

PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

- Trafford Corporation v. Columbia Gas of Pennsylvania, Inc., Columbia Gas of Maryland, Inc. and Columbia Energy Group Service Corporation, Horgos, J.**Page 125
Breach of Contract—No-Oral-Modification Clause—Pennsylvania Contractor and Subcontractor Payment Act
- M.R. Mikkilineni and Talasila, Inc. v. Municipal Authority of the Borough of Punxsatawney, O'Reilly, J.**Page 130
Breach of Contract Action—Procurement Code—Contractor/Subcontractor Payment Act
- Deborah A. Noble n/k/a Deborah A. Hamilton v. J. William Noble a/k/a James W. Noble, et al., O'Reilly, J.**Page 134
Commercial Loans—Invasion of Trust Agreement—Forbearance Agreement
- Maurice A. Nernberg and Associates v. Reed Smith, LLP, Friedman, J.**Page 138
Tortious Interference with Fee Agreement—Aider and Abettor Liability—Civil Conspiracy—Rules of Professional Conduct
- Cavalla, Inc. v. Tri-State Plastics, Inc., Friedman, J.**Page 139
Motion for Post-Trial Relief
- Jefferson Regional Medical Center v. Vascular & Interventional Associates, Inc., et al., O'Reilly, J.**Page 142
Breach of Contract—Fraud—Puffing
- Commonwealth of Pennsylvania v. David Stephen Sullivan, McDaniel, A.J.**Page 143
Criminal Law—Post-Sentence Motions
- Commonwealth of Pennsylvania v. Jeremy Benjamin Ogrosky, Cashman, J.**Page 147
Criminal Law—Photo Array—Suppression of Evidence—Ineffective Assistance of Counsel
- Commonwealth of Pennsylvania v. Douglas Richard Kennedy, Sasinoski, J.**Page 150
Criminal Law—Driving Under the Influence
- Commonwealth of Pennsylvania v. John H. Ford, Cashman, J.**Page 150
Criminal Law—Insufficient Evidence

CAPSULE SUMMARIES

- Glenn Sieber v. Michele Sieber, Eaton, J.**Page 154
Alimony and Equitable Distribution: 80% of Estate awarded to Wife with 24 months of modifiable alimony—\$50,000 counsel fee award
- Rose Ann Lackovic v. Susan A. Czapko, James P. Czapko and Terence Dineen, Jr., Eaton, J.**Page 154
Custody—Contempt—Sanctions—Counsel Fees and Make-Up Time

PLJ

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

OPINIONS

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

ALLEGHENY JURY VERDICT REPORTER

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

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

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

CAPSULE SUMMARIES

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

BINDERS

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**Trafford Corporation v.
Columbia Gas of Pennsylvania, Inc.,
Columbia Gas of Maryland, Inc. and
Columbia Energy Group Service Corporation**

*Breach of Contract—No-Oral-Modification Clause—
Pennsylvania Contractor and Subcontractor Payment Act*

1. Where the parties' settlement agreement established new terms and did not affect the parties' rights and duties under their original contract, a no-oral-modification clause in the original contract would not preclude the jury's finding that there was an enforceable oral settlement agreement that had been breached.

2. While there was conflicting evidence on the issues introduced at trial, there was nothing inherently improbable or at variance with the evidence in the jury's verdict so as to shock the court's sense of justice. Accordingly, the court would not substitute its judgment for that of the jury.

3. Defendant's proposed special interrogatories were unnecessary because the issues were covered in the jury instructions and were implicit in the actual interrogatory presented to the jury.

4. Defendants could not claim error in the admission of testimony that the parties were "partners" where the evidence tended to show the origin and history of the transaction at issue and not the legal relationship of the parties, and where Defendants' own witnesses and counsel used the words "partners" and "partnership" when referring to the parties on several occasions.

5. Exclusivity provisions contained in a letter of intent and specifically negotiated by the parties take precedence over general language contained in boilerplate contract forms.

6. The Pennsylvania Contractor and Subcontractor Payment Act, 73 P.S. §§501 *et seq.* does not provide a requirement regarding "good faith" claims in regard to the award of attorneys' fees.

(Laura A. Meaden)

Christopher R. Opalinski for Plaintiff.
Kevin C. Abbott for Defendants.

No. GD 03-15284. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Horgos, J., January 24, 2008—Plaintiff, Trafford Corporation (Trafford), filed a Complaint in Civil Action against Defendants, Columbia Gas of Pennsylvania, Inc., Columbia Gas of Maryland, Inc. and Columbia Energy Group Service Corporation (Columbia), to recover damages for breach of contract claims. Following a jury trial from March 15, 2006 through March 29, 2006, the jury returned a Verdict in favor of Trafford on Count III (Violation of the Exclusivity Provisions in the Contracts) and Count IV (Breach of Oral Contract) and awarded damages to Trafford in the amount of \$2,401,000.00. Columbia filed Motions for Post-Trial Relief which were denied by Order of Court dated March 26, 2007. Columbia filed a timely Notice of Appeal to the Pennsylvania Superior Court.

The cause of action arose from several contracts entered into by Trafford and Columbia for pipeline construction by Trafford for various Columbia operational areas, including

Pennsylvania and Maryland.

Trafford and Columbia first entered into three (3) Blanket Contracts (Blanket Contracts) for pipeline construction, each of which was for a three-year term from 2000 to 2003. The parties also entered into four (4) additional contracts for restoration work to be performed by Trafford on roadways in the three regions in which it performed pipeline work for Columbia (Paving Contracts).

The Blanket Contracts and the Paving Contracts included exclusivity provisions which gave Trafford the exclusive right to perform all of the work within the scope of the specific contracts that Columbia assigned and scheduled within the operational areas covered by the contracts. Trafford and Columbia negotiated prices and executed a Letter of Intent dated November 19, 1999 which memorialized the negotiations and understandings reached by the parties. Mark Miller, the Vice President of Trafford, signed the Letter of Intent on or about November 29, 1999 and Columbia signed it on December 7, 1999. The Letter of Intent terms were expressly made part of each of the written contracts for 2000 through 2003.

In its Complaint, Trafford alleged that Columbia failed to properly pay Trafford for the work performed under the Blanket Contracts. Although Columbia was required to pay Trafford within 30 days of performance as recorded on Daily Field Reports (DFR's), Trafford presented evidence that Columbia did not pay the total amount owed under the various DFR's and failed to pay others at all. The Blanket Contracts also included a method to compensate for "show up" time on rain days but Columbia did not pay for those submissions.

Trafford presented evidence at trial to show that deficient payments began shortly after the inception of the Blanket Contracts in 2000 and continued through the terms of the contracts. By early 2002, Trafford claimed that Columbia owed it in excess of \$650,000.00 for work performed under the Blanket Contracts.

John Pultan, the President of Trafford, and Mark Miller, the Vice President of Trafford during the relevant time period, testified that they reached a settlement agreement with Columbia regarding the claim. Larry Smore, the Vice President and Chief Operating Officer of Columbia, also testified regarding the settlement agreement. The agreement reduced Columbia's outstanding debt to Trafford to \$350,000.00 and gave Trafford a three-year contract with the right of first refusal on all projects performed in the Pennsylvania/Maryland region. The agreement was for three years of additional work at different units and unit pricing than the previous Blanket Contracts. On August 23, 2002, John Pultan and Larry Smore agreed to the terms and Kevin Steele of Columbia confirmed the agreement with Mark Miller of Trafford.

Count III of Plaintiff's Complaint alleged violation of the exclusivity provisions in the 2000 to 2003 contracts and Count IV alleged breach of the oral contract covering 2003 through 2006, including its exclusivity provisions. The jury awarded Trafford \$278,000.00 in damages on Trafford's claim of breach of the exclusivity provisions in the 2000 to 2003 contracts and \$2,123,000.00 on Trafford's claim in Count IV for breach of the oral contract. On August 11, 2006 and January 27, 2007, the Court granted Plaintiff's Motion to Mold the Verdict and awarded Plaintiff attorneys' fees and costs pursuant to the Pennsylvania Contractor and Subcontractor Payment Act.

Columbia's Statement of Matters Complained of on Appeal filed pursuant to Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure challenges this Court's Order of March 27, 2007 denying Columbia's Motions for Post-Trial

Relief which sought both entry of judgment in Columbia's favor as a matter of law and a new trial. Columbia further challenges on appeal this Court's orders granting Plaintiff's Motion to Mold the Verdict and awarding attorneys' fees under the Pennsylvania Contractor and Subcontractor Payment Act.

Columbia sets forth approximately thirty-one (31) allegations of error.

Denial of Motion for Judgment Notwithstanding the Verdict on Plaintiff's Claim for Breach of Oral Agreement

First, Columbia argues that the Court erred in failing to enter judgment notwithstanding the verdict in favor of Columbia on Plaintiff's claim for breach of oral agreement (Count IV). Judgment notwithstanding the verdict must be entered by the trial court when the movant is entitled to judgment as a matter of law. Thus, entry of judgment is required when the law requires a verdict in favor of the movant even when all factual inferences are decided adverse to the movant. *Davis v. Berwind Corp.*, 690 A.2d 186, 189-190 (Pa. 1997).

Judgment notwithstanding the verdict is also required when "reading the record in the light most favorable to...the verdict winner, and affording it the benefit of all reasonable inferences,...there is insufficient, competent evidence to sustain the verdict." *Pennsylvania Dept. of General Services v. U.S. Mineral Products Co.*, 898 A.2d 590, 604 (Pa. 2006). The Pennsylvania Superior Court has explained:

The jury may not be permitted to reach its verdict merely on the basis of speculation and conjecture, but there must be evidence upon which logically its conclusion may be based. Therefore, when a party who has the burden of proof relies upon circumstantial evidence and inferences reasonably deducible therefrom, such evidence, in order to prevail, must be adequate to establish the conclusion sought and must so preponderate in favor of that conclusion as to outweigh in the mind of the fact-finder any other evidence and reasonable inferences therefrom which are inconsistent therewith.

Van Zandt v. Holy Redeemer Hosp., 806 A.2d 879 (Pa.Super. 2002) (citations and internal quotations omitted).

Columbia specifically argues that it was entitled to judgment notwithstanding the verdict on Count IV because Plaintiff failed to prove the existence of an oral contract or alternatively, even if there was an oral contract, it was not binding on Columbia because the written contract between the parties contained a no-oral-modification clause prohibiting oral modifications. Related to this argument is Columbia's further contention that there was insufficient evidence that the alleged oral contract was a new agreement rather than a modification of the parties' prior agreements.

At trial, Trafford set forth clear and convincing evidence that when Columbia failed to pay Trafford for outstanding payments, the parties entered into negotiations to resolve the dispute and allow the parties to continue their working relationship. The evidence set forth by witnesses for both Trafford and Columbia was clearly sufficient for the jury to find that Trafford and Columbia reached a binding settlement agreement by which Trafford agreed to accept \$350,000.00 for the outstanding payments due based on Columbia's agreement to provide Trafford with a new three-year contract under which Trafford would perform all of Columbia's pipeline work in Pennsylvania and Maryland from 2003 through 2006.

Specifically, the testimony of Trafford's President, John Pultan, and its Vice President, Mark Miller, together with the

testimony of Columbia's Chief Operating Officer, Larry Smore, and its Contract Administrator, Kevin Steele, established that Trafford and Columbia agreed to the settlement to resolve the payment dispute and allow the parties to continue their working relationship. Mr. Pultan testified that he discussed a resolution of the payment issue with Larry Smore in 2001 and suggested that the parties agree on a discounted figure and provide Trafford the opportunity to perform work for Columbia for three more years. (Tr. 792-793). Mr. Pultan was not willing to settle for \$350,000.00 without receiving the commitment of additional work from Columbia. (Tr. 802).

On August 23, 2002, Mr. Pultan met with Larry Smore to discuss the settlement proposal and later informed Mark Miller of the proposal. (Tr. 806). After Mr. Miller agreed, Mr. Pultan called Larry Smore and informed him that the proposal was acceptable to Trafford and Mr. Smore replied: "Done deed, let's go with it." (Tr. 806).

During Mr. Pultan's various discussions with Mr. Smore, Mr. Smore never told John Pultan that the settlement agreement they had reached had to be approved by anyone else at Columbia or that the agreement had to be finalized in writing before it would be effective or payment would issue. (Tr. 808).

The understanding was that the agreement encompassed three years of additional work with new unit descriptions and unit prices which John Pultan had previously proposed and reviewed with Kevin Steele. (Tr. 805-806, 838, 848). Further, the settlement agreement was a new contract which was to commence at the expiration of the original Blanket Contracts. (Tr. 853).

Mark Miller corroborated Mr. Pultan's testimony regarding the settlement contract. He testified that Trafford had informed Columbia that it would accept a discounted amount for the outstanding receivables in exchange for additional work. (Tr. 409). Mr. Miller further testified that he received a separate phone call from Kevin Steele in which Steele advised that he had just talked to Larry Smore and that Mark Miller should send him an invoice for \$350,000.00. (Tr. 242). Mr. Miller testified that Kevin Steele said that Larry Smore advised him: "It's a done deal." (Tr. 455).

The testimony of Kevin Steele, a Contract Administrator for Columbia, strongly corroborated the testimony of Trafford's witnesses concerning the existence of the settlement agreement. Specifically, he stated that senior Trafford representatives indicated that they wanted to settle the dispute. (Tr. 891). Steele testified that Larry Smore signed contracts between Columbia and Trafford and that Mr. Smore was the Columbia representative designated to negotiate the settlement between Trafford and Columbia. (Tr. 894-895). Mr. Steele testified: "Mr. Smore would have had to approve" a settlement agreement between Columbia and Trafford. (Tr. 898-899). He also admitted that he called Mark Miller and told Mr. Miller to send him the invoice for \$350,000.00. (Tr. 900-901). Mr. Steele further testified that Larry Smore requested him to prepare the contracts and the paperwork for the settlement agreement. (Tr. 903). He further stated that he prepared and sent to Larry Smore a three-year contract for signature. (Tr. 903-905, 1298-1299). Mr. Steele testified:

Q. Did you prepare, Mr. Steele, a contract extension document for Mr. Smore to sign? You had earlier testified that there was documentation on the desk ready to be signed. Did you prepare that paperwork?

A. Yes, and I wouldn't consider it an extension, but it was another contract, a separate contract from

the agreement that this is covering. And it was a multiple year contract.

Q. A three-year contract?

A. Yes.

(Tr. 1298-1299). His testimony, therefore, confirms that both Columbia and Trafford considered the settlement agreement to be a separate contract from the original Blanket Contracts.

Larry Smore testified that he had the authority to enter into contracts to bind Columbia. (Tr. 1256). He admitted that he entered into negotiations with senior representatives of Trafford to resolve the payment issues and stated that these negotiations included discussions regarding a contract for additional work. (Tr. 1241, 1281-1282, 1310). Mr. Smore clearly stated regarding the negotiations: "I was fine with \$250,000.00. And I think we are still negotiating any and all of the terms and conditions of the new contract." (Tr. 1275).

Columbia argues in its Motions for Post-Trial Relief and Statement of Matters Complained of on Appeal that Trafford did not provide clear and convincing evidence of the existence of an oral contract between Trafford and Columbia. Columbia argues alternatively that the agreement between the parties was merely a modification of the parties' contracts and thus subject to a no-oral-modification provision of the original contracts.

The evidence at trial, highlighted by the testimony of the four witnesses herein discussed, was sufficient for the jury to find that a new contract was in existence that had two components: a \$350,000.00 cash payment and three years of additional work for the period 2003 through 2006. The terms of the agreement contained new unit descriptions and new unit prices. Importantly, the new agreement did not change or alter the unit descriptions or the unit prices under the Blanket Contracts but took effect after the expiration of the Blanket Contracts. (Tr. 401, 412). In short, none of the work under the Blanket Contracts was affected by the settlement agreement. Even the \$350,000.00 cash payment could not be said to modify a term of the Blanket Contracts but reflected the settlement of an outstanding receivables dispute.

Columbia argues that Trafford failed to prove waiver of the no-oral-modification provision of the Blanket Contracts and that the Court was required to charge the jury on the law governing waiver of a no-oral-modification clause. Columbia relies on *C.I.T. Corp. v. Jonnet*, 214 A.2d 620 (Pa. 1965) and *Douglas v. Benson*, 439 A.2d 779 (Pa.Super. 1982) regarding Pennsylvania's enforcement of a no-oral-modification clause in a contract. In both of these cases, however, the parties challenging the clauses had attempted to alter rights and obligations of the parties under the existing contracts that contained no-oral-modification clauses. Such is not the case here. The settlement agreement established new terms and did not affect rights and duties under the Blanket Contracts. Accordingly, the no-oral-modification clause does not preclude the jury's finding that there was an enforceable oral settlement agreement that was breached.

Columbia argues that Trafford must prove two elements by clear and convincing evidence in order to prevail on its oral contract claim: 1) that Columbia waived the no-oral-modification clause in the Blanket Contracts; and 2) that the parties entered into an oral agreement to settle Trafford's claim for \$350,000.00 and to extend the contracts for three years with an exclusivity provision. Columbia insists that it is of no consequence if Trafford proves the existence of a new oral contract if there is not first sufficient proof of a waiver of the no-oral-modification clause.

Parties to a written contract may modify the contract orally although the contract provides that it can only be mod-

ified in writing. The modification can occur and be evidenced by the parties' words, writings or conduct. See: *Universal Builders, Inc. v. Moon Motor Lodge, Inc.*, 244 A.2d 10 (Pa. 1968).

Even where the contract specifically states that no nonwritten modification will be recognized, the parties may yet alter their agreement by parol negotiation. The hand that pens a writing may not gag the mouths of the assenting parties. The pen may be more precise in permanently recording what is to be done, but it may not still the tongues which bespeak an improvement in or modification of what has been written.

Wagner v. Graziano Constr. Co., 136 A.2d 82, 84 (Pa. 1957) (quoting *Achenbach v. Stoddard*, 253 Pa. 338, 98 A. 604, 605 (1916)).

This issue was previously addressed in this case by the Honorable R. Stanton Wettick at the summary judgment stage of the proceeding where he stated that Pennsylvania courts find a waiver of a no-oral-modification clause upon a showing that the parties entered into a verbal modification that was not to be reduced to writing before it would be binding. *Trafford Corporation v. Columbia Gas of Pennsylvania, Inc., et al.*, GD03-15284, (Memorandum Opinion, September 7, 2005, p. 4).

