female patron (Molinari's girlfriend) got out of control and attacked or was attacked by another woman outside the establishment. When Plaintiff heeded Defendant's request and attempted to break up the fight, Molinari hit Plaintiff.

2. Remittur was properly denied as the verdict was not excessive.

Although the verdict amount was a little high *for Allegheny County* where damage awards are notoriously low, it was not out of line *with the evidence*. There was overwhelming evidence that Plaintiff was badly injured in the face and required a lengthy time to recover during which he suffered a good deal of pain, inconvenience and distress and was even unable to visit with his young children for fear of frightening them by his shocking appearance.

CONCLUSION

The appeal is without merit. There was ample evidence to support the jury's verdict and the Court's charge on the applicable law was correct.

BY THE COURT
/s/Friedman, J.

[1] See Statement of Matters Complained of on Appeal p. 3, 5c.

G. Gray Garland, Jr. and Margaret G. Garland v. Alfonso C. D'Orazio and Theresa Donahue D'Orazio

Easement—Impermissible Interference—Obstacles Placed on Easement

1. Defendants placed a statue in the middle of an easement which both parties were entitled to use pursuant to deeds from a common grantor.

2. The original purpose of the easement was for use as a driveway for ingress and egress.

3. Plaintiff's sewer line runs through the right of way and underground access to the lines was impeded by the statue.

4. Both parties had a duty to keep the easement clear except for good cause.

(Mary Ann C. Acton)

J. Michael Baggett for Plaintiffs
William E. Otto for Defendants

No. GD 04-15926. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

INTRODUCTION

Friedman, J., January 23, 2008—Defendants have appealed from this Court's Order dated July 23, 2007, denying their Motion for Post-Trial Relief filed in the captioned matter, in Equity. We held a non-jury trial on April 17, 2007.

As will be discussed more fully below, the case arose from Defendants' placement of a statue in the middle of an easement which both Plaintiffs and Defendants are entitled to use pursuant to deeds going back to their common grantor. On April 27, 2007, we issued a Decision under to Pa. R.C.P. 1038, along with an Order of Court directing the Defendants to remove the statue and enjoining them from placing any object within the easement boundaries except with the prior written consent of Plaintiff-husband[1] or upon further Order of Court. Defendants then filed a Motion for Post-Trial Relief. After briefing and argument, we denied the Motion by Order dated July 23, 2007. This appeal followed.

Our Decision dated April 27, 2007 contains a summary of our findings of fact, which we will not reiterate here. It should also be noted that written transcripts of the April 17, 2007 Equity Trial, as well as of the July 23, 2007 oral argument on Defendants' Motion for Post-Trial Relief, have been filed of record. The Decision and the Trial Transcript set forth the facts, the issues raised by the parties at the time, and the reasons for the Court's rulings.

ISSUES ON APPEAL

In their Concise Statement of Matters for Appeal, Defendants have raised a total of six matters. For purposes of our discussion here, we have grouped them together in three categories:

- Whether Plaintiffs failed to prove their *prima facie* case of impermissible interference by Defendants with Plaintiffs' use of the easement, whether the Court erred in considering the relative need of the parties and applying a balancing test, and whether the Court therefore erred in denying Defendants' Motion for Compulsory Nonsuit. (Defendants' Issues I and II)

- Whether the Court erred in concluding that Defendants' use of the Easement was unreasonable and "prohibiting Defendants from placing any objects, including a small movable statue, within the area of the Easement" since the Easement was no longer needed for ingress or egress, although vehicular *access* was admittedly needed. (Defendants' Issue IV.)

- Issues regarding discovery requests, Motion in Limine and Motion to Withdraw Admissions. (Defendants' Issues V and VI.) There will be no further discussion of these miscellaneous issues as they were resolved at the beginning of the trial, which then proceeded on the merits without objection by anyone. See Trial Transcript (TT) pp. 3-14.

DISCUSSION

A. The Court properly denied Defendants' Motion for Compulsory Nonsuit.

After the Pre-Trial issues regarding discovery violations and subpoenas were resolved without objection (see T.T. pp. 3-14), the Court then asked counsel for opening statements, "to be sure that I do understand what everybody's legal positions are." Defendants' counsel informed the Court that the parties had "agreed on short stipulations." T.T. 14, ll. 14-15. Defendants' counsel then stated Defendants' legal position, to-wit, that Plaintiff, to prevail,

> …has to show that his [Plaintiff's] use of the right-of-way is consistent with the grant of the right-of-way as recorded. That his [Plaintiff's] use is not unreasonable. [Plaintiff] also has to show that defendants' use is … unreasonable, and that it is an unreasonable interference with [Plaintiff's] use … of [the] right-of-way.
>
> T.T. p. 16, l. 23–p. 17, l. 7.

The Court agreed, *sub silentio*, with Defendant counsel's assessment of Plaintiff's burden and Plaintiff, also *sub silentio*, seemed to agree as well. The non-jury trial then commenced, with Plaintiff calling Defendant Husband as of cross. See T.T. pp. 18-36.

In his testimony, in Plaintiff's case, Defendant Husband, Mr. D'Orazio, admitted he had placed the statue in the middle of the Easement and said the statue was on the portion of the easement that crosses Defendants' own property. He also conceded that he had the statue placed in the middle of the easement only because that was where he wanted it. (T.T. p. 35, ll. 6-20 and p. 36, ll. 1-11.) Mr. Garland, the surviving Plaintiff, then testified describing the location of the easement using Plaintiff's Exhibit 1 for demonstrative purposes.

It seemed undisputed that the original purpose of the easement was for use as a driveway for ingress and egress (T.T. p. 43, l. 24-p. 44, l. 2). In addition, it was undisputed that Plaintiff's sewer line runs down the right-of-way and that plumbers have had to take equipment and vehicles down the Easement, over the spot where Defendants placed the statue, to service the line (T.T. p. 42), and that future such needs are likely and unpredictable. It was also undisputed that, as Plaintiff Husband, Mr. Garland, testified, the

statue was moved to the easement after Defendants lost a case involving their violation of a zoning ordinance. (T.T. pp. 44-46.)

Lastly, it must be remembered that the Easement was granted by a deed and is not one by prescription.

It is well-settled that "[w]hat constitutes unreasonable interference on the part of the possessor of the land subject to the easement will depend upon consideration of the advantage to him of his desired use of the easement and the disadvantage to the owner of the easement." *Palmer v. Soloe*, 411 Pa.Super. 444, 449, 601 A.2d 1250, 1253 (1992). In the case at hand, *no* advantage to the Defendants was demonstrated. However, a small but real disadvantage to Plaintiff *was* demonstrated.

Defendants' Motion for Nonsuit was based on their contention that since the statue was moved on different occasions, Plaintiff could have the statue "picked up and then removed and replaced" if a vehicle had to go down the easement. (T.T. p. 50, ll. 10-14.) Defendants argued that it therefore was not "unreasonable." However, Defendants fail to comprehend that it would be *they*, not Plaintiff, who would have the duty to remove the statue. Moreover, there was no evidence of the actual size of the statue nor how easy it might be to remove, especially by an older person such as Mr. Garland, even if Plaintiff were somehow required to move it. In addition, the evidence to that point was that Defendants objected to giving their reason for placing the statue where they did. Since there was a rebuttable presumption that both Plaintiffs and Defendants had a duty to keep the Easement clear except for good cause, the facts related to the size of and possible utility or justification for the choice of location for the statue were for *Defendants* to adduce. The Court properly denied the Motion for a Nonsuit.

B. The Court properly balanced the equities and properly concluded that Defendants should be enjoined from placing *any* object in the Easement.

In Defendants' case, counsel introduced a photo showing the height of the statue relative to Mr. D'Orazio's height. (Def. Ex. A-3.) It appeared to the Court to be roughly 40 inches high, although no other evidence of its exact height other than the photo was offered by Defendants. Defendants introduced nothing regarding the weight or composition[2] of the statue.

In addition, Defendants had previously objected to Plaintiff's question regarding their reason for placing the statue where they did.[3] (T.T. p. 33.) Plaintiff merely wanted the statue moved to where it was after the prior litigation, off the Easement.

As indicated in the Court's Decision, Plaintiff's need to keep the Easement clear of statues may be small, but it *is* legitimate. Defendants not only failed, but refused, to present *any* valid reason for their need to have the statue where it is. Defendants admitted that their permanent residence is in Florida and that the house at issue, while kept ready for use, is used only intermittently. Were Defendants constantly in residence, it might have been arguable that *they* (not Plaintiff) could be required to move the statue when vehicles needed to be on the Easement. However, since the need to access the underground lines servicing Plaintiff's residence is unpredictable and could be urgent, the Court properly declined to impose such a condition. It would have been impractical and unduly onerous on Defendants to force them to have someone on call in their absence in case their duty to remove the statue were invoked. The Court, sitting in Equity, evaluated the respective rights of the parties related to the Easement and concluded that they were equal. It then balanced the relative needs of the parties to have the Easement fully unobstructed or slightly obstructed. That balancing resulted in a slight tip of the scales in favor of Plaintiff.

CONCLUSION

The factual findings of the Court were supported by the evidence and its legal conclusions are supported by the law. Given the animosity the parties have managed to generate towards each other, the Court also notes that its Order eliminates the need for *Plaintiff* to move the statue as needed, at the risk of being sued by Defendants for any resultant damage thereto.

The Defendants have placed an obstacle on the Easement without offering any reason other than their unexplained desire to place it there. Plaintiff has the right to have the Easement accessible for repairs to underground lines servicing Plaintiff's real estate. The mere fact that the obstacle Defendants put in the middle of the Easement may not be a massive one does not relieve Defendants of their duty not to place obstructions such as statuary on the Easement. They may only place obstacles on the Easement for a good reason. No reason at all is not a good reason.

The Court properly enjoined Defendants from placing anything on the Easement without its permission or the consent of the Plaintiff.

BY THE COURT:
/s/Friedman, J.

