

PITTSBURGH LEGAL JOURNAL

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PLJ

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

OPINIONS

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

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

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

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**Scott & Christie and Associates, P.C.,
and William C. Christie, M.D. v.
Houston Harbaugh, P.C. and
Jacqueline W. Phillips**

Legal Malpractice—Preliminary Objections

1. Plaintiffs were given two opportunities to amend their Complaint to include facts necessary to support their claims.

2. Plaintiffs' claims of malpractice are based on unfounded claims that the defendant failed to perform work for which they were not hired.

(Rhoda Shear Neft)

John E. Lippl and Edwin P. Smith for Plaintiffs.

James R. Schadel for Jacqueline W. Phillips.

Mary-Jo Rebelo for Houston Harbaugh.

No. GD 05-31373. In the Court of Common Pleas of Allegheny County, Civil Division.

OPINION

Friedman, J., November 26, 2007—This case first came before the undersigned on Defendants' Preliminary Objections to Plaintiffs' Amended Complaint. After briefing and argument, we sustained the Preliminary Objections and directed Plaintiffs to file a Second Amended Complaint in accordance with our comments, which were memorialized on the videotape record of the argument. Plaintiffs then filed their Second Amended Complaint, and the Defendants again filed Preliminary Objections. After briefing and argument,¹ we once again sustained Defendants' Preliminary Objections, this time with prejudice and without further leave to amend. Plaintiffs then filed this appeal.

Factual Summary

This is essentially a legal malpractice action dealing with Defendants' allegedly negligent review of a contract to construct a building, to be known as the Christie Medical Office Building, on property owned by Plaintiff William C. Christie.

For purposes for these Preliminary Objections, we turn to Plaintiffs' Second Amended Complaint for a summary of the facts, which Plaintiffs contend support the two counts of their complaint, sounding in negligence and contract.

- Plaintiff William Christie is a physician and is sole shareholder of Plaintiff Scott & Christie, P.C. (Second Amended Complaint, ¶12.)

- Plaintiff Scott & Christie, P.C. "serves, in part, as an administrator and business manager for Dr. Christie and the Christie Entities," which include other corporations, LLCs, and entities of a medical nature, all of which have Dr. Christie as the sole shareholder or sole proprietor. (Second Amended Complaint, ¶¶3-5.)

- "By Retainer Agreement addressed to Scott & Christie dated March 9, 1998, [Defendant] Houston Harbaugh [law firm] agreed to act as counsel for Plaintiffs to 'organize and expand your eye care network' and to provide 'estate planning' services for Dr. Christie and immediately began performing legal services for Plaintiffs in accord with the Retainer Agreement." (Second Amended Complaint ¶13.)

- "Houston Harbaugh served as sole and exclusive legal counsel (excepting those matters covered by insurance counsel) to Plaintiffs and the Christie Entities, in accord with the Retainer Agreement, from at least May 6, 1998 until April 5, 2005, when Plaintiffs transferred the Tri-State Vision, Mission Vision and SCAC, LLC d/b/a The Surgery Center at Cranberry files to Kirkpatrick & Lockhart [law firm]. By letter dated January 18, 2006, Plaintiffs transferred 'all the remaining files related to the entities owned

by Dr. Christie, as well as Dr. Christie's personal estate planning file' to Kirkpatrick & Lockhart." (Second Amended Complaint ¶16.)

- In January 2001, Dr. Christie acquired the property where the building in question was to be built. (Second Amended Complaint ¶18.)

- The contractor furnished Plaintiffs with a General Contract Agreement which was derived from a form promulgated by the American Institute of Architects. (Second Amended Complaint ¶¶20 & 21.)

- Plaintiffs forwarded the Agreement to Defendant for the purpose of completing all services necessary in the preparation of a contract and requested the following:

"I have enclosed a general contractor agreement for the commercial office building that we are currently planning to build in Cranberry Township. Please have someone at your firm review the enclosed agreement and please provide your comments to me at your earliest convenience.

"If you should have any questions or should require additional information, please give me a call."

(Second Amended Complaint ¶22, Ex. F)

- Plaintiffs allege that Defendants "were specifically aware, or should have been aware, based upon these instructions and over three years (3) representing Plaintiffs and the Christie Entities, that Plaintiffs sought Defendants to scrutinize the General Contract Agreement and disclose to the Plaintiffs the full import of the instrument and any possible consequences which might arise therefrom." (Second Amended Complaint ¶23.)

- Plaintiffs further allege that [b]y letter dated June 21, 2001, Defendant Phillips, who had previously reviewed and commented upon other matters for Plaintiffs and/or the Christie Entities and knew that Plaintiffs were constrained by a budget related to the development and construction of the CMOB, returned a copy of the General Contract Agreement, 'marked with [her] comments.' The letter provided as follows:

Gary Gunnett had requested that I review the General Contract Agreement between TCB Construction Company and William C. Christie for the development of property on Brandt Drive in Cranberry Township, PA. I apologize for the delay in getting back to you.

Enclosed herewith please find a copy of said Agreement, which I have marked with my comments. In general, I believe the documents could have been written better, however, the scope of the document is standard for a development manager. I have marked my comments on the Agreement, which should clarify some points. However, as to Article 11, I believe that the Contractor needs to clarify the meaning thereunder. Additionally, in Articles 13 and 14, it should be clarified as to who is responsible for the utilities and the dumpster. Finally, in Article 16, I believe that general liability insurance coverage should be increased to \$1,000,000.

Upon your review of my comments, if you have any questions, please do not hesitate to contact me. *If you wish Houston Harbaugh to negotiate the contract with the Contractor directly, we would be happy to do so.*

"Defendant Phillips made no comments concerning

“Schedule A” in Article III of the General Contract Agreement. *As the Contractor agreed to all the comments made by Defendant Phillips, no further negotiations were necessary.*” (Second Amended Complaint ¶24. Emphasis added.)

- Plaintiffs returned the Agreement as marked to the Contractor, who accepted all of the suggested changes, and the Agreement was executed by the parties. (Second Amended Complaint ¶25.) (Note that there is *no* allegation that Plaintiffs submitted a revised or re-typed Agreement to any Defendant for final review nor is there an allegation that Plaintiffs advised any Defendant that they intended to sign the Agreement based on the Contractor’s acceptance of Ms. Phillips’ comments, nor is there any allegation that Defendants were contacted by any of the Plaintiffs prior to signing.)

- Plaintiffs then sought to obtain financing for the project, and requested Defendants to represent them. (Second Amended Complaint ¶27.)

- Dr. Christie obtained financing from PNC Bank, with Scott & Christie as a guarantor. (Second Amended Complaint ¶32.)

- Prior to the closing of the loan, PNC required a signed copy of the Agreement and a project budget. (Second Amended Complaint ¶32.)

- The closing of the loan took place, and Defendant Phillips continued to represent Plaintiffs on related issues. (Second Amended Complaint ¶¶34, 39.)

- Plaintiffs allege that Defendants failed to include in the Agreement provisions which would limit the ultimate cost and price of the project. (Second Amended Complaint ¶42.)

- They allege that as a result, they were billed in excess of the established budget. (Second Amended Complaint ¶43.)

- Plaintiffs allege that as a result, pursuant to the Agreement, the budget dispute with the contractor was submitted to arbitration, and an award in the amount of \$406,120.77 was entered against Plaintiff. Plaintiffs also allege that they incurred “additional costs in excess of the project budget of \$297,933.76 and additional financing costs of \$276,151.20 plus interest and costs,” and that they were “forced by the aforesaid negligence of Defendants to become embroiled in further litigation and incurred additional counsel fees and costs in the amount of \$246,605.91 and lost income in the amount of \$107,625.54.” (Second Amended Complaint ¶¶49 and 50.) Note that Plaintiffs’ first specific allegation that Defendants were made aware of a project budget is in paragraph 33 of the Second Amended Complaint, in which Plaintiffs say that “the final version of [the Project Budget] was submitted by Defendant Phillips to PNC Bank and its counsel by letter dated October 31, 2002. Prior to and subsequent to her submission of the Project Budget, Defendant Phillips communicated directly with the Contractor regarding the Project Budget and other matters. A true and correct copy of the October 31, 2002 letter is affixed hereto as Exhibit ‘L’ and incorporated herein.” As discussed above, Defendant Phillips’ review of and comments on the General Contract Agreement had taken place in June 2001. (Second Amended Complaint ¶¶22-24.) There are no allegations that demonstrate the Defendants would have known, in 2001, of the project budget or of Plaintiffs’ financial constraints when those are pled not to have been communicated to Defendants until after the contract had been executed.

- Plaintiffs allege that Defendants “fail[ed] to render services commensurate with those required of attorneys in this Commonwealth and breached its implied contract to do so.” (Second Amended Complaint ¶53.) They seek repayment of all fees paid to Defendants.

DISCUSSION

At oral argument of the original Preliminary Objections to the first Amended Complaint,² counsel for Defendants raised several issues. Defendants raised a demurrer based on lack of duty and causation, arguing that, as evidenced by the documents attached to the Amended Complaint, they were only retained to review the proposed contract and provide comments, and not to negotiate the contract further. Defendants argued that Plaintiff did not plead *what* terms were left out of the contract as to price and cost. Defendants also argued that the mere fact that Plaintiffs lost in the arbitration proceeding does not give rise to an inference that the contract was inadequate, since lawyers are not expected to guarantee results of a case.

As is set forth in detail in the transcript of the oral argument on the Preliminary Objections to the first Amended Complaint, which took place on January 24, 2007, the Court sustained the demurrer based on those arguments. Defendants also had raised an issue as to whether the corporate Plaintiff was properly a party, since there was no evidence that the corporation was a party to the attorney-client relationship and since it was alleged that the arbitration award was only as to the individual plaintiff. Defendants further objected to Plaintiffs’ Breach of Contract claim, arguing that a tort claim and a breach of contract claim cannot be pled in the alternative for the same professional conduct. We gave Plaintiffs leave to amend to address those issues as well.

At the subsequent argument involving Defendants’ Preliminary Objections to the Second Amended Complaint,³ Defendants argued, and we agreed, that Plaintiffs had still not pled that Defendants were retained to *negotiate* the contract in question. Although Plaintiffs aver in the Second Amended Complaint that Defendant Houston Harbaugh had advised Plaintiffs in various other matters in the past, they do not provide any other evidence that Defendants were retained to *negotiate* the contract. Furthermore, there are no allegations that Plaintiffs responded in any way to Ms. Phillips’ letter of June 21, 2001, where she expresses her willingness to be further involved with negotiating the contract at issue.

Defendants also again argue that as to the lack of or inappropriateness of the price terms in the contract, the Second Amended Complaint establishes that there was no budget or building design in place as of the date of the signing of the contract. (Transcript of Argument of Defendants’ Preliminary Objections to the Second Amended Complaint, 4-20-07, p. 9, and Second Amended Complaint ¶¶25 and 33.) Furthermore, Plaintiffs make a bare assertion in paragraph 24 of the Second Amended Complaint that Defendants knew that Plaintiffs were constrained by a budget, but do not provide details as to how this was made known, whether this was made known at the time Defendant Phillips gave her advice, or what the budget was. (*See* the transcript throughout.) Plaintiffs argued that Defendant Phillips should have known of the budget constraints based on her course of dealing in representing them, and that she did not comprehend the shortcomings of the contract because of her inexperience. This “course of dealing” is not sufficiently pled nor was there any indication at argument of any unpled facts that would warrant granting Plaintiffs leave to file a Third Amended Complaint.

Defendants also repeat their earlier argument that the mere fact that Plaintiffs lost the arbitration proceeding does not prove that the contract was inadequate, since it is not known whether the contract provisions had anything to do with the arbitrators’ decision. Plaintiffs counter that the presence of the arbitration clause in the contract should

have, but did not, raise a red flag to Defendant Phillips. We concluded that there was no factual way to prove that the drafting of the contract had an impact on the outcome of the arbitration proceeding. It is well-settled that “[t]he setting aside of an [arbitration] award is proper only on a showing of denial of a hearing or fraud, misconduct, corruption, or similar irregularity leading to an unjust, inequitable, or unconscionable award.” *Runewicz v. Keystone Ins. Co.*, 476 Pa. 456, 461, 383 A.2d 189, 192 (1978). Absent these circumstances, no one may look behind or second-guess an arbitration award. Defendants’ argument on this point is well-taken.

Defendants also raised, again, the issues of the inclusion of the corporation as a party, and of the propriety of the breach of contract claim. We concluded that the corporation was not a proper party, since it was not a party to the construction agreement but only a guarantor of the loan for the project. We also concluded that the breach of contract claim was not proper in what is essentially a legal malpractice action.

Because Plaintiffs have, for a third time, been unable to set forth sufficient and material factual support for their claims against the Defendants, we properly dismissed their Second Amended Complaint, with prejudice.

BY THE COURT:
/s/Friedman, J.

Dated: November 26, 2007

¹ Transcripts of the arguments on both sets of Preliminary Objections have been filed of record.

² The first Amended Complaint was filed as a matter of course within the time allowed by the Rules of Court; Defendants’ Preliminary Objections to the original Complaint were never argued before any member of this Court.

³ The transcript of the oral argument of the Preliminary Objections to the Second Amended Complaint, which took place on April 20, 2007, has been filed of record, and reference is made thereto.

Donald Levitt, M.D. v. Craig Patrick, Nelson Goldberg and Marsha Goldberg

Collateral Estoppel

Collateral Estoppel prevents a party whose issues were resolved in earlier proceedings and affirmed in appeals, in which he chose not to participate, from filing a new claim arguing that in the instant case the trial court should not give consideration to the opinions of the appellate court since he was not a party to the appeals.

(Rhoda Shear Neft)

Scott M. Hare for Marsha Goldberg.

Kelly Smith Dorenkamp for Donald Levitt, M.D.

J. Michael Baggett for Craig Patrick.

Maurice A. Nernberg for Nelson Goldberg.

No. GD 01-15053. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Horgos, J., November 29, 2007—Plaintiff, Donald Levitt, M.D. (Levitt), filed a Complaint in Mortgage Foreclosure against Defendant, Craig Patrick (Patrick), Nelson Goldberg and Marsha Goldberg (the Goldbergs), seeking repayment of a loan made to the Goldbergs which was secured by a second mortgage on real estate located at 113 Royston Road, Fox Chapel, Pennsylvania (the Property). Following several years of litigation, Patrick is the record owner of the

Property having purchased it from the Goldbergs.

On March 9, 2006, the Honorable Eugene B. Strassburger, III entered three Orders of Court in this case. The first was a Consent Order by which all parties agreed to the dismissal of Defendant Nelson Goldberg from the action pursuant to Pa. R.C.P. 229. The second Order of Court bifurcated the action and scheduled the *in rem* action in mortgage foreclosure for a non-jury trial on March 13, 2006. The third was a Consent Order which entered judgment on the mortgage attached to Levitt’s Amended Complaint in Mortgage Foreclosure in an amount to be determined at trial in favor of Plaintiff Donald Levitt, M.D. and against Defendant Marsha Goldberg without prejudice to any defenses that may be asserted by Craig Patrick.

A non-jury trial was heard before this court on March 13th and March 14, 2006. The court entered a Non-Jury Verdict on August 3, 2006 in favor of Patrick and against Levitt on the Amended Complaint in Mortgage Foreclosure and directed the Prothonotary to enter the amount of the judgment entered in favor of Plaintiff, Donald Levitt, M.D., and against Defendant, Marsha Goldberg, by Order dated March 9, 2006 in the amount of \$184,637.87 plus interest.

Levitt filed a Notice of Appeal to the Pennsylvania Superior Court on August 30, 2006 and the appeal was quashed by Order of the Superior Court dated November 2, 2006. Levitt filed an untimely Motion for Post-Trial Relief on September 25, 2006. This court subsequently granted Levitt leave to file a Motion for Post-Trial Relief *Nunc Pro Tunc*. Levitt’s Motion for Post-Trial Relief was argued before this court and denied by Order dated July 3, 2007. Levitt timely filed a Notice of Appeal from the Order denying Post-Trial Motion.