As earlier discussed, Trafford presented sufficient evidence at trial to establish a binding oral settlement agreement. This agreement could be found by the jury to have been a waiver of the no-oral-modification clause. The evidence at trial also established that Trafford and Columbia engaged in a course of performance of not requiring a written contract, including starting work under the Blanket Contracts without the agreements being reduced to writing, performing a variety of boring work without any written contract, renting equipment without a writing and amending lease obligations without a writing. (Tr. 129-133, 783, 785). Thus, this evidence was sufficient to provide the jury with a reasonable basis on which to conclude that the no-oral-modification clause had been waived.

Denial of Motion for New Trial on Plaintiff's Oral Contract Claim

Columbia argues that it is entitled to a new trial on Trafford's oral contract claim because the jury's Verdict is against the weight of the evidence and against the law. Columbia maintains that the jury's Verdict bears no rational relationship to the evidence adduced at trial regarding the oral agreement.

As the Pennsylvania Superior Court has explained:

A new trial based on a weight of the evidence claim should be granted to a party only where the verdict is so contrary to the evidence as to shock one's sense of justice [and not] where the evidence is conflicting [or] where the trial judge would have reached a different conclusion on the same facts.

Womack v. Crowley, 877 A.2d 1279, 1283 (Pa.Super. 2005) (Citations omitted). "The authority of the trial judge to upset a verdict premised upon a weight claim is narrowly circumscribed." *Armbruster v. Horowitz*, 813 A.2d 698 (Pa. 2002).

Here, as discussed in relation to Columbia's request for judgment notwithstanding the verdict, there was sufficient evidence adduced at trial to support the jury's finding of a binding oral agreement and the breach of that agreement. While there was certainly conflicting evidence on the issues, it was within the province of the jury to weigh the credibility of the witnesses. There is nothing inherently improbable or at variance with the evidence in the jury's verdict and the

verdict is not shocking to the Court's sense of justice. There is no compelling reason alleged by Columbia for this Court to substitute its judgment for that of the jury.

Columbia argues that the Court's instructions on the oral agreement claim were erroneous as a matter of law and might have had an effect on the jury. Specifically, Columbia maintains that the Court failed to properly charge the jury on the law-governing waiver of a no-oral-modification clause. Columbia states that the Court was required to instruct the jury that in order to find in favor of Trafford on the oral contract claim, it had to first find by clear and convincing evidence that Columbia intended to waive the no-oral-modification clause.

The Court's instructions to the jury must accurately and fairly describe the applicable law and be sufficient to guide the jury in its deliberations. *Empire Properties, Inc. v. Equireal, Inc.*, 674 A.2d 297 (Pa.Super. 1996). Here, the Court gave the standard charge on waiver which summarizes the relevant Pennsylvania law:

[P]arties to a contract may modify or waive the provisions of a contract either expressly or implicitly, meaning that the modification or waiver can occur and be evidenced by the parties' words, writings, conduct, or all three, even if the contract states that it may not be amended or has to be amended in writing.

(Pa. SSJI (Civ) 15.05; Tr. 1798).

The Court further instructed the jury that "if you find that the settlement agreement was a modification of the existing Blanket Contracts, then you must determine the issue of waiver." (Tr. 1798). The Court's instructions fairly and accurately informed the jury of the governing law in Pennsylvania on the waiver issue.

Columbia also complains that the Verdict Slip used by the jury "did not ensure that the jury would make all determinations required before a verdict could be entered in Trafford's favor on the oral agreement claim." (Defendants' Brief in Support of Motions for Post-Trial Relief, p. 32).

The Pennsylvania Superior Court stated the general rule regarding a trial court's authority to rule on a request for special interrogatories:

Generally, a trial judge in Pennsylvania may grant or refuse a request for special findings on the basis of whether such would add to the logical and reasonable understanding of the issue. We will not disturb a trial judge's decision to grant or refuse the request absent an abuse of discretion.

(Citations omitted). *Fisch's Parking, Inc. v. Independence Hall Parking, Inc.*, 638 A.2d 217, 223 (Pa.Super. 1994).

Columbia's proposed interrogatories were unnecessary because the issues were covered in the jury instructions and were implicit in the actual interrogatory presented to the jury. No subsidiary findings that Columbia claims were required to establish an oral agreement were necessary. There was no error in this Court's refusal to grant Columbia's request for additional interrogatories.

Columbia also argues that the Court's admission of evidence which suggested that Trafford and Columbia had a partnership relationship is grounds for a new trial. The evidence to which Columbia objects was admitted because it was relevant to show Trafford's relationship with Columbia and Columbia's course of conduct in ignoring the underlying intent and design of the parties' Blanket Contracts. Columbia identifies the issue as whether Columbia and Trafford were partners "as that relationship is defined under the law." (Defendants' Brief in Support of Motions for Post-Trial Relief, p. 34). The evidence of the relationship between

Trafford and Columbia tended to show the origin and history of the transaction at issue between the parties rather than to determine the legal relationship of the parties. Moreover, while Columbia complains that evidence of a partnership was not admissible, its own witnesses and counsel, on several occasions, used the terms "partners" and "partnership" when referring to Trafford and Columbia. See: Tr. 755, 756, 1431, 1455, 1468, 1650, 1733). Columbia cannot now claim that it was error for the Court to allow evidence regarding the relationship of the parties and the history of the transaction at issue although the terms "partner" and/or "partnership" were used by counsel and witnesses for both parties.

Denial of Motion for Judgment Notwithstanding the Verdict on Breach of Written Agreement

Count III of Trafford's Complaint alleged that Columbia breached the exclusivity provisions of the Blanket Contracts. The jury found Columbia liable on this claim and awarded Trafford \$278,000.00 in damages.

This claim arose from provisions contained in the written contracts for 2000 to 2003 which were provided in a Letter of Intent presented to Mark Miller by Larry Smore on November 29, 1999, the terms of which were expressly incorporated into each of the written contracts. (Tr. 104, 336; Joint Exhibits 1-3 at Exhibit A, pp. 2-5). Under the terms of the Letter of Intent, Trafford was entitled to perform all work described as blanket construction of new and replacement mains and miscellaneous maintenance activities within the term of the contract period and located within defined Columbia operating areas in Pennsylvania and Maryland. Trafford was designated as the "preferred supplier" of all work located within the Western Pennsylvania operating area. (Joint Exhibits 1-3 at Exhibit A, p. 3). Columbia agreed that it would "approach Trafford first for the work" in Western Pennsylvania. (Tr. 91-92; Joint Exhibits 1-3 at Exhibit A, p. 3 n. 1). Columbia was only permitted to solicit proposals from other contractors in the Western Pennsylvania operating area if Columbia and Trafford failed to agree on terms for a specific job. (Tr. 91-92).

Columbia does not deny that it used several other contractors for work during the relevant time period but claims that such work was within specifically negotiated exceptions to the exclusivity provisions of the parties' agreement. In fact, the Letter of Intent contains a number of specifically negotiated exceptions to the exclusivity provision including: (1) work that Columbia chooses to self-perform with its own crews and/or labor; (2) work that falls outside the geographic boundaries; (3) work that is outside the scope of the contracts; (4) work required to be separately and competitively bid; (5) work given to another contractor solely for the purpose of determining the contractor's qualifications; (6) work that Columbia negotiates as a dig and backfill agreement; and (7) meter movements. (Tr. 91-96; Joint Exhibits 1-3 at Exhibit A., p. 3).

Columbia states that the most relevant exceptions to the exclusivity provision are the following. Columbia did not have to use Trafford if: (1) Trafford could not meet Columbia's scheduling requirements; (2) the total, estimated cost of a project exceeded \$250,000; or (3) the work was part of the consideration for a line extension or construction project. (Joint Exhibits 1-3 at Exhibit A at pp. 1 and 3). Columbia, however, cites to the form exclusivity exceptions contained in the Blanket Contract Conditions. Columbia actually ignores the exclusivity exceptions contained in the Letter of Intent and ignores the express statement in the Letter of Intent: "the understanding that any final agreement to be entered into will include at least the following terms and conditions" and is "expressly made a part of [each

Blanket Contract].” (Joint Exhibits 1-3 at p. 1, Exhibit A, p. 1). Some provisions of the Blanket Contract Condition Forms directly conflict with the specifically negotiated Letter of Intent exclusivity provisions.

For example, Columbia argues that Trafford was unable to meet Columbia’s unilaterally set schedule so that it was excused from the exclusivity provisions when it awarded work to Lineal Industries, Wright Industries, Horizontal Boring and Henson and Sons. The scheduling exception on which Columbia relies, however, is not listed in the Letter of Intent which represents the final, negotiated agreement reached by the parties regarding exceptions to the exclusivity provisions. Columbia relies on the form exclusivity exception that appears in the Blanket Contract Conditions.

The Restatement (Second) of Contracts sets forth two relevant standards of preference in the interpretation of contracts:

Section 203. Standards of Preference in Interpretation

In the interpretation of a promise or agreement or a term thereof, the following standards of preference are generally applicable:

- (c) specific terms and exact terms are given greater weight than general language;
- (d) separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated.

Specific terms negotiated as part of an agreement between the parties take clear precedence over general language contained in boilerplate contract forms. *PBS Coal v. Hardhat Mining*, 632 A.2d 903, 906 (Pa.Super. 1993). The language in the Letter of Intent is specific while the language of the standard form Conditions was more general. Further, there is no question that the Letter of Intent exclusivity exceptions were specifically negotiated by the parties. Columbia, however, continually relies on the form exclusivity exceptions found in the Blanket Contracts rather than the specific exclusivity provisions which were discussed and negotiated specifically by the parties.

Denial of Motion for New Trial on Plaintiff’s Breach of Exclusivity Clause

The jury’s Verdict on Plaintiff’s claim of breach of the exclusivity provisions of the Blanket Contracts was not contrary to the evidence and does not shock the Court’s sense of justice. Columbia’s argument that the Verdict is against the weight of the evidence and that a new trial must be granted is without merit.

Columbia argues that the Court should have instructed the jury that Trafford had the burden to prove that none of the exceptions to the exclusivity provisions applied under the circumstances of the alleged breaches. As a general rule, the burden of proving the applicability of a contractual exception is placed upon the party asserting it. *Zenner v. Goetz*, 324 Pa. 432, 435-436 (Pa. 1936). There was no error in the Court’s failure to instruct the jury that it was Trafford’s burden to prove that none of the exclusivity exceptions applied.

Denial of Columbia’s Post-Trial Motions on Damages

Columbia argues that the jury’s award of damages is not supported by substantial competent evidence and Columbia is entitled to entry of judgment in its favor; a new trial or remittitur. Columbia argues that the damages were not proven with reasonable certainty and were speculative and that the jury’s award of damages for lost profits under Counts III and IV was not supported by the evidence, was

excessive and based on an improper measure of damages.

Columbia maintains that Trafford failed to demonstrate actual lost profits as a result of the breach of the Blanket Contracts for the period 2000 through 2003 and the breach of the oral settlement agreement in 2003 through 2006. Columbia argues that Trafford failed to demonstrate that it could have performed the work that was given to the other contractors from 2000 through 2003 (Count III) and that it could have performed the Columbia work in addition to the work it did perform from 2003 through 2006 (Count IV).

To recover for lost profits in a breach of contract action, plaintiff must show with affirmative evidence that the loss resulted from the breach. *Delahanty v. First Pennsylvania Bank*, 464 A.2d 1243 (Pa.Super. 1983). The amount of the loss need not be shown with absolute or mathematical certainty but may be approximated by competent proof. *Am/Pm Franchise Ass’n v. Atlantic Richfield Co.*, 584 A.2d 915 (Pa. 1990).

Trafford did provide sufficient evidence from which the jury could find that Trafford was able to perform additional work during both time periods. Specifically, Trafford provided evidence which would tend to show that during the relevant time periods, Trafford had an established ability to increase capacity, it maintained additional established crews and a source of capital to buy equipment. Trafford also demonstrated Columbia’s failures in communication which prevented Trafford from efficiently utilizing labor and equipment. (Tr. 74, 145-146, 437-439, 829, 1034-1035).

Columbia also argues that the calculation of lost profits for the additional work under the oral contract was incorrect because Trafford based its figures on the prices negotiated by other contractors rather than the prices agreed to by the parties. Other contractors had, in fact, negotiated the prices because they had performed the work but it was of the same type and in the same market locations as the work Trafford would have performed. This was the figure available for the calculation. No other evidence was produced by Columbia to challenge the method of calculation or offer an alternative. The methodology utilized at trial provided a competent basis upon which the lost profits on a particular volume of work could be approximated to a reasonable certainty and met the requirements of proof of lost profits under Pennsylvania law.

Columbia further argues that Trafford’s expert’s lost profits calculation was incorrectly based on a “gross profit margin” rather than net profits. (Defendants’ Brief in Support of Motions for Post-Trial Relief, p. 40). To the contrary, Plaintiff’s expert correctly explained that for lost profits on unperformed work, gross profit margin appropriately deducts the actual cost of performing the work. (Tr. 969-972). Trafford has never sought the gross earnings or total revenues lost due to Columbia’s breach of the exclusivity provisions. “Trafford seeks the additional value of the work less direct and indirect costs of performing that work.” (Trafford Corporation’s Brief in Opposition to Columbia’s Motions for Post-Trial Relief, p. 65). Trafford’s expert’s calculations were not improper and Columbia is not entitled to judgment notwithstanding the verdict or remittitur.

Finally, Columbia objects to the Court’s award of penalty, interest and attorneys’ fees to Trafford under the Pennsylvania Contractor and Subcontractor Payment Act, 73 P.S. 501, *et seq.* (PCSPA). This issue was first addressed in pre-trial proceedings. In his Memorandum and Order of Court dated September 7, 2005, the Honorable R. Stanton Wettick clearly stated that he disagreed with Columbia’s position that the PCSPA does not apply and found that the PCSPA “covers a contractor which it defines as a person authorized or engaged by the owner to improve real property.” *Trafford Corporation v. Columbia Gas of Pennsylvania*,

Inc., et al., supra.

Under the PCSPA, contrary to Columbia's assertion, it must be shown that the contractor substantially prevailed in a proceeding to recover attorneys' fees. Columbia argues that "good faith" must be determined by the jury. The PCSPA does not provide a requirement regarding "good faith" claims in regard to the award of attorneys' fees. 73 P.S. 512(b). The only factual question relating to the PCSPA which remained in this case for jury determination was whether Trafford proved, by a preponderance of the evidence, that it was due payment under the terms of the contract and, if so, the amount that is due. As earlier stated, this issue was sufficiently addressed by the standard jury instructions on burden of proof for contract claims.

For all of the foregoing reasons, this Court denied Columbia's Motions for Post-Trial Relief.

BY THE COURT:
/s/Horgos, J.

M.R. Mikkilineni and Talasila, Inc. v. Municipal Authority of the Borough of Punxsatawney

*Breach of Contract Action—Procurement Code—
Contractor/Subcontractor Payment Act*

In a breach of contract action where the contractor alleges entitlement under the Procurement Code or, alternatively, under the Contractor/Subcontractor Payment Act, where a bona fide dispute exists between the parties, entitlement will not lie for the enhanced interest and penalty provisions of these acts. Instead, the contractor may recover simple interest from the date of completion through the date of reconciliation among the parties.

(Joseph H. Bucci)

M.R. Mikkilineni, *Pro Se*.
Lawrence G. Zurawsky for Defendants.

No. GD 99-6661. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM

O'Reilly, J., January 15, 2008—This matter began on May 3, 1999 with the filing of the Complaint by Plaintiffs, M.R. Mikkilineni and Talasila, Inc. (collectively "Contractor")¹ seeking payment from the Defendant, Municipal Authority of the Borough of Punxsatawney ("Authority"), alleging that it owed him monies on a Contract for a project known as the "North Findley Street Storm Sewer Phase II." This project itself dates back to 1995. The docket entries are confusing to say the least, and the action moved at a "snail's pace" until it came to me in Motions' Court in April of 2003. My initial involvement concerned the matter of Preliminary Objections filed by the Authority to the Motion to Strike Defendant's Answer and New Matter in Response to the Complaint filed the Contractor. I denied those Preliminary Objections on April 23, 2003.

On that same date, the Contractor filed a Praecepto to Enter Default Judgment against the Authority. The Prothonotary entered Judgment in the amount of \$570,000. Thereafter, on May 5, 2003, the Authority filed a Petition to Strike and Open the Judgment, which was argued before me on May 22, 2003. By my Order of May 22, 2003, I struck the Judgment. I also entered the following order:

Now, 22 day of May, 2003, in consideration of

Defendant's Motion for Reconsideration and/or Reargument, it is hereby adjudged, ordered and decreed that:

1. The Order of this Court issued April 23, 2003, denying Defendant's Motion to Strike Plaintiff's Motion to Strike Defendant's Answer and New Matter and granting Plaintiff's Motion to Strike Defendant's Answer and New Matter is hereby vacated.

2. Plaintiff's Motion to Strike Defendant's Answer and New Matter is denied. Defendant's Preliminary Objections pending as of 4-23-03 are also denied. Discovery to begin forthwith and be completed in 90 days. Any problems to be brought to me.

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

The Contractor appealed the above Order to the Superior Court. That appeal was quashed on November 7, 2003. The case was thereafter assigned to me, and by my Order of October 22, 2004, I directed that the parties file Status Reports. That got the ball rolling. Unfortunately, it also led to the parties filing various motions as well as *ex parte* communications, so on December 30, 2005, I directed the parties to cease and desist all *ex parte* communications with my staff and that the Trial would begin on March 28, 2006. (See My Pre-Trial Order of December 30, 2005).

On March 24, 2006, on the eve of Trial, the Contractor made application for a continuance of the Trial because the parties were still battling over discovery. Finally, on October 25, 2006, the Trial began. It continued on the 26th of October, and picked up again on November 2 and 3, 2006, and concluded on December 18 through the 20th, 2006. All parties filed post-trial briefs, the last one on April 26, 2007. I have reviewed the three (3) volumes of testimony, as well as the post-trial filings of the parties, and although I indicated in my Order of March 23, 2007 that I intended to hold oral argument after the briefs were filed, I have deemed such unnecessary, as the briefs were ably prepared by the parties.

I. Background

Mr. Mikkilineni's background is impressive. He graduated High School in India in 1955, and received a BS Degree in India in 1958. After coming to the United States, he earned a Master's Degree in Civil and Structural Engineering from Mississippi State University. He worked with a variety of companies constructing bridges, buildings and nuclear power plants. After working in the Philadelphia area, he moved to the Pittsburgh area about 30 years ago. He formed his company, Talasila, Inc. in 1976. (N.T. 10/25/06-10/26/06 pp. 35-36). It ceased to exist in 1997 as noted above. (N.T. 10/25/06-10/26/06 pp. 14-15) (See, also, Plaintiff's Exhibit 26a, Certificate of Dissolution dated Aug. 4, 1997). He further explained that Talasila was his wife's name.