Dated: January 23, 2008

[1] Plaintiff-wife is now deceased.

[2] Was it made of plaster, cement, fiberglass, paper mache?

[3] The Court sustained this objection since Defendants, who had the burden of coming forth with their reason, had made it.

Henderson Brothers, Inc. v. Paul R. Schaaf and Peoples First Insurance

Preliminary Injunction—Confidential Information—Nonsuit

1. During the time that Defendant Schaaf was employed with Henderson, an insurance firm, he became one of the company's top producers.

2. When employee left to work for another company, Henderson sought a preliminary injunction.

3. Employee advised former clients that he had a non-solicitation agreement with his former employer and his contact with former clients was not prohibited by the employment contract.

4. Pa. R.C.P. 230.1 permits the entry of a compulsory nonsuit in an action for preliminary injunction where Plaintiff has failed to establish a right to relief.

(Mary Ann C. Acton)

Manning J. O'Connor, II and *Patrick Sorek* for Plaintiff.
Jane L. Volk and *Mary C. McGinley* for Paul R. Schaaf.
John J. Myers for Peoples First Insurance.

No. GD 07-18765. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Wecht, J., January 23, 2008—Plaintiff Henderson Brothers, Inc. ["Henderson"] has appealed from this Court's

November 9, 2007 Order. That Order denied Henderson's request for preliminary injunction and granted Defendants' motions for nonsuit. In accordance with Pa.R.A.P. 1925, this Opinion sets forth the reasons for the Court's Order.

BACKGROUND

Henderson, a firm that provides insurance, hired Defendant Paul R. Schaaf ["Schaaf"] as a producer in 1999. Prior to his employment with Henderson, Schaaf had no experience in the insurance industry. During his tenure with Henderson, Schaaf became one of the company's top producers. On March 28, 2007, Schaaf resigned from the firm. In April 2007, he began to work for Defendant Peoples First Insurance ["Peoples"], which is located in Rock Hill, South Carolina.

On August 31, 2007, Henderson commenced an action against Schaaf by filing a Complaint in Equity. In its Complaint, Henderson set forth four counts, including breach of contract, misappropriation of trade secrets, unfair competition, and intentional interference with contract and prospective contractual relations. On September 5, 2007, Henderson filed a Motion for Preliminary Injunction. The Court scheduled a status conference for October 9, and a hearing for October 10, 2007. On September 25, 2007, Schaaf filed his Answer and New Matter.

On October 3, 2007, Henderson requested a continuance because it was anticipating filing an Amended Complaint that included Peoples. The Court granted the continuance, and rescheduled the hearing for November 1, 2007. On October 9, 2007, Henderson filed its Amended Complaint, which contained additional counts against Peoples for misappropriation of trade secrets, unfair competition, and intentional interference with contract and prospective contractual relations. Schaaf filed his Answer to the Amended Complaint on October 29, 2007. Peoples filed its Answer and New Matter on October 31, 2007.

An evidentiary hearing on the Motion for Preliminary Injunction was held of record on November 1 and November 9, 2007. On November 9, 2007, this Court issued an Order that granted Schaaf's and Peoples' oral motions for compulsory nonsuit, denied Henderson's motion for preliminary injunction, and allowed Henderson to proceed on its other claims. The November 9 Order memorialized the decision announced by the undersigned on the record in open Court earlier that same day.

On December 6, 2007, Henderson filed a timely Notice of Appeal. On December 7, 2007, this Court ordered Henderson to file a concise statement of errors complained of in the appeal, in accordance with Pa.R.A.P. 1925 (b). On December 7, 2007, Henderson filed an Amended Notice of Appeal. In response to the Amended Notice, on December 12, 2007, this Court issued a second Order for a concise statement. Henderson filed a timely 1925(b) statement on December 27, 2007.

PLAINTIFF'S MATTERS COMPLAINED OF ON APPEAL

In its Rule 1925(b) Statement, Henderson alleges twelve errors, as follows:

> 1. The Court erred in failing to afford Henderson favorable inferences arising from the evidence.
>
> 2. The Court erred in failing to establish that compulsory nonsuit is available in a proceeding involving motions for preliminary injunction.
>
> 3. The Court erred in declining to hear Henderson's evidence in support of its Motions for Preliminary Injunction.
>
> 4. The Court erred in failing to apply the governing test for determination of motions for preliminary injunction.
>
> 5. The Court erred in failing to review or apply the contract which established the legal relationship between Henderson and Defendant Schaaf.
>
> 6. The Court erred in failing to recognize that, through the terms of his contract with Henderson, Schaaf voluntarily subjected himself to strict standards of conduct during and after his employment, the violation of which entitle Henderson to injunctive relief.
>
> 7. The Court erred in failing to recognize that solicitation is not the only form of conduct prohibited by the contract between Henderson and Schaaf, and by Pennsylvania law.
>
> 8. The Court erred in failing to recognize that preliminary injunctions are issuable based on the threat of disclosure of confidential information, and do not require proof of actual disclosure or proof of actual solicitation.
>
> 9. The Court erred in failing to consider Henderson had information subject to protection from disclosure by Schaaf.
>
> 10.The Court erred in considering evidence about previous contracts between the parties other than the one in effect at the time the dispute arose.
>
> 11. The Court erred in failing to recognize that Peoples First Insurance is subject to the same standards of injunction under Pennsylvania law as Schaaf.
>
> 12. The Court failed to recognize that Peoples First Insurance exhibited willful disregard of its obligations under Pennsylvania law and therefore can be enjoined.

THE CONTROLLING LAW

Entry of nonsuit is proper when the plaintiff has failed to establish a right to relief. Pa. R.C.P. 230.1. A motion for compulsory nonsuit is granted only when it is clear that the plaintiff has not provided sufficient evidence to establish the elements of the cause of action. *Bugosh v. Allen Refractories Co.*, 932 A.2d 901, 913 (Pa.Super. 2007). In determining whether a nonsuit should be entered, the fact-finder must give the plaintiff the benefit of all reasonable inferences. *Id.*

In reviewing a nonsuit order, the appellate court will reverse if, after giving the appellant the benefit of all reasonable inferences, it finds that the trial court could not reasonably have concluded that the elements of the cause of action were lacking. *Vicaro v. Spiegel*, 936 A.2d 503, 509 (Pa.Super. 2007). The lack of evidence must be so clear as to leave no room for fair and reasonable disagreement. *Id.*

Because a grant of nonsuit is proper when the elements of the cause of action are not established, this Court was required to consider the elements of a preliminary injunction. A preliminary injunction will be granted only if the plaintiff establishes that the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated by damages, that greater injury would result from the denial of the preliminary injunction than from granting it, that the preliminary injunction would restore the parties to the status quo, and that the plaintiffs right to the injunction is clear and equity jurisdiction is warranted. *Committee of Seventy v. Albert*, 381 A.2d 188, 190 (Pa.Cmwlth. 1977). A preliminary injunction is an extraordinary remedy, and will be granted only when each of the criteria is fully and completely established. *Valley Center, Inc. for Mental Health v. Parkhouse*, 437 A.2d 74, 75 (Pa.Cmwlth. 1981).

DISCUSSION AND ANALYSIS

Henderson contends that this Court failed to establish that a compulsory nonsuit is available in motions for preliminary injunction. There is nothing in the text of Pa. R.C.P. 230.1 (nor in the Explanatory Comment to the Rule) that prohibits or even disfavors entry of a compulsory nonsuit in an action for a preliminary injunction. As a matter of law, if a plaintiff (whether in a case seeking damages or in a case seeking an injunctive remedy) cannot establish any colorable claim to relief during its case in chief, our courts do not require the defendant to slog through the empty exercise of disproving a non-case. In an action alleging that an appraiser misused confidential information, the trial court denied the plaintiff an injunction and granted a motion for nonsuit. *Harmar Ice Association v. Lignelli*, 686 A.2d 819, 820 (Pa. 1996). Although the case was appealed,[1] the trial court's authority to grant nonsuit in a case seeking an injunction was never questioned in the Supreme Court's opinion.

Henderson's next claim is that this Court declined to hear Henderson's evidence supporting its request for a preliminary injunction. The Court has attempted to puzzle through this allegation, but must confess it remains at a loss. The Court heard this case for more than a half day on November 1, 2007 and more than a half day on November 9, 2007. It was only after Henderson rested its case that this Court entertained Defendants' motions for nonsuit. Henderson had every opportunity during the two days of hearing to present any and all evidence in support of its request for preliminary injunction. Perhaps Henderson is attempting to allege that this Court erred in some unspecified evidentiary ruling. However, without any guidance whatsoever from Henderson in its concise statement, this Court is wholly unable to address any individual evidentiary rulings.

Henderson's principal claim of error is that this Court improperly granted the motion for nonsuit. To this end, Henderson complains that this Court did not review or apply the employment contract, that this Court did not recognize that Schaaf's conduct entitled Henderson to injunctive relief, that this Court did not properly recognize the prohibited conduct, that this Court did not recognize that the threat of disclosure of confidential information was sufficient to warrant a preliminary injunction, that this Court failed to consider that Schaaf had confidential information, that this Court did not consider evidence of prior contracts, and that this Court did not consider Peoples' obligations. Additionally, Henderson claims that this Court failed to give Henderson the benefit of all reasonable inferences, and further alleges that this Court did not apply the appropriate test for determining the preliminary injunction.

In granting a nonsuit, this Court reached the conclusion that, despite the evidence presented, and giving Henderson the benefit of all reasonable inferences, Henderson was unable to establish the elements for granting a preliminary injunction. Henderson's claims to the contrary notwithstanding, this Court properly examined all of the hearing evidence. This Court articulated the legal standard for granting a nonsuit at length, on the record. (11/9/07 T. at 137.) This Court further discussed the evidence and arguments that Henderson presented in favor of a preliminary injunction. (*Id.* at 138-43.) In doing so, this Court considered all reasonable inferences that could be drawn in nonmovant's favor.