The litigation arising from the transactions regarding the Property has been lengthy and repetitious. The relevant facts and procedural history follow.

On November 16, 1999, Patrick made a written offer to purchase the Property which was accepted by the Goldbergs (the Patrick Agreement). The purchase price stated in the Patrick Agreement was \$908,000.00. According to a separate addendum, an agreement between Patrick and the Goldbergs allocated \$58,000.00 of the purchase price to specific items of personalty. The Patrick Agreement provided that settlement would take place on or before February 28, 2000 with time being of the essence. The Agreement further provided that the Goldbergs would convey the Property free and clear of all liens, encumbrances, and easements with certain standard exceptions and that the title to said real estate would be good and marketable.

On February 18, 2000, Laura A. Shapira (Shapira) and Thomas A. Karet (Karet) made a written offer to purchase the Property which was accepted by the Goldbergs (the Shapira-Karet Agreement). During this period of time, an *in rem* judgment in mortgage foreclosure in favor of Southwest National Bank of Pennsylvania (Southwest) and against the Goldbergs had been entered at number GD96-000396. Southwest held the first mortgage on the Property and Levitt held a second mortgage. On March 6, 2000, the Property was sold at a judicial sale pursuant to the judgment in mortgage foreclosure. The high bidder and purchaser of the Property for \$925,000.00 at the judicial sale was counsel for Karet who acted as a straw party for Karet in the transaction.

The Nelson-Patrick settlement did not occur on February 28, 2000 as contemplated by the Patrick Agreement. Although prior to the judicial sale, Patrick was ready, willing and able to carry out the purchase but Nelson Goldberg refused. Patrick learned of the pending judicial sale on March 1, 2000 and communicated his intent to settle the transaction prior to the judicial sale. The Goldbergs did not appear at the appointed time and place although Patrick did appear.

On March 17, 2000, Patrick timely filed a Petition to Set Aside Sheriff's Sale pursuant to Pa. R.C.P. 3136 at number GD96-000396. On July 18, 2000, Levitt filed a Petition to Intervene at GD96-000396 and an Order was entered granting Levitt leave to intervene in the Petition to Set Aside Sheriff's Sale proceedings. Levitt's purpose in the intervention, as stated in his Petition and Brief, was an attempt to protect the amounts due under his second mortgage. The contractual purchase price to be paid by Patrick was not sufficient to pay his second mortgage in full. In his Petition to Intervene, Levitt averred that "if the petition to set aside the sale is granted, his (Levitt's) interest will be adversely affected." Levitt argued in his Petition and Brief in Opposition to Petition to Set Aside Sheriff's Sale that his interest in the Property would be harmed because the funds from the Goldbergs/Patrick sale would not pay his second mortgage in full. Levitt and his counsel appeared in court and counsel participated in the argument regarding the Petition to Set Aside.

On December 7, 2000, the court entered an Order setting aside the sheriff's sale of March 6, 2000. Both Karet and Nelson Goldberg appealed the Order to the Pennsylvania Superior Court but Levitt did not file an appeal.

On April 28, 2000, Patrick had filed a Complaint in Specific Performance against the Goldbergs at number GD00-7417 seeking the enforcement of the Patrick Agreement which would result in the conveyance of the Property for \$908,000.00. Levitt and Karet both sought to intervene in the action for specific performance raising the same issues that he had raised in the Petition to Set Aside. In his Petition to Intervene, Levitt again argued that if the Property was conveyed under the terms of the Patrick Agreement, the amount paid would not satisfy his mortgage. The court denied both Karet's and Levitt's Petitions and Levitt filed a Petition for Reconsideration which was also denied. Levitt did not file an appeal to the Pennsylvania Superior Court from the denial of his request to intervene.

On February 28, 2001, the court issued an Adjudication and Decree Nisi in the action for specific performance which directed the Goldbergs to pay such sums of money as necessary to extinguish liens and encumbrances against the Property and deliver a good and insurable title to the Property. Nelson Goldberg appealed the decision of the trial court to the Pennsylvania Superior Court at 637 WDA 2001 and Karet filed an appeal at 688 WDA 2001 from the Order denying his Petition to Intervene.

The Pennsylvania Superior Court addressed the three Appeals together because they arose from the same set of facts and affirmed the trial court's Orders in a Memorandum Opinion and Order on September 13, *Southwest National Bank of Pennsylvania v. Nelson L. Goldberg and Marsha R. Goldberg, Appeal of: Thomas Karet*, No. 28 WDA 2001; *Craig Patrick v. Nelson L. Goldberg and Marsha Goldberg, Appeal of: Nelson Goldberg*, No. 637 WDA 2001; *Craig Patrick v. Nelson Goldberg and Marsha Goldberg, Appeal of: Thomas Karet*, No. 688 WDA 2001.

In the trial of the within action for mortgage foreclosure, Patrick introduced the trial court Opinions and Decrees as well as the Pennsylvania Superior Court Opinion discussed herein. In his Motion for Post-Trial Relief and his Concise Statement of Matters Complained of on Appeal, Levitt seeks to disregard all of the previous litigation and argues that it was error for this court to consider the Superior Court's Memorandum Opinion of September 13, 2002 affirming the trial court's Orders in both previous actions concerning the Property. Levitt's position in his pleadings and at trial as well as in his Post-Trial Motion ignores the significance of the results of the prior litigation. Levitt now wishes to proceed in

this lawsuit as if the conveyance by the Goldbergs to Patrick was a simple sales transaction rather than one ordered by the trial court with attendant directives and affirmed by the Pennsylvania Superior Court.

The sole issue presented in Levitt's Amended Complaint in Mortgage Foreclosure and at trial was whether Patrick is liable for the remaining debt on Levitt's second mortgage on the Property. The trial court specifically found that Patrick is not obligated to pay any amount in excess of the \$908,000.00 to satisfy liens including the Levitt mortgage. The court clearly stated that the satisfaction of liens and encumbrances is the responsibility of the Goldbergs.

This issue was raised and argued by Southwest as well as Levitt in the proceeding to set aside the sheriff's sale. Karet again raised the issue in his appeal to the Superior Court. In its Memorandum Opinion, the Superior Court quoted the trial court's opinion with approval:

"The record reflects that the unpaid balance of the first and second mortgage loans alone, agreed and normal settlement costs, as well as other priority items, exceeded the purchase price which Patrick agreed to pay and which the Goldbergs agreed to accept.... It is clear from the record that at the time the Goldbergs accepted Patrick's offer, they would be required to tender funds from a source other than Patrick to extinguish liens and convey marketable and insurable title to Patrick."

Id. at pp. 26-27, citing trial court Opinion, 4/25/01 p.6.

The Pennsylvania Superior Court continued:

An independent review of the record indicates no competent evidence that the Goldbergs were unable to secure the funds for closing or that Nelson Goldberg refused to perform under the agreement for this reason. On the contrary, in his deposition submitted for the court in the sheriff's sale proceeding, Nelson Goldberg testified that he had the resources to obtain \$530,000.00 in an effort to stop the sheriff's sale, but that he was approximately \$70,000.00 short of what he needed. Nelson Goldberg Deposition, 5/15/00, at 53-54. Clearly, Nelson Goldberg had the ability to obtain the funds needed for closing, which were considerably less than the \$530,000.00 amount, for extinguishing any outstanding liens and closing costs. Accordingly, we find Karet's argument in this regard devoid of merit

Id. at p. 27.

The Pennsylvania Superior Court also quoted with approval the findings of the trial court that "It is not Patrick's obligation to pay money in excess of the agreed purchase price to obtain the quality of title which the Goldbergs have agreed to deliver to him.... It was and is the responsibility of the Goldbergs to be prepared to extinguish all liens and encumbrances, whether or not the proceeds derived from Patrick were sufficient for that purpose or not." *Id.* at p. 41, citing Adjudication and Decree Nisi, 2/28/01 at pp. 4-5.

The major issue before this court in the within action has already been specifically addressed. Levitt argues that this court erred as a matter of law by considering the Superior Court's Memorandum Opinion of September 13, 2002 affirming the Orders of the trial court in the previous litigation concerning the Property because Levitt was not a party to the action for a specific performance and did not participate in the appeal of the Order to set aside the sheriff's sale. (Concise Statement of Matters Complained of on Appeal, paragraph 2, c-g.)

The doctrine of collateral estoppel is designed to relieve parties from the cost and vexation of multiple lawsuits, to conserve judicial resources and to prevent inconsistent decisions while encouraging reliance on adjudications. *Shaffer v. Smith*, 673 A.2d 872 (Pa. 1996). In order for the doctrine to be applicable, four elements must be met: (1) an identity of issues between the present and former actions; (2) a final judgment on the merits; (3) the party against whom the doctrine is asserted must have been a party, or be in privity with a party, to the prior action; and (4) the party against whom the doctrine is asserted must have been afforded a full and fair opportunity to litigate the issue in question. *Menna v. St. Agnes Medical Center*, 456 Pa.Super. 301, 690 A.2d 299, 302 (1997).

It is not necessary that the claim in the instant action and the claim in the prior action be the same. It is only necessary that the issue of fact determined in the prior case and the issue in the pending case are the same and that the party against whom the doctrine is asserted was a party to or in privity with a party in the prior actions. *Davis v. O'Brien*, 326 A.2d 511 (Pa.Super. 1974).

Here, Levitt was granted leave to intervene in the proceedings in the Petition to Set Aside at GD96-000396. Once a party is permitted to intervene, the intervenor has all the rights and liabilities of a party to the action. Pa. R.C.P. 2330(a). Levitt utilized his rights to file a brief, present evidence at trial and file a Post-Trial Motion. He also had the right to file an appeal from the court's final Order as did Thomas Karet, another intervenor in the same action. Levitt did not file an appeal, but he had the opportunity to do so. He therefore had a full and fair opportunity to litigate this very issue which he raised and repeatedly argued in his Petition to Intervene and in his Brief in Opposition to Petition to Set Aside Sheriff's Sale and at trial. Levitt's arguments were obviously considered by the trial court in reaching its final decision as affirmed by the Pennsylvania Superior Court in its Memorandum Opinion.

Both Levitt and Karet filed Petitions to Intervene in Patrick's action for specific performance at number GD00-7417. The court denied both Petitions and Levitt filed a Petition for Reconsideration which was denied. Karet filed an Appeal to the Pennsylvania Superior Court and his appeal at 688 WDA 2001 was addressed with Goldbergs' appeal of the trial court's Order of March 15, 2001 at 637 WDA 2001. Levitt did not file an appeal from the Order denying his Petition to Intervene in the specific performance action although he clearly had an opportunity and right to do so.

In the within action in mortgage foreclosure, Levitt is essentially arguing that the trial court erred in its Adjudication and Decree Nisi in the action for specific performance in which the court stated that:

It is the legal responsibility of the Goldbergs to otherwise pay persons holding liens and encumbrances amounts sufficient to extinguish those liens and encumbrances and deliver a general warranty deed of conveyance of the Property to Patrick.... If the consummation of the transaction contemplated by the Agreement has been made more expensive by the conduct of the Goldbergs, or either of them, it should not fall upon Patrick to absorb such additional expense.

(Adjudication and Decree Nisi, 2/28/01, pp. 5-6.)

Levitt has had a full and fair opportunity to litigate the issue of whether Patrick has any obligation to Levitt on Levitt's second mortgage securing his loan to the Goldbergs. The trial court and Pennsylvania Superior Court have stated that Patrick is not liable on the mortgage. The previous judicial determinations regarding the Goldbergs' liability to

Levitt and the corresponding determination that Patrick has no liability to Levitt are conclusive.

Moreover, at trial on Levitt's action in mortgage foreclosure, he failed to prove that Patrick is liable for the balance of his second mortgage. In Pennsylvania, a mortgage does not transfer title to the mortgagee but constitutes a lien on the mortgagor's interest thereby securing the mortgagee's loan. *General Credit Co. v. Cleck*, 609 A.2d 553 (Pa.Super. 1992). When an underlying debt no longer exists, the mortgage can no longer be valid and enforceable. There is no evidence whatsoever of an underlying debt owed by Patrick to Levitt. On the contrary, all testimony and documentary evidence shows the loan was directly from Levitt to the Goldbergs. Levitt therefore had no right to foreclose on Patrick's real estate.

For all of the foregoing reasons, this court entered the Non-Jury Verdict of August 3, 2006 against Plaintiff, Donald Levitt, M.D., and in favor of Defendant, Craig Patrick, on the Amended Complaint in Mortgage Foreclosure and directed the Prothonotary to enter the amount of judgment entered in favor of Plaintiff, Donald Levitt, M.D., and against Defendant, Marsha Goldberg, by Order of Court dated March 9, 2006 in the amount of \$184,637.87 plus interest.

BY THE COURT:
/s/Horgos, J.

In re: Estate of Julia K. Barrett

Testamentary Capacity—Undue Influence—Abuse of Position of Trust and Confidence—Burden of Proof

1. Based upon findings that the decedent was in a weakened mental state, that her will favoring one of two daughters resulted from undue influence on the part of one of her daughters, and that the pre-death sale of decedent's real estate by one daughter and the pre-death transfer of funds from joint accounts by the other daughter were wrongful and the result of undue influence, the Court voided the will and, in accordance with the decedent's original testamentary intent, ordered all the decedent's assets, including real estate proceeds, insurance proceeds, and proceeds from joint accounts, to be divided equally between the two daughters.

2. Notwithstanding testimony of decedent's apparent mental soundness, based only on casual observations, the Court found that she was in a weakened mental state based on evidence from physicians, that she suffered from Alzheimers's-type dementia and that she lacked the capacity to receive and process information and to make decisions based on that information.

3. One daughter, on whom the decedent relied for her medical treatment and all her personal affairs, shared a confidential relationship with the decedent at all relevant times, so that, even had decedent not been shown to be of weakened intellect, the burden of proof shifted to the daughter to show that decedent's actions were not unduly influenced by the daughter's position of dominance.

(Ronald D. Morelli)

David K. McMullin and James T. Carney for Patricia J. MacDonald.

James S. Vergotz for Maureen K. Blosser.

No. 4840 of 2005. In the Court of Common Pleas of Allegheny County, Pennsylvania, Orphans Court Division.

OPINION

Mazur, J., December 17, 2007—The issues in this matter

came before this court when an appeal was filed in the Register's office asking for an accounting on a power of attorney and questioning transfers made on joint accounts prior to Julia K. Barrett's death. Also at issue are two wills left by Mrs. Barrett, one made in 2003 and one made in 2005. The Register did not probate either will, and the matter has been appealed to this court.

On the facts presented at trial, the court has determined that the actions of Julia Barrett's daughters, Maureen K. Blosser and Patricia J. MacDonald, subsequent to the illnesses preceding her death changed her estate plan. The assets of the decedent must be divided equally between her daughters pursuant to the decedent's original intentions.

Near the end of her life, Julia suffered from many physical ailments. Among the problems were hearing loss and macular degeneration which caused her to be classified as legally blind. Julia underwent two hospitalizations and rehabilitative therapy as a result of injuries caused by two falls which occurred in her home within approximately one month. While she was hospitalized due to the second fall, she was seen by her personal physician of many years; Dr. Donald Klinestiver. After being treated at the hospital, Decedent was moved to Vincentian Regency for rehabilitative therapy, and in November 2004 she was transferred to New Hope Assisted Living, a personal care home. While still at New Hope, the decedent signed a will dated March 14, 2005 and closing documents to complete the sale of her home.