While well educated and knowledgeable in his field, his efforts at being a *pro se* litigant contributed to some of the confusion in the presentation of evidence and exhibits. However, eventually I believe that all the evidence was finally developed and I understand the issues.

In early 1994, the Authority began accepting bids for the Project, a storm sewer that was to run into Mahoning Creek. (N.T. 10/25/06-10/26/06 pp. 21-23). The bids were based on plans and specifications by Gannett Fleming, Inc., which was its engineer at the time of the bidding. The Contractor bid on the Contract on April 11, 2004. (N.T. 10/25/06-10/26/06 p. 16). The bid was for \$736,225. It was the lowest and was accepted by the Authority.

Mr. Mikkilineni expected to begin work in June, 1994, as he received notice dated June 10, 1994 from the Authority to post his bond within ten (10) days. He did so on June 17, 1994. (N.T. 10/25/06-10/26/06 pp. 207 & 209).

However, problems arose with the design from Gannett Fleming. The storm sewer ran down hill to outfall into Mahoning Creek. Due to the topography of the area to be served and through which the pipe was to be run, the Gannett Fleming design ended up with the outfall of the line to be 5 feet below the bed of the creek. The U.S. Army Corp of Engineers, which controls all such outfalls, would not approve this design. (N.T. 10/25/06-10/26/06 pp. 257-258).

It appears that this problem became apparent only *after* the bids were received and awarded. The Authority did not want to have new plans drawn by Gannett Fleming; it did not want to re-bid the job, but it wanted the storm sewer in before the fall and winter set in; it also liked the Contractor's price of \$736,225; and Mr. Mikkilineni also did not want the Project to be re-bid.

The Authority, dissatisfied with Gannett Fleming, but reluctant to re-bid, consulted another engineer, Van Plocus, who was located in Punxsutawney and who was known to both Mr. Mikkilineni and the Authority. Van Plocus' company was known as VAPCO. Mr. Mikkilineni devised a way to utilize most of the Gannett Fleming plans and specifications with certain modifications so as to raise the outfall to a level which the Corps of Engineers would approve. Mr. Plocus testified that Mr. Mikkilineni had approached him about the design problems that had come about with Gannett Fleming, and that Mr. Mikkilineni came up with a solution to correct these problems. Van Plocus testified that:

"I took Mikki's concept of providing a hydraulic lift, which is just take the water from the end of the phase I project, put in a concrete chamber, allow the water to rise by gravity to any elevation that we can start from, eliminate the lift station and allow gravity to convey the water up to a point in elevation that we could start phase II." (N.T. 10/25/06-10/26/06 p. 263).

His testimony was that this solution was better than the solution of Gannett Fleming's, which was to "put in a lift station at the end of the existing storm water system to raise the water up and then start at a different grade so that they could outfall into the Mahoning Creek and the elevation." (N.T. 10/25/06-10/26/06 p. 262). However, Van Plocus stated that this concept was not good because "the expense and the maintenance of a pump station to handle storm water just to convey it from point A to point B was going to be very costly to the borough and was certainly not in their capital." It would be a maintenance nightmare for the Borough. (N.T. 10/25/06-10/26/06 pp. 262-263).

Both Van Plocus and Mr. Mikkilineni approached the Borough on several occasions in an effort to get the Project off the ground. This was reflected in the Borough minutes of September 12, 1994, September 26, 1994 and October 10, 1994. (N.T. 10/25/06-10/26/06 pp. 264-268 & Defendant's Exhibits 12, 13 & 14). The Borough ultimately agreed with the concept changes submitted by VAPCO and Mr. Mikkilineni, and retained VAPCO and fired Gannett Fleming. Finally, on October 27, 1994, the Construction Agreement was signed by all the parties, and the Contractor commenced work on the Project. (N.T. 10/25/06-10/26/06 pp. 273-274 & Plaintiff's Exhibit 23).

In addition to the Corps of Engineers, the Pennsylvania Department of Transportation was affected by the Project because the sewer line had to cross through two state roads, being a Borough road and State Route 119. (N.T.

10/25/06-10/26/06 pp. 258-259). In addition, the lending institution for the funds for this Project, Farmers Home Administration, had its own engineering staff that needed to be consulted before the Rural Utility Service would release the funds. (N.T. 10/25/06-10/26/06 pp. 259-260). Finally, the Buffalo and Pittsburgh Railroad had an interest in this Project because the pipeline had to cross the Railroad right of way where it ran through the Borough. (N.T. 10/25/06-10/26/06 p. 260).

An early dispute concerned the unit pricing, especially for the 72" pipe. The Contractor asserts it was \$336 per foot, while the Authority states that it was \$225 per foot. (See, N.T. 10/25/06-10/26/06 p. 62 & N.T. 12/18/06-12/20/06 pp. 97-98). Actually, during Trial, Mr. Mikkilineni agreed to compromise his amount from \$336 per foot to \$300 per foot. (N.T. 12/18/06-12/20/06 pp. 97-98).

Other areas of dispute concerned at least 3 other matters that the Contractor encountered with this Project. First, problems arose with respect to a Bell Telephone fiberoptic cable. In particular, the design did not show the specific depth. Next, a dispute occurred over the driveway/parking lot for a Bank that needed to be replaced after the Contractor excavated that area for the sewer line. The Authority's position was that the Contractor had excavated too much. Finally, there was a dispute over the pre-cast storm water chamber versus a poured in place chamber under Route 119 and the alleged concerns of PennDOT.

Mr. Mikkilineni advised the Borough that under the Agreement the Project was completed as of "5/30/95." (Plaintiff's Exhibit 30a). The Authority admitted that the work was completed timely on May 30, 1995 (N.T. 10/25/06-10/26/06 pp. 143-144), and that the Project works today. (N.T. 10/25/06-10/26/06 p. 264).

In addition, Mr. Mikkilineni has made a claim for delays. He contends that he lost another potential job in Glassport due to the delays from the acceptance of his bid in June, 1994, until the Project was finally commenced in October, 1994. A further claim for delay was based on work stoppage to permit Bell Telephone to raise and/or relocate the level of the fiberoptic cable. (N.T. 12/18/06-12/20/06 pp. 50-52, 289-290 & 345-348).

He also attempted to join Gannett Fleming during the Trial of this matter. I disposed of that amendment request by denying it as too late, and beyond the statute of limitations. (N.T. 11/2/06-11/3/06 pp. 3-8).

II. Analysis and Conclusions

The Contractor contends that his final bill amounted to \$1.1 Million due to change orders. (N.T. 10/25/06-10/26/07 p. 34). I noted on the Record during the proceedings that according to the evidence presented to me, it's total was \$1,012,436; that it was paid "900-something"; and that the claim was for the difference of \$112,000. (N.T. 12/18/06-12/20/06 pp. 197-198). Actually, according to the documentary evidence, he was paid \$900,853 (See Plaintiff's Exhibit 13) and he is seeking an additional \$230,391 (See Plaintiff's Exhibit 3). That totals \$1,131,244.00.

On the other hand, the Authority contends that the Contractor was paid, and contends that the checks it brought to the Trial were all negotiated by the Contractor. (N.T. 10/25/06-10/26/06 p. 71). It presented checks for all the Change Orders, being 1 through 13. (N.T. 10/25/06-10/26/06 p. 72). Its position is that the original contract price of \$736,225 plus change orders totaling \$138,888 has been paid. (N.T. 10/25/06-10/26/06 p. 129).

The checks were offered through the testimony of Mary McHenry, who was the Authority's secretary at the time of this Project. (N.T. 10/25/06-10/26/06 p. 119). She testified

that she was in charge of writing the checks for the Project. The process involved the Contractor submitting payment requests to Mr. Plocus, who in turn, if approved, would submit them to the Authority. Once approved by the Authority, the request would be submitted to Farmers Home/Rural Utilities Services. Upon their approval, verification would be sent back, and she would issue payment to the Contractor. (N.T. 10/25/06–10/26/06 pp. 119-120). Ms. McHenry had no first hand knowledge of the Project and simply wrote the checks in the amounts as directed by the foregoing entities.

According to the Defendant's evidence, the Contractor was paid a total of \$893,641. (See, Defendant's Exhibit 1). This Exhibit was prepared by Ms. McHenry, and it is on that document that she offered her testimony. (N.T. 10/25/06–10/26/06 pp. 123-124).

The parties submitted a plethora of Exhibits. I have painstakingly reviewed them, as well as my Trial Notes and the Transcripts. The parties' briefs were also robust with their respective positions. Likewise, the Trial was difficult at best as is typical of *pro se* litigation. There was no real semblance of order and presentation by the parties, and I noted it on the record. For instance, near the end, I stated that "(I) don't want to jump around. It's taken me six days to get some modicum of order and now you're upsetting it.... You start off talking about 72 inch pipe. Then you talk about the delays, whether he had to sign the contract or not. Try to stay on the roadmap, will you?" (N.T. 12/18/06–12/20/06 p. 177). Additionally, I stated "well, you know, we've heard this but you've had, you know, both of you, have had a lot of time. I mean, this is almost an on the job training case, but you've had plenty of time to go through these boxes"; and "we can't just wander around." (N.T. 12/18/06–12/20/06 pp. 237 & 282).

However, we finally got all the evidence out and the crux of the Contractor's claim can be summarized in Plaintiff's Exhibit 3. It is a breakdown of the items allegedly in dispute, and is indeed somewhat of a "roadmap" to follow.

A. Unit Pricing

This claim of the Contractor pertains to the pricing on the footage of 72" pipe used in the Project. It contends that the price asserted by the Authority of \$225 per foot is not the right amount. Instead, Mr. Mikkilineni initially asserted that it should be \$336, but during the course of the Trial, he agreed to lower it to \$300. (N.T. 12/18/06–12/20/06 pp. 97-98). His calculations are 568 feet @ \$300 = \$170,400. The record reveals that he was paid \$125,100. He is seeking the difference of \$45,300.

The Authority contends that the \$225 was the agreed upon price. It relies on a letter dated November 17, 1994 from VAPCO to Farmer's Home Administration (Defendant's Exhibit 40). However, although testimony from Van Plocus was that Mr. Mikkilineni was part of a meeting on November 15, 2004, Mr. Mikkilineni was never copied on that letter, nor did he sign that letter. (N.T. 12/18/06–12/20/06 pp. 161-166). Interestingly, this took place after the Contract date of October 27, 1994 and work had already commenced on the Project.

I will credit Mr. Mikkilineni that he objected to this amount, but agreed to continue doing the work so that the Project would not be stalled. The Project was already delayed from June, 1994 until October, 1994. Moreover, it appears that the Contract was entered and the work began before the issue of pricing was obviously established. I find no merit to the Authority's suggestion that \$225 was part of the original bid through Gannett Fleming, nor am I persuaded by its other evidence that \$225 was the agreed price, nor by its contention that the Contractor underbid or underpriced this Project. Therefore, I will award the Contractor

this amount.

B. Dispute over Distance

This claim of the Contractor pertains to the linear feet of the 72" pipe trench. (N.T. 12/18/06–12/20/06 p. 27). Mr. Mikkilineni claims that he used the calculations from the "as built design" for the Project. His calculations are based on 568 linear feet (\$42,600), but he was only paid on 339 linear feet (\$25,425), and he is seeking the difference of \$17,175.

Based on all of the evidence regarding the bidding, redesign, new agreement and the work performed, I find this claim to have merit, and I will therefore Award the Contractor this claim for \$17,175.

C. Delay Claim (Glassport Job)

The Contractor has made a claim for not being able to bid on another project, which Mr. Mikkilineni stated was a job in Glassport, due to the design problems that occurred while Gannett Fleming was the engineer for the Authority. (N.T. 10/25/06–10/26/06 pp. 214-236). His claim is for \$241,300 (N.T. 12/18/06–12/20/06 p. 86). Apparently, Gannett Fleming was the engineer for this job, and Mr. Mikkilineni asserts that Gannett Fleming bore animosity towards him and that was why he did not get that job. I DENIED that claim on the Record during the October, 2006 proceedings. Specifically, I ruled as follows:

"Unless you have somebody else, the Glassport job is irrelevant. You had the bonding capacity, you placed the bid, you didn't get the bid. I don't know why you didn't get the bid, but it is irrelevant here.

As I said, if you want—if you think that Gannett Fleming bad mouthed you, your suit was against them and you didn't and that is not before me. I am not hearing anything about Glassport."

(N.T. 10/25/06–10/26/06 pp. 236-237).

D. Delay Claim (work on Project)

The Contractor contends that he is entitled to damages for delays in work on the Project due to changes made by the Authority. Mr. Mikkilineni's rationale is that he estimated 66 days based on "sequence change and the weather problems and the site weather problem, stop and go types of job," in addition to the fact that it was noted in January of 1995 that he was 90% complete and that he had estimated that out of 50 days, 25% was waste due to changes. (N.T. 12/18/06–12/20/06 pp. 84-85). He calculates that he is due an additional \$55,000 based on a 50 days at 25% of his daily cost of \$4,400.

Certainly, delays may be expected. Moreover, Mr. Mikkilineni has offered no concrete evidence to support this, just mere speculation. Therefore, I will not award this claim.

E. Aggregate Backfill

The Contractor claims that he was not fully paid for the backfill that he used after trenching and installing the pipe. Mr. Mikkilineni based his calculations on Defendant's Exhibit 31 and 38. He testified that normally refill should have been done with backfill material that was excavated. (N.T. 12/18/06–12/20/06 pp. 24-27). But due to rainy weather, the material became unusable, and he had to use other materials. He stated that there was no way economically possible to protect the backfill. Moreover, to keep on schedule, he contends that he was forced to move ahead, even in poor wet weather. That is his justification for additional backfill and stone to put back into the trenches. Although he was paid for some, he claims that he is still due \$68,950. (N.T. 12/18/06–12/20/06 p. 27).

The Authority asserts that this is the Contractor's fault. Its position is that trenching and refill work should not have

been done in rainy weather. It claimed that wet weather work was not allowed under the Project Manual, and therefore, it denied the Contractor's request for refill and stone when the backfill was unusable. (N.T. 11/2/06-11/3/06 pp. 311-314).

Under the facts of this matter, i.e. the late start of the Project and the time constraints that the Contractor was under to complete the Project, I find that he is entitled to this amount, and I will therefore award the Contractor this claim for \$68,950.

F. Chamber-pre-cast v. pour in

The Contractor claims that he is entitled to reimbursement for a Pre-Cast Concrete Chamber that he made that was to go under Route 119. Testimony was that he had already prepared such a Chamber, but was later told by the Authority that PennDOT would not approve it. Therefore, the Contractor could not use it and disposed of it after he had already completed that Chamber at a cost of \$15,000.

However, testimony further developed that Van Plocus had received a letter from PennDOT, but it was never shared with Mr. Mikkilineni. That letter essentially showed that such a pre-cast chamber could have been used, but Van Plocus attempted to justify not approving it unless it was certified. (N.T. 12/18/06-12/20/06 pp. 317-322). Moreover, Mr. Mikkilineni had obviously prepared the pre-cast Chamber before he was told it was not usable in order to proceed with the Project. As a result of this failure to communicate between the parties or confusion about this Chamber, I find that the Contractor is entitled to payment for this pre-cast Chamber and will award him \$15,000 as claimed.

G. Trench Box-PennDOT

The Contractor claims that he is entitled to \$9,600 for widening the trench box for the crossing at Route 119. (N.T. 12/18/06-12/20/06 pp. 47-48). PennDOT wanted it wider than 8 feet. The Contractor was already paid \$48,000 (48 feet @ \$1200 per foot) for the trenching, but since he was required to widen this particular section, he is asking for an additional \$9,600 (8 x \$1200). I do not recall a vigorous objection in the Record from the Authority on this item. So again, based on the totality of the circumstances in this matter, I am inclined to award this additional amount for trenching and I will do so in the amount of \$9,600.

H. Fiberoptics cable-Bell Telephone

Although the drawings show the existence of fiberoptics cable, it was only learned *after* the work had begun that the fiberoptics cable of Bell Telephone would interfere with the Project. As a result, the Contractor claims that he is entitled to \$13,800 due to this unexpected problem, and the delay that it cost for the work stoppage when Bell Telephone had to raise up/relocate the cable.

The Authority has refused this claim on the basis that the drawings do show a fiberoptic cable, but not the depth, which it asserts is of no importance. (N.T. 12/18/06-12/20/06 pp. 211-217). I am not persuaded by that position. As I said on the Record, "so he submits his bid sort of blind. Then he goes out and digs it up and finds that it interferes with the new design. Didn't interfere with the old design....(he dug it up after the contract was signed)...see that's the problem. You want him to go out and dig it up, take that, you're suggesting, take that responsibility before he even has a contract." (N.T. 12/18/06-12/20/06 pp. 214-215). Having not been persuaded at that time by that contention, I will award the Contractor his claim for this item in the amount of \$13,800.

I. Pipe Bore-Jack

The Contractor's next claim is for an additional amount

for \$8,000 for pipe bore and jack. His contention is that the Authority paid for 56 linear feet when according to the "as built," he should have been 64 linear feet. (N.T. 12/18/06-12/20/06 pp. 43-46). Mr. Mikkilineni was paid \$56,000, but claims he was due \$64,000. There is no dispute as to the price, but only as to the distance. Viewing the testimony on this issue, and the drawings, I am convinced that the Contractor is due that sum, and I will award that amount to him, which is \$8,000.

J. Gravel for Driveway/Alley

This claim pertains to the replacement of gravel to areas where the Contractor did excavating and had to return the property to its original condition. Mr. Mikkilineni claims that he was only paid for 616 square yards at \$20 per yard when he actually used 1767 square yards. (N.T. 12/18/06-12/20/06 pp. 62-67). He was paid \$12,320, but he maintains that he should have been paid \$35,340 because he was required to use more gravel. He is seeking the difference, which is \$23,020.

The Authority's position is that he replaced gravel in those areas where there was not gravel before he began excavating in that area. (N.T. 11/2/06-11/3/06 pp. 89-92). Specifically, it contends that there was a designated work area for the alley behind the bank and the Contractor was to stay within that 60 foot limit. He did not stay within that work area, and as a result was required to use more gravel than what was allotted. (N.T. 11/2/06-11/3/06 pp. 316-318).