Henderson elicited testimony from Schaaf that, after leaving Henderson, Schaaf told clients with whom he had worked at Henderson that he had a non-solicitation agreement in his Henderson employment contract. (11/1/07 T. at 22-24.) Schaaf testified that he was not attempting to solicit customers by saying he had a non-solicitation agreement, but was merely advising the clients of that information. (*Id.* at 23, 25, 56, 58, 61-62.) Henderson suggested, through the testimony of its President, Thomas Grealish, that by telling a former client that there was a non-solicitation agreement, Schaaf actually was soliciting the client. (*Id.* at 111-12, 145-47.) However, this Court found Schaaf to be a credible witness. This Court believed Schaaf's testimony that, when he was letting former clients know that he was not able to solicit their business, he was providing information. It would have been an unreasonable inference, in this Court's view, to determine that Schaaf was somehow soliciting business by disclosing his non-solicitation obligation. (See 11/9/07 T. at 138-39.) Plaintiff presented no witnesses that could testify to any solicitation.

Henderson presented evidence that Schaaf had emailed information to a personal account from Henderson. Schaaf admitted that he had forwarded information on a Henderson client to his personal account the evening before he gave notice of resignation. (11/1/07 T. at 31-32.) Schaaf intended to continue to work for two weeks at Henderson following his notice of resignation, so as to transition his clients to other employees. (*Id.* at 35, 11/9/07 T. at 30.) Instead, Henderson terminated Schaaf the day he gave notice. (11/1/07 T. at 165.)

Schaaf further testified that he forwarded the information in order to be able to work on an upcoming renewal from home. (11/1/07 T. at 34.) Schaaf explained that an employee could not access Henderson information from home or on the road, so that the only way to work outside the office was to forward information to a personal account. (*Id.* at 44-45.) Henderson's own witnesses buttressed Schaaf on this point. Mr. Grealish, confessing that "I'm not Mr. Computer," could not challenge (or affirm) Schaaf's claim. (*Id.* at 123.) Tom Philbin, the commercial lines manager and Schaaf's former supervisor, admitted that Henderson is "a little bit behind in the industry as far as working from home," such that work from a remote location is otherwise impossible. (*Id.* at 179-80.)

On the second day of the hearing, Henderson introduced evidence showing that Schaaf had emailed nineteen items to his personal account on March 27, 2007, the day before he gave notice. (11/9/07 T. at 15-17.) However, on further examination, Schaaf testified, and the documentary record substantiated, that Schaaf made it his practice to send many emails to his personal account throughout the month of March 2007, and not just on the eve of his departure. (*Id.* at 19-25.) Some of the emails were directly related to clients Schaaf was working with, while other emails were general information or solicitations. (*Id.* at 19-25, 40-41.) Schaaf credibly testified that it was his practice to send emails to his personal account so he could access information from home, or review emails that were not work-related at home. (*Id.* at 31, 40-41.) While the timing of the March 27, 2007 emails, if viewed in isolation, could suggest that Schaaf was attempting to maintain access to confidential information after leaving Henderson, Schaaf's belief that he would be with Henderson for two more weeks to wrap up business and transition his clients, and his testimony (and the documentary evidence) that it was his practice to send emails to his personal account for business and personal reasons, made the inference that these emails had a nefarious purpose unreasonable.

Significantly, despite controlling its own computer server, Henderson chose to bring no evidence whatsoever of its January or February email commerce to contradict Schaaf's testimony. As this Court stated:

> On the other side, the absence of evidence is evidence and the Plaintiff which controls its server did not bring evidence of the January or February e-mail commerce. And while it is no doubt self-serving for Mr. Schaaf to testify as he did that prior months history would show the same or substantially the same type of volume, the evidence is nonetheless uncontested in that regard and the Court is not free to simply disregard it unless the Court had concluded the Mr. Schaaf was lying which the Court does not conclude.

Id. at 139-40.

Henderson also asserted that the fact that Schaaf had a production report that he had emailed to himself was a breach of the employment contract. This claim was undermined by the uncontradicted testimony that, after Schaaf left, and in regard to determining Schaaf's final payments, Henderson itself sent two production reports to Schaaf. (11/1/07 T. at 50.) Additionally, one of the production reports was sent to Schaaf at Peoples First's office. (*Id.* at 78.) If Henderson willingly provided production reports to Schaaf while fully aware that he was working for Peoples, it would be patently unreasonable for this Court to infer that Schaaf's possession of a production report was a breach.

This Court also considered evidence presented concerning the employment contracts between Schaaf and Henderson. Mr. Grealish admitted (and the documentary record showed) that, in prior employment contracts, employees were prohibited from contacting, or accepting work, from any Henderson customer or prospective customers. (11/1/07 T. at 134, Ex. 1-6, 9.) But the contract under which Schaaf was operating when he resigned differed significantly from the prior agreements. It prohibited only solicitation of business. (*Id.* at 143-44, Ex. 9.) Mr. Grealish further testified that the language was changed to keep the contract enforceable. (*Id.* at 144-45.) The meaning of the contract was clear. There was no reasonable inference that could be made from the evidence and testimony that Schaaf had solicited or intended to solicit any Henderson clients. Since only solicitation was prohibited, the evidence of Schaaf's contact with, or acceptance of business from, Henderson clients could not lead to any reasonable inference that supported a preliminary injunction. As this Court stated:

> The Court does not invent or rewrite the parties' contract papers, and the fact that the document says solicit is important. It does not say accept. And if Henderson Brothers wanted it to say accept, then they could have contracted for accept. It may be that by this time in his career Mr. Schaaf had sufficient bargaining leverage to command the amendment of the term to change it from accept to solicit. Be that as it may, the fact is it says accept, it doesn't say solicit. There is no evidence, there's no evidence nor any reasonable inference available to the Court from the evidence of record that Mr. Schaaf did solicit the business. The Court could make that conjecture. The Court could make a number of conjectures, but the Court is not free and is not permitted to do so.

11/9/07 T. at 141.

In determining the motion for a nonsuit in this case, the Court was required to look to the standard governing preliminary injunctions: necessity of the injunction to prevent immediate and irreparable harm that cannot be compensated by damages; greater injury from the denial of the injunction than from the grant of the injunction; restoration of the status quo; and clarity of right to the injunction. *See Committee of Seventy, supra.* In this case, after affording Henderson the benefit of all reasonable inferences, this Court could not conclude that there was immediate and irreparable harm or that the right to the injunction was clear. On the record, this Court clearly and thoroughly articulated the standard it was using and the reasons for its decision. (11/9/07 T. at 136-43.)

This Court applied the appropriate law and rules in considering the motions for preliminary injunction and nonsuit. This Court considered all the relevant testimonial and documentary evidence, and afforded Henderson the benefit of all inferences that reasonably could be drawn in Henderson's favor. However, for the reasons stated herein and on the record at the hearing's close, this Court was constrained to grant the motions for nonsuit.

BY THE COURT:
/s/Wecht, J.

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[1] On appeal, the Superior Court (in a memorandum decision) reversed the trial court's denial of the injunction and remanded for entry of an injunction. *See Harmar Ice Ass'n*, 686 A.2d at 820. The Supreme Court reversed the Superior Court. The Supreme Court held that, because the grant of nonsuit had divested the defendant of the opportunity to present evidence, the entry of an injunction without a hearing worked a denial of defendant's due process rights. *Id.* at 820-21.

Commonwealth of Pennsylvania v. Keith Navaro Carter

Criminal Law—Amendment to Criminal Information—Pa. Rule of Criminal Procedure 564—Evidence—Harmless Error—Jury Charge—Transferred Intent

1. Defendant was found guilty of one count of criminal attempt-homicide; two counts of aggravated assault; one count of violation of the Uniform Firearms Act and two counts of recklessly endangering another person for firing at least 28 rounds from a Tec 9 firearm at two Pittsburgh Police Detectives and was sentenced to an aggregate term of imprisonment of not less than 12 nor more than 25 years. Defendant complained that the trial court erred: in allowing amendment to the criminal information; in not allowing a defense witness to testify and; in giving a transferred intent instruction to the jury.

2. Amendment to a criminal information is permitted by Pa. Rule of Criminal Procedure 564 where the Commonwealth makes its amendment request far enough in advance of the trial so as to give the defendant enough time to prepare its defense and where the amendment does not materially change the facts the Commonwealth must prove to obtain a conviction. In this case, the Court granted the amendment since the request was made tree months prior to trial and since the Court was satisfied that the defendant had sufficient time to prepare its defense and because the amendment adding counts of aggravated assault did not materially change the facts the Commonwealth had to prove to obtain a conviction.

3. Defendant's allegation that the Court erred in not allowing defense private investigator to testify as to whether defendant was able to see that he was shooting police officers on account of the lighting and other conditions of the crime scene was rejected, as harmless error, since

Defendant was acquitted of the two counts of aggravated assault of a police officer against him; where it appeared that whether defendant could recognize the victims as police officers was irrelevant to the other charges for which the defendant was convicted and where it appeared that whether Defendant knew the persons in the car were police officers was irrelevant to his claim of self defense, since Defendant's own testimony established that he did not act in self defense when he fired at his victims.

4. Jury instruction on transferred intent is appropriate where the facts show that the actual results of a person (shooting at Detectives) differed from the result contemplated or designed by a defendant (shooting at other unidentified persons). Where defendant admitted to shooting at persons whom he believed were others intent on doing harm to him and who turned out to be detectives, jury was properly instructed that defendant's intent to kill or cause serious bodily injury to those unidentified persons could be transferred to the detectives.

(Peter Clyde Papadakos)

Daniel Konieczka for the Commonwealth.
Paul Boaz for Defendant.