Although several lay witnesses testified to the apparent soundness of decedent's mental faculties, the court gave less weight to their testimony since its content concerned only casual observations and interactions and lacked any critical evaluations of her thought processes and ability to deal with complex information. The decedent had been diagnosed with mild dementia in 2004 by her long-time personal physician, Dr. Klinestiver, who last saw her on October 5, 2004. (Klinestiver Deposition at 26) Her mental condition worsened by the time Dr. Shoenthal examined her on her admission to New Hope in November of that year. Dr. Shoenthal examined her again at New Hope in December 2004 and in March and April of 2005. His diagnosis throughout that time was dementia of the Alzheimer's type, and he said that, within a reasonable medical certainty, she lacked the capacity to receive and process information and to make decisions based on that information and that she was not lucid in her thinking. (March 8, 2007, Deposition of Donald Shoenthal, M.D. at 14-17) Dr. Shoenthal's statement that, "I think this patient could have the appearance of normalcy, but yet with really pointed questioning, they cannot follow along with reason," (Shoenthal Deposition at 25) explains how some of the people who interacted with decedent could have believed she was capable of processing information in a meaningful way. Dr. Shoenthal's opinion is entitled to considerable weight since the majority of his patients are 65 and older, he routinely makes rounds of nursing and personal care homes to examine geriatric patients (Shoenthal Deposition at 6-7), and it is based on personal examinations of the decedent throughout the time she spent at New Hope. After considering the evidence of record, the court finds that the decedent was in a weakened mental state from the time she entered New Hope until the end of her life.

Before becoming ill, the decedent's estate plan was to share her wealth equally by establishing joint accounts with each of her daughters. Her illness allowed her daughters to circumvent that plan. It enabled Maureen to keep all of the proceeds from the sale of the house and to cash in the life insurance policy on decedent's life on which her sister was beneficiary while retaining the policy on decedent's life on which she was the named beneficiary. She moved the decedent's federal credit

union account funds previously titled in the names of decedent and both her daughters to an account titled only in decedent's name and her own. Patricia wrongfully removed funds from the joint Citizens Bank accounts titled in her mother's name and her own, which she admitted were contributed entirely by decedent (Tr. 430), but she testified that she placed half the funds in trust accounts for her mother.

As to the existence of a confidential relationship, Maureen was involved in every aspect of the decedent's life during the period of all transactions Patricia questions in this proceeding. Maureen testified that she handled her mother's financial affairs since 1999. (Tr. 456) Maureen was an employee of Dr. Klinestiver and was also familiar with her mother's medications, the dosages, and when they were changed. (Tr. 469) During the decedent's final months, it was Maureen who chose both the personal care home and the nursing home. (Tr. 117, 518)

Maureen took care of every detail in the sale of the decedent's home. In January of 2005 she obtained a power of attorney from the decedent, granting her, *inter alia*, the authority she needed to remove Patricia's son from the house before selling it. (Tr. 461) She suspected her sister would have a problem with the sale of the house but never discussed the details with Patricia. (Tr. 459, 460, 488) To circumvent the potential difficulties she anticipated with her sister, on December 3, 2004, Maureen prepared a memo for decedent's signature documenting the decision to sell the home. It was necessary to place a large black line on the document so that Julia could see where to sign it. (Tr. 458-459) Maureen testified to having made the decision to sell to a reseller, as opposed to listing it with a realtor, as well as deciding to sell without advertising or obtaining an appraisal of the home's value. (Tr. 485-488)

It is apparent that Julia placed a great deal of trust in her daughter Maureen and depended upon her not only for her medical treatment but also for all of her personal and financial affairs. The evidence supports the court's finding that Maureen K. Blosser shared a confidential relationship with the decedent throughout all times relevant to this proceeding, including the time leading up to the making of the decedent's 2005 will. Patricia has proven that the decedent was in a weakened mental condition, that Maureen received a substantial benefit, and that Maureen shared a confidential relationship with the decedent. The burden of proof is then shifted to Maureen to show that she did not unduly influence the decedent's actions during the time period at issue.

Even if decedent had not been shown to be of weakened intellect, Maureen's confidential relationship with the decedent shifts the burden to her to show that Julia's actions were not unduly influenced by her position of dominance:

Nevertheless, if a confidential relationship is shown to exist, then even in the absence of evidence of actual fraud or of mental incapacity, the burden is on the dominating party to prove by clear and satisfactory evidence that the contract was the free, voluntary and independent act of the other party, entered into with an understanding and knowledge of its nature, terms and consequences; and that the entire transaction was unaffected by undue influence or imposition or deception or fraud. *McCown v. Fraser*, 327 Pa. 561, 192 A. 674; *Matthaei v. Pownall*, 235 Pa. 460, 84 A. 444; *Darlington's Appeal*, 86 Pa. 512, 27 Am.Rep. 726; *Stepp v. Frampton*, 179 Pa. 284, 36 A. 177; *Thorndell v. Munn*, 298 Pa. 1, 147 A. 848; *In re Null's Estate*, 302 Pa. 64, 153 A. 137; *McConville v. Ingham*, 268 Pa. 507, 112 A. 85; *Lochinger v.*

Hanlon, 348 Pa. 29, 33 A.2d 1; *Corrigan v. Conway*, 269 Pa. 373, 112 A. 466; *In re Williams' Estate*, 299 Pa. 440, 149 A. 728. *Kees v. Green*, 365 Pa. 364, 375, 75 A.2d 602, 605-606 (1950).

Maureen's position is that the decedent knowingly and intentionally changed her will because she believed that Patricia took two accounts at Citizens Bank that Julia had titled jointly with Patricia. (Tr. 463-464) However, Maureen presented no evidence to show that she did not foster this belief in her mother. In fact, she evaded the court's question as to why she never told Julia that they should talk with Patricia concerning the Citizens accounts (Tr. 521-522) and that, through her position of dominance, Maureen deliberately and intentionally failed to address the decedent's growing anxiety about Patricia's changes to the joint accounts. Maureen could have investigated the situation with the bank and informed the decedent that Patricia had placed one-half of the money from both of the closed accounts into trust accounts at the bank for Julia's benefit. Maureen did not do so. *Id.* Maureen could have obtained the correct information and presented it to Julia, but she did not. By her inaction, Maureen benefited herself and abused the trust placed in her by the decedent.

Additionally, Maureen would have this court believe that she had no interaction with the decedent regarding the changes in her testamentary disposition effected by the 2005 will. The facts point to a different conclusion. Four days prior to the execution of the 2005 will, Maureen requested a letter from Dr. Klinestiver, her employer of fourteen years, indicating that the decedent was competent. When questioned as to her reason for obtaining the letter, she indicated that she was told by someone, but did not recall by whom, that her sister was going to have their mother declared incompetent. (Tr. 498) Additionally, she arranged for the delivery of Dr. Klinestiver's letter to the attorney who drew up the 2005 will. (Tr. 499)

The drafting attorney testified that he had asked Maureen to provide the letter and that he was concerned about a will contest. (Tr. 343, 346) He further testified that, based on the letter, he believed Dr. Klinestiver's opinion was that the decedent was capable of signing a will. (Tr. 342) The letter does state Dr. Klinestiver's opinion of the decedent's competence at the time of her last examination, but it does not indicate that he had not examined her in the five months prior to the letter or that he was no longer her current physician. Maureen failed to convey this information to the will's scrivener. The letter was a deceptive device employed by Maureen to facilitate the execution of the 2005 will even though she knew that her employer, Dr. Klinestiver, was not the decedent's current treating physician.

Despite the letter from Dr. Klinestiver, Maureen maintains that she had nothing to do with the procuring of the decedent's will of March 14, 2005. However, to adopt a will disinheriting Patricia in favor of Maureen, the decedent, who previously had wanted her daughters to share equally, must have believed that Maureen was at a disadvantage due to Patricia's actions. Julia's source of that misinformation had to be Maureen. Through the sale of the house, the decedent was manipulated into granting the power of attorney in favor of Maureen. According to Maureen's own testimony, there was no financial reason to sell the house. (Tr. 487)

"Because undue influence has been described as subtle, intangible, yet recognizable by human experience, it may be shown by circumstantial evidence." *In re Ziel's Estate*, 467 Pa. 531, 541, 359 A.2d 728, 734 (1976). Having the decedent's trust, it was possible for Maureen to manipulate the decedent into an uninformed and misrepresented view of Patricia

that worked to Maureen's benefit, thereby taking advantage of the decedent's mental and physical infirmities. She was able to circumvent Julia's original intent to share her wealth equally between her daughters, keep all of the proceeds from the sale of the house, and cash in the life insurance policy with her sister as beneficiary and retain her own. She moved the decedent's federal credit union account funds that were previously titled jointly in the names of the decedent, Patricia and herself, into another account titled in the names of the decedent and Maureen only.

The court holds that Maureen influenced the decedent's actions during the last months of her life and effectively replaced the decedent's desires with her own. The court also finds that Patricia wrongfully removed funds from the Citizens Bank accounts titled jointly to her and the decedent that she admitted were contributed entirely by the decedent during her lifetime. (Tr. 430)

After considering the evidence of record, the court finds that the decedent was in a weakened mental state throughout her stay at New Hope Assisted Living and thereafter until her death and that Patricia has met her burden of satisfying all three elements of undue influence and will enter an order voiding, decedent's Last Will and Testament dated March 14, 2005 and directing that the decedent's assets be distributed according to her Last Will and Testament dated August 20, 2003.

ORDER

And now, this 17th day of December, 2007, after hearing and due consideration of the evidence of record, it is hereby ORDERED and DECREED that the value of all the financial assets of Julia K. Barrett existing prior to January 21, 2005, including insurance policies, joint accounts, and proceeds from the sale of the decedent's real estate, regardless of the identity of the current account holder, shall be divided equally between her daughters Patricia and Maureen.

FURTHER, if probate assets remain after the implementation of this order, the Last Will and Testament of Julia K. Barrett dated August 20, 2003 shall be probated by the Register who is authorized to appoint a qualified independent administrator, c.t.a. thereof.

Mazur, J.

In re: Estate of Loretta Frances Wolf

Gifts Pursuant to Power of Attorney—Confidential Relationship—Undue Influence—Mental Capacity of Principal—Removal of Executrix

1. If a confidential relationship exists at the time of a challenged gift, with or without a power of attorney, as with will contests, the burden shifts to the donee to establish, by clear and convincing evidence, that the gift was free of undue influence and deception.

2. A confidential relationship can be established either by a finding of incompetency or the existence of a power of attorney given to the alleged donee.

3. In the present case, a confidential relationship between the executrix/attorney-in-fact and the principal/decedent is established by the execution of a broad power of attorney and also by the fact that decedent was exclusively dependent upon the executrix/attorney-in-fact to conduct all her affairs, to provide her daily necessities, transportation and medical care, to make decisions concerning nursing care, and to decide who could communicate with the decedent.

4. In a proceeding to surcharge an executrix/attorney-in-fact for inter vivos gifts she made for the benefit of her fam-

ily and herself from the decedent/principal's estate, the Court held:

a. The executrix/attorney-in-fact would not be surcharged for gifts made under a power of attorney where the power of attorney was executed when the principal/decedent had sufficient mental capacity, the power of attorney authorized such gifts, and the gifts were made while the principal/decedent had sufficient mental capacity to authorize such gifts. These transactions were found to be free of taint of undue influence or deception.

b. The executrix/attorney-in-fact would be surcharged for gifts made under a power of attorney after the date when the principal/decedent was found to lack the mental capacity to authorize such transfers. The executrix/attorney-in-fact did not establish that such gifts were free, voluntary and clearly-understood acts of the decedent, free of undue influence.

5. The executrix would be removed based upon poor business judgment, adverse interests, and poor administration of the estate, as evidenced by a less-than-desirable record in managing the decedent's inter vivos affairs, failure to address the disputed matters in these proceedings, failure to account for an estate asset, and inconsistencies in records kept as compared with tax returns.

(Ronald D. Morelli)

John K. Foster III for LouElla Yavorka.

Charles J. Avalli for Katherine Meyer and Kathleen Johnson.

Eugene J. Herne for the Commonwealth.

No. 2663 of 2002. In the Court of Common Pleas of Allegheny County, Pennsylvania, Orphans' Court Division.

AMENDED OPINION

Mazur, J., December 17, 2007—Following argument and consideration of the exceptions and cross-exceptions filed, the Opinion and Order of this court dated August 7, 2007, are hereby amended. Each amendment is marked by a double asterisk (**) at its beginning and end.

Loretta Wolf ("decedent") died February 21, 2002. Decedent's niece, LouElla Yavorka ("respondent"), is the executrix of her estate and was named her attorney-in-fact under a power of attorney granted by Loretta Wolf on May 17, 1995. Petitioners Katherine Meyer and Kathleen Johnson, two of the residuary beneficiaries under the Last Will and Testament of Loretta Wolf, question whether the power of attorney authorized LouElla Yavorka to make gifts and to engage in other disputed transactions.

Petitioners also aver that the inter vivos gifts and transactions LouElla Yavorka made under the power of attorney principally benefited respondent or members of her family, causing a reduction in the distribution to the estate's residuary beneficiaries. Petitioners request that the Court void the gifts and transactions and surcharge the respondent for the value lost to the estate. Other relief requested includes removing LouElla Yavorka from her position as executrix; eliminating her administrative fee and the fees of Attorney John K. Foster III; surcharging her for losses which occurred during her administration of the estate as well as for all legal fees paid by the estate; and requesting that she reimburse petitioners' legal fees and costs.

LouElla Yavorka believes the inter vivos gifts and other transactions were authorized under the May 17, 1995 power of attorney, but she also has stated that decedent directed her to make the transactions in dispute. In addition, petitioners allege that LouElla Yavorka exerted undue influence upon

Loretta Wolf and, for that reason, the questioned gifts and transactions should be rescinded and respondent surcharged.

Power of Attorney

The Durable Financial Power of Attorney of May 17, 1995, executed in favor of LouElla Yavorka (See Trial Exhibit 7) contains a clause entitled "General Grant of Broad Powers" which states as follows:

My Attorney is hereby given the fullest possible powers to act on my behalf when I am not available or cannot act on my own behalf: to transact business, make, execute and acknowledge all agreements, contracts, orders, deeds, writings, assurances and instruments for any matter, with the same powers and for all purposes with the same validity as I could, if personally present.

Further, the final provision of the power of attorney, "Duration of Power, Relief from Liability, Revocation," contains the following language as Subsection 2:

2. I hereby ratify and confirm all that each Attorney acting hereunder shall do or cause to be done under this General Power of Attorney. I specifically direct that such Attorney shall not be subject to any liability by reason of any of such Attorney's decisions, acts or failures to act, all of which shall be conclusive and binding upon me, my personal representatives, heirs and assigns. Furthermore, except in the case of malfeasance of office, I agree to indemnify such Attorney, and hold such Attorney harmless from all claims that may be made against such Attorney as a result of such Attorney's services hereunder and I hereby agree to reimburse such attorney in the amount of any damages, costs and expense that may be incurred as a result of any such claim.

The power of attorney also contains a clause entitled "Specific Powers Included in General Power." The introductory language reads: "Without limiting the general powers hereby already conferred, my Attorney shall have the following specific powers..." Subsection 7 of that clause, at (a)(i) grants LouElla Yavorka the authority to make limited gifts:

(a) To make limited gifts. My Attorney may make gifts on my behalf to any donees and in such amounts as my Attorney may decide subject to the following:

(i) The class of permissible donees shall consist solely of my spouse, my children, my grandchildren and my great grandchildren (including my Attorney if my Attorney is a member of such class).

It is petitioners' contention that this limitation precludes LouElla Yavorka from making gifts under the "General Grant of Broad Powers."

The case law and the Powers of Attorney Act, 1992, Dec. 16, P.L. 1163, No. 152 in effect at the time decedent's power was executed do not require a specific provision to grant an attorney-in-fact the authority to make gifts. See the discussion of the history of the Powers of Attorney Act found in *Estate of Reifsnieder*, 531 Pa. 19, 23-27, 610 A.2d 958, 960 (1992).