No justifiable reason was given for the need for this additional gravel. Having gone outside the confines of the designated area, I find that the Contractor is not entitled to this claim, and I therefore deny it.

K. "Incidentals"

I will label this claim "incidentals" because it encompasses some minor matters. The Contractor is seeking \$500 for raising a manhole cover, \$2,000 for traffic control and \$600 for grading the railroad area. This totals \$3,100. As to the traffic control amount, Mr. Mikkilineni states that this pertains to the area and work done around the Railroad area, and that he came to this figure by a comparison with what the Authority paid for the traffic control with the PennDOT matter. Although the Authority has refused to pay these items, I find that they are reasonable for the work that was done by the Contractor, and that this work was a necessary part of the entire Project. Therefore, I will award the Contractor the sum of \$3,100 for these items.

L. Fees/Costs

In addition to the items that are Project related, Mr. Mikkilineni is seeking costs that he incurred during the litigation of this case. During the Trial, he stated that he was seeking "attorney fees and costs and traveling costs and engineers,... and (his) time" in the amount of \$20,000. (N.T. 12/18/06-12/20/06 pp. 91-95). I did note on the Record that he was not getting paid for his time. (N.T. 12/18/06-12/20/06 pp. 91). None of this claim rises to the appropriate standard for granting such relief. He chose to represent himself, and as I alluded to on the Records, all other costs are part of the process of litigation. Therefore, I will deny attorney's fees and engineering costs.

Another issue is present and that concerns the interest and other payments that may be due under the Procurement Code (62 Pa.C.S.A. §§3932(c), 3941(b)) or Contractor's Payment Law (See, *John B. Conomos, Inc. v. Sun Company, Inc.*, 831 A.2d 696 (Pa.Super. 2003)). After analysis, I do not believe the enhanced interest and penalties provisions of either law are applicable here because I find a bona fide dispute exists between the parties and thus, the essential puni-

tive provisions of those laws do not apply. However, I do believe simple interest is available to the Contractor calculated at 6% from June 1, 1996, one (1) year after the Project was completed and during which year the parties discussed their differences and attempted to reconcile them. From that date through December 31, 2007, the interest amount calculates to \$124,838.25.

M. Change Orders 3 & 4

There were at total of 12 Change Orders for this Project. (N.T. 10/25/06–10/26/06 pp. 129). The Contractor contends that Change Order 3 (\$3,250) and Change Order 4 (\$11,700 for 18” PVP Pipe and trenching were never paid.

The Authority offered evidence that these Change Orders were paid. Specifically, testimony from Ms. McHenry (N.T. 10/25/06–10/26/06 pp. 136) and Mr. Plocus (N.T. 12/18/06–12/20/06 pp. 149, 157) suggest that they have indeed been paid. In particular, Defendant’s Exhibit 21 lists all the 12 Change Orders, including 3 and 4, and it indicates that all the Change Orders were paid for in that invoice (No. 94-5). I find this evidence compelling to rebut the Contractor’s claim that he was not paid. Therefore, I will not award him this claim.

A “Recap” is set forth on the next page.

CLAIMS:	RECAP:	AWARDED	DENIED
1. Unit Pricing:	\$45,300	X	
2. Dispute over distance:	\$17,175	X	
3. Delay Claim (Glassport):	\$241,300		X
4. Delay Claim (Work on Project)	\$55,000		X
5. Aggregate Refill:	\$68,950	X	
6. Chamber– (pre-cast v. pour in)	\$15,000	X	
7. Trench Box– (PennDOT)	\$9,600	X	
8. Fiberoptics cable (Bell Telephone)	\$13,800	X	
9. Pipe Bore–Jack	\$8,000	X	
10. Gravel for Driveway/Alley	\$23,020		X
11. Incidentals	\$3,100	X	
12. a. Fees/Costs	\$20,000		X
b. 6% Interest	\$124,838.25	X	
13. Changes 3 & 4	\$14,950		X
TOTAL AWARDED:	\$305,763.25		
TOTAL DENIED:	\$354,270		

An appropriate Non-Jury Verdict is attached hereto.

BY THE COURT:
/s/O’Reilly, J.

Dated: January 15, 2008

NON-JURY VERDICT

AND NOW, to-wit, this 15th day of January, 2008, consistent with my attached Memorandum, I find in favor of the Plaintiff, M.R. Mikkilineni and Talasila, Inc. and against the Defendant, Municipal Authority of the Borough of Punxsutawney, in the amount of \$180,925, plus simple interest at 6% per annum from June 1, 1996 to December 31, 2007 in the amount of \$124,838.25, for a total of \$305,763.25.

BY THE COURT:
/s/O’Reilly, J.

¹ Talasila, Inc. was a Texas Corporation formerly owned by M.R. Mikkilineni that is since become defunct, but whose

right, title and interests have been acquired by M.R. Mikkilineni. (Complaint ¶3 & Notes of Testimony “N.T.” 10/25–10/26/06 pp. 14-15).

**Deborah A. Noble
n/k/a Deborah A. Hamilton v.
J. William Noble a/k/a
James W. Noble, et al.**

*Commercial Loans—Invasion of Trust Agreement—
Forbearance Agreement*

1. Where the underlying trust agreement has conflicting provisions regarding whether or not trust funds can be pledged upon the signature of one or both of the trustees, an invasion of the trust upon the signature of one trustee, and the possible forgery of the other trustees’ signature, is improper.

2. Where a forbearance agreement is tendered on a “take it or leave it” proposition and presented with little or no negotiation, it will be deemed a contract of adhesion.

(Joseph H. Bucci)

Anthony A. Seethaler and John R. Orie for Plaintiff.

Christopher J. Soller for Defendants.

J. William Noble, Pro Se.

No. GD 98-5295. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM

O’Reilly, J., January 17, 2008—This case involves claims by Plaintiff, Debra Hamilton, formerly known as Debra Noble (“Hamilton or Debra”) against her ex-husband J. William Noble (“Mr. Noble or Bill”), PNC Bank, (“PNC”), and bank employees, Colleen Pietrusinski, (“Pietrusinski”) and Diane L. Martin (“Martin”). I tried this case non-jury from May 11 to June 13, 2006, which produced over 2800 pages of transcript in 7 volumes, plus over 100 exhibits. The preparation of the transcript, and the submission of post-trial arguments, plus answers, and rebuttal consumed over a year. I have carefully reviewed and analyzed the facts and able arguments of counsel.

BACKGROUND

Lifestar Ambulance Services, Inc., (“Lifestar”) was founded in 1985 by Debra and Bill who were 40% and 60% shareholders respectively. It was an ambulance and emergency medical services business, which through hard work grew into a substantial enterprise. In or about 1980, while attending an Emergency Medical Technician (EMT) training course, Debra and Bill met, and ultimately married in 1983, and form Lifestar thereafter. Through their joint industry in the enterprise it grew and by 1991, the couple was living in a new, up scale residence in Murrysville, Pennsylvania, and each were driving expensive foreign cars, and one of them was even in a Porsche club. Their tax returns were received in evidence and reflected taxable income in the years 1994 and 1995 in excess of 1 million for each year. (N.T. May 11-26, 2006, Vol. I, p. 234).

PNC was their bank, and they dealt with its Monroeville Office and its employee, Pietrusinski. Various loans were made by PNC to finance the business and were periodically repaid. The loans were for such things as working capital, equipment, payroll, and expenses while waiting for payment

for services. The great bulk of their income was from Medicaid, Medicare and Health Insurance Companies. Pietrusinski described herself as a relationship manager. A relationship was developed with each customer, and the goal of the relationship was to get all of the customers business for PNC.

Here, that relationship had been cultivated and was well developed and Bill and Debra and Lifestar did a lot of business with PNC and Pietrusinski. As a result Pietrusinski was willing to let some bank procedures slide and/or be ignored so as to continue to develop a very profitable relationship with the Nobles. As the relationship progressed, the concept of "caveat emptor" fell by the way side, and many formalities, such as signing documents, and the notarization thereof became very casual.

In or about early 1996, Bill and Debra had had a child and they each had two children by prior marriages. Given their substantial income, they told Pietrusinski they would like to create some sort of trust for security for their children. (N.T. May 11-26, 2006, Vol. I, p. 185).

Pietrusinski referred them to a Trust Officer of PNC who printed out a form trust agreement for each to sign. The record shows no discussion or consultation by PNC with the Nobles, and they were not advised that they might want private counsel to advise them and review the trust document. (N.T. May 11-26, 2006, Vol. II, pp. 177-182).

The trust document was executed by them on June 20, 1996, and they deposited substantial sums into it, so that by January, 1997, there was \$430,000 in the trust. Interestingly, they did not receive a copy of their executed Trust document until December 7, 1996. Obviously, the business was doing well to permit these kinds of deposits within a space of 6 months.

The salient portions of the Trust instrument are as follows:

ARTICLE II

In addition to the powers conferred by law, the Trustee shall have the following powers, to be exercised in its absolute discretion:

A. To retain all assets received in kind, including but not limited to stock in PNC BANK CORP. or its successors, as investments, without duty of diversification, or to sell the same upon such terms as it shall deem advisable; to invest in all forms of property, including but not limited to common trust funds maintained by the corporate trustee or its bank affiliates, securities underwritten by PNC BANK, NATIONAL ASSOCIATION or any of its affiliates, whether individually or as a member of a divided or undivided syndicate, participations in registered investment companies (including money-market funds) for which the corporate trustee, any affiliate, or any subsidiary of an affiliate provides services for additional compensation, whether as custodian, transfer agent, investment advisor or otherwise (The Grantors acknowledge that such participations are not bank deposits and are not insured by, guaranteed by, obligations of, or otherwise supported by the United States of America, the Federal Deposit Insurance Corporation, or any bank), and interest-bearing deposits in a bank or other financial institution under state or federal supervision, including the corporate trustee's banking department, without restriction to legal investments and without regard to diversification; to exchange or lease for any period of time any real or personal property and to give

options for sales, exchanges and leases; to exercise all rights of security holders; to compromise any claim or controversy without court approval; to borrow money from any source including PNC BANK, NATIONAL ASSOCIATION; to delegate discretionary powers; and to make distribution in cash or in kind.

B. To vote all proxies for securities held hereunder in accordance with the proxy policy in effect from time to time for the Personal Trust Services Department of the Private Bank of PNC BANK, NATIONAL ASSOCIATION, unless the Grantors or any individual trustee serving hereunder specifically directs otherwise in writing. The Grantors acknowledge that they understand that this power may involve the voting of PNC BANK CORP. stock and shares of mutual funds affiliated with PNC BANK, NATIONAL ASSOCIATION or PNC BANK CORP., and that in voting such shares in accordance with such policy, the corporate trustee may be in a position to vote for the Board of Directors of PNC BANK, CORP. or to increase the fees paid at the mutual fund level to PNC BANK, NATIONAL ASSOCIATION or its affiliates.

C. To purchase and sell securities through any Broker or brokerage firm the trustee may select, including any brokerage operation affiliated with or conducted by PNC BANK, NATIONAL ASSOCIATION, PNC BANK CORP., or any of their subsidiaries. The payment of the usual commissions charged by such an affiliated brokerage operation shall in no way reduce or otherwise affect the Trustee's compensation as hereinafter provided for.

ARTICLE III

A. The Grantors *expressly reserve the right at any time and time to time by a signed instrument delivered to the Trustee, to revoke, alter, or amend this trust*, in whole or in part, provided that the duties and rate of compensation of the Trustee shall not be modified without the written consent of the Trustee. *These rights shall be exercised jointly by the Grantors during their joint lifetime and by the surviving Grantor subsequent to the death of the other.* [EMPHASIS SUPPLIED].

B. During the joint lifetime of the Grantors, the *joint exercise of any rights hereunder or any direction to the Trustee may be over the signature of either Grantor and it is agreed that the signature of either Grantor shall reflect the act of both Grantors and shall for all purposes be considered their joint action upon which the Trustee is entitled conclusively to rely.* [EMPHASIS SUPPLIED].

C. It is agreed that either Grantor shall have the right, from time to time, to add to the principal of the trust estate such property, as such Grantor sees fit, and as shall be acceptable to the Trustee, and the Trustee agrees to hold such property, so added, under the trusts herein set forth, as well as any property, acceptable to the Trustee, received hereunder from any other source.

Analysis of the Trust document shows it to be well tailored to keep PNC as trustee, and to permit it to deal in its own securities as assets of the trust.

However, in Article III, there appears to be an ambiguity

in that the Trust, in Paragraph A, may not be altered, revoked or amended except by a writing signed by *both* Bill and Debra, yet in Paragraph B, it provides that the *joint* exercise of any of the rights hereunder (including the requirement of *joint* action in paragraph A) may be done by either Bill or Debra by a writing, but *without* the consent, or even knowledge of the other.

I will address this *infra* in regard to Bill's pledging, and PNC taking *all* the funds out of the so-called Trust.

Inasmuch as the income of Lifestar was tied to Medicare, Medicaid and health insurance companies, Bill believed that some diversification was needed as a hedge against changes in those payments. In 1994, he took steps to diversify, and to acquire, a mobile magnetic resonating imaging service as an adjunct to the business of Lifestar, an MRI Service known as MMG Enterprises ("MMG"), which was a mobile MRI service. His belief was that mobile MRI services would be beneficial for Lifestar. Debra did not share this view.

It was also around this time that Bill solicited offers for the purchase of Lifestar. One interested entity was TransCare, a much larger provider of ambulance services, and the like. Testimony was offered that TransCare had offered \$6 million for Lifestar, but Bill and the firm's accountant believed that figure to be too low, and nothing more was done.

Notwithstanding her opposition, Bill, went ahead with the MRI business, and in late 1994, he and Debra formed a partnership with Richard Martha and Karen Martha, and secured a loan from Wheeling Bank. Debra testified that she was not in favor of the MMG venture or the Wheeling Bank loan, but went along with Bill because she believed the maximum exposure would be \$725,900, which she believed Lifestar could handle if the enterprise failed. (N.T. May 11-26, 2006, Vol. I, pp. 169-170).

It actually involved two other corporations in which the Nobles and the Marthas were exclusive shareholders respectively. We need not explore this mode of financing for the real parties were MMG and Lifestar.

In early 1996, Bill determined that MMG should acquire an additional MRI machine, to bolster its mobility and possibly sell MMG to the University of Pittsburgh Medical Center ("UPMC"). (N.T. May 11-26, 2006, Vol. I, p. 186). On February 20, 1996, he signed a sales agreement to buy a Picker brand MRI machine for \$1.4 million, and made a deposit of \$25,000. Debra did not know of this transaction, and she had specifically told Bill that she wouldn't go along with the Picker acquisition. (N.T. Vol. I, p. 186). PNC was to provide the financing for this purchase, but Lifestar, and all four partners were to provide personal guarantees inasmuch as MMG itself could not support the loan or offer adequate security. At least that was the view of PNC. It required substantial additional security and collateral beyond the new machine, and the assets of MMG, and therefore required a guarantee from Lifestar, and the personal guarantees of the four partners. It is the making of this loan; the facts surrounding it, and the decline in the MRI market that started the downhill slide that culminated in the ruination of Lifestar, Bill and Debra, and this lawsuit.

As frequently occurs within the human drama, Debra and Bill began to suffer marital discord, but in early 1996 they were still living together, and attempting to operate the business. Debra did not share Bill's view that the MRI service that MMG would be good for the company, and she had spoken against such a venture. He had also expressed concern over the amount of Federal Income Taxes they were paying, and thought MMG might provide some relief. The specifics thereof were not provided, but they did get some tax relief after they formed MMG.

The critical facts here occurred on and after June 28, 1996. It was on that date that the loan for the Picker MRI took place, in the afternoon, at the offices of Lifestar, and MMG on Duff Road in Penn Hills. At that time, Debra was in Hawaii, and had previously expressed her opposition to the MRI enterprise, and the Picker purchase, and was not aware of this loan at all. Notwithstanding, Bill had Pietrusinski prepare the necessary documents, and bring them to the Duff Road Office for execution. Those present were Bill, Pietrusinski, and the two Marthas, Richard and Karen. Bill freely admitted that he had forged Debra's signature on the documents, while Pietrusinski denied that she was aware of, or participated, in the foregoing. She said she had given the documents to Bill to have Debra sign at home, and return to her at some later date. (N.T. May 30-31, 2006, Vol. I, pp. 141-167). I do not credit her. Her interest lay in the loan being closed, and she let no obstacle stand in her way, including Debra's absence, and her opposition to the deal. Further, Richard Martha testified that he and his wife were eager to simply sign and get out of the office because they knew something unusual was going on, and they did not want to be part of it. Thus, I find Bill, Pietrusinski, and PNC to be in a conspiracy to forge Debra's name so that the loan could go through. In his deposition, Richard Martha, when asked about his signing of the documents, that day, said "I'm walking out of the room, ...I'm walking out of the room because I don't want to see anything." (N.T. May 11-26, 2006, Vol. I, pp. 319-320). He also testified, "Then the Nobles signed them or whoever signed them." Moreover, the 1.4 million was made available later in the day, after business hours. Not even Pietrusinski's casual approach to documentation would have permitted release of 1.4 million without Debra's signature. Thus, Bill could only have forged Debra's signature, and Pietrusinski knew it.

While a great show was made of the preparation of the documents for the Picker loan earlier in the day, I find this to be window dressing because no substantive modifications occurred, and there was no "negotiation" of the loan. The word "negotiation" cropped up throughout the case—usually in the questions of defense counsel. No substantive changes were made in the loan documents and they were the ones used for the June 28, 1996 closing. What was interesting is the fact that Attorney Robert Dannhauser, counsel for MMG, came to the PNC Headquarters in Downtown Pittsburgh, and did review the security agreement, and added two significant disclosures. They were that Siemens and General Electric were suing MMG at that time. Nothing more was said about those disclosures at that time, which I find strange. But 2 months later in August Attorney Dannhauser advised Debra of these law suits and they related to MMG's failure to make the monthly payments to Siemens and General Electric which were financing the MRI machines that MMG had been using even before it bought the Picker. Thus, at the time of the \$1.4 million dollar loan for the Picker, MMG was delinquent on its payments for the equipment then being used by it. This fact does not appear in any exhibit proffered by anyone, yet underscores how weak MMG was, yet it was acquiring more debt.

On Debra's return from Hawaii, she was *not* told about the Picker loan, even when she asked. She did, however, sign a consolidation loan for \$287,490, which she believed was to payoff the existing Wheeling Bank loan. There is no dispute that Pietrusinski did not tell Debra about the Picker loan and explained she was relying on Bill to tell her. (N.T. May 30-31, 2006, Vol. I, pp. 166-167).