CC No. 200510561. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Manning, J., December 7, 2007—The defendant appeals from the Judgment of Sentence imposed following his conviction on multiple counts arising out of an incident during which the defendant fired numerous shots from a Tec 9 firearm at two Pittsburgh Police Detectives. Following a jury trial, the defendant was found guilty of one count of criminal attempt-homicide (18 Pa.C.S.A. §901); two counts of aggravated assault (2702 (a) (1)); one count of violation of the uniform firearms act-altering or obliterating marks of identification (18 Pa.C.S.A. §6117); and two counts of recklessly endangering another person (18 Pa.C.S.A. §2705). He was found not guilty of one count of criminal attempt-homicide and two counts of aggravated assault (18 Pa.C.S.A. §2702 (a) (2). He was sentenced to an aggregate term of imprisonment of not less than 12 nor more than 25 years.[1]

Post sentence Motions were filed and denied. In a Concise Statement of Errors Complained of on Appeal filed at this Court's direction, the defendant identified that following alleged errors:

> 1. That the Court erred in permitting the Commonwealth to amend the criminal information to add two counts of aggravated assault charging violations of section 2702 (a) (1) (attempting to cause serious bodily injury);
>
> 2. The Court erred in precluding testimony from Private Investigator Raoul Rapneth; and
>
> 3. The Court erred in instructing the jury regarding transferred intent.

The charges arose out of an incident that occurred on June 4, 2005 when Pittsburgh Police Detectives Phillip Mercurio and Robert Kavals were patrolling in an unmarked police vehicle in the Ferris Court housing complex in the City of Pittsburgh. When they pulled into the parking lot of that complex at about 3:30 a.m., they observed the defendant walking toward the lot holding an Intratec 9 millimeter automatic weapon in his right hand. Detective Mercurio brought the vehicle to a stop and, as he and Detective Kavals began to exit the vehicle, the defendant pointed the weapon at them and opened fire, riddling the police vehicle and barely missing the plain clothes detectives. A minimum of twenty eight rounds from the defendant's weapon were fired, based upon the number of shell casings found. The detectives took cover and returned fire. They pursued the defendant and saw him enter the rear of 1290 Ferris Court. They and other responding units surrounded this building. The defendant was arrested as he left the building with other residents. During an interview, the defendant admitted that he had been the person firing at the officers and said them that he had thrown the weapon onto a hillside. The weapon was recovered from that hillside. He claimed that he did not know that the detectives were police officers when he fired on them.

The defendant testified at trial. He said that the day before the shooting he was fired upon as he drove his vehicle. He stated he did not know who shot at him and did not report the incident to police. He said that he then called a friend and obtained the weapon that was later used to shoot at the detectives. Other than leaving to get that firearm, he claimed that he stayed at Ferris Court until around 3:00 a.m., when he left to walk to the lot where he had left his. He said that as he was walking, he carried the firearm in his right hand, at his side. When the detective's vehicle pulled into the lot, he testified that he feared that they were the same people who shot at him the previous day. When the car stopped and the doors began to open, he raised his weapon and began firing. He said that he did not hear the officers identify themselves as police officers. He fled to the apartment building where he was later found, stopping to throw the weapon over the hillside.

The original criminal information filed in this matter charged the defendant with two counts of aggravated assault pursuant to Section 2702 (a) (2) of the Crimes Code. This section provides that a person is guilty of aggravated assault if he:

> attempts to cause or intentionally, knowingly or recklessly causes serious bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c) or to an employee of an agency, company or other entity engaged in public transportation, while in the performance of duty.

The information identified the victims as police officers, one of the persons enumerated in subsection (c). On October 5, 2005 the Commonwealth filed a Motion seeking to amend the information by adding two counts of aggravated assault pursuant to section 2702 (a) (1), which provides that a person is guilty of aggravated assault if he "…attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." The defense filed a response to this Motion on December 29, 2005. The Court granted the Motion on January 3, 2006.

The amendment of criminal informations if controlled by Pennsylvania Rule of Criminal Procedure 564, which states:

> The court may allow an information to be amended when there is a defect in form, the description of the offense(s), the description of any person or any property, or the date charged, provided the information as amended does not charge an additional or different offense. Upon amendment, the court may grant such postponement of trial or other relief as necessary in the interests of justice.

Pa.R.Crim.P. 564. The purpose of Rule 564 "is to ensure that a defendant is fully apprised of the charges, and to avoid

prejudice by prohibiting the last minute addition of alleged criminal acts of which the defendant is uninformed." *Commonwealth v. Davalos*, 779 A.2d 1190, 1194 (Pa.Super. 2001) (citation omitted). The test to be applied is:

> [W]hether the crimes specified in the original indictment or information involve the same basic elements and evolved out of the same factual situation as the crimes specified in the amended indictment or information. If so, then the defendant is deemed to have been placed on notice regarding his alleged criminal conduct. If, however, the amended provision alleges a different set of events, or the elements or defenses to the amended crime are materially different from the elements or defenses to the crime originally charged, such that the defendant would be prejudiced by the change, then the amendment is not permitted.

Id., 779 A.2d at 1194 (citation omitted).

The Commonwealth sought amendment on October 4, 2005, hardly on the eve of a trial that did not commence until January 3, 2006. Although the Court did not grant the Motion until January 3, 2006, the defendant was put on notice on the date that the Motion was filed and served on defense counsel that the Commonwealth wanted to add these additional counts. He was also made aware at that time that the Commonwealth wanted to proceed to trial on charges for which the victim's status as police officers was not an element that the Commonwealth needed to prove.

In addition, the original criminal information filed in this case included two counts of criminal attempt-homicide. This offense requires proof very similar to that required for the amended aggravated assault charge. The only difference being that the criminal attempt homicide charge required proof of a specific intent to kill while the aggravated assault charges required proof of intent to cause serious bodily injury. The facts that the Commonwealth would offer to demonstrate each of these intents was, however, identical: that the defendant fired numerous rounds from an automatic weapon at the victims. Both because the amendment was made far enough in advance to allow the defendant to prepare a defense and, more importantly, because the amendment did not materially change the facts that the Commonwealth had to prove to obtain a conviction, the amendment was proper. The defendant was not prejudiced by this amendment. *Commonwealth v. Fuller*, 579 A.2d 879 (Pa.Super. 1990).

The defendant next complains that the Court erred in not permitting a defense witness, private investigator Raoul Rapneth, to testify. According to defense counsel, he and this witness went to the scene of the crime at night and, using the same model of car that the detectives were in that right, attempted to recreate the scene. They used the Crime Lab reports and tape measures to place the vehicle and the defendant. Defense counsel explained to the Court what the witness would say:

> He is going to say that he went to various distances and he couldn't–and in the car were two people he knew very well, including Barry Fox, and he couldn't recognize them. He couldn't make them out.
>
> From 15 feet he could see that they may have been white person or light-skinned or dark, but once you get to 25 feet or 30—

(N.T. Vol. II, p. 409). The defendant argued that the evidence was admissible because the witness was simply testifying to his observation of facts, those facts being the lighting and other conditions relevant to his client's ability to recognize that the persons in the car were police officers. The Commonwealth objected and the Court sustained the objection. This claim is without merit because, regardless of whether the Court was correct in excluding this testimony, the defendant suffered no prejudice by its exclusion.

The decision to admit or exclude evidence is within the discretion of the trial court, and will not be reversed absent an abuse of that discretion. *Commonwealth v. Wyatt*, 688 A.2d 710 (1997), *appeal denied*, 699 A.2d 735 (11997). Test results of experiments are admissible if conditions under which the experiment was conducted are "substantially similar" to conditions involved in the commission of the crime charged. *Commonwealth v. Sero*, 387 A.2d 63 (1978) "Reversal based on the exclusion of evidence requires a showing of abuse of discretion *as well as a showing of actual prejudice.*" *Wyatt, supra*, 688 A.2d at 714 (emphasis added).

The defendant was acquitted of the two offenses for which his knowledge that the persons he was shooting were police officers, had relevance. The defense investigator's testimony was proffered to corroborate the defendant's claim that he could not recognize that the occupants of the car Were police officers. The jury, in finding him not guilty of the two counts of aggravated assault for which knowledge that the victims were police officers was a necessary element, obviously found that the Commonwealth failed to prove, beyond a reasonable doubt, that the defendant knew that he was shooting at police officers. Whether the defendant could recognize the victims as police officers, however, was irrelevant to the other charges for which the defendant was convicted.

In addition, whether the defendant knew the persons in the car were police officers was irrelevant to his claim of self defense because his own testimony established, beyond a reasonable doubt, that he did not act in self defense when he fired at the victims. His direct testimony failed to establish that, at the time he started firing his weapon, he had any reason to believe that the occupants of that vehicle meant to harm him, regardless of whether they were police officers. He said that he fired at the vehicle as soon as one of the doors of the vehicle started opening. Because he testified that he could not see into the vehicle, he obviously did not observe any threatening movements or gestures by the occupants. He did not see that they had weapons until after he started firing and they returned fire. (N.T., Vol. II, pp. 368-369). This testimony established that at the time that he made the decision to shoot, he was not possessed of any facts that could have caused him to reasonably believe that he needed to use deadly force to protect himself.

During cross-examination, he further undermined his claim of self defense with the following exchange between the himself and the Assistant District Attorney:

> Q: But you made the decision to shoot without any information that those people in that car were causing you any harm?
>
> A: Yes. I didn't have time to see, you know what I mean, who was in the car.
>
> Q: Sure you had time. You fired first, didn't you?
>
> A: Yes.
>
> Q: If you would have waited another five seconds, what do you think would have transpired?
>
> A: I thought it might have been too late.
>
> Q: But you didn't know?
>
> A: No, I didn't.

> Q: And you had no reason to know that those occupants of that vehicle were going to cause you harm?
>
> A: ***No, I didn't.***

(N.T. Vol. II, p. 397, emphasis added).

Whether the defendant could see who was in that car was not relevant to the claim of self defense because the defendant did not care who was in that car, he was going to shoot first and ask questions later. Because the facts that may have been established by the testimony from the defendant's investigator, *i.e.* that the defendant could not see into the vehicle from where he was standing when he started shooting, was not probative of any fact material to the offenses for which the defendant was convicted, any error in excluding that testimony was harmless as the defendant suffered no prejudice.