The decedent in the instant case, Loretta Wolf, was elderly, she had no children, her spouse had predeceased her and her attorney was not a relative, thus leaving her with no one in the "class of permissible donees" at the time of the execution of the power and with no expectation that there would be any in the future. The court concludes that decedent's failure to note the inconsistencies and have them corrected

at signing is another indication that Loretta Wolf was at that time in the beginning stages of weakened intellect.

Undue Influence

Although Loretta Wolf was never adjudicated incompetent, she was in a period of intellectual decline for some time prior to her death. (Tr. 20-31) She suffered from mild dementia as early as 1996 and was thereafter documented as having Alzheimer's disease (Tr. 22-29), a conclusion also reached by petitioners' medical expert, testifying from his review of decedent's medical records. When evaluating the mental condition of the decedent prior to her death, the following facts of record have been noted:

1. In January 1997, Greater Pittsburgh Medical Association records indicated the decedent had memory loss for "quite some time." An MRI taken February 21, 1997, showed signs of Alzheimer's disease, and the drug Aricept, a drug specifically made to treat Alzheimer's symptoms, was prescribed to her in 1997. (Tr. 23-26)
2. Loretta Wolf became a full time resident of Vincentian Regency Home with an admission diagnosis of Alzheimer's disease as of September 14, 1999. (Tr. 27-28)
3. While at Vincentian her intellectual capacity was routinely evaluated by the staff. By October of 2000, comments on the staff notes indicate that her ability to recollect had failed. (Tr. 54)
4. The September 8, 2000 memorandum from counsel to LouElla Yavoroka concerning the "Loretta Wolf Charitable Foundation & Power of Attorney" notes that Loretta Wolf "...currently suffers from senile dementia and/or Alzheimer's disease," and that "...her advisors do not believe it advisable to attempt to 'pass this off' as being established at her direction and above her signature." (See Trial Exhibit 52.)
5. Records show that at some point before the end of her stay at Vincentian Regency Home, Loretta Wolf became "very dependent" on the staff and had lost the ability to function independently. (Tr. 50)
6. By June 2001 the decedent was admitted to the Alzheimer's Unit of Rebecca Residence. (Tr. 27-28)
7. Petitioner's medical expert, Dr. Chughtai, opined that the survival of an Alzheimer's patient is typically limited to two to five years after diagnosis. (Tr. 29-31) In fact, Loretta Wolf was diagnosed in 1997 and died in 2002.

The court has no doubt that Loretta Wolf was incapable of making independent decisions for a significant period of time prior to her death and that she became highly susceptible to suggestion as her mental faculties weakened. (See, for example, expert testimony at Tr. 29-32, and 59, 60.) The precise time at which she lost her ability to direct or approve gifts independently is uncertain. There is insufficient evidence to conclude that she completely lost the intellectual capability to function independently on the first date on which she was diagnosed with Alzheimer's disease.

After reviewing all the evidence, this court concludes that the decedent lost her ability to make independent decisions on or about March 31, 2000. By then there is no doubt that her mental faculties were so weakened that she could not effectively evaluate the wisdom of financial decisions and was dependent upon the suggestion of others.

If a confidential relationship exists at the time of a challenged gift, with or without a power of attorney, the same

principle applies as in will contests in that the burden shifts to the donee to show by clear and convincing evidence that the gift was free of any taint of undue influence or deception. LouElla Yavoroka, whose status is both that of a donee and attorney-in-fact has failed to do so.

When the donee establishes a prima facie case of a gift, a rebuttable presumption arises that the gift is valid and the burden is then on the contestant to rebut the presumption by clear, precise and convincing evidence. *Fenstermaker Estate*, [413 Pa. 645, 198 A.2d 857 (1964)] *supra*; *Rogan Estate*, [404 Pa. 205, 171 A.2d 177 (1961)] *supra*. However, it is well settled that by showing a confidential relationship between the donor and donee existed at the time of the gift, the burden then shifts to the donee to show that the gift was free of any taint of undue influence or deception. *Shaffer v. Shaffer*, [344 Pa. 158, 23 A.2d 883 (1942)] *supra*; *Union Trust Co. of Pittsburgh v. Schreck*, [335 Pa. 190, 6 A.2d 428 (1939)] *supra*; *McCown v. Fraser*, [327 Pa. 561, 192 A.2d 674 (1937)] *supra*. *Estate of Clark*, 467 Pa. 628, 634-635, 359 A.2d 777, 780 (1976).

Either incompetency or a power of attorney given to the alleged donee can serve to demonstrate the confidential relationship. The language in the power of attorney giving broad powers to make gifts and the ratification of those gifts is governed by the law applicable to will contests when a confidential relationship and undue influence exist. *Hera v. McCormick*, 425 Pa. Super. 432, 440-443, 625 A.2d 682, 686-688 (1993).

Howard Schreiber, LouElla Yavoroka's **uncle and a brother of the decedent, lived with Loretta Wolf prior to February 1995, and had been assisting with her finances. (Tr. 151) In February of 1995, he asked LouElla Yavoroka to stay with the decedent while he vacationed in Florida. (Tr. 155) Thereafter, LouElla Yavoroka and her husband moved into her aunt's home. On February 17, 1995, Loretta Frances Wolf granted a Durable Financial Power of Attorney jointly to Howard Schreiber and LouElla Yavoroka. At a later point, the **uncle and **niece disagreed on issues concerning the decedent's medical care and some prior disbursements of the decedent's funds to Mr. Schreiber, resulting in Mr. Schreiber moving out of his sister's residence. From that point forward, the record indicates that LouElla Yavoroka, together with her husband, cared for the decedent and managed her finances.

The May 17, 1995 power of attorney made LouElla Yavoroka decedent's sole attorney-in-fact. That arrangement continued until Loretta Wolf died in 2002. The power of attorney was very broad, giving respondent extensive control over the affairs of Loretta Wolf. "If there be any clearer indicia of a confidential relationship than the giving by one person to another of a power of attorney over the former's entire life savings, this Court has yet to see such indicia." *Foster v. Schmitt*, 429 Pa. 102, 239 A.2d 471 (1968). The decedent was exclusively dependent on LouElla Yavoroka to conduct all of her affairs, as well as to provide her daily necessities, transportation, medical attention, and to decide which nursing home she entered and when. As early as 1997, respondent was deciding who could communicate with Loretta Wolf and when the communication could occur. (Tr. 240) In short, LouElla Yavoroka managed all of the decedent's physical and financial needs during the time at issue in this matter. (Tr. 23, 165, 200) Those uncontested facts are clear and convincing evidence of a confidential relationship between the decedent and LouElla Yavoroka throughout the time in which LouElla Yavoroka made the questioned transactions and gifts under the power of attorney.

As noted previously, LouElla Yavorka had a dual status in her relationship with the decedent: the first as decedent's attorney-in-fact, in which capacity she made gratuitous transfers on decedent's behalf, and the second as donee, in which capacity she and her family received the gratuitous transfers which she made for decedent acting as decedent's attorney-in-fact. The court has concluded that the power of attorney authorized the actions which she undertook to give gifts on decedent's behalf.

The next question examined is whether respondent can show by clear and convincing evidence that these gifts were "free of any taint of undue influence or deception," and that each gift was "the free, voluntary and intelligent act of the person giving it." *Clark, supra*, at 635; *Hera v. McCormick, supra*; *Estate of Dzerski*, 449 Pa. 285, 289, 296 A.2d 716, 718 (1972); *Estate of Keiper v. Moll*, 308 Pa.Super. 82, 87, 454 A.2d 31, 34 (1982); *Teats v. Anderson*, 358 Pa. 523, 58 A.2d 31 (1948).

Upon careful consideration of the evidence presented, the court concludes that the decedent had sufficient mental capacity to authorize LouElla Yavorka to make gifts on her behalf. Therefore, the transactions undertaken on or before March 31, 2000 were without "taint of undue influence or deception." *Clark* at 633-634. While the gifts to charities prior to March 31, 2000 were made by LouElla Yavorka during the confidential relationship, no surcharge is requested or will be imposed based upon the pattern of giving established by decedent and the fact that none of those gifts were to LouElla Yavorka or her extended family. With regard to the gifts made to LouElla Yavorka and her extended family after March 31, 2000, the court holds that LouElla Yavorka has not established that they were the free, voluntary and clearly understood acts of the decedent and that the transactions were free of undue influence.

As much as reasonably possible, the estate should be made whole for the funds divested by and costs of LouElla Yavorka's creation and operation of the Loretta Frances Wolf Foundation Charitable Trust. The foundation as established by LouElla Yavorka is a breach of her fiduciary duty, a conclusion borne out by the facts. Her contentions that others besides family and friends have benefited as well and that the foundation serves a tax purpose does not prevent recognition of its true value to LouElla Yavorka. In the final analysis, the foundation constitutes a standing source of funds, taken from the estate, which serve to provide her with a sphere of influence and stature, particularly within the educational community, and to provide funding to her family and friends into the future. It has been said about a will contest that, "In no case, however, has the court undertaken to exactly define the character of benefit or the extent of interest the confidential adviser must receive in order to shift the burden of proof, and, indeed, it may be said no hard and fast rule can be laid down." *In Re Estate of LeVin*, 615 A.2d 38, 41, 419 Pa.Super. 89, 96 (1992) In the instant matter, the substantial interest of LouElla Yavorka is shown not only by past funneling of funds to benefit family and friends via the foundation but also by the control exerted on the foundation which permits her to influence the future accrual of foundation funds to the use and benefit of herself, her family, and friends over time.

Removal of the Executrix and Disposition of Fees Requested

The petitioners' position that LouElla Yavorka should be removed as executrix of the decedent's estate is accepted. Among the issues are her business judgment, her adverse interests, the failure to keep adequate records (Tr. 178, 382), and failure to perform her duties as required by the Prudent Investor Act, 20 Pa.C.S. §7207. As noted in many locations in the trial transcript, as a fiduciary LouElla Yavorka has

established a less than desirable record in managing the inter vivos affairs of the decedent. The estate administration should not be compromised by similar problems. Difficulties in the administration of this estate include LouElla Yavorka's failure to address the matters disputed in the instant matter, failure to include a jointly owned automobile as an estate asset and inconsistencies in records kept versus filed tax returns. The poor administration of the estate is a just basis for surcharges by way of forfeiture of all fees claimed for the executrix' services as well as for the losses addressed herein. The attorney fees claimed in the accounts will be denied, although itemized billing records for legal work done and charges incurred for the estate, not including the defense of the instant matter, may be submitted to the new administrator as a claim to be considered.

The Loretta Frances Wolf Foundation Charitable Trust created under the Power of Attorney after March 31, 2000 was not properly executed by LouElla Yavorka, and she did not prove by clear and convincing evidence that she had the authority to establish such a trust. The remaining assets in the trust will be returned to the estate, and the trust will be terminated.

Finally, petitioners are denied the requested award of fees and costs. An order will be entered consistent with the court's findings and conclusions herein.

AMENDED ORDER

And now, this 17th day of December 2007, after due consideration of the evidence presented by both sides in this surcharge action brought by petitioners Kathleen Johnson and Katherine Meyer, residuary beneficiaries of the Estate of Loretta Wolf, it is hereby ORDERED and DECREED that the Register of Wills revoke the Letters Testamentary granted to LouElla Yavorka. The successor executor named in the will, John K. Foster III, is not permitted to serve as executor. Upon proper application and qualification, the Register of Wills is authorized to issue Letters of Administration c.t.a., to an applicant chosen by petitioners.

It is FURTHER ORDERED that:

LouElla Yavorka is removed as Trustee of the Loretta Wolf Living Trust and the administrator c.t.a. is appointed in her place, effective upon the date of his or her grant of letters.

Within 30 days of the appointment of the administrator c.t.a., LouElla Yavorka shall present said administrator with all documents and records connected to and prepared in the administration of this estate and for any related matters including the revocable trust.

Within 30 days of the appointment of the administrator c.t.a., LouElla Yavorka shall file accountings of her administration of this estate and trusts from inception through and including the date of her removal, a true and correct copies of which shall be served upon the administrator c.t.a.

Because of the decedent's weakened intellect, the confidential relationship that existed between LouElla Yavorka and the decedent, and the fact that LouElla Yavorka and her immediate family and in-laws received substantial assets from decedent, LouElla Yavorka has the burden of proving through clear and convincing evidence the absence of undue influence. LouElla has failed to meet her burden of proof and is, therefore, surcharged in the following amounts for transactions occurring after March 31, 2000:

- | | |
|-------------------|---|
| a. \$1,043,234.00 | as regards The Loretta Wolf Foundation Charitable Trust; |
| b. \$56,267.00 | as regards the Executrix's fees claimed for estate administration; |
| c. \$55,000.00 | as regards the estate administration fee paid to John Foster III, Esq.; |

- d. \$11,341.00 as regards fees paid to John Foster, III, Esquire for creation of the Loretta Wolf Charitable Trust;
- e. \$**418,735.00** for gifts to LouElla, John, Randall, and Kristen Yavorka and to LouElla Yavorka's extended family, including LouElla's in-laws (See Exhibits 37-1, 2, 3, 4, and 5); (**Modification due to erroneous inclusion of transactions before March 31, 2000.**)
- f. \$8,000.00 for gifts made to John Foster III, Esquire (See Exhibit 37-11);
- g. \$64,727.00 for cash withdrawals from Loretta Wolf's assets.

The surcharges against LouElla Yavorka will be reduced by any amount she will be entitled to under decedent's Last Will and Testament and by any amounts returned to the estate from any transaction related to the surcharges. The assets remaining in The Loretta Frances Wolf Foundation Charitable Trust shall be returned to the estate of Loretta Frances Wolf, and the surcharge shall be reduced by that amount. **Further, the portion of the surcharge resulting from awards by the foundation may be filed as claims against the estate to be paid to the extent they are proven to be disbursements having no connection or benefit to LouElla Yavorka, her family, her extended family, or friends. The final distribution, if any, under the Last Will and Testament of Loretta Wolf to the children of LouElla Yavorka shall be reduced by the gifts they received after March 31, 2000. The surcharge to LouElla Yavorka attributed to those gifts shall be reduced in like amount, and she shall remain liable for any balance remaining thereon.**

Although LouElla Yavorka will not be surcharged for the following gifts made to beneficiaries under the Last Will and Testament of Loretta Wolf, the final distribution made to each beneficiary under said Will shall be reduced by these total gift amounts received after March 31, 2000:

- a. \$62,500.00 for gifts to Kathleen and Clifford Johnson (See Exhibit 37-6);
- b. \$42,000.00 for gifts to Charles and Glenda Schreiber (See Exhibit 37-7);
- c. \$11,000.00 for gifts to Carol Fiala (See Exhibit 37-8); and,
- d. **\$16,000.00** for gifts to Betty Rees (See Exhibit 37-10).

The final distribution under the Last Will and Testament of Loretta Frances Wolf to the above-listed beneficiaries also shall be reduced by the gifts that additionally were received by any spouse, child, family member or spouse thereof after March 31, 2000.

BY THE COURT:
/s/Mazur, J.

**Tech One Associates v.
Board of Property Assessment, Appeals
and Review of Allegheny County**

*Real Estate Tax Assessment—Valuation of Improvements—
Long-term Lease—Constitutional Uniformity of Assessment*

1. Real estate tax assessment must take into account the

value of buildings and other improvements to real estate even when, because of a long-term leasehold agreement, the owner of the real estate receives only a fixed annual rental, and therefore receives no economic benefit from the improvements.

2. If vacant property acquired under a long-term lease were assessed on the value of the land only, without improvements, while vacant property acquired by deed were assessed on the value of the land and subsequent improvements, this would violate the Uniformity Clause of the Pennsylvania Constitution as well as the prohibition against creating exemptions not provided for.

(Ronald D. Morelli)

John A. Straka III for Tech One Associates.
Michael J. Wojcik for Allegheny County.
Mike Adams for West Mifflin Borough.
Ronald Zera for West Mifflin Area School District.