Ultimately, Debra learned of the Picker loan for 1.4 million in late August, 1996, when she received the documents from Pietrusinski, and she saw the obvious forgery. Bill

acknowledged the forgery, but said it was necessary to get the MRI so as to retain such business as MMG had, and possibly get more from UPMC, or sell to UPMC. Obviously, this did not sit well with Debra.

As one might expect, the disclosure in August, 1996 of the June 28th forgery exacerbated the already fragile marital relationship. In September, 1996 Debra got a Protection from Abuse Order against Bill, and he was barred from the family residence for 90 days. (N.T. May 11-26, 2006, Vol. II, p. 119).

Late in 1996, difficulties arose and Bill wanted more money, and PNC wanted greater security for the outstanding loan, especially the \$1.4 million Picker loan. To that end, Bill inquired whether the trust funds could be used and/or pledged to pay the loans. The PNC Trust Department, *mirabile dictu*, said those funds could be so used.

In January, 1997, a closing was then held to acquire another \$450,000 to bail out the floundering MMG, and by implication Lifestar. This loan was collateralized by the trust and documents were signed memorializing the loan and the pledge.

Debra testified that her signature on those documents was also a forgery. Pietrusinski contradicted Debra, and said she participated fully in the closing on that loan. (N.T. May 30-31, 2006, Vol. I, p. 196).

In late August, or early September, 1996, Attorney Dannhauser held a luncheon meeting with Debra and Bill, which he believed was necessary to inform Debra of the condition of MMG for which she was a guarantor. (N.T. May 11-26, 2006, Vol. II, pp. 209-211 & 220-221).

He explained to her that General Electric had filed suit against MMG. Her reaction was one of shock and she "looked physically upset." (N.T. May 11-26, 2006, Vol. II, p. 213). In this respect, and as noted above, Dannhauser had gone to PNC offices on the afternoon of June 28, 1996, to review documents, and, in his own handwriting, added the disclosure to the guaranty agreement that MMG was presently being sued by General Electric, and that Siemens was then threatening litigation. (N.T. May 30-31, 2006, Vol. I, p. 61). The testimony from Attorney Dannhauser suggested that he only got the closing documents on the afternoon of June 28, and appears to have been summoned to the PNC offices to do his review so the loan could close later that day. (N.T. May 30-31, 2006, Vol. I, p. 59).

The facts are somewhat garbled as to this \$450,000, and the pledge of the Trust. It appears it was to be closed in January, 1997, but a question over giving mortgages by both Debra, Bill and the Marthas arose, which appeared to postpone the transaction until May. Suffice to say that Debra was steadfast in her position that she was never told about the pledge of the Trust at any time and signed no document, which had been explained to her to involve the Trust. (N.T. May 11-26, 2006, Vol. II, pp. 114-115). Obviously, Pietrusinski contradicted Debra, and said she was well aware of all that went on. (N.T. June 5-6, 2006, Vol. II, pp. 401-404).

As time passed, the infusion of \$450,000 was insufficient to revive MMG, and on July 29, 1997, it filed for the protections of Bankruptcy. Under the cross-default provision in all the documents involved herein, PNC immediately called all of the loans then outstanding, and proceeded to liquidate all assets of Lifestar, MMG, and threatened mortgage foreclosure on the family residence, but which never came to pass.

PNC's attorneys, Tucker Arensberg, handled the liquidation and in particular Attorney Beverly Weiss-Manne, who called a meeting of Debra, Bill and the Marthas on September 9, 1997, and outlined how the liquidation would be handled. The record suggests that Attorney Weiss-Manne was nettled over this turn of events and lectured Debra, Bill,

and the Marthas on their failures, and set forth what would be done. Debra analogized the meeting to "a the third grade scolding."

The liquidation proceeded apace and PNC repossessed the Picker machine and sold it for \$900,000; seized the balance of the Trust funds (about \$100,000), and sold Lifestar to TransCare for \$1,350,000, consisting of \$600,000 cash, and \$750,000 in a Nonnegotiable Convertible Promissory Note payable January 23, 2004. (PNC Exhibit 125). In addition, all counsel fees, which were substantial, were imposed on Lifestar, Debra or Bill. At the end, PNC was made whole, and even came away with about \$200,000, which it continues to hold and will not release. Debra and Bill then divorced, and she moved to Las Vegas, and Pietrusinski took a job with National City Bank.

One glaring feature in the liquidation was the execution of a "Forbearance Agreement" whereby PNC delayed the aforesaid liquidation by a few weeks, but otherwise gave no consideration to Debra. That "Forbearance Agreement" likewise contained a clause, which essentially provided that the debtors would bear all of PNC costs, including counsel fees. It is the basis of this clause that PNC has refused to refund to Debra the funds from the liquidation referred to above, and asserts that it has a claim to them to pay counsel fees in this case.

ANALYSIS

After review and analysis, and as found above, I believe that Debra's signature was forged on both the 1.4 million Picker loan guarantee, and the \$450,000 loan in pledge of the Trust. However, the 1.4 million dollars was loaned by PNC, and it was used to buy the Picker machine. Thus, I have no problem with the re-possession and sale of that, or any other MMG collateral. Similarly, I will not disturb the sale of Lifestar to TransCare, even though at a considerably lower price than what TransCare had offered two years earlier and under a structure where the Note given by TransCare will probably never be paid.

I do believe, however, that the invasion of the Trust was contrary to its terms, given the ambiguity as to whether joint or individual action was required to invade the Trust. Further, Debra and Bill were ill served by the PNC information or advice about trusts, how they work, and what value they are.

Accordingly, I find the invasion of the Trust, and the appropriation of \$415,000 to be improper both as invasion of a trust, and the forgery of her signature to the documents used for such invasion. This amount should be paid to Debra plus all the interest that PNC made on it from the date of invasion to the date of payment.

As to the forbearance agreement, I find it to be a contract of adhesion, and credit the testimony of Debra when she says that Attorney Manne told her there would be no "work out" if said "contract" was not signed. (See, Letter of January 18, 1998). Initially, this "forbearance" agreement brought no forbearance, and the liquidation occurred shortly thereafter. Second, no "negotiation" occurred, and it was presented as a "take it or leave it" proposition with the threat of no workout, and possibly a home mortgage execution sale if the "forbearance" was not signed. Finally, and notwithstanding the efforts of Attorney Manne, Debra did *not* sign this agreement.

An even greater abuse of PNC's bargaining power was the inclusion of the clause that is being interpreted as requiring Debra to bank roll the PNC defense to her lawsuit. This clause is akin to the medieval practice of a condemned man giving a gold piece to the ax man at his execution. I will not enforce this clause, and find that Debra is certainly due

the proceeds from the New York closing, as well as the earnings that PNC has made from those proceeds. With respect to these "earnings," the parties were able to develop these from information on the PNC web site, and there should be no problem in calculating them. They should be so calculated from the date of the closing to the date of payment.

When this forbearance agreement first surfaced in this case, I raised a question as to whether it was a contract of adhesion, and got little response from defense counsel. Finally, in their brief, which is excellent, and well drafted, the defense can only cite a Federal District Court case, *Pocopson Indus., Inc. v. Hudson United Bank*, No. 05-6173, 2006 WL 2092578 (E.D. Pa. Jul. 26, 2006), from the Eastern District no less, to support their contentions. While the opinion of any Trial Judge, State or Federal, is worthy of consideration, they have no precedential value, and are not controlling. Indeed, over recent years, probably due to the ease of finding cases on the Internet, I have seen more and more young lawyers cite Federal District Court cases as meaningful and controlling.

To his credit, however, defense counsel, almost in passing, cites to *Denlinger, Inc., v. Denlinger*, 608 A.2d 1061 (Pa. Super. 1992), which cites *Galligan v. Arovitch*, 219 A.2d 463 (Pa. 1966), the lead case on this issue. In *Denlinger*, we learn that a contract of adhesion is "...a standardized contract form offered to owners of goods and services on essentially a "take it or leave it" basis without affording consumer realistic opportunity to bargain. Under such condition that consumer cannot obtain the desired product or services except by acquiescing in the form contract. The distinctive feature of an adhesion contract is that whether party has no realistic choice as to its terms...not every such contract is unconscionable..." 608 A.2d 1061 at 1072. This Forbearance Agreement with respect to Paragraph 10 is indeed a contract of adhesion and I will not enforce that provision.

To recapitulate, I do find forgeries in this case, but also the lending of money for capital acquisition and business operation. As a result, PNC is entitled to recoup what it can on those loans. However, the invasion of the Trust was improper and relief is granted there. Further, the Forbearance Agreement (Exhibit D-129) is overreaching, and in particular, Section 10.1 which reads "(T)he Bank shall be reimbursed for all reasonable legal fees and other costs and expenses actually incurred by the Bank in connection with the negotiation, enforcement, defense or collection of the Bank Indebtedness and this Agreement, including any costs or fees for actions taken in connection herewith," and which is the provision that permits PNC to charge its own counsel fees against funds realized in the closing, is found to be void and all those sums are to be paid to Debra with interest equal to what PNC made on that money from the date of closing to the date of payment.

I will consider an award of counsel fees after I have heard any post-trial motions which I am sure will be filed. If none are filed, I will consider counsel fees on praecipe of counsel for Debra.

An appropriate Non-Jury Verdict form is attached.

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

NON-JURY VERDICT

AND NOW, to-wit, this 17th day of January, 2008, consistent with my attached Memorandum, I find in favor of the Plaintiff, DEBORAH A. NOBLE, now known as DEBORAH A. HAMILTON, and against the Defendants as follows:

1. for the Trust proceeds, estimated at \$415,000; and

2. for the net proceeds realized at the closing, estimated at \$200,000, with interest calculated from the date of invasion or the date of closing, respectively. The parties are directed to provide me with the precise calculations based on this Verdict. Counsel fees are deferred.

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

Maurice A. Nernberg and Associates v. Reed Smith, LLP

Tortious Interference with Fee Agreement—Aider and Abettor Liability—Civil Conspiracy—Rules of Professional Conduct

1. Claims for aider and abettor liability and civil conspiracy must have as their basis the commission of an underlying tort.

2. The duties, if any, owed to opposing counsel with respect to the tendering of settlement proceeds in the absence of a separately written document, arise under the Rules of Professional Conduct.

(Joseph H. Bucci)

Maurice A. Nernberg for Plaintiff.
William M. Wycoff for Defendant.

No. GD 03-13156. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM IN SUPPORT OF ORDER

Friedman, J., February 8, 2008—Defendant, a law firm who represented the opponent of Plaintiff's client in a separate lawsuit, filed Preliminary Objections to Plaintiff's Amended Complaint in the nature of a demurrer to the entire Complaint. The Court concludes the objection must be sustained and the Amended Complaint dismissed with prejudice.

The gist of the Amended Complaint is that Arnd von Waldow, Esq. and another attorney, on behalf of Defendant, knowingly allowed their client to disburse settlement proceeds to Plaintiff's client rather than to Plaintiff alone as Plaintiff, by letter to Mr. von Waldow, had directed Defendant's client to do. Plaintiff also alleges that Mr. von Waldow (and possibly the other attorney) heeded the contrary request of Plaintiff's client to let the settlement proceeds be paid by Defendant's client directly to Plaintiff's client. Plaintiff further alleges that Mr. von Waldow attempted to conceal his involvement in the violation of Plaintiff's direction by telling Plaintiff's client to contact Defendant's client directly regarding sending the proceeds directly to Plaintiff's client. As a result, Plaintiff claims that Defendant knowingly assisted Plaintiff's client in breaching its fee agreement with Plaintiff.

Count I of the Amended Complaint seems to assert a tortious interference with contractual relations, as a result of which Plaintiff had to engage in litigation of three actions, (1) to recover the fee his client owed him, (2) to recover that fee also or alternatively from Plaintiff's client's debtor, Defendant's client, and (3) the instant action. The total fees to date for that litigation is alleged to be roughly \$229,000. The fee Plaintiff's own client owed him is also sought here, in the additional amount of \$257,000.

Count II is essentially repetitious of Count I, but here

Plaintiff expressly bases his claim on Mr. von Waldow's alleged violations of the Rules of Professional Conduct and the "custom and usage of the industry." Plaintiff asserts that these violations aided and abetted Plaintiff's client's breach of contract.

Count III also is repetitious of Counts I and II. Plaintiff here seems to raise a conspiracy saying Defendant "jointly participated" in Plaintiff's client's breach of contract and fraud.

The only duties Defendant would have to Plaintiff under the facts of this case arise solely under the Rules of Professional Conduct. Absent those Rules, Defendant would have *no* duty to Plaintiff, so the conduct of Mr. von Waldow, even if as unethical as Plaintiff suggests, gives rise to no legally cognizable claim. There is no further amendment that could cure that basic deficiency. See Order filed separately.

BY THE COURT:
/s/Friedman, J.

Dated: February 8, 2008

Cavalla, Inc. v. Tri-State Plastics, Inc.

Motion for Post-Trial Relief

1. In order to preserve issues for appeal, a party must make timely objection on the trial transcript.

2. A warranty claim will not lie where manufactured parts are merely incorrect as opposed to being defective.

3. Where the undisputed facts establish that conversion machinery parts failed to function as intended, rather than being incorrectly manufactured, the use of the word "defective" by a lay witness is not conclusive proof that a warranty claim has been established.

4. In the absence of an error or abuse of discretion by the Court, there is no basis for the award of post-trial relief.

5. In the absence of any credible legal authority contrary to the Court's award of pre-judgment interest on lost profits under well settled Pennsylvania law, an appeal on this basis will be denied.

(Joseph H. Bucci)

Jamie L. Flaherty, Daniel C. Lawson, and Meghan E. Jones-Rolla for Plaintiff.

Austin P. Henry for Defendant.

No. AR-04-714. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

INTRODUCTION

Friedman, J., February 8, 2008—Plaintiff appeals this Court's Order dated December 14, 2007 denying Plaintiff's Motion for Post-Trial Relief and entering judgment on Defendant's Counterclaim in the amount of \$354,949.27. The Order was docketed on December 18, 2007, and Plaintiff's Notice of Appeal is timely.

FACTUAL BACKGROUND

The instant dispute involves a contract between Plaintiff and Defendant for the conversion of certain used bottling equipment purchased by Defendant from a third party. Plaintiff instituted the suit based on approximately \$9,000

owed for "wear parts" needed to make the used equipment operable. Under the contract Plaintiff had also promised to convert the equipment so Defendant could bottle a liquid candy for its customer, Innovative Candy Concepts, in time for the Halloween candy season. The used equipment had been manufactured by an Italian company referred to as Comas, and Plaintiff was expected to obtain the wear parts and replacement parts necessary for the conversion from Comas. Defendant had no contractual relationship with Comas. Defendants' Counterclaim was based on Plaintiff's failure to complete the job at all. The jury found in favor of Plaintiff on the claim for payment of the wear parts (which Defendant never disputed but was holding as a setoff). The jury also found in favor of Defendant on its Counterclaim for failure to perform the conversion. The jury clearly believed the Defendant's evidence and rejected that of Plaintiff. The questions on appeal are solely related to some of the Court's legal rulings.

In the instant case, the essence of the contract was that the modification of certain bottling equipment and the installation of appropriate parts be completed in a timely fashion by Plaintiff so that Defendant could begin supplying product to its customer in accordance with the customer's seasonal needs. Plaintiff claimed this work was done as of May 10, 2003 (a date that would have been timely), and performed no substantial work on the project after that date. (See T.T. Vol. I, p. 92.) However, Plaintiff supplied and installed incorrect parts (*not* defective parts) and never completed the modification. Plaintiff's position was essentially that Comas sent the wrong parts and that Comas' failure excused Plaintiff's lack of performance.

Defendant's production needs were based on its customer's supply requirements and were known to Plaintiff in substantial detail. Plaintiff knew that Defendant had to be able to supply the product to its customer by a certain deadline. Plaintiff knew that if it did not perform its contract properly and in a timely fashion, Defendant would lose the customer totally and, of course, would receive none of the profits Defendant had expected to gain from the customer. Plaintiff also knew the Defendant was relying on Plaintiff's knowledge and expertise with regard to the equipment at issue and the conversion. By the time Defendant had managed to perform the modifications itself and corrected Plaintiff's failed performance of its contract obligations, the customer for whose seasonal business the modifications had been required had had to find a different supplier to meet its needs in a timely fashion. The resultant damages suffered by Defendant were substantial, were supported by expert evidence and were not seriously disputed.

In its Concise Statement of Matters Complained of Pursuant to Pa.R.A.P. 1925(b) ("Statement"), Plaintiff raises three issues on appeal involving (1) a warranty asserted by Plaintiff as a defense to Defendant's Counterclaim, (2) a ruling regarding the mention in Defendant's closing of Plaintiff's failure to join the manufacturer of the replacement parts as an additional defendant to Defendant's Counterclaim, and (3) the Court's award of pre-judgment "interest" on the lost profits component of Defendant's Counterclaim. These three main issues generate five sub-issues:

1. Whether the Court erred in concluding that a warranty provision in the contract between the parties was inapplicable to the dispute at hand.
2. Whether the Court applied an incorrect definition of "principal" in the warranty provision and therefore erred in not allowing parol evidence regarding Defendant's agents' legal conclusions

about the applicability of the warranty.

3. Whether the use of the word “defective” by lay witnesses during their depositions is a conclusive admission by Defendant that the parts used by Plaintiff to convert the equipment at issue were “defective” in the legal sense, so as to invoke the warranty at issue, or were merely incorrect and non-compliant with the contract requirements.

4. Whether the Court abused its discretion, first, in overruling Plaintiff’s objection to Defendant’s statement in its closing argument that Plaintiff “could have joined Comas” which Plaintiff, in its Statement, characterizes as calling for a mandatory joinder, incorrectly saying Defendant’s argument was that Plaintiff “should have joined the manufacturer of the replacement parts; second, in permitting Defendant to argue that Defendant could not itself have joined the said manufacturer; and third, in permitting Defendant to argue that Plaintiff still could recover from the manufacturer the losses that Plaintiff owed Defendants. (Plaintiff says these rulings were erroneous for two reasons, lack of evidence of those legal conclusions and the Rules of Court related to permissive joinder and long-arm jurisdiction.)

5. Whether the Court erred in awarding pre-judgment interest on Defendant’s claim for lost profits because such damages are not “ascertainable by calculation,” and Plaintiff could not have learned that amount prior to trial and tendered it in satisfaction of Defendant’s Counterclaims. (Plaintiff does not complain of the Court’s stated basis for the award, which was that monetary damages “in the nature of interest” are authorized as discussed in a memorandum that accompanied the Order now complained of.)