The defendant next complains that the Court should not have instructed the jury on the doctrine of transferred intent. The Court instructed the jury:

> If you find beyond a reasonable doubt that the defendant intended to kill or cause serious bodily injury to other unidentified persons and was acting with that intent at the time that he fired the shots, you may find that the defendant acted with specific intent under what the law calls the doctrine of transferred intent.
>
> What that means is that if the actual result the defendant intended differed from what he contemplated only because a different person than the one he actually intended to harm or kill was involved, the crime or crimes are still established.

(N.T. Vol. II, pp. 516-517). This instruction is derived from 18 Pa.C.S.A. §303 (b) (1), which provides:

> **(b) Divergence between result designed or contemplated and actual result.—**When intentionally or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the intent or the contemplation of the actor unless:
>
> > (1) the actual result differs from that designed or contemplated as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused

The defendant claimed that he did not intend to kill or cause seriously bodily injury to the police officers in this case because he believed that he was shooting at unidentified other persons who were a threat to him. It is not disputed that the actual facts were different from what the defendant claimed he believed them to be in that he was, in fact, shooting at two police officers. Because he raised the claim that he thought he was shooting at unidentified other persons, however, an instruction on the transferred indent doctrine was necessary. The jury was properly instructed that they could find the defendant guilty even if they concluded that the "actual result" (*i.e.*, that the defendant was shooting at Detectives Mercurio and Kavals) differed from the result "contemplated or designed" by the defendant (*i.e.*, that he was shooting at unidentified other persons.) The jury was properly instructed that the defendant's intent to kill or cause serious bodily injury to the unidentified other persons could be transferred to the detectives.

Giving this instruction also did not negate the defendant's claim of self defense or create the possibility that the jury would be confused as the applicability of these two doctrines. In claiming that he acted in self defense, the defendant essentially admitted that he intentionally fired at the police officers, believing that they were other persons intent on doing him harm. The instruction on self-defense did not touch upon his *intent* in shooting but, rather, went to whether he was *justified* in doing so. It is impossible to see how giving these two instructions, both warranted under the facts, could have confused the jury. Given the evidence presented by both the Commonwealth and defense, it was not disputed that the defendant fired numerous rounds from an automatic weapon at Detectives Mercurio and Kavals. Nor was it disputed that when he did so, the defendant was not actually in danger of death or serious bodily injury. What was left for the jury to decide were whether the Commonwealth had proven that the elements of self defense, *i.e.* 1) did he reasonably believe that he was in immediate danger of death or serious bodily injury; 2) was he free from fault in provoking the difficulty that led to his use of deadly force; and 3) did he violate his duty to retreat before resorting to the use of deadly force, were not present. In addressing these elements, intent is not relevant. Accordingly, the jury could not have been confused by the Court's instructions on these unrelated concepts.

For these reasons, the defendant's judgment of sentence should be affirmed.

BY THE COURT:
/s/Manning, J.

Dated: December 7, 2007

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[1] He received consecutive sentences of not less than 7 nor more than 15 years on the criminal attempt-homicide charge and not less than 5 nor more than 10 years on one of the aggravated assault charges. No further penalty was imposed on the other counts.

Commonwealth of Pennsylvania v. Andre Basking

Supression of Drugs and Weapons—Authority to Consent to Search

1. After Defendant was in custody, police entered his mother's house to search for the weapon believed to have been used in an assault.

2. Defendant's mother permitted a search of her house, including a third floor used by Defendant.

3. The third floor was used exclusively by Defendant who paid a monthly rent to his mother. A door at the top of this floor was kept closed and Mother was not permitted access to this area.

4. Here the relationship between mother and son was akin to a landlord-tenant relationship, and Mother did not have authority to consent to a search of Defendant's living quarters.

(Mary Ann C. Acton)

Lawrence E. Sachs for the Commonwealth.
Lee M. Rothman for Defendant.

CC No. 200517437. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Mariani, J., January 23, 2008—This is a direct appeal

wherein the Commonwealth of Pennsylvania appeals from the Order of Court dated May 17, 2007 which granted the defendant's motion to suppress various evidence including, but not limited to, drugs and weapons which were located in the third floor attic area of 6526 Meadow Street, a house located in Pittsburgh, Pennsylvania. The Commonwealth has certified that the Court's order substantially handicapped and/or effectively terminated prosecution of this case. The Commonwealth of Pennsylvania filed a Concise Statement of Errors Complained Of On Appeal alleging the following errors:

> 1. Whether, the court erred in finding that Leslie Nunley did not have actual authority to consent to a police search of her residence, including the third floor of that residence, defendant/appellee's room, which was not separately secured?
>
> 2. Whether the court erred in failing to find that a police officer of reasonable caution would have believed that Leslie Nunley had authority over the entire premises so as to permit the warrantless search of those premises based on her consent?
>
> 3. Whether the court erred in finding that the concept of apparent authority cannot be used to justify a search absent exigent circumstances and, if exigent circumstances are in fact required, whether the court erred in finding that they did not exist here?
>
> 4. Whether the court erred in concluding that the Pennsylvania Supreme Court would interpret the apparent authority exception more narrowly under Article I Section 8 of the Pennsylvania Constitution than it has been interpreted under the Fourth Amendment?

The facts of this case demonstrate that on November 13, 2005, Officer Rattigan of the City of Pittsburgh Police Department was dispatched to 6526 Meadow Street, Pittsburgh, Pennsylvania for a domestic call. When he arrived at the scene, Officer Rattigan observed an adult female sitting on an outside wall. The female was crying and she was accompanied by two young children at the time. Upon being questioned by Officer Rattigan, the female indicated that the defendant had assaulted her and during the incident the defendant fired "two rounds at her." The female advised Officer Rattigan that the defendant was last seen running into the residence located at 6526 Meadow Street. The City of Pittsburgh "Special Emergency Response Team" or "SERT" was also dispatched to the scene as well. Officer Rattigan did not personally observe the defendant at that residence. However, shortly after being on scene, Officer Rattigan was advised, over the police radio, that the defendant had turned himself in to the police at the Zone 5 Police Station.

After the defendant was in custody, law enforcement officers decided to conduct a search of the house for the weapon used by the defendant in the assault. The SERT team entered the house first and conducted a sweep of the house to ensure that no other persons were in the house prior to a search of the house being conducted. At some point, Officer Rattigan advised the defendant's mother, who owned the house, that he wanted to search the house for the weapon alleged to have been used by the defendant. Defendant's mother advised Officer Rattigan that the defendant resided on the third floor of the house. Defendant's mother did permit a search of the house but requested that she be permitted to accompany the law enforcement officers during the search. During the search of the third floor, the officers found heroin and weapons as well as some other incriminating evidence.

The defendant's mother testified during the suppression hearing that she owned the Meadow Street residence and that the defendant, an adult, resided on the entire third floor of the residence. She testified that the defendant paid $100 in monthly rent. She testified that nobody in the home was permitted access to the third floor. She also testified that there was a door at the top of the steps leading to the third floor and that this door was kept closed by the defendant. This Court found the testimony of the defendant's mother credible.

In this case, the defendant challenged the constitutionality of the search under both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution. The Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution protect individuals from unreasonable searches and seizures, thereby ensuring the "right of each individual to be let alone." *In the Interest of D.M.*, 566 Pa. 445m 781 A.2d 1161, 1163, (Pa. 2001); *Commonwealth v. Blair*, 394 Pa.Super. 207, 575 A.2d 593, 596 (Pa.Super. 1990).

A warrantless search or seizure is presumptively unreasonable under the Fourth Amendment, subject to a few specifically established, well-delineated exceptions. *Horton v. California*, 496 U.S. 128, 134, n.4, 110 S.Ct. 231, 110 L.Ed.2d 112 (1990). Warrantless searches are also presumptively unreasonable under Article I, Section 8 of the Pennsylvania Constitution. *Commonwealth v. McCree*, 924 A.2d 621, 627 (Pa. 2007) Under the Fourth Amendment, one such exception is a consensual search.

The Commonwealth first avers that this Court erred in ruling that Leslie Nunley did not have actual authority to consent to the search in this case. A description of third party consent is contained in *Commonwealth v. Blair*, 394 Pa.Super. 207, 575 A.2d 593, 597 (1990):

> Third-party consent cases fall into four broad categories. Previous to this decision, cases in our Commonwealth concerned situations where: (1) the consenting party had "superior authority" to the party objecting to the search, see *Commonwealth v. Latshaw*, 481 Pa. 298, 392 A.2d 1301 (1978), *cert. denied*, 441 U.S. 931, 99 S.Ct. 2050, 60 L.Ed.2d 659 (1979) (barn's owner had not surrendered any indicia of her absolute control over barn where defendant's marijuana was found pursuant to warrantless search with consent of barn's owner); (2) the consenting party had equal or common authority to the party objecting to the search, *see*, *Commonwealth v. Arnold*, 331 Pa.Super. 345, 480 A.2d 1066 (1984); *Commonwealth v. Lowery*, 305 Pa.Super. 66, 451 A.2d 245 (1982); *Commonwealth v. Devlin*, 302 Pa.Super. 196, 448 A.2d 594 (1982); (3) the consenting party had inferior authority to the party objecting to the search, see, *Commonwealth v. Garcia*, 478 Pa. 406, 387 A.2d 46 (1978), *Commonwealth v. Netting*, 315 Pa.Super. 236, 461 A.2d 1259 (1983) (third party who has neither interest nor control in a premises may not give the police valid consent to conduct a warrantless search of the premises); and (4) the last area of third-party consent cases concerns those situations where a police officer is reasonably mistaken as to the actual authority of the party consenting to his entry; stated another way, the police officer reasonably mistakes apparent authority for actual author-

ity to consent to his entry.