No. BV 02-002742. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Wettick, A.J., December 28, 2007—In this Opinion, I address the issue of whether the assessed value of real estate shall take into account the value of buildings and other improvements to the real estate where, because of a long-term leasehold agreement, the owner of the real estate does not receive any economic benefit from these buildings and other improvements.

This litigation involves a real estate tax appeal for the tax years 2001-2005. A hearing was held before Special Master Mary D. Colville, Esquire, and Lay Master Barbara R. Utterback on April 21, 2005. The Masters recommended a fair market value for the property owned by Tech One of \$9.5 million for years 2001 through 2005.¹ The taxing bodies have filed objections to the Report of Special Master. These objections are the subject of this Opinion and Order of Court.

In 1989, Tech One Associates owned approximately 50 acres of undeveloped land. It entered into a 50-year lease agreement with Terra Century Associates covering this undeveloped land. This was an arm's-length transaction.

The lease provides for an annual rent of \$665,000 for the entire 50-year term. The lease provides for a purchase option that cannot be triggered by Terra until the first six months of the forty-ninth year of the lease. Pursuant to the lease, Terra pays all real estate taxes and other taxes related to the property.

Under the lease, Terra has the right to improve the land. It owns what it builds. Terra can assign its interests at any time.

Terra and others, pursuant to agreements with Terra, have constructed on the land a one-story shopping center, a multi-screen movie theater building, and a restaurant building. The shopping center has a rentable area of 415,613 square feet with 29 tenant spaces. School District's Brief in Support of Objections at 1.

The dispute in this case is over whether buildings and other improvements located on the land may be considered in determining the assessed value of the property.

Tech One's real estate appraiser valued the property based on its income stream (\$665,000 per year). He used a capitalization rate of 7% and arrived at a value of \$9.5 million.²

The taxing bodies' appraiser took into account the value of the improvements. In valuing the improvements, he used the income approach (the income that Terra derived from its leases to subtenants).³

**VALUATION OF ANTHONY C. BARNA,
TAXPAYER EXPERT**

Year	Land (Leased Fee)	Improvements (Leasehold)	Total
2001	9,500,000.00	Not Valued	9,500,000.00
2002	9,500,000.00	Not Valued	9,500,000.00
2003	9,500,000.00	Not Valued	9,500,000.00
2004	9,500,000.00	Not Valued	9,500,000.00
2005	9,500,000.00	Not Valued	9,500,000.00

**VALUATION BY MARK D. ACKERMAN,
TAXING BODIES EXPERT**

Year	Land (Leased Fee)	Improvements (Leasehold)	Total
2001	9,300,000.00	26,685,000	35,985,000
2002	9,300,000.00	26,685,000	35,985,000
2003	9,300,000.00	19,350,000	28,650,000
2004	9,300,000.00	13,300,000	22,600,000
2005	9,300,000.00	21,350,000	31,650,000

School District's Brief at 2-3.

It is the position of Tech One that the property could be assessed at no more than \$9.5 million even if the tenant had replicated the Taj Mahal or the Empire State Building on the land so long as the owner receives only \$665,000 per year under the lease agreement. It contends that since the lease was entered into in good faith, the assessed value of the property is determined by the income Tech One receives. Transcript of 7/05/07 Argument at 3.

Terra—rather than Tech One—has a greater interest in this assessment litigation because under the lease agreement Terra is responsible for paying the real estate taxes for the entire property. At oral argument, I asked counsel appearing on behalf of Tech One whether the taxpayer was raising a procedural or a substantive claim. Is it the taxpayer's position that the improvements could be assessed if there had been a separate assessment of the improvements which identified Terra as the owner of the improvements or is it the taxpayer's position that Tech One was the only owner of any property that is subject to a real estate tax? Counsel for Tech One said that it is Tech One's position that only the owner-lessee may be taxed and that the improvements are not taxable to the lessee (T. 18).

In Appellee's Rebuttal Brief, counsel for Tech One states that there is no statutory authority under Pennsylvania law for the imposition of a real estate tax upon a lessee's leasehold interest. Tech One cites the opinion of the Pennsylvania Supreme Court in *Independent Oil and Gas Ass'n of Pennsylvania v. Board of Assessment Appeals of Fayette County*, 814 A.2d 180, 182 (Pa. 2002) (citation omitted), where the Court stated: "In Pennsylvania, the power to tax is statutory and must be derived from [an] enactment of the General Assembly."

Section 201 of the General County Assessment Law (72 P.S. §5020-201) describes the property that may be assessed:

(a) All real estate, to wit: Houses, house trailers and mobile homes, buildings permanently attached to land or connected with water, gas, electric or sewage facilities, buildings, lands, lots of ground and ground rents, trailer parks and parking lots, mills and manufactories of all kinds, furnaces, gorges, bloomerics, distilleries, sugar houses, malt houses, breweries, tan yards, fisheries, and ferries, wharves, all office type construction of

whatever kind, that portion of a steel, lead aluminum or like melting and continuous casting structures which enclose, provide shelter or protection from the elements for the various machinery, tools, appliances, equipment, materials or products involved in the mill, mine, manufactory or industrial process, and all other real estate not exempt by law from taxation.

While §201(a) refers to buildings, parking lots, and all other real estate not exempt from taxation, it is Tech One's position that a lessee has a nonownership interest in real estate, because it has only the right to use and occupy real estate for a stated term and under certain conditions. While §201(a) sets forth a comprehensive list of all real estate subject to taxation, leasehold interests remain conspicuously omitted from the list.

Since Tech One is contending that there can only be a single assessment, the only issue before this court is whether the single assessment should include the value of the buildings and other improvements which the tenant has made to the property. For the reasons set forth below, I agree with Tech One that the assessment must include the value of the buildings and other improvements.

Whenever a developer is purchasing vacant land that it wishes to develop, it has two choices: It can purchase the land for its fair market value and thereafter develop the land. Alternatively, it can develop the land after entering into a transaction that will be structured as a long-term lease with the amount of the rental payments being based on the fair market value of the vacant land. If legislation explicitly provided that the assessed value of property shall consist of the land and subsequent improvements whenever vacant land is acquired by a deed, but shall consist of only the value of the vacant land, and shall not include subsequent improvements, whenever the vacant land is acquired pursuant to a long-term leasehold agreement, this legislation would not survive constitutional challenges based on the mandates of the Uniformity Clause and the prohibition against creating exemptions not provided for in the Pennsylvania Constitution.

In *Downingtown v. Chester County Board of Assessment Appeals*, 913 A.2d 194 (Pa. 2006), the owner of a strip shopping center sought to have its assessment reduced below the county's common level ratio of 85.2% by showing that the assessments for comparable shopping centers ranged from a ratio of assessed value to actual value of 34% to 69%. The trial court stated that evidence of comparable properties is irrelevant because the pertinent class of properties consists of all real estate in the taxing district. The Pennsylvania Supreme Court rejected a mandated use of the common level ratio. Justice Saylor, writing for the majority, stated that the constitutional mandate for uniformity in tax assessments requires uniformity in assessment of properties having like characteristics and qualities, located in the same area. *Id.* at 201.

Tech One does not contend that there are other shopping centers in Allegheny County whose assessments do not include the value of the buildings and other improvements made to the land on which the shopping center is located. *Downingtown* does not permit the use of an assessment scheme that is not designed to assess comparable properties similarly.

Under settled case law, a court shall not construe legislation in a manner that produces a result that the Legislature would not have intended or a result that may be unconstitutional if the legislation can be reasonably construed to produce an outcome that achieves the goals the Legislature

apparently sought to achieve and avoids constitutional challenges. 1 Pa.C.S.A. §1922; *Pennsylvania Financial Responsibility Assigned Claims Plan v. English*, 664 A.2d 84 (Pa. 1995).

Even assuming that the assessment legislation may be construed in the manner that Tech One proposes, this legislation can also be easily construed to require the use of a method of valuing leased property that takes into account the value of improvements which a lessee has made to the property. Section 201 of the General Assessment Law, set forth at pages 4-5 of this Opinion, provides for the assessment of all real estate, the description of which includes "buildings" and "parking lots." Section 402 of the General Assessment Law (72 P.S. 5020-402) provides that real estate shall be assessed according to actual value. These provisions do not permit the use of any method of assessing property that does not consider the value of buildings and other improvements.

Tech One relies on two appellate court cases to support its position that the entire assessment for the land and the improvements on the land must be based on the revenue Tech One receives from its lease with Terra: *In re Appeal of Marple Springfield Center, Inc.*, 607 A.2d 708 (Pa. 1992); and *In re Assid*, 842 A.2d 995 (Pa.Cmwlth. 2004).

In *Marple*, the taxpayer was the owner of land and the shopping center constructed on the land. In 1968, the taxpayer's predecessor in title entered into a long-term lease with an unrelated third party covering a large portion of the shopping center. The lease was to expire in 1994 but the lessee had options for an additional fifty years. Under the lease, the owner received \$1.47 per square foot, a rate that would not change throughout the lease, including the option years. Subsequently, the lessee sublet its leased space to others at \$3.04 per square foot. The assessment board, using current market rent, valued the shopping center at \$19.5 million. The court of common pleas, using contract rent, reduced the value to \$7 million in 1988 and \$8.5 million in 1989. The taxing bodies appealed to the Commonwealth Court which vacated the order of the trial court, holding that it erred in utilizing a capitalization of actual income approach to valuation when the property was rented for less than current market rental value. The Supreme Court reversed, stating that the capitalization of income approach (which uses contract rent) is the most appropriate and the only valid means of establishing fair market value of real estate when the rental income from a long-term commercial lease is below current market value. The Court said that to interpret the tax assessment legislation as requiring valuation of property in a hypothetical unencumbered form is to ignore the economic realities of commercial real estate transactions. The Court cited §5020-402 which provides for taxable property to be valued at its actual value which means what a purchaser, willing but not obligated to buy, would pay an owner, willing but not obligated to sell.

Marple does not support Tech One's position that the assessment of a property shall not consider improvements to the property made by the tenant. The issue that *Marple* addressed was whether the improvements shall be based on market rent or contract rent. Nothing in the opinion suggests that a county may use a method of assessing property that does not consider the value of buildings and other improvements.

In the case of *In re Assid*, 842 A.2d 995, *supra*, the lessor-taxpayers appealed an order of the trial court assessing the fair market value of their property for 2002 at approximately \$1.3 million. The taxpayers contended that the trial court erred in failing to consider the impact of a long-term lease which depressed the market value of their property.

The taxpayers owned a 339-acre tract of land. On April 1,

1999, they leased the entire property to Spring Church. The lease was for five years with Spring Church having the option to extend for four additional five-year terms. The taxpayers retained a right of reversion upon expiration of the lease. Upon execution of the lease, Spring Church constructed an 18-hole golf course and clubhouse on approximately 100 acres. The remainder consisted of farmland, forestland, and out-buildings that existed prior to the execution of the lease. Under the lease, the lessor-taxpayers were responsible for the payment of real estate taxes. The lease provided that Spring Church would pay \$60,000 per year or 10% of the gross profits of the golf course, whichever was greater.

The taxpayers' expert valued the property at \$555,900 based on an annual rent of \$60,000. However, the trial court concluded that *Marple* did not apply because in *Marple* the rent reflected the fair market value of the property following the construction while in *Assid* the rent payable under the lease reflected the fair market value of the property before construction. Thus, the trial court said that the use of "the capitalization-of-income approach would permit the improvements made to the property by the...tenant to escape real estate taxation. That would be an absurd result." *Id.* at 999.

The Commonwealth Court reversed. It ruled that the capitalization of income approach based on the amount of rent that the lessor-owners receive should be used to value the property.

The *Assid* opinion is not a holding that the capitalization of income approach required in *Marple* applies where a tenant has made significant improvements to the property. At footnote 7 of the *Assid* Opinion, the court stated that counsel for the County agreed that the capitalization of income approach required in *Marple* applied to this litigation. *Id.* at 998 n.7.

At footnote 11 of the Opinion, the Court stated that the County was precluded from filing a brief and presenting oral argument for failure to file a brief by a specific date set forth in a court order. Thus, the Commonwealth Court did not have the benefit of the arguments presented by the taxing bodies in this case, including the constitutional arguments.

Furthermore, in *Downingtown v. Chester County Board of Assessment Appeals*, 913 A.2d 194, *supra*, (which was decided more than two years after *Assid*), the Pennsylvania Supreme Court imposed the requirement that comparable properties be assessed at the same percentage of assessed value to market value. The requirement that specific categories of property be taxed at similar rates means that the assessment laws cannot be construed to allow improvements on land to escape real estate taxation.

I find to be credible the testimony of Mark D. Ackerman and that his testimony supports his assessed values for 2001-2005.

For this reason, I enter the following Order of Court:

ORDER OF COURT

On this 28th day of December, 2007, it is ORDERED that the assessed value of the subject real estate is \$35,985,000 for 2001, \$35,985,000 for 2002, \$28,650,000 for 2003, \$22,600,000 for 2004, and \$31,650,000 for 2005.

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

¹ The Allegheny County tax blotters valued the property at \$30,984,700 for 2001 and \$32,477,300 for the subsequent years. Appellee's Brief in Reply and Opposition to Objections at 2.

² The taxing bodies' appraiser would value the property, if his assessment was based on an annual income of \$665,000, at \$9.3 million.

³ The value declined in 2004 because a major subtenant went out of business.

**William Wiesenfeld, by Jason DiNardo,
d/b/a Keystone Judgment Recovery,
Assignee v.
Robert Kennedy and Rana Felton**

Assignee of Judgment—Collection Agency—Right to Appear Pro Se—18 Pa.C.S. §7311(b), (h)

1. An assignee of a judgment, under an assignment that provides that the assignor will receive a percentage of amounts recovered from the judgment debtor, is a “collection agency” barred by operation of 18 Pa.C.S. §7311(b) from appearing for or representing a creditor except through an attorney.

2. A judgment is a “claim” for purposes of 18 Pa.C.S. §7311(h), defining a “collection agency” as one who takes action with respect to “claims.”

(Ronald D. Morelli)

Wayne P. McGrew for Plaintiff.

Norma Chase for Defendants.

No. AR 97-006102. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION AND ORDER OF COURT

Wettick, A.J., December 28, 2007—Defendants’ motion for a court order barring Jason DiNardo, d/b/a Keystone Judgment Recovery, Assignee, from participating in court proceedings except through counsel is the subject of this Opinion and Order of Court.

On January 14, 1998, a Board of Arbitrators entered an award in William Wiesenfeld’s favor and against Robert Kennedy and Rana Felton in the amount of \$2,800. This award was reduced to a judgment on October 14, 2003.

On June 4, 2007, an assignment of judgment was filed in these proceedings. The assignment, dated April 20, 2007 and signed by Mr. Wiesenfeld, states that Mr. Wiesenfeld is transferring and assigning “all title rights and interest” to the judgment entered at AR07-006192 in the amount of \$2,800.

On June 19, 2007, defendants filed a petition to strike or open the judgment entered on October 14, 2003.¹ The petition identified plaintiff as William Wiesenfeld by Keystone Judgment Recovery, Assignee. On July 9, 2007, Mr. DiNardo, *pro se*, filed an answer to this petition.

On June 19, 2007, defendants also filed a motion to bar assignee for collection from proceeding *pro se* in the court proceedings. In the motion, defendants alleged that Mr. DiNardo, doing business as Keystone Judgment Recovery, is a collection agency and that Mr. DiNardo is not permitted to file legal papers with the court except through counsel. On June 29, 2007, Mr. DiNardo (*pro se*) filed an answer to this motion.

On July 13, 2007, I entered a rule to show cause why the motion should not be granted. I provided for the motion to be decided under Pa. R.C.P. No. 206.7 with depositions to be completed within sixty days.²

Mr. DiNardo’s deposition was taken on August 29, 2007. He described his business as purchasing judgments and then trying to collect them (T. 6). He was asked if he collects them on some kind of a contingency arrangement. His response was that it is not contingency; it is for future consideration (T. 6).