There was no objection to the Court’s charge to the jury, which begins at T.T. Vol. II, p. 343, l. 15. The charge conference is found at pp. 256 to 283 of T.T. Vol. II. During the charge conference, Defendant, by implication, asked the Court to reconsider its prior ruling that its counterclaim for fraud would not be submitted to the jury. The Court refused. Plaintiff asked the Court to grant a non-suit (meaning a directed verdict) on Defendant’s counterclaim for breach of contract. The Court refused this as well, saying it was a jury question. Defendant then asked for a directed verdict in its favor on the issue of Defendant’s breach of contract. This too was denied and left to the jury. The record reflects that the Court and counsel were in general agreement as to the breach of contract charge. The Court gave the jury its own “standard” charge on the law of contracts, a copy of which had been given to counsel before the closings.

DISCUSSION

1. The Court properly concluded that a warranty provision in the contract between the parties was inapplicable to the dispute at hand.

The warranty provision was inapplicable to Defendant’s Counterclaim, which was based on Plaintiff’s failure to complete its performance under the Contract. The warranty would only arise if a conversion part were defective as opposed to merely being incorrect. An analogy to automobile tires might be helpful in understanding this distinction. Suppose Plaintiff had been hired by Defendant to install a new tire on Defendant’s used car. Plaintiff installs a 24” tire, but the car needed a 22” tire. The larger tire quickly mal-

functions (but fortunately causes no personal injury). Plaintiff sues Defendant for the unpaid balance due on the contract price for the tire and the installation. Defendant files a Counterclaim for a refund of the money already paid. (We will not attempt an analogy to the remainder of instant Defendant’s claim for lost profits.) Plaintiff’s defense to the counterclaim is a warranty provision identical to that here. However, as here, the tire warranty *presupposes* that Plaintiff has performed its obligations under the contract correctly. In the tire analogy, Plaintiff installed the wrong size tire. Plaintiff’s *performance of the contract* was “defective,” but the *tire* was not. Here, Plaintiff’s provision and installation of incorrect parts was a defective *performance*, but the parts themselves were *not* defective. The warranty does not apply.

It must be noted that neither Plaintiff nor Defendant *ever* contended that the parts themselves were poorly manufactured. Defendant’s contention was that they were simply wrong given the contract requirements. Plaintiff *could* have defended by adducing evidence to show the parts it installed were the correct ones and that the reason they failed was that they were poorly manufactured. However, since Plaintiff had no such evidence, it could not and did not contend that they were *manufactured* incorrectly. Rather, Plaintiff relied on semantics and word games in a failed attempt to obfuscate the true factual dispute and introduce an inapplicable warranty defense.

The Court was able to rule on this issue fairly early in the case because it was clear that Plaintiff had *no* evidence that the parts were the correct ones under the contract but had been poorly manufactured. Plaintiff was relying only on the lay use of the word defective and attributing it to the parts, when, in context, it referred to Plaintiff’s defective *performance* of its contract obligations. The contentions of Defendant and, later, the evidence before the jury, clearly indicated that the Counterclaim was based on *wrong* parts, not bad ones.

2. The Court did not apply an incorrect definition of “principal” in the warranty provision and did not err in not allowing parol evidence regarding Defendant’s agents’ legal conclusions regarding the applicability of the warranty.

Plaintiff’s alternate meaning of the word “principal” in the warranty provision was never articulated because there can be no alternate meaning, as the discussion with Court and counsel indicated, during a lengthy conference in chambers, on the record. (T.T., Vol. I, p. 239 to 256.) Counsel for Plaintiff contended that “Principal in that context [the warranty] is defining somebody else. It [the use of the word “principal” in the warranty provision] doesn’t invoke the law of principal and agent.” (T.T. Vol. I, p. 246.) Later, in the same discussion, counsel for Plaintiff re-affirms that “[t]here is no principal-agent relationship [between Plaintiff and Comas].” (T.T. Vol. I, p. 248.)

Still later, at T.T. Vol. 1, pp. 308-334, Plaintiff’s counsel attempts to retract his earlier statements that there was no principal-agent relationship between Plaintiff and Comas, the manufacturer of the conversion parts at issue. After much in-chambers discussion, the Court read into the record the ruling it had made during the lunch recess.

The Cavalla warranty is not relevant either to Tri-State’s defense nor to its counterclaim. Tri-State has not claimed and does not intend to claim that the Comas parts themselves were defective, and this is what I understand. This is what was said in your briefs, and I hold Tri-State to that.

Rather, Tri-State claims that Cavalla failed to per-

form its other obligations under the agreement between the parties related to setting up the used machine that was to be purchased and was eventually purchased by Tri-State and providing related training to Tri-State employees so that the converted machine would be ready to operate. And I think the date was May 16, 2003.

The jury, not the judge, will have to decide what the agreement was—in other words, whether they believe Tri-State’s version of events. They’ll have to decide what the agreement was as to those other issues, not the supplying of the parts themselves, and whether or not Cavalla breached that part of the parties’ agreement. Damages for any such breach are not limited by the warranty.

Since no one has contended that the parts Comas manufactured were defective, the warranty has no relevance to the issues in the dispute. Those issues involve Cavalla’s conduct in inducing Tri-State to enter the contract and Cavalla’s performance of its own duties beyond the mere furnishing of the Comas parts.

MR. LAWSON: Your Honor, I do not believe that that is a correct account of some of the evidence. The evidence is that a torque head, for instance, manufactured by Comas, was defective.

THE COURT: Mr. Henry, speak out if you’re making a representation.

MR. HENRY: That’s incorrect, Your Honor. We are saying that the torque head as supplied and as set up did not work for these particular bottles, and that’s what we’ve always said. Obviously that torque head may have worked for some other bottle. We are not claiming that that torque head broke down or kept breaking down.

T.T. Vol. 1, pp. 326-327.

There then followed additional discussions regarding Plaintiff’s counsel’s questions, which the Court ruled were premature, concerning Defendant’s closing arguments.

3. There was no error in barring Plaintiff’s questions related to Defendant’s understanding of the applicability of the warranty based on their lay use of “defective.”

Plaintiff’s counsel had indicated he wanted to be sure that his offer of proof was on the record regarding the lay witnesses’ understanding of the applicability of the warranty and that if the record was not already clear he would “have that for the Court on Monday.” (T.T. Vol. 1, p. 334, ll. 11-12.) The Court believes that such a supplement to the then-existing record was not offered. The record of “Monday’s” proceedings begins at T.T. Vol. II, p. 3. The record does not reflect that Mr. Lawson had created such a supplement.

The gist of Plaintiff’s argument is that the lay witnesses’ use of the word “defective” is conclusive proof that the warranty therefore applies. As previously indicated, this argument takes one word out of context and without regard to the facts shown by the evidence. The undisputed facts were that the conversion parts did not work with the customer’s bottle, as required by the Contract, that Plaintiff failed to provide the correct parts, and that Defendant eventually was able to provide the correct parts itself as part of its efforts to mitigate the effects of Plaintiff’s incomplete performance. Returning to the tire analogy, once a correct 22” tire was installed, the car could be driven as intended.

4. There was no error or abuse of discretion in allowing Defendant to argue to the jury, correctly, that if Plaintiff blamed Comas, Plaintiff could have brought Comas into the suit and that Plaintiff still could bring its claims against Comas in a separate action.

The language complained of and the resultant discussion are found at T.T. Vol. II, pp. 305 to 311.

It must be noted that Defendant counsel stated “Cavalla could have joined Comas in the lawsuit.” (T.T. Vol. II, p. 305, ll. 21-22.) Plaintiff complains on appeal that Defendant told the jury it “should” have joined Comas. Statement p. 4, item B.

Plaintiff also complains that the Court erred in ruling that Defendant itself did not have a viable claim directly against Comas and says the Court should have let Plaintiff inform the jury that Defendant’s only claim was against Comas, not Plaintiff. (Statement, Item B, pp. 4-5.) At the time, Mr. Lawson raised the inapposite case of “McPherson and Buick Motor,” saying that “privity went out” with that case. (T.T. Vol. II, pp. 309-311.) *McPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) is the landmark opinion of justice Benjamin Cordozo of the New York Court of Appeals and involved a tort claim for personal injuries that resulted when a defective wheel on a car broke causing an accident. It was not a contract action and Plaintiff does not cite it on appeal nor contend that it has anything to do with privity of contract where the claim is, as here, breach of contract.

This in-court discussion out of the jury’s hearing also reveals another misstatement by Plaintiff of the Court’s Ruling. On page 5 of Plaintiff’s Statement Plaintiff says, “This Court denied [Plaintiff’s request that it be permitted to argue that Defendant also could have sued Comas but failed to do so], stating that Tri-State could not have sued Comas because it lacked privity and jurisdiction.” (Emphasis added.) At page 311, ll. 11-12, the Court expressly told Plaintiff’s attorney that its ruling was not “a jurisdictional decision” as he had characterized it. On page 309 the Court had said Defendant couldn’t sue Comas because Defendant had no contract with Comas. The idea of jurisdiction sprang fully grown from the forehead of Plaintiff’s counsel and was never part of the Court’s ruling nor was the long-arm statute ever an issue or a factor in the Court’s rulings as to who could or could not have joined Comas.

On appeal Plaintiff also raises an issue that was not preserved by a timely objection. On page 5 of its Statement, Plaintiff complains that “counsel for Tri-State was permitted to argue that Cavalla could still attempt to recover from Comas for any losses Cavalla was forced to pay Tri-State” and goes on to raise sub-issues 131 and B2. The Court’s review of the transcript reveals only one comment by Defendant’s counsel that resembles the above-quoted portion of Plaintiff’s Statement. At p. 312 ll. 7-8, Defendant counsel says “They [i.e. Plaintiff] had a relationship with Comas. They can still sue Comas if they want to.” *No objection* was made to this part of Defendant’s argument so the Court made *no* ruling on it. Waiver clearly applies to Plaintiff’s argument on appeal regarding Defendant’s allusion to Plaintiff’s right to indemnification.

5. The Court properly awarded damages in the nature of interest on Defendant’s claim for lost profits.

It must be noted that this issue was extensively discussed in the prior Memorandum in Support of Order that was filed with the Order that is the subject of this appeal. As previously indicated, Plaintiff does not complain on appeal of the basis in Pennsylvania law for the award of pre-judgment interest on lost profits upon which the Court actually relied, that set forth in *Frank B. Bozzo, Inc. v. Electric Weld Division*, 345 Pa.Super. 423, 498 A.2d 895

(1985). *Bozzo* elucidates the *two* aspects of interest, “interest as such” on liquidated, i.e. “ascertainable,” damages and “compensation for delay” on *unliquidated* amounts, which is “in the nature of interest” and is “measured by the legal rate of interest.”

On appeal, Plaintiff merely argues against the basis for interest that the undersigned also expressly stated was *inapplicable*. Plaintiff fails to raise any argument that *Bozzo* is an incorrect statement of Pennsylvania law or that the Court’s stated reasons for awarding “compensation for delay” in the instant case violated the *Bozzo* holding in any way. Having failed to state any error, the portion of the appeal as to pre-judgment interest has been waived. In the event it is found not to have been waived, it is fully discussed in the Memorandum in Support of Order dated December 14, 2007.

CONCLUSION

There is no merit to Plaintiff’s appeal. The matters raised were correctly ruled on by the Court or, as to some, were waived.

BY THE COURT:
/s/Friedman, J.

Dated: February 8, 2008

Jefferson Regional Medical Center v. Vascular & Interventional Associates, Inc., et al.

Breach of Contract—Fraud—Puffing

1. Where sophisticated business entities negotiate contracts with intricate provisions, mere puffing by one party during the course of negotiations does not rise to the level of fraud or fraudulent inducement.

2. To establish fraud, one must demonstrate the establishment of a representation, with falsity, scienter, deception and injury.

3. Where the evidence fails to comport with the requirements of fraud, mere puffing made by one party during the time when an agreement is negotiated will not rise to the level of fraud in the inducement.

(Joseph H. Bucci)

H. Woodruff Turner and Jeremy A. Mercer for Plaintiff.

Scott Michael Hare for Defendant.

Mary Jo Rebelo for Third Party Plaintiff.

Scott C. Essad for Third Party Defendants.

No. GD 06-002341. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM ORDER

O’Reilly, J., February 25, 2008—The issue presently before me raises the question of when, or whether, in a commercial transaction, “puffing” can become fraud. Here, Plaintiff, Jefferson Regional Medical Center, (“Jefferson”) has sued Defendant Vascular & Interventional Associates, Inc., Penn Imaging Affiliates, PC, Albert J. Cook, II, M.D., Brandt A. Cook, and Edata Financial Services, LLC, (collectively “Associates”) over a contract entered with Associates for it to perform certain radiologic services for Jefferson including providing radiologists to read x-rays, and the like. Jefferson alleges that Associates did not live up to its contractual obligation, and did not provide the services agreed

upon yet was paid under the contract. Associates has characterized the matter as a breach of contract action.

Jefferson, obviously feeling bilked by one of its own, Dr. Albert Cook, II, M.D., has reacted with litigious fury and commissioned its lawyers to bring every conceivable cause of action against Associates and Cook. They have carried out that assignment with gusto.

The initial complaint was filed on January 27, 2006 and contained 30 pages, and XVI Counts plus numerous attachments including the contract between the parties and other documents. Eventually it grew to a third amended complaint consisting of 57 pages, numerous attachments and XXII Counts. Counts I through III—Breach of Contract; Count IV—for unjust enrichment; Count V—for fraud; Count VI—for fraudulent inducement; Count VII—for negligence inducement; Count VIII—for Declaratory Judgment; Count IX—Breach of Contract by another Defendant, Penn Imaging Affiliates, PC, (“Penn”); Count XII—claim under the Wage Payment and Collection Law (“WPCL”); Count XIII—Breach of Contract versus Penn; Count XIV—WPCL; Count XV—Breach of Contract versus Penn; Count XVI—WPCL; Count XVII—Tortious interference with business relation; Count XVIII—Racketeer Influenced and Corrupt Organization Law, (“RICO”); Count XIX—RICO versus Defendant, Brandt A. Cook, (“Cook”); Count XX—conspiracy to violate RICO; Count XI—Prime Facie Tort; Count XXII—Conspiracy to interfere with Business Relationships.

The Wage Payment and Collection Law counts appear because certain radiologists were allegedly employed by one of the other Defendants, Penn, and who claim they were not fully paid by it, and have claims under the WPCL. Jefferson has purchased these claims from those purported employees and now seeks full recompense from Associates on those claims.

In view of the RICO allegations, defense counsel removed the case to Federal Court on April 5, 2006, where it wound its way through Federal Discovery practice for 16 months, after which Jefferson *withdrew* its RICO claims, and the matter was removed back to Common Pleas on August 27, 2007.

Thereafter various matters for Summary Judgment and Judgment on the Pleadings were filed and various of these were voluntarily worked out or adjusted by the parties including the Count for “Prima Facie Tort.” What came before me is the Motion for Judgment on the Pleadings, filed by Associates, as to the Counts sounding in fraud.

Associates counsel has argued that this is simply a breach of contract claim with various parties and contracts and sophisticated billing, but a breach of contract case only. He has also argued that the gist of the action theory militates against any question of fraud.

Jefferson counters by citing to *Sullivan v. Chartinell Inc. Partners, L.P.*, 873 A.2d 710 (Pa.Super. 2005), an apt reference to a case where an employee of a personnel recruitment and placement firm, who was literally lied to by the Defendant to keep him within the company for a short additional period and then the Defendant there reneged on those specific promises. Jefferson has also cited numerous other cases, many from Federal District Courts. While interesting, these have no precedential value. I am seeing this more and more, probably due to the internet and the ease in finding cases.

Here, however, the parties are sophisticated business entities who employ capable counsel to negotiate contracts. The contract so negotiated likewise contains provisions that indicate the parties were uncertain how the contract would actually work and instituted provisions that called for rebates to Jefferson if it paid too much under the contract. Further, *Sullivan* involves the granting of a *demurrer*, by the Trial Court, to all of *Sullivan’s* Complaint. That is vastly different from the case herein where a sophisticated contract is

involved. Further, the logical extension of this interpretation of Sullivan is the complete erosion of the “gist of the action” theory and every Breach of Contract case will become a fraud case.

In *Sullivan* the Court also found that the inducements offered to the Plaintiff were *collateral* to the performance of the contract, and therefore not barred by the gist of the action. I do not find that distinction here, and rather the alleged “fraud” occurred as the contract was being negotiated, which led to the blurring between “puffing” and actual fraud.

While Jefferson has asserted a Fraud in the inducement Count, I find nothing in the material submitted to me that shows anything more than “puffing” by Associates, that is making claims to perform that have not been realized. Our commercial system and the concept of caveat emptor have been developed to deal with such claims.

Generally, fraud consists of the establishment of representation, falsity, scienter, deception, and injury (Black’s Law Dictionary). Here, all of these elements do not exist, particularly the element of scienter. Further the contract itself, with its provision for Post Contract accounting recognizes that over billing or even over payments may occur. The parties, themselves, built in a provision to deal with the uncertainties of this kind of contract.

Thus, I believe the Motion for Judgment on the Pleadings is well taken, and I will GRANT it and DISMISS the Fraud and Fraudulent inducement Counts from the Complaint, to-wit, Counts V and VI.

BY THE COURT:
/s/O’Reilly, J.

Dated: February 25, 2008

Commonwealth of Pennsylvania v. David Stephen Sullivan

Criminal Law—Post-Sentence Motions

1. The trial court acted within its discretion when it denied criminal defendant’s motion for a new trial based on a claim that the verdict was against the evidence as the jury clearly awarded child-victim’s testimony greater weight than the testimony identified by the defendant.

2. The admission of pornographic magazines with a cautionary instruction from the court was proper and within the court’s discretion where the “story line” of the materials referenced at trial was similar to the defendant’s alleged assaults on the child-victim and where the child-victim alleged the defendant had shown her the magazines in question. Because the magazines were relevant to and probative of the crimes charged, their probative value greatly outweighed the prejudice caused by their admission.

3. Prosecutor did not commit misconduct in questioning defendant because the statements in question were not actually comments on his post-arrest silence, but rather a discussion of his partial confession.

4. Although the sentence imposed was outside the guideline range, it did not exceed the statutory maximum sentence and under the circumstances of the case was appropriate and adequately supported on the record.