The uncontroverted facts of record demonstrate that the Leslie Nunley did not have superior authority over the defendant's living quarters nor did she have common authority over those quarters. As set forth above, Leslie Nunley herself testified that the defendant paid rent for his living quarters, nobody other than the defendant was permitted to enter those quarters and he kept the door closed at all times. The evidence supports the conclusion that the relationship between Leslie Nunley and her son was akin to a landlord-tenant relationship and, therefore, Leslie Nunley did not have the actual authority to consent to the search of the defendant's living quarters. Such a relationship does not give rise to actual authority. See *Garcia*, 387 A.2d at 54.

This Court's finding that Leslie Nunley did not have actual authority is, however, not dispositive of this appeal. Derivative of actual consent, the "apparent authority" doctrine exists in federal jurisprudence. *Illinois v. Rodriguez*, 497 U.S. 177, 188-89, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990); *Commonwealth v. Strader*, 931 A.2d 630, 635 (Pa. 2007); *Commonwealth v. Hughes*, 575 Pa. 447, 836 A.2d 893 (Pa. 2003). The Pennsylvania Supreme Court has not yet determined whether the "apparent authority" doctrine of consent applies to ordinary citizens of this Commonwealth under the Pennsylvania Constitution. *Hughes*, 836 A.2d at 904 ("Nevertheless, we need not reach the question of whether the "apparent authority exception" should be applied in situations involving the average citizen because Appellant is a parolee and, consequently, he has a diminished expectation of privacy.")

Under the Fourth Amendment, a third party with apparent authority over the area to be searched may provide police with consent to search. *United States v. Matlock*, 415 U.S. 164, 171, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). Third party consent is valid under the Fourth Amendment when police reasonably believe a third party has authority to consent. *Rodriguez*, 497 U.S. at 188-89; *Strader*, 931 A.2d at 634-635. Specifically, the apparent authority exception turns on whether the facts available to police at the moment would lead a person of reasonable caution to believe the consenting third party had authority over the premises. *Id*. If the person asserting authority to consent did not have such authority, that mistake is constitutionally excusable if police reasonably believed the consenter had such authority and police acted "on facts leading sensibly to their conclusions of probability." *Id*. at 186 (quoting *Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949)). In determining whether guests or people happening to be in a defendant's home have authority to consent to a search, the question is what is apparent, not actual, authority and the reasonableness of the police officer's belief in that apparent authority. The totality of circumstances in each case controls whether police have a reasonable belief the person consenting to the search has authority to do so. *Strader*, 931 A.2d at 635. Based on the totality of the circumstances in this case, this Court does believe that the police reasonably believed that Leslie Nunley had authority to consent to the search of her son's living quarters. As set forth above, Leslie Nunley was the defendant's mother, she owned the house and it was reasonable for the officer to believe that, as owner, she could consent to a search of the living quarters of her son located within the house she owned. The suppression order in this case, however, is not premised on Fourth Amendment guarantees but rather the heightened privacy rights conferred by Article I, Section 8 of the Pennsylvania Constitution.

This Court believes that the "apparent authority" doctrine accepted by the United States Supreme Court is inconsistent with the heightened privacy guarantees of the Pennsylvania Constitution. Where a defendant argues that the Pennsylvania Constitution grants him greater protection than the Fourth Amendment to United States Constitution, the appropriate analysis requires consideration of the factors set forth in *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (Pa. 1991).

Under *Edmunds*, in determining whether the Pennsylvania Constitution affords greater protection to an individual than does the federal constitution, a court must consider: (1) the text of the provision of our Constitution; (2) the history of the provision, including the case law of this Commonwealth; (3) relevant case law from other jurisdictions; and (4) policy considerations, "including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence." *Edmunds*, 586 A.2d at 895. See also *Commonwealth of Pennsylvania v. Russo*, 934 A.2d 1199 (Pa. 2007).

1. Text

The starting point of the *Edmunds* analysis has little significance in this case. A comparison of the language of Article I, Section 8 to the language of the Fourth Amendment yields no significant input toward the disposition of this case. The Fourth Amendment of the U.S. Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section 8 of the Pennsylvania Constitution states:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Although the language of each constitutional provision is similar, a court is "not bound to interpret the two provisions as if they were mirror images, even where the text is similar or identical." *Edmunds*, 586 at 996.; see also *Commonwealth v. Tarbert*, 517 Pa. 277, 283, 535 A.2d 1035, 1038 (Pa. 1987). This analysis is certainly not controlling in this case as the Pennsylvania Supreme Court has made the textual comparison of Article I, Section 8 of the Pennsylvania Constitution to the Fourth Amendment and afforded greater protections to individuals. *Edmunds, supra.* Therefore, the next pertinent inquiry is the history of Article I, Section 8.

2. History

Article I, Section 8 has a "unique history" *Edmunds*, 586 A.2d at 896. As set forth in *Commonwealth v. Sell*, 504 Pa. 46, 63, 470 A.2d 457, 466 (1983), the "constitutional protection against unreasonable searches and seizures existed in Pennsylvania more than a decade before the adoption of the federal Constitution, and fifteen years prior to the promulgation of the Fourth Amendment." In fact, Pennsylvania's Constitution enjoys a rather storied past. As aptly explained in *Edmunds*:

> Perhaps the extent of the untapped history of the

Pennsylvania Constitution should be underscored. Pennsylvania's Constitution was adopted on September 28, 1776, a full ten years prior to the ratification of the U.S. Constitution. Like the constitutions of Virginia, New Jersey, Maryland, and most of the original 13 Colonies, Pennsylvania's Constitution was drafted in the midst of the American Revolution, as the first overt expression of independence from the British Crown. *See* W. Adams, *The First American Constitutions* at 61 (1980). The Pennsylvania Constitution was therefore meant to reduce to writing a deep history of unwritten legal and moral codes, which had guided the colonists from the beginning of William Penn's charter in 1681. *See* White, *Commentaries on the Constitution of Pennsylvania* (1907). Unlike the Bill of Rights of the United States Constitution, which emerged as a later addendum in 1791, the Declaration of Rights in the Pennsylvania Constitution was an organic part of the state's original constitution of 1776, and appeared (not coincidentally) first in that document.

Thus, contrary to the popular misconception that state constitutions are somehow patterned after the United States Constitution, the reverse is true. The federal Bill of Rights borrowed heavily from the Declarations of Rights contained in the constitutions of Pennsylvania and other colonies. *See* Brennan, *The Bill of Rights and the States,* in *The Great Rights* 67 (E. Cahn ed. 1963). For instance, the Pennsylvania Declaration of Rights was the "direct precursor" of the freedom of speech and press. See 1 B. Schwartz, *The Bill of Rights: A Documentary History* 262 (1971). The Delaware Declaration of Rights prohibited quartering of soldiers and ex-post facto laws. *Id.* at 276-78. North Carolina's Declaration of Rights provided a number of protections to the criminally accused — the right to trial by jury, the privilege against self-incrimination, and others — which later appeared in the United States Constitution. *Id.* at 286-88.

With respect to Article I, Section 8 of the present Pennsylvania Constitution, which relates to freedom from unreasonable searches and seizures, that provision had its origin prior to the 4th Amendment, in Clause 10 of the original Constitution of 1776. *See Sell*, 504 Pa. at 63, 470 A.2d at 466. Specifically, the original version of the search and seizure provision reads as follows:

The people have a right to hold themselves, their houses, papers and possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right and ought not be granted.

See Buckalew, *An Examination of the Constitution of Pennsylvania* at 13 (1883). The above provision was reworded at the time the Pennsylvania Constitution was revised extensively in 1790, and reappeared as Article I, Section 8. The modern version of that provision has remained untouched for two hundred years, with the exception of the words "subscribed to by the affiant," which were added by the Constitutional Convention of 1873. *Id.*

The requirement of probable cause in this Commonwealth thus traces its origin to its original Constitution of 1776, drafted by the first convention of delegates chaired by Benjamin Franklin. *See* White, *supra*, at xxiii. The primary purpose of the warrant requirement was to abolish "general warrants," which had been used by the British to conduct sweeping searches of residences and businesses, based upon generalized suspicions. *See* White, *supra*, at 158; *Wakely v. Hart*, 6 Binn. 316 (1814). Therefore, at the time the Pennsylvania Constitution was drafted in 1776, the issue of searches and seizures unsupported by probable cause was of utmost concern to the constitutional draftsmen. *Id.*

Moreover, as this Court has stated repeatedly in interpreting Article I, Section 8, that provision is meant to embody a strong notion of privacy, carefully safeguarded in this Commonwealth for the past two centuries. As we stated in *Sell*: "the survival of the language now employed in Article I, Section 8 through over 200 years of profound change in other areas demonstrates that the paramount concern for privacy first adopted as part of our organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth." *Id.* 504 Pa. at 65, 470 A.2d at 467. (citations omitted). The history of Article I, Section 8, thus indicates that the purpose underlying the exclusionary rule in this Commonwealth is quite distinct from the purpose underlying the exclusionary rule under the 4th Amendment, as articulated by the majority in *Leon*.

The United States Supreme Court in *Leon* made clear that, in its view, the *sole purpose* for the exclusionary rule under the 4th Amendment was to deter police misconduct. *Id.* 468 U.S. at 916, 104 S.Ct. at 3417. The *Leon* majority also made clear that, under the Federal Constitution, the exclusionary rule operated as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Id.* 468 U.S. at 906, 104 S.Ct. at 3412, 82 L.Ed.2d at 687 *quoting*, *United States v. Calandra*, *supra*, 414 U.S. at 348, 94 S.Ct. at 620.

This reinterpretation differs from the way the exclusionary rule has evolved in Pennsylvania since the decision of *Mapp v. Ohio* in 1961 and represents a shift in judicial philosophy from the decisions of the United States Supreme Court dating back to *Weeks v. United States*.