The record (DiNardo Dep., Ex. A) includes the form agreement for assignment that Mr. DiNardo uses (Attachment 1 to this Opinion).

The relevant provisions of this Agreement read as follows:

JUDGMENT CREDITOR hereby agrees to assign all rights, interests in and title to the judgment whose Civil Action Number is: AR-97-006102, and original

judgment award amount is \$2,800.00 entered on or about 1/14/1998 in Allegheny County against Robert Kennedy & Rana Felton, herein after referred to as “JUDGMENT DEBTOR” to ASSIGNEE.

ASSIGNEE will advance all expenses for asset searches, skip tracing, related court costs, process serving and related collection fees. JUDGMENT CREDITOR will not incur or advance any expenses associated with the collection of said judgment. ASSIGNEE will retain, out of revenue collected, sufficient funds to satisfy advanced expenses prior to disbursement to either party, and petition the court to increase the Judgment by an equivalent amount.

Thereafter, amounts collected are disbursed as follows:

50% to William Wiesenfeld, JUDGMENT CREDITOR, until such date as JUDGMENT CREDITOR has received 50% of any portion of monies recovered by ASSIGNEE in the above mentioned judgment award amount from any combination of ASSIGNEE and JUDGMENT DEBTOR,

AND all remaining amounts to Jason DiNardo d/b/a Keystone Judgment Recovery, ASSIGNEE, until judgment is satisfied and/or canceled.

Mr. DiNardo testified that he has never bought a judgment with no future consideration (T. 12). He further testified that the assignor has no say in how Mr. DiNardo handles the judgment.³

Collection agency practices are governed by 18 Pa.C.S. §7311. Defendants rely on §7311(b) which reads as follows:

(b) Appearance for creditor.—It is unlawful for a collection agency to appear for or represent a creditor in any manner whatsoever, but a collection agency, pursuant to subsection (a), may bring legal action on claims assigned to it and not be in violation of subsection (c) if the agency appears by an attorney.

Section 7311(h) defines *Claim* and *Collection agency* as follows:

“Claim.” Includes any claim, demand, account, note, or any other chose in action or liability of any kind whatsoever.

“Collection agency.” A person, other than an attorney at law duly admitted to practice in any court of record in this Commonwealth, who, as a business, enforces, collects, settles, adjusts, or compromises claims, or holds himself out, or offers, as a business, to enforce, collect, settle, adjust, or compromise claims.

Mr. DiNardo contends that he is not governed by §7311(b) because he is not a collection agency acting on behalf of a creditor. He raises the following arguments in support of this contention:

First, a *collection agency*, as defined in §7311(h), reaches only a person who takes action with respect to *claims*. The term *claim*, as defined in §7311(h), does not include a judgment.

I find this contention to be without merit. The definition of *claim* includes “liability of any kind whatsoever.”⁴

Second, it is Mr. DiNardo’s position that (1) the definition of *collection agency* only reaches a person who is taking action on behalf of a third party creditor and (2) he is acting on his own behalf as the owner of an assignment, and not on behalf of a third party.

This position is without merit because the purpose of the assignment is for Mr. DiNardo to collect and enforce payment

of the judgment on behalf of the judgment creditor. Section 7311(a) provides that it is lawful for a collection agent to take an assignment of a claim from a creditor "for the purpose of collecting or enforcing payment thereof." Section 7311(b) provides that the collection agency taking an assignment for the purpose of collecting or enforcing the payment thereof may bring legal action on claims assigned to it only if the agency appears by an attorney. Section 7311(h) defines a *collection agency* as a person who, as a business, "enforces, collects, settles, adjusts, or compromises claims."

Mr. DiNardo's interpretation of §7311 would render §7311(b) meaningless. Section 7311(b) is intended to cover any person in the business of enforcing, collecting, settling, adjusting, or compromising claims where the amount of the payment that will be made to the creditor is contingent upon the amount which is collected. If a person can evade §7311(b) by using an assignment form, such as Mr. DiNardo is using, every transaction will be structured in this fashion.

This transaction between Mr. DiNardo and Mr. Wiesenfeld is contrasted with a transaction in which a person buys 500 judgments and claims of a large medical practice, paying 15 cents per dollar of the amount of a judgment and 10 cents per dollar of the amount of a claim. In this situation, any collection activities in which the assignee engages are on behalf of the assignee alone and not as a service provider for the assignor because the assignor has no interest in the collection activities of the assignee. Thus, there has been a complete assignment rather than an assignment for the purpose of collecting or enforcing payment.⁵

This distinction that I have drawn between an assignment where the purchase price is dependent upon the amount the assignee collects and an assignment where the assignor has been fully paid and has no interest in the collection activities of the assignee is recognized in the following cases (together with cases cited therein): *Iowa Supreme Court Comm'n on Unauthorized Practice of Law v. A-1 Assocs., Ltd.*, 623 N.W.2d 803 (Iowa 2001); *State ex rel. Frieson v. Isner*, 285 S.E.2d 641 (W. Va. 1981); and *State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 514 P.2d 40 (1973).

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

ORDER OF COURT

On this 28th day of December, 2007, it is ORDERED that:

(1) defendants' motion to bar assignee for collection from proceeding *pro se* is granted and Jason DiNardo, d/b/a Keystone Judgment Recovery, is prohibited from filing any legal papers in this matter except through counsel; and

(2) an argument on defendants' motion to open or strike judgment will be held on January 25, 2008, at 10:00 a.m. o'clock.

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

¹ The petition alleges that neither defendant participated in the arbitration proceedings. A judgment should not have been entered against Rana Felton because the complaint only named Robert Kennedy. A judgment should not have been entered against Robert Kennedy because he never received notice of the hearing.

² Subsequently, Mr. DiNardo retained counsel (Wayne P. McGrew, Esquire) to represent him in connection with this motion. At oral argument, Mr. McGrew stated that he may not be representing Mr. DiNardo in the proceedings to open or strike the judgment if defendants' motion to bar Mr. DiNardo from proceeding *pro se* is denied.

³ The Agreement is silent on this issue. The implied duty of good faith and fair dealing would be part of the Agreement.

⁴ Mr. DiNardo contends that the word *claim*, if given its ordinary meaning, means a demand for money to which one asserts a right. While this may be so, the definition of the term *claim* in §7311(h) is broader. The term *claim* as used in §7311 includes more than a claim; it includes the following in addition to claim: "demand, account, note, or any other chose in action or liability of any kind whatsoever."

⁵ This Opinion does not address the issue of whether the term *collection agency* includes a person who is in the business of enforcing, collecting, settling, adjusting, and compromising claims that this person acquired through assignments where the assignor was fully paid and has no interest in the collection activities of the assignee.

EXHIBIT A ATTACHMENT 1

AGREEMENT FOR ASSIGNMENT

THIS CONSTITUTES THE ENTIRE AGREEMENT, entered into between William Wiesenfeld of 5703 Mifflin Road, Pittsburgh, PA 15207 herein after referred to as "JUDGMENT CREDITOR" and Jason DiNardo d/b/a Keystone Judgment Recovery a Pennsylvania business, herein after referred to as "ASSIGNEE."

JUDGMENT CREDITOR hereby agrees to assign all rights, interests in and title to the judgment whose Civil Action Number is: AR-97-006102, and original judgment award amount is \$2,800.00 entered on or about 1/14/1998 in Allegheny County against Robert Kennedy & Rhena Felton, herein after referred to as "JUDGMENT DEBTOR" to ASSIGNEE.

ASSIGNEE will advance all expenses for asset searches, skip tracing, related court costs, process serving and related collection fees. JUDGMENT CREDITOR will not incur or advance any expenses associated with the collection of said judgment. ASSIGNEE will retain, out of revenue collected, sufficient funds to satisfy advanced expenses prior to disbursement to either party, and petition the court to increase the judgment by an equivalent amount.

Thereafter, amounts collected are disbursed as follows:

50% to William Wiesenfeld, JUDGMENT CREDITOR, until such date as JUDGMENT CREDITOR has received 50% of any portion of monies recovered by ASSIGNEE in the above mentioned judgment award amount from any combination of ASSIGNEE and JUDGMENT DEBTOR,

AND all remaining amount to Jason DiNardo d/b/a Keystone Judgment Recovery, ASSIGNEE, until judgment is satisfied and/or canceled.

Funds will be disbursed to JUDGMENT CREDITOR within 90 days of receipt by ASSIGNEE.

JUDGMENT CREDITOR affirms that his/her interest in and title to said judgment is real, marketable, was legally obtained, has not been previously assigned, and has not been satisfied or canceled.

JUDGMENT CREDITOR affirms that he/she has, to date, received \$0.00 as partial payment of this debt from JUDGMENT DEBTOR, and will IMMEDIATELY notify ASSIGNEE of any future receipts. From the date of this agreement, JUDGMENT CREDITOR will cease and desist all efforts to collect this judgment and recognize that ASSIGNEE has total and exclusive right to collect said judgment at its discretion.

By signing this agreement the undersigned JUDGMENT CREDITOR acknowledges that he/she had read, accepts, and fully understands the agreement, and is a duly authorized representative with all powers required to execute this agreement. Executed this 20th day of April, 2007.

William Wiesenfeld Jason DiNardo d/b/a Keystone
Judgment Recovery
Assignee

Commonwealth of Pennsylvania v. Thomas Harris

Search and Seizure

When a party voluntarily consents to police conducting a search of his body during a mere encounter and makes statements to police during that time, the party cannot claim later that the search was involuntary and the statements are the fruit of the illegal search.

(Rhoda Shear Neft)

Jerry Johnson for the Commonwealth.

Amy Lindberg for Defendant.

No. CC 204510173. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Mariani, J., November 15, 2007—This is a direct appeal wherein the defendant, Thomas Harris, appeals from the Judgment of sentence of March 14, 2007. After a non-jury trial, this Court found the defendant guilty of possession and possession with intent to deliver cocaine and sentenced the defendant to a period of intermediate punishment of house arrest of 18 months followed by a term of probation of two years. The defendant timely filed a Notice of Appeal. The defendant filed a Concise Statement of Matter Complained Of On Appeal alleging that the following errors:

- a. The trial court erroneously failed to order suppression of contraband discovered after the unlawful seizure of the defendant;
- b. The trial court erroneously failed to order the suppression of contraband discovered after the unlawful seizure of the ATM Card held by the defendant;
- c. The trial court erroneously failed to order the suppression of contraband discovered after the unlawful search/frisk of the defendant;
- d. The trial court erroneously failed to order the suppression of contraband discovered after the unlawful removal of a sock from the defendant's pocket;
- e. The trial court erroneously failed to order the suppression of contraband discovered via the unlawful emptying of the sock found in the defendant's pocket;
- f. The trial court erroneously failed to order the suppression of the defendant's custodial statement acquired after the unlawful search and seizure of the defendant;
- g. the evidence was legally insufficient to convict the defendant of possession with intent to deliver; and
- h. the trial court imposed an illegal sentence of intermediate punishment because it imposed an indefinite term of intermediate punishment.

The facts of record adduced in this case are as follows:

On May 27, 2005 at approximately 12:40 a.m., Officers Cuiffi and Frisk of the Wilkesburg Police Department received a dispatch of a disturbance being caused by the defendant at the 600 block of Ross Avenue at a Citizens Bank ATM location. Upon their arrival, they encountered the defendant attempting to access the ATM machine at that location. The defendant was known to the officers as a person who has been arrested in the past, who has resisted arrest in the past and who had been arrested with the use of force in the past. As the officers approached the defendant,

the defendant noticed the officers and began to walk away. Officer Cuiffi called out to the defendant and the defendant responded by coming back to the officers. Officer Cuiffi observed an ATM card and other papers in the defendant's hand. The defendant volunteered that he was trying to use the ATM card but the Personal Identification Number (PIN) wasn't correct and he couldn't get any money from the machine. Officer Cuiffi asked if he could see the ATM card and the defendant handed it to Officer Cuiffi. Officer Cuiffi looked at the ATM card and notice that the card was in the name of Ralph Carter, a known fugitive wanted by the Pennsylvania State Police for burglary. The defendant was acting in an excited manner and Officer Cuiffi testified that he was concerned for his own safety as a result of the defendant's prior incidents with police. Officer Cuiffi asked the defendant how he obtained the card. The defendant responded by advising the officer that Ralph Carter's girlfriend gave him the card but provided an incorrect PIN. Officer Cuiffi suspected that the defendant may have been trying to get money for Ralph Carter while Carter was on the run. At that point, Officer Cuiffi asked the defendant if he could conduct a pat down search. The defendant placed his arms out to the side. Officer Frisk conducted a pat down search and felt something "crunchy" on the outside of the defendant's pants pocket. Officer Frisk asked the defendant about the item and the defendant tried to put his hands in his pocket. Officer Frisk asked the defendant for permission to remove the item from his pocket. The defendant permitted Officer Frisk to retrieve the item. Officer Frisk retrieved crack cocaine from a sock located in a pocket in the defendant's pants. The defendant was taken into custody and charged with possession and possession with intent to deliver crack cocaine.

The defendant and the Commonwealth agreed to proceed with a stipulated non-jury trial. The entire trial court record consisted of the following evidence admitted by the Commonwealth and to which the defendant stipulated:

1. A Laboratory Report from the Allegheny County Crime Laboratory containing the following evidence:
 - a. Four knotted plastic bags holding off-white solid, collectively weighing 20.142 grams, testifying positive for cocaine base, a Schedule II controlled substance; and
 - b. One knotted plastic bag containing 11 knotted plastic baggie corners hold off-white solid, collectively weighing 1.08 grams, also testing positive for cocaine base, a Schedule II controlled substance.
2. The Wilkesburg Police Department Incident Report and Summary which contained a statement of the defendant acknowledging that he had not been selling drugs very long.
3. The stipulated testimony of an expert witness, Detective Marty Zimmel, that the defendant possessed the drugs with the intent to distribute them.

Prior to trial, the defendant filed an Omnibus Pretrial Motion seeking to suppress all evidence in this case. This Court denied the motions to suppress because all of the suppression claims of the defendant are without merit.

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." *Commonwealth v. Blair*, 394 Pa.Super. 207, 575 A.2d 593, 596 (Pa.Super. 1990). To secure this right, courts in

Pennsylvania require law enforcement officers to demonstrate ascending levels of suspicion to justify their interactions with citizens as those interactions become more intrusive. See *Commonwealth v. Beasley*, 2000 Pa.Super. 315, 761 A.2d 621, 624 (Pa.Super. 2000). The first of these is a 'mere encounter' (or request for information) which need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond. See *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). The second, an 'investigative detention,' must be supported by a reasonable suspicion; it subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Commonwealth v. Ellis*, 541 Pa. 285, 662 A.2d 1043, 1047 (1995). Finally, an arrest, or 'custodial detention,' must be supported by probable cause. *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *Commonwealth v. Rodriguez*, 532 Pa. 62, 614 A.2d 1378 (1992).

As set forth above, a mere encounter between police and a citizen need not be supported by any level of suspicion, and carries no official compulsion on the part of the citizen to stop or to respond. See *Beasley*, 761 A.2d at 624. No constitutional provision prohibits police officers from approaching citizens in public to make inquiries of them. If, however, the police action becomes too intrusive, a mere encounter may be regarded as an investigatory detention or seizure. See *Id.* To determine whether a mere encounter rises to the level of an investigatory detention, we must discern whether, as a matter of law, police have conducted a seizure of the person involved. See *Commonwealth v. Mendenhall*, 552 Pa. 484, 715 A.2d 1117, 1119 (Pa. 1998).