(Laura A. Meaden)

Jennifer DiGiovanni for the Commonwealth.
Robert E. Stewart for Defendant.

No. CC: 200502944. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

McDaniel, A.J., December 4, 2007—The Defendant has appealed from this Court’s Order of April 12, 2007, which denied his Post-Sentence Motions. A review of the record reveals that the Defendant has failed to present any meritorious issues and, therefore, this Court’s Order must be affirmed.

The Defendant was charged with Rape of a Child,¹ Involuntary Deviate Sexual Intercourse with a Child,² Aggravated Indecent Assault with a Child,³ Indecent Assault of a Person Less than 13 Years,⁴ Endangering the Welfare of a Child,⁵ Corruption of Minors⁶ and Terroristic Threats.⁷ Prior to trial, one (1) count each of Rape and Aggravated Indecent Assault were withdrawn. Following a jury trial, the Defendant was found not guilty of the Rape, Aggravated Indecent Assault and one (1) IDSI charge, and was found guilty of the remaining charges.

He appeared before this Court on January 18, 2007 and was sentenced to a term of imprisonment of 18 to 36 years on the IDSI charge. No further penalty was imposed on the remaining charges. Timely Post-Sentence and Supplemental Post-Sentence Motions were filed and denied. This appeal follows.

On appeal, the Defendant raises a number of issues which are addressed as follows:

1. Weight of the Evidence

The Defendant argues that the guilty verdicts were against the weight of the evidence. However, a review of the record reveals that this claim is meritless.

“The weight of the evidence is exclusively for the finder of fact who is free to believe all, part or none of the evidence and to determine the credibility of the witnesses.... A motion for a new trial based on a challenge to the weight of the evidence concedes that the evidence was sufficient to support the verdict.” *Commonwealth v. Jaroweki*, 923 A.2d 425, 433 (Pa.Super. 2007). “Trial judges, in reviewing a claim that the verdict is against the weight of the evidence, do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.” *Commonwealth v. Bruce*, 916 A.2d 657, 665 (Pa.Super. 2007). Weight of the evidence claims are directed to the discretion of the trial court, and the trial court’s ruling will not be disturbed absent an abuse of discretion. *Id.*

The evidence presented at trial—and which the Defendant has conceded was sufficient to support the verdict, see *Jaroweki*, *supra*—established that over the course of several years, the Defendant molested his step-daughter Madison Betush. The abuse began when Madison lived with the Defendant—whom she believed to be her natural father—and her mother in the family trailer in West Deer Township. Eventually, the Defendant and Madison’s mother began divorce proceedings and the Defendant, Madison and her younger brother Davey all moved in with the Defendant’s mother, Kathy Sullivan. According to Madison, the lion’s share of the abuse took place once they had moved into “Grandma Kathy’s” house. When he was alone with Madison, the Defendant would show her pornographic videos and magazines, many of which depicted older “father figure” men and young girls, and would play a pornographic dice game with her. He would drape the pool table with a sheet, which he dubbed the “clubhouse” and make Madison undress and crawl underneath with him. There he would touch Madison’s breasts and genitals and force her to per-

form oral sex on him. Madison testified that the Defendant told her that all fathers and daughters did this, and he threatened to abandon her, essentially leaving her orphaned since her mother had already left, if she told anyone.

In his weight of the evidence argument, the Defendant argues that Madison's allegations lack credibility because they were "vague and formulaic" and that they were made during a custody and visitation dispute, which according to the Defendant, renders them suspect. He also argues that because there was no physical examination evidence and that many of his relatives testified that Madison was a happy child and they witnessed no abuse. While it is certainly true that there was testimony regarding these facts at trial, none of these facts prove that the Defendant did *not* commit the various acts Madison testified to. The jury clearly awarded Madison's testimony greater weight than the testimony identified by the Defendant, as was their right. The guilty verdicts do not shock the conscience, and, therefore, this Court was well within its discretion when it denied the Motion for a New Trial based on a claim that the verdict was against the weight of the evidence. This claim must fail.

2. Trial Court Error—Admission of Adult Magazines

The admission of evidence is within the discretion of the trial court. *Commonwealth v. Carter*, 932 A.2d 1261, 1264 (Pa. 2007). Generally, all relevant evidence will be admitted. *Commonwealth v. Dean*, 693 A.2d 1360, 1367 (Pa.Super. 1997). "Evidence is relevant if it tends to make more or less probable the existence of some fact material to the case, it tends to establish facts in issue or when to some degree advances the inquiry and thus has probative value.... However, even relevant evidence is inadmissible if the trial court, in its discretion, determines that its prejudicial impact outweighs its probative value." *Commonwealth v. Moore*, 567 A.2d 701, 706 (Pa.Super. 1989).

The Defendant has alleged that this Court erred in permitting the admission of a number of pornographic magazines at trial. Among the magazines, which included several copies of Playboy, there was one magazine in particular which was referenced by the Commonwealth throughout the case. That magazine, *Tight*, contained an article/story line entitled "Ten Little Virgins Who Love Older Men." The "story" concerned a series of older men/father figures who engaged in sexual relationships with younger girls and one of the pairings occurred in a "Clubhouse," much as the Defendant dubbed the area where his assaults on Madison occurred. In addition to the similarities in the nature of the assaults, Madison testified that the Defendant showed her the magazines. The Defendant now alleges that the magazines were so "overly prejudicial" as to be inflammatory such that they prevented the jury from arriving at a fair verdict.

After reviewing the magazines and hearing arguments from counsel, this Court ruled that the magazines were relevant and probative and would be admissible with a cautionary instruction. (Trial Transcript, p. 31). When the magazines were admitted at trial, this Court gave the following cautionary instruction:

THE COURT: Before we go any further, ladies and gentleman, I would like to give you an instruction.

There are some adult magazines and DVDs that will be admitted as evidence and will be available to you in your deliberations.

These are not pleasant to look at. You should not let them stir up your emotions to the prejudice of the defendant. Your verdict must be based on rational and fair consideration of all of the evi-

dence and not on passion or prejudice against the defendant, the Commonwealth or anyone connected with this case.

(Trial Transcript, p. 213).

"It would be difficult to conceive of a trial at which the prosecution's evidence was not prejudicial to the defendant.... The difficulty arises when the evidence is so prejudicial that it sweeps the jury beyond rational consideration of guilt or innocence of the crime on trial." *Commonwealth v. Moore*, 567 A.2d 701, 706 (Pa.Super. 1989). "The drawing of lines with respect to the admission of sexually explicit materials is difficult.... In some instances materials found in an accused's possession might very well be probative of an issue in a case. For instance, if the publication sought to be admitted here had depicted women being tied up and subjected to anal intercourse against their will, it may have been probative of whether [defendant] forced his victim to commit those same acts. Further, if there had been allegations that the [defendant] had shown the magazine to the victim or in any way used the magazine during his attack on her, the probative value of the evidence would be more obvious." *Commonwealth v. Impellizzeri*, 661 A.2d 422, 431 (Pa.Super. 1995).

As noted above, the "story line" of the materials referenced at trial was similar to the Defendant's assaults on Madison, specifically as it concerned the father/daughter type relationships depicted and the "clubhouse" location of the assaults. Further, Madison testified that the Defendant showed her the magazines in question. (Trial Transcript, pp. 96, 159). Because the magazines were relevant to and probative of the crimes charged, their probative value greatly outweighed the prejudice to the Defendant caused by their admission. See *Impellizzeri*, *supra*. See also *Commonwealth v. Enders*, 595 A.2d 600 (Pa.Super. 1991).

In addition, the Defendant's prejudice argument fails to take into account the not guilty verdicts to the most serious charges. If the jury was as prejudiced by the admission of the magazines as the Defendant now claims, they certainly would not have been able to return not guilty verdicts to the top counts of the information, namely Rape, Aggravated Indecent Assault and Involuntary Deviate Sexual Intercourse.

Further, the Defendant's argument that the Commonwealth compounded the prejudice by referencing the magazines during cross-examination of several defense witnesses also fails. During their testimony, the Defendant's aunts Mary May and Debbie Becker testified that the Defendant could not have committed the acts as Madison alleged. The Commonwealth then appropriately cross-examined the women with the magazines to demonstrate their lack of knowledge of the existence of the magazines which were seized from the basement by police. The fact that neither woman knew about the magazines goes directly to the weight afforded their testimony.

Under the circumstances, the admission of the magazines with the cautionary instruction was proper and within this Court's discretion. This claim must fail.

3. Prosecutorial Misconduct—Comment on Post-Arrest Silence

Next, the Defendant argues that the Assistant District Attorney committed prosecutorial misconduct when she allegedly commented and questioned the Defendant regarding his post-arrest silence. However, because the statements in question were not actually comments on his post-arrest silence, but rather a discussion of his partial confession, this claim must fail.

"Prosecutorial misconduct does not occur unless the

unavoidable effect of the comments at issue was to prejudice the jurors by forming in their minds a fixed bias and hostility towards the defendant, thus impeding their ability to weigh the evidence and render a true verdict.” *Commonwealth v. Chmiel*, 889 A.2d 501, 542 (Pa. 2005). It is well-established that a prosecutor may use a defendant’s post-arrest silence as an inference or admission of guilt. *Commonwealth v. DiNicola*, 866 A.2d 329, 337 (Pa. 2005). However, “a prosecutor may, when responding to a defendant’s argument, comment on a defendant’s pre-arrest silence or post-arrest silence and not run afoul of the defendant’s Fifth Amendment right against self-incrimination.” *Commonwealth v. Colavita*, 920 A.2d 836, 844 (Pa.Super. 2007). “The protective shield of the Fifth Amendment may not be converted into a sword that cuts back on an area of legitimate inquiry and comment by the prosecutor on the relevant aspects of the defense case.” *Commonwealth v. Copenhefer*, 719 A.2d 242, 251 (Pa. 1998).

The Defendant takes issue with the Commonwealth’s cross-examination regarding his statement to Detective Matthews that “not all of [the allegations] were true.”⁸ However, the record reflects that defense counsel first elicited the testimony from the Defendant on direct examination:

Q. (Mr. Stewart): Now, you heard Detective Matthews said he put in quotes, not all of them. Do you remember what you said to him with regard to when he’s talking about things that Madison said?

A. (The Defendant): I don’t remember the exact words.

Q. Well, what is your understanding or what is your recollection of what you said?

A. I had said along the lines of, Not all of it is true or, there is some truth to it, something along those lines.

Q. What were you talking about?

A. I was talking about the things he was telling me that were being said, there was some truth to them.

Q. Well, some truth to the allegations of sexual molestation?

A. Some truth to the story.

Q. Which part?

A. For example, it said in there that I would shave Madison’s legs. That part was true. It said that she had seen magazines. That part was true.

Q. What about movies?

A. Yes.

(Trial Transcript, p. 473-474).

Then, on cross-examination, the following occurred:

Q. (Ms. DiGiovanni): So now you’re in the vehicle with Detective Matthews and he’s detailing for you what these allegations are, correct?

A. (The Defendant): That’s correct.

Q. And you would agree with me he was very specific—you would agree with me, sir, that Detective Matthews was very specific with you about what specific acts Madison was alleging, correct?

A. Yes.

Q. And he said, Madison is saying that you made

her perform oral sex on you, correct?

A. Yes.

Q. Madison is saying that you performed oral sex on her, correct?

A. Yes.

Q. Madison is saying that you digitally penetrated her with your finger, correct?

A. Yes.

Q. Madison is saying that you put your finger in her vagina?

A. Yes.

Q. Madison was also saying that you put your tongue in her vagina?

A. Yes.

Q. And he also says Madison says that you showed her pornography in terms of videos and magazines, correct?

A. Yes.

Q. Okay. And at the end of that, your reaction to that is something along the lines of, Not all of it’s true. There is some truth to the, or there is some truth to that story. That’s your reaction?

...Q. Let me ask you this, sir: your first reaction when you hear all of these allegations, very specific sexual allegations, your first reaction is not, I never raped my stepdaughter, is it?

A. No.

Q. Your first reaction is, I never put my finger in my stepdaughter’s vagina?

A. No.

Q. Your first reaction isn’t anything about, I never molested her, I never touched her?

A. No.

Q. Your first reaction is, Not all of it is true. There is some truth to that. There is some truth to that story.

A. That’s correct. That’s correct.

Q. And by that, you say today, two years later, close to two years later, that you meant the part about you shaving her legs was true, correct?

(Trial Transcript, p. 496-499).

First, the record is clear that the questions posed by the Assistant District Attorney were not an improper comment on his post-arrest silence. Rather, the comments concerned the Defendant’s admission that not all of the allegations were true, or, essentially his admission that some of the allegations were true. The ADA was well within her discretion in testing the Defendant’s admission, especially given his direct examination testimony that the admission referred to his shaving Madison’s legs as opposed to the allegations of sexual conduct.

However, to the extent that the questions could somehow be considered a comment on his post-arrest silence, it is clear that the questions fall within the fair response exception to the prohibition. The Defendant brought up his admission to Detective Matthews on direct examination and opened the door to further questioning on the point. He can-

not now use the prohibition against comments on post-arrest silence to limit the Commonwealth's cross-examination. See *Copenhefer, supra*.

It is clear that in light of the Defendant's direct examination, the questions posed by the ADA on cross were proper. This claim is meritless.

4. Sentencing Issues

Finally, the Defendant argues that the sentence imposed was unreasonable, unjust and a manifest abuse of this Court's discretion because it was "grossly disproportionate to the circumstances of the case" and because it was allegedly based on a number of victim impact statements.

"Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion.... 'To constitute an abuse of discretion, the sentence imposed must either exceed the statutory limits or be manifestly excessive'.... In this context, an abuse of discretion is not shown merely by an error in judgment...Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision." *Commonwealth v. Mouzon*, 828 A.2d 1126, 1128 (Pa.Super. 2003), internal citations omitted. "The sentencing court may deviate from the sentencing guidelines to fashion a sentence which takes into account the protection of the public, the rehabilitative needs of the defendant and the gravity of the particular offense as it relates to the impact on the life of the victim and the community, so long as the court also states of record the factual basis and specific reasons which compelled [it] to deviate from the guideline range." *Commonwealth v. Tirado*, 870 A.2d 362, 366 (Pa.Super. 2005). Victim impact statements are a standard part of a Pre-sentence Investigation Report, and the Court may also consider other, additional victim impact statements when fashioning a sentence. See *Commonwealth v. Perry*, 883 A.2d 599 (Pa.Super. 2005), *Commonwealth v. Simpson*, 829 A.2d 334 (Pa.Super. 2003) and *Commonwealth v. Mountain*, 711 A.2d 473 (Pa.Super. 1998).

Though the Court did consider, in part, the victim impact statements it received, the Defendant fails to recognize that they were not the sole basis for the sentence imposed. At the sentencing hearing, this Court placed its reasons for sentencing on the record:

The Court has ordered, read and considered a pre-sentence report made available to you and your attorney.... The Court has received a number of victim impact statements which I have read. Those statements are directed to the Court personally, I believe, and will not become a matter of public record. I have statements from the victim. I have a statement from Rita and Robert Betush; one from Ginger Hoover; one from Madison Betush's aunt whose name is Gina Mele; and one from Melanie Sullivan. In addition I have also received a letter from your son, Davey. These will become a part of my personal file...

The impact that you had on the victim is quite obvious through her letter, through her words. One of the things that upsets this Court is that you did violate a condition of trust. You did threaten a child. And your heinous acts took place over a two year period. It's not as though this was one offense that it was something that a child is likely to recover from and I think that you have taken Madison's childhood away from her. I'm glad to

hear that she is in therapy. I hope that therapy will continue. I hope that someday she will be a well human being, but you have done everything in your power to be sure that that did not happen, to the fact of taking her when you and your wife had separated.

I am also saddened by the impact on your family. The letter that I read from your son is one of the saddest letters I've ever seen. So not only have you destroyed your life, you've destroyed the lives of both families.

The Court feels that your actions, because they were over such a significant period of time, because they were on a young, vulnerable victim, a victim who trusted you, a victim who you threatened, you are obviously not a candidate for county supervision. There's a five year mandatory in this sentence and you are a danger to the community.

(Sentencing Hearing Transcript, p. 3, 12-13). It is evident that the Court appropriately placed its reasons for imposing sentence—which encompassed more than the victim impact letters—on the record.

The sentence imposed, 18 to 36 years, though outside the guideline ranges, was within the statutory maximum. "It is well-established that the Sentencing Guidelines are purely advisory in nature...the Guidelines do not alter the legal rights or duties of the defendant, the prosecutor or the sentencing court. The guidelines are merely one factor among many that the court must consider in imposing a sentence....Despite the recommendations of the Sentencing Guidelines, 'the trial courts retain broad discretion in sentencing matters and therefore, may sentence defendants outside the Guidelines.' **The only line that a sentence may not cross is the statutory maximum sentence.**" *Commonwealth v. Yuhasz*, 923 A.2d 1111, 1118-19 (Pa. 2007), internal citations omitted, emphasis added. Under the circumstances of this case, the sentence was appropriate and adequately supported on the record. This claim must fail.

Accordingly, for the above reasons of fact and law, this Court's Order of April 12, 2007, denying the Defendant's Post-Sentence Motions must be affirmed.

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

Date: December 4, 2007

¹ 18 Pa.C.S.A. §3121(c)—2 counts

² 18 Pa.C.S.A. §3123—2 counts

³ 18 Pa.C.S.A. §3125—2 counts

⁴ 18 Pa.C.S.A. §3126(a)(7)—2 counts

⁵ 18 Pa.C.S.A. §4304(a)

⁶ 18 Pa.C.S.A. §6301

⁷ 18 Pa.C.S.A. §2706(a)(1)

⁸ At trial, Detective Matthews testified that after the Defendant was arrested and was advised of the charges against him, he stated that "not all of those were true." (Trial Testimony, p. 239). Said testimony was an admission and was properly admitted into evidence at trial. The Defendant has NOT objected to the introduction of this admission through Detective Matthews.

Commonwealth of Pennsylvania v. Jeremy Benjamin Ogrosky

*Criminal Law—Photo Array—Suppression of Evidence—
Ineffective Assistance of Counsel*

1. Fact that defendant's picture was placed at the end of the first-row in the top right-hand corner in a photo array is not indicative of suggestive placement requiring photo identification to be suppressed.

2. Defendant failed to present evidence of his standing or his expectation of privacy with respect to bags of clothing delivered to the police by a third party who was neither an agent of nor acting in concert with the police. Accordingly, evidence contained in the bags would not be suppressed.