Like many of its sister states, Pennsylvania did not adopt an exclusionary rule until the United States Supreme Court's decision in *Mapp* required it to do 225, 80 S.Ct. 1437, 1448, 4 L.Ed.2d 1669 (1960). However, at the time the exclusionary rule was embraced in Pennsylvania, we clearly viewed it as a constitutional mandate. *Commonwealth v. Bosurgi*, 411 Pa. 56, 190 A.2d 304 (1963) (interpreting *Mapp* to require the exclusion of illegally seized evidence as "an essential part of both the 4th and 14th Amendments,") *Id.* at 64, 190 A.2d at 309, *quoting,*

Mapp, 367 U.S. at 657, 81 S.Ct. at 1693. This interpretation was in keeping with a long line of federal cases, beginning with *Weeks* in 1914, which viewed the exclusionary rule as a necessary corollary to the prohibition against unreasonable searches and seizures. (footnote omitted).

As one commentator noted in piecing together the history of the exclusionary rule: "'Deterrence,' now claimed to be the primary ground for exclusion, seems to have had no substantial place in any of these conceptions of the practice." *See*, White, *Forgotten Points in the Exclusionary Rule Debate*, 81 Mich.L.Rev. 1273, 1279 (1983).

During the first decade after *Mapp*, our decisions in Pennsylvania tended to parallel the cases interpreting the 4th Amendment. However, beginning in 1973, our case-law began to reflect a clear divergence from federal precedent. The United States Supreme Court at this time began moving towards a metamorphosed view, suggesting that the purpose of the exclusionary rule "is not to redress the injury to the *privacy* of the search victim (but, rather) to deter future *unlawful police conduct*." *Calandra*, 414 U.S. at 347, 94 S.Ct. at 619 (emphasis added); *See, also, U.S. v. Peltier*, 422 U.S. 531, 536, 95 S.Ct. 2313, 2317, 45 L.Ed.2d 374 (1975). At the same time this Court began to forge its own path under Article I, Section 8 of the Pennsylvania Constitution, declaring with increasing frequency that Article I, Section 8 of the Pennsylvania Constitution embodied a strong notion of privacy, notwithstanding federal cases to the contrary. In *Commonwealth v. Platou* and *Commonwealth v. DeJohn*, we made explicit that "the right to be free from unreasonable searches and seizures contained in Article I, Section 8 of the Pennsylvania Constitution is tied into the implicit right to privacy in this Commonwealth." *DeJohn*, 486 Pa. at 49, 403 A.2d at 1291. In *DeJohn*, we specifically refused to follow the U.S. Supreme Court's decision in *U.S. v. Miller*, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976), which had held that a citizen had no standing to object to the seizure of his or her bank records.

From *DeJohn* forward, a steady line of case-law has evolved under the Pennsylvania Constitution, making clear that Article I, Section 8 is unshakably linked to a right of privacy in this Commonwealth. *See, Commonwealth v. Platou*, (1973); *Commonwealth v. DeJohn*, (1979); *Commonwealth v. Sell*, (1983); *Commonwealth v. Miller*, (1986); *Commonwealth v. Blystone*, (1988); and *Commonwealth v. Melilli*, (1989).

As Mr. Justice Flaherty noted in *Denoncourt, supra*, in echoing the wisdom of Justice Brandeis over 60 years ago: "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness.... They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Id.* 504 Pa. at 199, 470 A.2d at 948- *quoting Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

Most recently, in *Melilli*, this Court cited with approval the decision of the Superior Court in *Commonwealth v. Beauford*, 327 Pa.Super. 253, 475 A.2d 783 (1984), *allocatur denied*, 508 Pa. 319, 496 A.2d 1143 (1985), holding that Article I, Section 8 of the Pennsylvania Constitution was offended by the installation of a pen register device without probable cause. Mr. Justice Papadakos, in rejecting the holding of the United States Supreme Court in *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979), emphasized that "Article I, Section 8 of the Pennsylvania Constitution ... may be employed to guard *individual privacy* rights against unreasonable searches and seizures more zealously than the federal government does under the Constitution of the United States by serving as an independent source of supplemental rights." *Id.* 521 Pa. at 412, 555 A.2d at 1258. Mr. Justice Papadakos went on to conclude that, because a pen register "is the equivalent of a search warrant in its operative effect where the intrusion involves a violation of a privacy interest," the affidavit and order "must comply with the requirements of probable cause required under Pa.Rules of Criminal Procedure Chapter 2000, Search Warrants." *Id.* 521 Pa. at 414, 555 A.2d 1259.

> Thus, the exclusionary rule in Pennsylvania has consistently served to bolster the twin aims of Article I, Section 8; to-wit, the safeguarding of privacy and the fundamental requirement that warrants shall only be issued upon probable cause. *Melilli, supra*. As this Court explained in *Commonwealth v. Miller*:
>
> The linch-pin that has been developed to determine whether it is appropriate to issue a search warrant is the test of probable cause. *Commonwealth v. Chandler* [505 Pa. 113, 477 A.2d 851], *supra*. It is designed to protect us from unwarranted and even vindictive incursions upon our privacy. It insulates from dictatorial and tyrannical rule by the state, and preserves the concept of democracy that assures the freedom of its citizens. This concept is second to none in its importance in delineating the dignity of the individual living in a free society. *Id.* 513 Pa. at 127, 518 A.2d at 1191-92.

It is clear that the Pennsylvania Supreme Court has gone to great lengths to explain the historical significance of the heightened protections of Article I, Section 8 relative to the privacy interests an individual has in his or her residence. In advocating these heightened privacy concerns, the Pennsylvania Supreme Court has parted with the United States Supreme Court and has deemed as unconstitutional a search performed by law enforcement officers who relied, in good faith, on an erroneous determination of probable cause made by an issuing authority. In *Edmunds*, the Court refused to permit police officers to rely, in good faith, on a defective search warrant despite the fact that the United States Supreme Court specifically permitted such reliance. *Edmunds*, 586 A.2d at 896. Relying on the history of Article I, Section 8, the Pennsylvania Supreme Court noted the *strong* interest in protecting the personal privacy that Pennsylvania citizens enjoy. *Edmunds*, 586 A.2d at 896. This Court finds it illogical that a law enforcement officer should be permitted to rely on an invalid consent by a third party which he/she reasonably believes to be valid when it is unconstitutional in this Commonwealth for law enforcement to rely, in good faith, on an erroneous legal finding by a judge after the police officer has set forth, in writing, the facts

he/she believes support a finding of probable cause, he/she takes an oath verifying that the facts are true, and then the judge reviews all the facts and signs the warrant application, indicating that the judge independently finds probable cause to permit the search. This Court believes that, in *Hughes*, the Supreme Court's having focused on the fact that a parolee has a lessened privacy interest then does an ordinary citizen is strong indication that the Supreme Court will refuse to accept the "apparent authority" doctrine in this Commonwealth as applied to ordinary citizens in Pennsylvania.

If a law enforcement officer cannot rely on an issuing authority's signature indicating a finding of probable cause, this Court does not believe that the Supreme Court will condone a search of a residence obtained via the consent of third party under the "apparent authority" doctrine when, in fact, that third person does not have the authority to consent. The instant case is distinguishable from *Hughes* because the defendant in this case is not a parolee and does not have a diminished expectation of privacy. His expectation of privacy in his residence is entitled to far greater protection. *Edmunds, supra.* To this Court, there is no distinction between the "reasonable belief" a law enforcement officer may have in obtaining consent to conduct a warrantless search and the "good faith" a law enforcement officer is not permitted act upon in executing a search warrant approved by a commissioned judicial officer of Pennsylvania.

Moreover, any search made upon a third person's apparent authority to consent, should be made only upon a showing of exigency.[1] No exigency justifying such measures existed in this case.

3. Related Case-Law From Other States

In *Hughes*, the Pennsylvania Supreme Court indicated that it has been persuaded by other states that have endorsed the "apparent authority" doctrine. *Hughes*, 836 A.2d at 904. Specifically, that Court endorsed the reasoning of various states that have adopted the "apparent authority" doctrine. *State v. Licari,* 659 N.W.2d 243 (Minn. 2003) (apparent authority alone exists if authority claimed by third party would, if true, be sufficient to satisfy the legal test for actual authority); *State v. Taylor,* 114 Nev. 1071, 968 P.2d 315 (Nev. 1998) (apparent authority alone is required); *People v. Hopkins,* 870 P.2d 478 (Colo. 1994) (warrantless search is not invalid merely because of a reasonable mistake of fact made by the police officers concerning the authority of the party consenting to the search); *State v. Maristany,* 133 N.J. 299, 627 A.2d 1066 (N.J. 1993) (consent to search may be obtained from a third party whom police reasonably believe has authority to consent); *State v. Girdler,* 138 Ariz. 482, 675 P.2d 1301 (Ariz. 1983), cert. denied, 467 U.S. 1244, 82 L.Ed.2d 826, 104 S.Ct. 3519 (1984) (apparent authority to consent alone is required); *Nix v. State,* 621 P.2d 1347 (Alaska 1981) (apparent authority alone of third party to allow entry by police is required); *People v. Adams,* 53 N.Y.2d 1, 439 N.Y.S.2d 877, 422 N.E.2d 537 (N.Y. 1981), cert. denied, 454 U.S. 854, 70 L.Ed.2d 148, 102 S.Ct. 301 (1981) (where searching officers rely on the apparent capability of a person to consent to a search and the circumstances reasonably indicate that the individual does, in fact, have the authority to consent, evidence obtained during that search should not be suppressed); *People v. Gorg,* 45 Cal. 2d 776, 291 P.2d 469 (Cal. 1955) (evidence obtained by officers as a result of a search could not be excluded merely because the officers might have made a reasonable mistake as to the extent of the authority of the third person). This Court, however, questions whether the endorsement of the apparent authority doctrine is consistent with the Pennsylvania Supreme Court's historical advocacy of greater constitutional protections against unreasonable searches of one's residence, as set forth in *Edmunds*.