An investigative detention occurs when a police officer temporarily detains an individual by means of physical force or a show of authority for investigative purposes. See *Ellis*, *supra*; see also *Commonwealth v. Lopez*, 415 Pa.Super. 252, 258, 609 A.2d 177, 180, *appeal denied* 533 Pa. 598, 617 A.2d 1273 (1992). See also *Commonwealth v. Lewis*, 535 Pa. 501, 636 A.2d 619 (1994). Such a detention constitutes a seizure of a person and thus activates the protections of the Fourth Amendment and the requirements of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968). In order to determine whether a particular encounter constitutes a seizure or detention, "a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' request or otherwise terminate the encounter." *Lewis*, 535 Pa. at 509, 636 A.2d at 623 (quoting *Florida v. Bostick*, 501 U.S. 429, 439, 115 L.Ed.2d 389, 111 S.Ct. 2382 (1991)). Moreover, it is necessary to examine the nature of the encounter. Circumstances to consider include, but are not limited to, the following: the number of officers present during the interaction; whether the officer informs the citizen they are suspected of criminal activity; the officer's demeanor and tone of voice; the location and timing of the interaction; the visible presence of weapons on the officer; and the questions asked. See *Beasley*, 761 A.2d at 624.

The facts of this case demonstrate that the interaction between the police officers and the defendant was a mere encounter. The defendant responded to a simple request from the officers and the defendant voluntarily and consensually cooperated with the arresting officers. There was no demonstration of "official compulsion" or detention. The arresting officers were dispatched to Citizens Bank for a dis-

turbance call involving the defendant. Upon arriving at the scene, the officers observed the defendant at the ATM machine punching numbers into the machine. As the officers approached the defendant, the defendant began walking away. The officers called out to the defendant at which time the defendant turned around and walked towards the officers. The officers noticed an ATM card in the defendant's hand. The defendant handed the ATM card to the officers and explained that he couldn't use the ATM card because the Personal Identification Number was incorrect. The officers then noticed that the ATM was not in the defendant's name but was in the name of Ralph Carter, a known fugitive. As a safety precaution, the officers requested that the defendant submit to a pat down search. The defendant consented and held his hands out to his side to facilitate the search. The circumstances of the interaction between the officers and the defendant establish a mere encounter. The defendant's voluntary consent to conduct a search during a mere encounter renders any subsequent search valid as well. See *Commonwealth v. Boswell*, 554 Pa. 275, 721 A.2d 336 (1998); *Commonwealth v. Lidge*, 399 Pa.Super. 360, 582 A.2d 383 (1990); *Interest of Jermaine*, 399 Pa.Super. 503, 582 A.2d 1058 (1990); *Commonwealth v. Roberts*, 771 A.2d 23 (Pa.Super. 2001). Accordingly, the defendant's motions to suppress were properly denied.

The defendant next claims that the custodial statements he made are "fruit of the poisonous tree" and should be suppressed. The defendant claims that the custodial statements derived from the illegal searches and seizure of the crack cocaine in this case. Because this Court has determined that the searches and seizures were lawful, this claim is without merit.

The defendant further claims that the evidence adduced at the non-jury trial was legally insufficient to convict the defendant of possession with intent to deliver. When considering a challenge to the sufficiency of the evidence, the appellate court must determine whether the evidence at trial, and all reasonable inferences derived therefrom, when viewed in a light most favorable to the Commonwealth, establish all of the elements of possession with intent to deliver marijuana beyond a reasonable doubt. *Commonwealth v. May*, 584 Pa. 640, 647, 887 A.2d 750, 753 (2005). In order for the Commonwealth to sustain its burden in this case, it must have presented evidence that proved beyond a reasonable doubt both the possession of the controlled substance and the intent to deliver the controlled substance. *Commonwealth v. Jackson*, 645 A.2d 1366, 1368 (1994).

Intent to deliver may be inferred from possession of a large quantity of controlled substances. *Commonwealth v. Santino*, 462 Pa. 216, 223, 340 A.2d 440, 444 (1975); *Commonwealth v. Smagala*, 383 Pa.Super. 466, 476, 557 A.2d 347, 351 (1989); *Commonwealth v. Pagan*, 315 Pa.Super. 7, 461 A.2d 321, 322 (1983); *Commonwealth v. Bagley*, 296 Pa.Super. 43, 442 A.2d 287, 289 (1982). If, when considering only the quantity of a controlled substance, it is not clear whether the substance is being used for personal consumption or distribution, it then becomes necessary to analyze other factors. In these cases, the quantity of the controlled substance is but one factor in analyzing whether a defendant had the necessary intent to deliver a controlled substance. *Pagan*, 315 Pa.Super. at 10, 461 A.2d at 323; *Bagley*, 296 Pa.Super. at 51, 442 A.2d at 291. Other factors to consider when determining whether a defendant intended to deliver a controlled substance include the manner in which the controlled substance was packaged, the behavior of the defendant, the presence of drug paraphernalia, and large sums of cash found in possession of the defendant.

Commonwealth v. Sherrell, 414 Pa.Super. 477, 482, 607 A.2d 767, 769 (1992); *Ramos*, 392 Pa.Super. at 594, 573 A.2d at 1034-35. See also *Commonwealth v. Brown*, 904 A.2d 925 (Pa.Super. 2006); *Commonwealth v. Clark*, 895 A.2d 633 (Pa.Super. 2006); *Commonwealth v. Ratsamy* 885 A.2d 1005 (Pa.Super. 2005). Additionally, the absence of paraphernalia which would otherwise be indicative of personal use is a factor to consider. *Commonwealth v. Torres*, 617 A.2d 812 (Pa.Super. 1992).

The defendant clearly possessed the drugs in question in this case. The cocaine was seized from his person. At the stipulated non-jury trial, the Commonwealth introduced, pursuant to a stipulation by the defendant, the police report in this case as well as the expert testimony which concluded that the defendant possessed the cocaine with the intent to distribute it. The police report contained an admission by the defendant that he hadn't been selling drugs for a long time. Additionally, the laboratory reports containing the analysis of the drugs found on the defendant were admitted. A large quantity of crack cocaine was found on the defendant and packaged in smaller, individually wrapped quantities. No drug paraphernalia which could be used to personally ingest the drugs was found on the defendant. This Court found that the quantity of drugs was of a nature that is more consistent with being held and packaged for sale, that the defendant's own admission was that he was in the business of selling drugs but had not been doing so for a long time, that there were no implements found on the defendant for personal use of the drugs and that there was a stipulation that the Commonwealth would have presented expert testimony to prove the "intent to deliver" element of the charged offense. Accordingly, the evidence was sufficient to convict the defendant of possession with intent to deliver.

The defendant challenged the imposition of a sentence of intermediate punishment in this case because he claims that the Court imposed an illegal indeterminate sentence of 11 1/2 to 23 months of intermediate punishment in this case. This claim is unfounded. As set forth in the Sentencing Transcript and on the Order of Court attached to the Defendant's Notice of Appeal, the Court, in fact, imposed a term of intermediate punishment of 18 months. The challenge is without merit.

For the foregoing reasons, the judgment should be affirmed.

By the Court:
/s/Mariani, J.

Commonwealth of Pennsylvania v. Brett Beecher

Constitutionality of Driving While Imbibing Statute

Plaintiff's admission in his Concise Statement of Matters Complained of on Appeal that the facts of his case are identical to those in a case decided by the Pennsylvania Supreme Court finding the Statute constitutional precludes the granting of relief for the Plaintiff.

(Rhoda Shear Neft)

John Fitzgerald for the Commonwealth.
Richard Joyce for Defendant.

No. CC: 200508106. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Mariani, J., November 15, 2007—This is a direct appeal wherein the defendant, Brett Beecher, appeals from the

judgment of sentence of August 23, 2006. After a non-jury trial, this Court found the defendant guilty of Driving While Imbibing, in violation of 75 Pa.C.S.A. §3802(b), and Driving on Roadways Laned Traffic, in violation of 75 Pa.C.S.A. §3309. Defendant was acquitted of other charges unrelated to this appeal. At the Driving While Imbibing conviction, this Court sentenced the defendant to a term of house arrest of 60 days with work release concurrent with a term of probation of six months. A timely Notice of Appeal was filed. The defendant filed a Concise Statement of Matters Complained Of On Appeal alleging that the Driving While Imbibing statute is unconstitutional as well as alleging that the Court failed to suppress the traffic stop in this case. The record in this case supports the ruling of this Court that 75 Pa.C.S.A. §3802(b) is constitutional and that the traffic stop was valid. The judgment of sentence should, therefore, be affirmed.

The pertinent facts of this case are as follows: The vehicle stop in this case occurred on April 3, 2005 at approximately 4:03 a.m. Officer Meisel, of the Brentwood Borough Police Department was parked in his patrol vehicle in a Sunoco gas station on Route 51 in Brentwood Borough. He observed the defendant's vehicle traveling southbound on Route 51 at a high rate of speed. Officer Meisel testified that there was a light snow which was blowing on the roadway and that parts of the roadway were covered in snow and/or obscured due to the blowing snow. Officer Meisel pulled his police vehicle out of the Sunoco parking lot and began to follow the defendant's vehicle in order to determine the speed of the defendant's vehicle. Officer Meisel followed the defendant's vehicle for two to three tenths of a mile. Officer Meisel noted the speed on his speedometer to be 65 miles per hour. Officer Meisel attempted to stay at a constant speed behind the defendant but his police vehicle slid on the roadway due to wet weather conditions. Officer Meisel observed the defendant's vehicle cross into what is commonly referred to as a "suicide lane" (a lane of traffic in the center of the roadway that permits traffic from both directions to make left turns across lanes for oncoming traffic) on three occasions. After making these observations, Officer Meisel initiated a traffic stop which ultimately resulted in the defendant's arrest for Driving While Imbibing.

With respect to the unconstitutionality of the Driving While Imbibing statute, the Defendant alleges a number of claims. The defendant, in his Statement of Matters Complained of Pursuant to Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure, however, notes that the challenges he raises in this case are identical to those raised by the defendant in *Commonwealth v. Duda*, Supreme Court No. 24 WAP 2005, an appeal which was pending before the Supreme Court at the time the defendant filed his Pa. App. R. Proc. 1925(b) statement. On May 31, 2007, the Supreme Court decided *Duda* and it rejected all of the defendant's constitutional challenges in that case. *Commonwealth v. Duda*, 923 A.2d 1138 (PA. 2007). By the defendant's own admission, his constitutional issues are identical to those of the defendant in *Duda*. Because the Supreme Court specifically rejected, in *Duda*, the constitutional claims raised by the defendant in this case, this Court's ruling denying the Omnibus Pretrial Motion challenging the constitutionality of 75 Pa.C.S.A. §3802(b) should be affirmed. See also *Commonwealth v. Finchio*, 926 A.2d 968 (Pa. 2007).

The defendant also challenges this Court's failure to declare the traffic stop unconstitutional. Before stopping a vehicle, an officer must be able to articulate specific facts that establish reasonable suspicion to believe that the vehicle or its driver was in violation of some provision of the Pennsylvania Vehicle Code.¹ *Commonwealth v. Hall*, 2007

Pa.Super. 220; 2007 Pa.Super. LEXIS 2169; *Commonwealth v. Hendricks*, 927 A.2d 289 (Pa.Super. 2007); *Commonwealth v. Little*, 2006 Pa.Super. 186, 903 A.2d 1269, 1272 (Pa.Super. 2006); *Commonwealth v. Sands*, 2005 Pa.Super. 372, 887 A.2d 261, 271-72 (Pa.Super. 2005). This standard is less stringent than probable cause. *Commonwealth v. Cook*, 558 Pa. 50, 57, 735 A.2d 673, 676 (1999). In order to determine whether the police officer had reasonable suspicion, the totality of the circumstances must be considered. *In the Interest of D.M.*, 566 Pa. 445, 781 A.2d 1161, 1163 (2001). A police officer's reasonable inferences which are drawn from the facts in light of his experience are entitled to due weight. *Cook*, 735 A.2d at 676. An actual violation of the Vehicle Code need not be established. The law only requires that there be a reasonable basis for the officer's action in stopping the vehicle. *Commonwealth v. Vincent*, 806 A.2d 31, 33 (Pa.Super. 2002); *Commonwealth v. Palmer*, 751 A.2d 223, 226 (Pa.Super. 2000).

The evidence adduced at the suppression hearing demonstrated that Officer Meisel possessed a reasonable suspicion that the defendant was operating his vehicle in violation of Sections 3111 and 3309 of the Vehicle Code.² The Officer observed the defendant's vehicle traveling at a high rate of speed in the early morning hours on a roadway that was partially covered and/or obscured by snow. Officer Meisel pulled behind the defendant's vehicle and observed his own speedometer, which suggested that the defendant was operating his vehicle approximately 25 miles per hour over the posted speed limit. During a period of two to three tenths of a mile, the defendant's vehicle crossed into the "suicide lane," which is reserved for turning vehicles, some of which are oncoming vehicles, three separate times. The conditions of the road were sufficiently dangerous that Officer Meisel's patrol car slid on the road while traveling at or near the same speed of the defendant's vehicle. The officer, relying on his experience as a police officer, had a reasonable suspicion that the defendant's speed was in excess of the posted speed limit and that he was operating his vehicle outside of the marked traffic lanes.³

Similar traffic stops have been approved. See *Commonwealth v. Hughes*, 908 A.2d 924 (Pa.Super. 2006) (defendant's vehicle swerved right onto the berm, then back into the right lane, and then left across the white dotted line into other lane; over next one-half to three-quarters of a mile, vehicle swerved into the other lane two more times); *Commonwealth v. Lindblom*, 854 A.2d 604 (Pa.Super. 2004) (police had probable cause to stop the defendant's vehicle where the defendant crossed the center double yellow lines four or five times, straddled the double yellow lines, and crossed the berm line four or five times; the panel made this conclusion even though opposing traffic was not present during the entire time the defendant was driving, noting that "a motorist may be stopped for reckless driving even if the only concern is for the motorist's own safety.").

The defendant relies on *Commonwealth v. Gleason*, 567 Pa. 111, 785 A.2d 983 (2001) as support for the notion that the erratic driving of the defendant did not warrant a traffic stop. The *Gleason* Court did note that "given the early morning hour, the fact that there was no other traffic on the roadway and the rather momentary nature of [the] defendant's vehicle crossing the fog line..., the officer erred in believing he had justification to stop [the] defendant's vehicle." *Gleason*, 785 A.2d at 985-86. The facts of this case do not support a finding of a momentary nature of a defendant's vehicle crossing a fog line, a line on the berm side of a driving lane. Rather, within two to three tenths of a mile, the defendant's vehicle crossed into the center lane of Route 51, a lane designated for turning vehicles approach-

ing from opposite directions, three times at a high rate of speed in snowy conditions. That no vehicle entered the "suicide lane" from the opposite direction at or near the area where defendant's vehicle crossed into that lane three different times is certainly fortuitous but that fact has no significance regarding the legality of the traffic stop. Under such circumstances, a police officer should not be required to wait to see if a motorist's crossing into and out of a "suicide lane" possess an immediate (and, perhaps, fatal) threat to another motorist approaching from the opposite direction before he can initiate a traffic stop. Accordingly, Officer Meisel had a reasonable suspicion that the defendant was operating his vehicle in violation of 75 Pa.C.S.A. §§3309 and 3111.

Accordingly, the judgment in this case should be affirmed.

BY THE COURT:

/s/Mariani, J.

¹ Prior to the amendment of 75 Pa.C.S.A. §6308(b) on February 1, 2004, police were required to have probable cause to suspect that a Vehicle Code violation had occurred in order to effect a traffic stop. While the defendant argues that this standard is applicable to the stop in this case, such an argument is incorrect.

² Section 3111 of the Vehicle Code provides, in pertinent part: "Unless otherwise directed by a uniformed police officer or any appropriately attired person authorized to direct, control or regulate traffic, the driver of any vehicle shall obey the instructions of any applicable official traffic-control device placed or held in accordance with the provisions of this title, subject to the privileges granted the driver of an emergency vehicle in this title."

Section 3309 of the Vehicle Code provides, in pertinent part: "DRIVING WITHIN SINGLE LANE.—A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety."

³ Arguably, the defendant was operating his vehicle at a speed greater than called for by the conditions of the roadway at the time of driving. See Section 3361 of the Vehicle Code.