Recognizing that the Pennsylvania Supreme Court has been very close to addressing whether the "apparent authority" doctrine should apply to the general citizen, the holding in *Hughes* was limited to the application of the "apparent authority" doctrine to a parolee. The defendant in this case was not a parolee and thus does not suffer from a diminished expectation of privacy. This Court, with guidance from *Edmunds*, accordingly finds the reasoning of those courts that have rejected the "apparent authority" doctrine persuasive. See, e.g., *State v. Lopez*, 896 P.2d 889, 901 (Haw. 1995) (rejecting doctrine of apparent authority); *State v. Wright*, 893 P.2d 455, 460-61 (N.M. Ct. App. 1995) (same); *State v. Will*, 885 P.2d 715, 719 (Or. Ct. App. 1994) (citations omitted) ("Although apparent authority is now sufficient under the Fourth Amendment, actual authority to grant consent is still required under Article I, Section 9 [of the Oregon Constitution].") (citations omitted).

In *State v. Lopez*, 896 P.2d 889, 901 (Haw. 1995) the Hawaii Supreme Court, noting that its constitution afforded greater protections than the federal constitution, rejected the doctrine of apparent authority and affirmed the requirement that a third party must have actual authority to consent because

> allowing warrantless searches of an individual's home without the consent of someone authorized to give it, absent any exigent circumstances, would fly in the face of this protection. Indeed, an invasion of privacy is no less of an "invasion" if the governmental officials are "reasonable" in their mistaken belief that the third party possesses the authority to consent. This is because, regardless of whether the police acted in good faith, the individual's "privacy" is still invaded when the police search his or her personal belongings without permission.);

In *State v. Vinuya*, 32 P.3d 116, 127 (Haw. App. 2001), that Court specifically suppressed evidence obtained after obtaining the consent of the defendant's mother to search the defendant's room which was located in the residence owned by mother. In ruling that the lack of actual authority to consent invalidated the search, that court explained:

> it is evident that Vinuya had an independent, reasonable expectation of privacy in his bedroom. [Mother's] uncontroverted testimony made it clear that [the defendant] had exclusive control over his room. He kept his bedroom door locked to prevent other family members from entering, even when he was in the house (including when he left his room to shower); no other person had the bedroom door key; and neither his mother nor any other person had access to the room.

Id.

Likewise, New Mexico does not permit consent based on apparent authority. *State v. Monteleone*, 123 P.3d 777, 782 (N.M. Ct. App. 2005); *State v. Wright*, 893 P.2d 455, 460-61 (N.M. Ct. App. 1995). In *Wright*, the New Mexico Court of Appeals, interpreting its own state constitution, a provision which is markedly similar to Article I, Section 8 of the Pennsylvania Constitution, explained[2]:

> We think the State's reliance on the officers' subjective belief that Wertz had "apparent authority" to give consent to search the residence and the bedroom occupied by Defendant and Corman runs counter to the provisions of Article II, Section 10 of the New Mexico Constitution. As noted by our

> Supreme Court in *State v. Gutierrez*, 116 N.M. 431, 446-47, 863 P.2d 1052, 1067-68 (1993), an individual's right to be free from unreasonable searches and seizures under Article II, Section 10 of our state constitution precludes the erosion of such right by recognition of a "good faith" exception as articulated by the United States Supreme Court in *United States v. Leon*, 468 U.S. 897, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984). We think the State's argument that this Court should recognize an "apparent authority" rule violates Article II, Section 10 of the New Mexico Constitution and is contrary to the rationale underlying our Supreme Court's decision in *Gutierrez*, 116 N.M. at 446-47, 863 P.2d at 1067-68.

Id.

The uncontroverted evidence adduced at the suppression hearing demonstrated that the defendant resided on the third floor of his mother's residence. His living quarters were considered separate from the remainder of the residence. No family members were permitted to enter his living quarters. The living quarters were protected by a separate door which was kept closed at all times. The defendant paid rent to his mother. It is this Court's belief that the defendant's living quarters were similar to those discussed in *Vinuya, supra,* and his expectation of privacy should not have been eviscerated by the consent of a third party who did not have the authority to consent.

4. Policy considerations

This Court believes that there exist various policy reasons why the guarantees of Article I, Section 8 do not endorse the "apparent authority" doctrine. Initially, this Court believes that an endorsement of such a doctrine runs afoul of the Supreme Court's holding and analysis in *Edmunds*. Reciting the history of our Commonwealth's greater constitutional protections, the Pennsylvania Supreme Court has uncategorically ruled that police officers cannot rely, in good faith, on an incorrect legal determination of probable cause to obtain evidence pursuant to a search warrant. This Court fails to see how condoning a search based upon incorrect belief that a third, lay party has authority to consent to a search is legally and intellectually different from allowing "good faith" reliance on a legal determination made by a commissioned judicial officer of Pennsylvania.

Because warrantless searches are disfavored in this Commonwealth, an additional policy concern arises. Consent is one of the few, limited exceptions to the warrant requirement and it presumably exists because we, as citizens, are certainly free to waive our individual privacy rights. Endorsing "apparent authority" permits someone without authority to do so to consent to the waiver of another's privacy rights and is inconsistent with a citizen's voluntary decision to consent to a search and waive of his or her expectation of privacy. See *Commonwealth v. Platou*, 455 Pa. 258, 262, 312 A.2d 29, 32 (1973)(explaining that an individual cannot consent to waive another's Fourth Amendment privacy rights). When a court is confronted with an alleged consent to search, an inquiry must be made to determine whether the consent was voluntary and the product of an essentially free and unconstrained choice. *Commonwealth v. Mack*, 796 A.2d 967 (Pa. 2002). Such an inspection cannot be made under the doctrine of "apparent authority." Allowing this doctrine permits a further erosion of the narrowly drawn exceptions to the warrant requirement.

There is also a concern that the "apparent authority" doctrine provides a negative incentive to police officers. Rather than inquiring into whether the consenting third party has actual authority to grant consent, an incentive exists for police officers to ask cursory questions or ask no questions at all to determine whether the third party has authority to consent. Allowing police officers to conduct a search based upon their reasonable belief that consent exists erases any incentive the officer would have to take further measures to determine whether actual authority to consent actually exists, especially in cases where no exigency exists. The proper incentive should be to obtain a warrant, not to provide a mechanism for the officer to potentially remain ignorant as to important facts that may be determinative of whether a third party possesses the requisite authority to consent to a search. Accordingly, this Court believes that policy considerations weigh against the doctrine of "apparent authority."

For the foregoing reasons, the Order of Court granting suppression should be affirmed.

BY THE COURT:
/s/Mariani, J.

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[1] This Court notes that the police officers in this case could easily have obtained a search warrant. They clearly had control of the residence and even advised Ms. Nunley that they would get a warrant in the event that the she did not consent to the search.

[2] Article II, Section 10 of the New Mexico Constitution provides "[t]he people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation."

CAPSULE SUMMARY

M.M.H. v. L.B.H.

Protection from Abuse

1. The parties were divorced in 2005 and have four minor children who were in the shared custody of the parties, residing with the mother approximately sixty percent of the time and with the father approximately forty percent of the time.

2. The mother filed an *ex parte* petition for protection from abuse at the local magistrate alleging that the father had engaged in two incidents of trespass, neither of which occurred at times when the mother was present. The *ex parte* order was entered and the father was ordered not to have any contact with the mother. The father, however, sent the mother two text messages with the mother filing an indirect criminal contempt charge as a result. The father spent a night in jail prior to being released pending a hearing on the petition for protection from abuse and the contempt.

3. The mother then filed with the Court of Common Pleas a petition for protection from abuse. The father requested that the prior custody arrangement which provided him with forty percent of the time with the children remain in effect. This was granted in spite of the father at that time testing positive for marijuana use.

4. A further incident occurred at a local swimming pool, with the mother alleging that the father abused one of the children at the pool. The mother filed a second indirect criminal contempt citation.

5. The trial court heard testimony for four days regarding the petition for protection from abuse and the two citations for indirect criminal contempt and after the first day of hearing, temporary custody of the children was granted to the mother, with supervised visitation for the father. Following the four days of hearing, the trial court dismissed the petition for protection from abuse and the second citation for indirect criminal contempt, but found the father in contempt of court for his text messaging of the mother after the initial petition for protection from abuse order was granted. The father was sentenced to time already served for this incident.

6. The mother appealed this decision, with the court determining that the father's actions did not constitute abuse under the Protection from Abuse Act, but represented conflicts over custody exchanges, not resulting in the mother having reasonable fear of bodily injury.

7. There was no evidence that the father used marijuana while having custody of the children; however, as possession and use of marijuana is illegal, the father was ordered to undergo a urine screen monthly for three months and attend two NA or AA meetings per week. The father agreed to a drug evaluation and to abide by any recommendations resulting from said evaluation.

8. The mother also alleged that the father screamed at the children while coaching sporting activities; however, the court found the father more credible, but as credibility determinations can be difficult, ordered the father to undergo three classes regarding coaching small children. The court determined that rude, offensive and even insulting language does not constitute abuse under the Protection from Abuse Act. Similarly, pushing the children when the children were misbehaving and even swearing at them also does not constitute abuse within the meaning of the Protection from Abuse Act. The trial court did not find such behavior to warrant the granting of the petition for protection from abuse; however, the court did order the father to attend parenting classes as well as anger management classes. The trial court concluded that while the mother does fear the father, there is no evidence that this fear is a fear of imminent bodily harm. The court also found that swearing does not equate to a threat to commit violence.

(Christine Gale)

David S. Pollock for Plaintiff/Mother.
Ted T. Blair for Defendant/Father.
No. FD 03-05018-001. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.
Hertzberg, J., January 18, 2008.

*****CORRECTION*****

Please make note of a correction on the following Capsule Summary published in the *PLJ* Opinions Supplement to the *Lawyers Journal* issue — February 15, 2008 — Volume 156 No. 4 — Page 47.

Jeffrey D. Martin v. Terri Benedict

No. FD 05-7658-001. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.
Hertzberg, J., November 5, 2007.

The Attorneys names and representation should appear as below:

Mary Margaret Boyd for Plaintiff/Father.
William Bishop for Defendant/Mother.