Commonwealth of Pennsylvania v. Thomas Cash

Simple Assault, 18 Pa.C.S. §2701(a)(1)—*Summary Harassment*, 18 Pa.C.S. §2709(a)(1), (2), and (3)—*Sufficiency of Evidence to Convict*

1. Evidence that defendant, during an argument, punched his girlfriend in the face was sufficient to support a conviction for simple assault, requiring that defendant "attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another." The resulting occipital fracture to the girlfriend's eye was a "bodily injury" under Pennsylvania law, and even if the injury was unintentional, the nature of the injury was sufficient to establish that defendant acted recklessly by ignoring a substantial and unjustifiable risk that bodily injury would be caused.

2. Evidence was sufficient to establish that defendant subjected his girlfriend to physical contact with the intent to harass, annoy or harm her, so as to support a conviction for summary harassment, as punching her in the face during an

argument is indicative of an intent to annoy or harass.

(Ronald D. Morelli)

Michael Sullivan for the Commonwealth.

Lisa Phillips for Defendant.

CC No. 200517772. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Mariani, J., December 17, 2007—This is a direct appeal wherein the defendant, Thomas Cash, appeals from the Judgment of sentence of October 17, 2006. After a non-jury trial, this Court found the defendant guilty of Count 2 of the Information charging simple assault, in violation of 18 Pa.C.S.A. §2701(a)(1), a second degree misdemeanor and one count of summary harassment, in violation of §2709(a)(1), (a)(2) and/or (a)(3). The defendant was acquitted of Count 1 of the Information charging Aggravated Assault. At Count 2 of the Information, the defendant was sentenced to a period of 12 months' probation. At the summary harassment count, no further penalty was imposed. The defendant filed a timely notice of appeal. The defendant filed an Concise Statement of Errors to be Asserted On Appeal alleging that the evidence adduced at trial was insufficient as a matter of law to convict the defendant of both simple assault and harassment. The errors raised by the defendant are without merit and the judgment of sentence should be affirmed.

The credible evidence presented at trial disclosed that the following events transpired:

On November 20, 2005, the defendant and his girlfriend, Loretta Wood, were at Wood's residence in Kennedy Township, Pennsylvania. They had just finished watching the Pittsburgh Steelers' football game. The two had been drinking alcohol during this time. After the football game, a game which the Steelers lost, the defendant and Ms. Wood had some sort of physical interaction which resulted in Ms. Wood's being injured. Immediately after the incident, Pittsburgh Police Officers responded to the scene. Officer Saniga, one of the responding officers, testified at trial that Ms. Wood advised him on the scene that she and the defendant had an argument that resulted in the defendant striking her in the face. At the time of the police response, Ms. Wood was shaken and crying. After observing Ms. Wood's injuries, Officer Saniga summoned Emergency Medical Services. She was transported to the University of Pittsburgh Medical Center at Shadyside. The medical records admitted at the trial, without defense objection, indicated that Ms. Wood presented at the hospital claiming that the defendant punched her in the left eye after they had a disagreement. Ms. Wood suffered a left orbital fracture as a result of being punched by the defendant. At trial, both Ms. Wood and the defendant testified that the injuries were the result of horseplay between them.

The defendant claims that the evidence was insufficient to convict him of simple assault. When considering a challenge to the sufficiency of the evidence, the appellate court must determine whether the evidence at trial, and all reasonable inferences derived therefrom, when viewed in a light most favorable to the Commonwealth, establish all of the elements of the offense of conviction beyond a reasonable doubt. *Commonwealth v. May*, 584 Pa. 640, 647, 887 A.2d 750, 753 (2005). It is for the trier of fact to make credibility determinations. *Commonwealth v. Schoff*, 911 A.2d 147, 159 (Pa.Super. 2006). Any doubts concerning a defendant's guilt are to be resolved by the fact-finder unless the evidence was so weak and inconclusive that no probability of fact could be drawn from the evidence. *Id.*

With respect to the conviction at Count 2, Title 18 Pa.C.S.A. §2701(a)(1), states that a person is guilty of simple assault if he "attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another." 18 Pa.C.S. §2701(a)(1); See *Commonwealth v. Jackson*, 907 A.2d 540, 545 (Pa.Super. 2006). Bodily injury is statutorily defined as an "impairment of physical condition or substantial pain." 18 Pa.C.S.A. 2301. The left orbital fracture is, indeed, a bodily injury under Pennsylvania law. See *Commonwealth v. Biagini*, 540 Pa. 22, 655 A.2d 492 (1995) (bodily injury proved where defendant punched police officer in the face).

This Court found the testimony of Officer Saniga and the information contained in the medical records to be credible in this case. The testimony of Officer Saniga demonstrated that the victim was struck in the left eye by the defendant after an argument ensued between the defendant and Ms. Wood. Moreover, the medical records introduced into evidence in this case likewise demonstrate that Ms. Wood was injured after an argument with the defendant which culminated in the defendant striking Ms. Wood with his fist. This Court discounted the version of the events offered at trial by both Ms. Wood and the defendant. They have apparently reconciled and it was this Court's impression after hearing the testimony of each person that they were attempting to minimize the seriousness of the incident. Moreover, the nature of the injury, a fracture of the left orbital bone, is of such seriousness that this Court doubts that the injury could have been caused by the minor level of horseplay described by the pair. This evidence was sufficient to prove beyond a reasonable doubt that the defendant attempted to cause bodily injury to Ms. Wood and it was sufficient to prove that the defendant caused bodily injury to Ms. Wood. Additionally, the evidence was sufficient to prove that the defendant recklessly caused injury to Ms. Wood. Under the Pennsylvania Criminal Code,

[a] person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstance known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

Commonwealth v. Huggins, 836 A.2d 862, 868-869 (Pa. 2003); *Commonwealth v. Comer*, 552 Pa. 527, 716 A.2d 593 (Pa. 1998); *Commonwealth v. Bullick*, 830 A.2d 998, (Pa.Super. 2003); see also *Commonwealth v. Mastromatteo*, 719 A.2d 1081, 1083-84 (Pa.Super. 1998) citing 18 Pa.C.S.A. 302(b)(3).

Assuming, but certainly not conceding, that actions of the defendant could be construed as not being intentional, the act of punching Ms. Wood in the face demonstrated that the defendant ignored a substantial and unjustifiable risk that Ms. Wood would suffer bodily injury. The elements of simple assault, 18 Pa.C.S. §2701(a)(1), were sufficiently proven in this case.

With respect to the conviction at the summary harassment count, Title 18 Pa.C.S.A. §2709(a)(1) provides that:

(a) OFFENSE DEFINED—A person commits the crime of harassment when, with intent to harass, annoy or alarm another, the person:

(1) strikes, shoves, kicks or otherwise subjects the other person to physical contact, or attempts or threatens to do the same;

Harassment includes subjecting someone to physical contact, or attempting or threatening to do so, with intent to annoy or alarm the person. *Commonwealth v. Kirwan*, 847 A.2d 61, 64 (Pa.Super. 2004). As set forth above, the testimony of Officer Saniga and the information contained in the medical records admitted in this case was sufficient to establish that defendant subjected Ms. Wood to physical contact with the intent to harass, annoy or alarm her. A boyfriend's act of punching his girlfriend in the face during an argument is, indeed, indicative of an intent to annoy or alarm her. An intent to harass could also be inferred from such an act.

The judgment of sentence should be affirmed.

BY THE COURT:
/s/Mariani, J.

Commonwealth of Pennsylvania v. Donald Varner

Electronic Communications—Admission as Evidence

1. The admissibility of postings on MySpace to impeach a witness is an issue of first impression for the courts of the Commonwealth.

2. The Rules of Evidence applicable to non-electronic evidence apply to electronic communications.

3. Instant messages are to be evaluated on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity.

(Rhoda Shear Neft)

Chris Hoffman for the Commonwealth.

Eric Randolph for Defendant.

No. CC: 200515196. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

McDaniel, A.J., November 27, 2007—The Defendant has appealed from the judgment of sentence entered by this Court on May 16, 2007. A review of the record reveals that the single issue raised by the Defendant on appeal lacks merit and, therefore, the judgment of sentence should be affirmed.

The Defendant was charged with Statutory Sexual Assault,¹ Involuntary Deviate Sexual Intercourse,² Aggravated Indecent Assault,³ Indecent Assault,⁴ Corruption of Minors⁵ and Endangering the Welfare of a Child.⁶ The evidence presented at trial established that the Defendant smoked marijuana with the victim, the then-15-year-old friend of his stepdaughter, the morning after a sleep-over. He then removed her clothing, fondled her, performed oral sex on her and raped her. Following a jury trial, the Defendant was convicted of all charges. This timely appeal followed.

During defense counsel's cross-examination of the victim, the following occurred at sidebar:

MR. RANDOLPH: Your Honor, I think I have an opportunity to try to impeach this girl's credibility as a witness. She is sitting up here obviously denying everything. I mean, I think the jury has to have the opportunity to grant whatever weight it might want to grant to some of the questions that I'm asking.

THE COURT: Her prior sexual activity, if any, is

totally irrelevant. I think it is called Rape Shield.

MR. RANDOLPH: I understand that. But the question about the Act 53 has nothing to do with the Rape Shield.

THE COURT: Wait. I don't know what an Act 53 is.

MR. RANDOLPH: Well, she sure does.

THE COURT: This is under prior sexual activity.

MR. RANDOLPH: Under what?

THE COURT: Under prior sexual activity. You're alleging that this—so the record is clear, this is an Internet posting?

MR. RANDOLPH: That's correct. This is from MySpace.

THE COURT: Who wrote this?

MR. RANDOLPH: She did.

MR. HOFFMAN: There is no way to authenticate it.

MR. RANDOLPH: She can authenticate it. It's her writing. Ask her regarding what her screen name is, her—

THE COURT: No. I disagree. The objection is—this is an IM?

MR. RANDOLPH: No.

MR. HOFFMAN: It would be a posting on MySpace, which there is no way to authenticate it. Two, it's not relevant to the facts of this case.

THE COURT: The objection is sustained.

(Trial Transcript, p. 45-46). The Defendant now alleges that this Court erred in prohibiting impeachment of the victim with the purported postings on her MySpace page. This claim is meritless.

The issue of the admissibility of information posted on MySpace pages is an issue of first impression for this Court. Though sister jurisdictions have addressed the general admissibility of email and internet postings, this Court was unable to find any cases in which a defendant sought to impeach a victim with postings from her MySpace page. The jurisdictions which have addressed the admissibility of internet postings generally tend to use a hearsay analysis (some, however, take a best evidence approach) and while that analysis may well be an appropriate standard, this Court need not reach that question, as the proposed postings in this case fail the prerequisite of authentication.

Generally, "the admission of evidence is a matter committed to the sound discretion of the trial court and the courts evidentiary decisions will not be overturned absent an abuse of discretion." *Commonwealth v. Constant*, 925 A.2d 810, 818 (Pa.Super. 2007). While our courts favor the admissibility of any relevant evidence, Rule 901 of the Pennsylvania Rules of Evidence makes authentication a "condition precedent to admissibility." Pa.R.Evid. 901(a). Demonstrative evidence must be authenticated by the offering party, who must present "evidence sufficient to support a finding that the matter in question is what its proponent claims." *Commonwealth v. Serge*, 896 A.2d 1170, 1177 (Pa. 2006).

The Defendant relies exclusively on *In the Interest of F.P.*, 878 A.2d 91 (Pa.Super. 2005), a delinquency assault case which originated in the Juvenile Division of this Court, and which is the only Pennsylvania case that even approaches

the question before this Court. In *F.P.*, the Commonwealth sought to introduce a transcript of an IM–instant message–between the defendant and the victim wherein the defendant threatened to assault the victim. The IM transcript was admitted at the delinquency hearing over the defendant’s objection and the Superior Court affirmed its admission. In *F.P.*, the Superior Court began with an authentication analysis, much as this Court has, and noted that in that particular case, the IM transcript was properly authenticated by circumstantial evidence. The victim testified after receiving the IM threats, in which the defendant identified himself by name, he told a school counselor, who then met with the defendant. It was noted specifically that the defendant did not deny he sent the messages. Furthermore, the messages were sufficiently specific and referred to the victim’s report to school officials and the exact location of the assault. Under the circumstances, the court found that there was sufficient evidence that the defendant sent the messages and that they had been properly authenticated by circumstantial evidence. The Court held that “email messages and similar forms of electronic communication can be properly authenticated within the existing framework of Pa.R.E. 901 and Pennsylvania case law.... We see no justification for constructing unique rules for admissibility of electronic communications such as instant messages; they are to be evaluated on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity.” *In the Interest of F.P.*, 878 A.2d 91, 95-96 (Pa.Super. 2005), emphasis added. Contrary to the Defendant’s assertion, *F.P.* is not a mandate for the automatic admissibility of all forms of electronic communication.

MySpace is “a social networking website offering an interactive, user-submitted network of friends, personal profiles, blogs, groups, photos, music and videos internationally.” <http://en.wikipedia.org>. It is different than an IM as referenced in *F.P.*, above, in that IMs are akin to a typed telephone conversation whereas MySpace pages are personal web pages. Anyone may create their own MySpace page by signing up for an account. The sign-up process does not include any type of identity verification, and users may choose their own “user name” or “screen name.” Thus, it would be possible for someone to create a MySpace page or username in the identity of or while pretending to be another. Moreover, anyone with a MySpace account can post a message to another’s MySpace page.

The evidence sought to be introduced was a six (6) page document which appears to be a series of messages between individuals with the usernames “oxRosiexo143” and “TAWNsTeR89XOXO.” The real names of the users are not identified in the document, and the document is not dated. There is nothing on the document which identifies it as a posting from a MySpace page, nor is there anything on the document which identifies the identity of the MySpace user from whose page it was taken. There is no internet address reference at the bottom of the page, which in this Court’s experience appears automatically when information is printed from the internet. In fact, the document itself appears to be a printout from a word-processing program and it could easily be duplicated–or even created–by anyone with rudimentary word-processing skills. There is nothing on or about this particular document which demonstrates that it is what the Defendant claims it to be–namely statements made by the victim which she posted on her MySpace page.

This Court agrees that the substance of the document does appear to concern in part the allegations made by the victim in this case–allegedly “TAWNsTeR89XOXO.” It also appears to concern threats made by the Defendant’s step-

daughter–allegedly “oxROSIExo143” against the victim. However, the fact that the document references the allegations of this case is not enough to authenticate it under the Rule 901 framework. See *F.P.*, *supra*. In addition to the lack of self-authentication discussed above, there was no testimony presented that the document was what the Defendant claims it to be. For example, the Defendant could have presented the testimony of his step-daughter which may (or may not) have been enough to authenticate the document; however, he did not do so. Further, unlike in the *F.P.* case, the parties to these postings did not identify themselves by name, nor was there any other trial testimony regarding the postings–such as in *F.P.* where there was testimony that the IMs were discussed with the school counselor and the defendant did not deny writing them. In sum, there was simply insufficient evidence presented to authenticate these particular purported MySpace postings. As such, this Court’s ruling was proper and the Defendant’s claim is without merit.

This Court is conscious that we live in an increasingly technological age in which electronic communication is fast becoming the norm, and as such, is mindful that more and more crimes are being committed using the internet. By this ruling, this Court does not mean to suggest that MySpace postings are not or will never be admissible. Rather, it means that in this particular case, these particular postings were not authenticated and therefore could not be admitted.

Accordingly, for the above reasons of fact and law, the judgment of sentence should be affirmed.

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

November 27, 2007.

¹ 18 Pa.C.S.A. §3122.1

² 18 Pa.C.S.A. §3123

³ 18 Pa.C.S.A. §3125

⁴ 18 Pa.C.S.A. §3126

⁵ 18 Pa.C.S.A. §6301

⁶ 18 Pa.C.S.A. §4304(a) (2 counts)