3. Defendant failed to meet his burden of demonstrating the ineffectiveness of his counsel for the alleged failure to call alibi witnesses where counsel did call an alibi witness, but not as many as the defendant now contends should have been called.

(*Laura A. Meaden*)

Michael Streiley for the Commonwealth.
Daniel DeLisio for the Defendant.

No. CC 200413966. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Cashman, J., January 28, 2008—The appellant, Jeremy Ogrosky, (hereinafter referred to as "Ogrosky"), has filed the instant appeal as a result of the imposition of a mandatory sentence of a period of incarceration of not less than five nor more than ten years as a result of his convictions for the crimes of robbery and theft. Ogrosky was directed, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), to file a concise statement of matters complained of on appeal and in filing that statement has identified four claims of error. Initially Ogrosky claims that the evidence was insufficient to establish that he was in fact the individual who committed these crimes. Ogrosky next claims that this Court erred in failing to suppress the photo array shown to the two victims on the basis that that array was unduly suggestive. Ogrosky also suggests that this Court erred in failing to grant his suppression motion with respect to the shirt and pair of sunglasses, which were delivered, to the police and, finally, Ogrosky has claimed that his trial counsel was ineffective for failing to interview or to call alibi witnesses. In order to understand these claims of error, it is necessary that a brief review of the facts of Ogrosky's case be made.

On July 14, 2004, Jessica Clancy, (hereinafter referred to as "Clancy"), and Lorie Eltringham, (hereinafter referred to as "Eltringham"), were working the afternoon shift at a Subway sandwich shop located in the Southland Shopping Center in Pleasant Hills, Pennsylvania. Eltringham was cleaning the back of the restaurant and, to facilitate that effort, opened the back door to the restaurant. That door was used exclusively by the employees for discarding waste and it was not an entrance that was open to the public. Clancy remained at the front counter to wait on potential customers. At approximately 6:54 p.m., a white male with a shaved head, tinted sunglasses and a white striped shirt, walked through the open back door and went to the front counter and asked Clancy for change for a dollar. When she opened the cash register drawer, this individual pulled a gun and demanded all of the money from the register. Clancy complied with his request and then he departed the restaurant; however, neither Clancy nor Eltringham could state with certainty in

which direction Ogrosky went. The police were called and interviewed both of these women and were given a description of a white male, approximately five foot seven, two hundred pounds, with a shaved head, tinted sunglasses and a white striped shirt. Based upon those descriptions, a composite sketch was made and the police continued with their investigation as to whom the perpetrator of these crimes might be.

On August 10, 2004, the Pleasant Hills Police received a phone call from an individual identifying himself as George Meyers, (hereinafter referred to as "Meyers"), who told the police that the individual who robbed the Subway sandwich shop was residing in his apartment. Meyers subsequently gave a written statement to the police identifying Ogrosky as the individual who committed these crimes and, based upon that information, the police prepared a photo array to be shown to the two eyewitnesses, Clancy and Eltringham. While Eltringham was unable to pick out Ogrosky as the individual, she indicated that he looked familiar and that he was one of the two that she thought might have been able to do it, but she could not make a definitive and an unqualified identification. This was based upon the fact that she had a very limited time to see Ogrosky and for the most part, viewed him from the back. Clancy, on the other hand, was positive in her identification and almost immediately identified Ogrosky when she viewed the photo array. Based upon this identification, an arrest warrant was issued for Ogrosky.

Before that warrant could be served, Ogrosky was arrested on another warrant for an unrelated incident and was lodged in the Allegheny County Jail. Ogrosky was arrested by the Elizabeth Township Police, which police department was contacted by Diane Ross, (hereinafter referred to as "Ross"), the mother of Meyer, the individual who initially indicated that Ogrosky was the robber. Ross was the actual renter of the apartment where Meyer and Ogrosky were staying, and she advised the police that there were several bags of Ogrosky's clothing that she was going to destroy since they had been left at her apartment and Ogrosky's then wife did not want to take possession of those items, which apartment was less than two hundred yards away from the Subway that was robbed. The police asked her not to destroy those items and, in fact, had them deliver them to the Elizabeth Police Department, where an inventory of the bags was made and a pair of tinted sunglasses and a white striped shirt were found.

Ogrosky, who had been separated for several weeks prior to his arrest, was lodged in the Allegheny County Jail, where his wife served him with divorce papers. During the first couple of weeks of his incarceration, Ogrosky was lodged in an intake pod and also in that pod, was Douglas Paul Callender, (hereinafter referred to as "Callender"), who had been arrested on the charge of possession of a controlled substance. During the two weeks that they were in the same pod, Callender heard several conversations that Ogrosky had with Callender's cell mate, including one in which Ogrosky admitted that he committed the robbery at the Subway sandwich shop. During the course of this conversation, Ogrosky would either refer to himself as the individual who committed the robbery, or this friend of mine. Ogrosky also made reference to the fact that he was worried about the security cameras at Subway, since they may have been able to get a good look at his face. He also stated that his initial plan was to go in and order a sandwich and then rob the shop but because of his concern about the security cameras, he decided to commit the robbery as soon as possible. Ogrosky also made it known to Callender that he was wearing a white striped shirt and sunglasses when he committed this robbery. Finally, he told Callender that his wife had served him

with divorce papers.

Ogrosky's first claim of error was that the evidence was insufficient to establish that he was the individual who committed the robbery. In reviewing the sufficiency of the evidence claim, a Court must determine whether or not the evidence admitted at trial and all reasonable inferences derived there from, when viewed in the light most favorable to the Commonwealth as the verdict-winner, supports the finding that all of the elements of the offense charged had been proven beyond a reasonable doubt. *Commonwealth v. Spotz*, 563 Pa. 269, 759 A.2d 1280 (2000). When examining the facts of the instant case in light of this standard, it is clear that the evidence is more than sufficient to demonstrate that Ogrosky was responsible for the commission of these crimes. Both of the employees of Subway gave a description to the police of a white male with a shaved head, tinted sunglasses and a white striped shirt, who was five foot seven or five foot eight and approximately two hundred pounds. Ogrosky's arrest photo and booking information indicated that he was five foot seven and two hundred pounds. When the police had developed enough information to determine that he would be a potential suspect, a photo array was prepared and shown to both Subway employees. While Eltringham was unable to unqualifiedly identify Ogrosky as the robber, Clancy was unequivocal in her identification of Ogrosky. In addition to the physical description of the robber and Clancy's positive identification of him, the Commonwealth produced Ogrosky's own words to identify him as the individual who perpetrated these crimes. Callender testified as to Ogrosky's admission that he was the individual who robbed the Subway and also detailed for him the change in his plan with respect to how the robbery was going to take place because of Ogrosky's concern about the cameras in the store. The fact that Callender also was aware of the divorce proceedings that have been started by Ogrosky's wife underscored the reliability of his testimony.

Ogrosky's second claim is that this Court erred when it failed to grant his suppression of the photo array used to identify him as the perpetrator of the crime when that array was unduly suggestive. In reviewing the record of this matter, it is clear that neither the original motion to suppress the photo identification nor Ogrosky's concise statement of matters complained of on appeal suggests the reason why the photo array was unduly suggestive and should have been suppressed. During the testimony that was taken on the suppression motion, it became clear that the only reason that Ogrosky could assert that the array was unduly suggestive, was that his photograph was placed in the upper right-hand corner of the photo array which contained eight total photographs, four on each of the two lines. In *Commonwealth v. Moore*, 534 Pa. 527, 633 A.2d 1119, 1125-1126 (1993), the Pennsylvania Supreme Court set forth the criteria that a Trial Court should use in making a determination as to whether or not the photo array is unduly suggestive.

We recognize that in response to this challenge, the Commonwealth bears the burden of establishing that any identification testimony to be offered at trial is free from taint of initial illegality. *Commonwealth v. Turner*, 454 Pa. 520, 314 A.2d 496 (1974); Pa.R.Crim.P. 323(h). In ruling on whether the Commonwealth has met its burden, the trial court must determine whether there has been suggestiveness employed during the process of photographic identification which creates a very substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct.

967, 19 L.Ed.2d 1247 (1968); *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). In making this determination, the court should normally consider the manner in which the identification procedure was conducted, the witness' prior opportunity to observe, the existence of any discrepancies between the witness' description and the defendant's appearance, any previous identification, any prior misidentification, any prior failure of the witness to identify the defendant, and the lapse of time between the incident and the court identification. *Commonwealth v. Fowler*, 466 Pa. 198, 352 A.2d 17 (1976); *United States v. Higgins*, 458 F.2d 461 (3d Cir. 1972).

Using these criteria, it is clear that the photo identification made by Clancy and Callender resulted from their ability to observe the defendant and not from any improper efforts on behalf of the police. Clancy had Ogrosky directly in front of her when he pulled the gun and demanded the money from her cash register. Similarly, Callender was in the same jail pod as Ogrosky for a two-week period and had more than an ample opportunity to identify him as the individual making the statements acknowledging his culpability in the commission of these crimes. There was sufficient evidence presented to document the manner in which the photographic array was put together and the photographs themselves, in no way lead one to the conclusion that the only individual who could have been identified was Ogrosky. The fact that his picture was placed at the end of the first row in the top right-hand corner, is not indicative of suggestive placement but was one of mere happenstance. The identification of Ogrosky was made a little more than a month after the occurrence and although the robbery took place in a short period of time, there was a sufficient period of time during which Clancy had the opportunity to observe the defendant and make her positive identification. It should also be noted that in making her identification, she did it almost immediately and was positive of that identification. Eltringham, while believing that the individual who committed the crime was one of the two photographs she identified in the photo array, which included Ogrosky's photograph, could not be definitive in her identification and, accordingly, that identification was not used. The reason she could not be entirely sure of her identification was due to the fact that she only momentarily saw his face and observed him from the back throughout the entire course of this robbery.

Ogrosky next claims that this Court erred in failing to grant his suppression motion with respect to the shirt and sunglasses that were delivered to the police by Ross. In *Commonwealth v. Boulware*, 876 A.2d 440, 442-443 (Pa.Super. 2005), the Superior Court acknowledged that an individual seeking suppression of evidence must first demonstrate standing to assert that claim and an expectation of privacy with respect to the items that were seized.

A defendant seeking suppression of seized evidence has the initial burden of establishing standing and a legitimate expectation of privacy in the area searched or the items seized. *Commonwealth v. Hawkins*, 553 Pa. 76, 80-81, 718 A.2d 265, 267 (1998); *Commonwealth v. Black*, 758 A.2d 1253, 1257 (Pa.Super. 2000). An accused may demonstrate standing by presenting evidence of any one of the following four elements: 1) his presence on the premises at the time of the search and seizure; 2) a possessory interest in the evidence seized; 3) that the offense charged includes possession as an

essential element; or 4) a proprietary or possessory interest in the searched premises. *Id.* It is also incumbent upon the defendant to demonstrate a subjective expectation of privacy in the premises on the date of the search. *Commonwealth v. Torres*, 564 Pa. 86, 105-06, 764 A.2d 532, 543 (2001); *Commonwealth v. Perea*, 791 A.2d 427, 429 (Pa.Super. 2002).

At the time of the hearing on Ogrosky's motion to suppress, he presented no evidence with respect to his standing or his expectation of privacy but, rather, expressed them as legal conclusions for which there is no factual basis. Additionally, he attempted inferentially to assume that Ross was an agent of the police in obtaining the seized items when the facts of this case do not support that contention. Ross was the mother of Meyers, who was residing in the Southpointe Towers in an apartment in Pleasant Hills, Pennsylvania, which apartment was being rented by Ross. Meyers, after seeing the composite photographs that were generated as a result of the description given to the Pleasant Hills Police by the two eyewitnesses, called the police and told them that Ogrosky was the individual who committed this crime and that provided the basis for the police to put together the photo array which was then shown to Clancy and Eltringham.¹ As a result of Ogrosky being arrested on these charges, he was lodged in the Allegheny County Jail and Ross, in cleaning her apartment, noticed several bags containing items, which may or may not have belonged to Ogrosky. When Ross contacted Ogrosky's wife and asked her if she wanted those items, she was told that she did not. Ross then contacted the police and informed them that she had these items and she was asked to deliver them to the police where an inventory search of the bags was done, during which inventory search the white-striped shirt and sunglasses were located. There was no independent search or seizure by the police but, rather, this was evidence that was delivered to them by a third party who was neither an agent or acting in concert with the police.

Even assuming that this Court erred in failing to grant the suppression of the physical evidence, no prejudice has befallen Ogrosky since his identification was not contingent upon these physical evidence but, rather, he was positively identified by Clancy and Callender as the individual who committed the crime. In addition, Callender provided testimony with respect to Ogrosky's inculpatory statements and that testimony was bolstered by the fact that the information that Callender provided was not made known to the general public and that Callender also knew of Ogrosky's pending divorce proceedings.

Finally, Ogrosky has suggested that his trial counsel was ineffective for failing to call certain alibi witnesses. Although the Pennsylvania Supreme Court in *Commonwealth v. Grant*, 813 A.2d 726 (Pa.Super. 2002), directed that all claims of ineffectiveness of counsel be raised in a collateral proceeding filed under the Post-Conviction Relief Act, it also recognized in *Commonwealth v. Bomar*, 573 Pa. 426, 826 A.2d 831 (2003), that since the claims of ineffectiveness were raised in post-sentencing motions and a hearing was held on those motions, that a record would be developed concerning the claims of ineffectiveness and the Trial Court could address those claims in its opinion.

To prevail on a claim that counsel was constitutionally ineffective, an appellant must overcome the presumption of competence by showing that its underlying claim has arguable merit, and that this particular course of conduct pursued by his counsel did not have some reasonable basis

designed to effectuate his interest and but for counsel's ineffectiveness, there is a reasonable probability of the outcome of the challenge proceeding would have been different. *Commonwealth v. Pierce*, 567 Pa. 186, 786 A.2d 203 (2001). The failure to satisfy any one of these three criteria, requires the rejection of the claim of ineffectiveness. *Commonwealth v. Albrecht*, 554 Pa. 31, 720 A.2d 693 (1998). If it is clear that the appellant has not demonstrated that counsel's act or omission affected the outcome of the proceedings, then there is no requirement to examine the question of whether or not the claim had arguable merit or that the course of conduct designed by counsel was not designed to affect the interests of the defendant. *Commonwealth v. Albrecht, supra.*

The predicate for the current claim of ineffectiveness is the failure of Ogrosky's trial counsel to investigate and subsequently to call alibi witnesses. An alibi defense is one that places the defendant, at the relevant time, in a different place than the scene that the crime was committed and that it is so removed that it would make it impossible for that individual to be the guilty party. *Commonwealth v. Roxberry*, 529 Pa. 160, 602 A.2d 826 (1992). To show the ineffectiveness of his counsel in not presenting alibi testimony, Ogrosky must establish that counsel could have no reasonable basis for not presenting that testimony. *Commonwealth v. Carpenter*, 555 Pa. 434, 725 A.2d 154 (1999).

To prevail on a claim of ineffectiveness for failing to call a witness, Ogrosky was required to demonstrate: 1) that the witness existed; 2) that the witness was available; 3) that trial counsel was informed of the existence of the witness or should have known of the witness' existence; 4) that the witness was prepared to cooperate and would have testified on his behalf; and, 5) that the absence of the testimony prejudiced him. *Commonwealth v. Malloy*, 579 Pa. 425, 856 A.2d 767 (2004). In a review of the record it is clear that Ogrosky's trial counsel knew of the potential alibi testimony since he did, in fact, present an alibi witness in addition to having Ogrosky testify to his presence at his brother's birthday party. Both Ogrosky and his alibi witness, his brother Lawrence Ogrosky, testified that he was at a birthday party some distance away from the Subway that was robbed. In describing their testimony, they also identified other individuals who might have been there. The question then became as to whether or not Ogrosky's counsel was ineffective for failing to call the five alibi witnesses that were called in support of his post-sentencing motions. The problem in analyzing this particular question, is that Ogrosky never called his trial counsel to explain the reason why he did not call these other individuals. It is Ogrosky's burden to demonstrate that his counsel had no rational basis for not calling these witnesses; however, he failed to do that when he failed to have his counsel testify. The reason why Ogrosky's trial counsel was never called might be because of the letters that Ogrosky wrote to this Court while he was awaiting sentencing. In both letters Ogrosky acknowledged that he committed these crimes and took responsibility for the crimes and apologized to the victims.

THE COURT: Let's start with the one he sent me on the 22nd of September, 2006: Sir, the reason I am writing to you is to apologize to you, the District Attorney, victims, and the state for the trouble I have caused. I never would have believed when I was in the military that one day in doing drugs, cocaine, and marijuana and be convicted of robbery. I regret the trouble and pain I have caused all the parties involved in the case. Here I am, a grown man and kids of my own and have to be punished like a child. I can't believe how irresponsible, reck-

less I was being to my family, friends, and everybody around me. I thank you for seeing through it. I went into your courtroom with an attitude, wanted and prayed for a miracle. I was no longer using, but my wife and family life was still at an all-time low. I seen something in your eyes that gave me hope. I misunderstood what that was in my selfish ways. I thought it was a sign that I would be found not guilty. Now, sir, I see what it was. I had to be found guilty. When I realized I wasn't fooling anyone, I started to look for hope and faith. Sir, you saved me and my family.

Then I have his letter to me of the 2nd of October, 2006: I was hoping that the sentencing chart found at the law library and looked up that pertained to my charges. Robbery holds a 22 to 46 month and/or boot camp for a zero prior record score; is that right? Well, no, that would be such a miracle. I would beg the Court to please give me a minimum amount of time, sir, not for me because I did the crime and I do deserve to be punished, but for my children and my wife.

Post Sentence Motion Transcript, page 28, lines 10-25 through page 29, lines 1-23.

It is clear that Ogrosky had failed to meet his burden of proof of demonstrating the ineffectiveness of his counsel for his alleged failure to call alibi witnesses when, in fact, he did call an alibi witness but did not call as many as Ogrosky now contends he should have. Similarly, Ogrosky failed to demonstrate the lack of trial strategy since he failed to call his trial counsel and, finally, Ogrosky in his own words, acknowledged to this Court that he committed the crimes for which he was convicted. Accordingly, Ogrosky's post-sentencing motions were properly denied and the sentence that was imposed upon him was done so in accordance with the mandatory minimum sentence that was required to be imposed.

Cashman, J.

Dated: January 28, 2008

¹ See Affidavit of Probable Cause attached to the original Complaint.

Commonwealth of Pennsylvania v. Douglas Richard Kennedy

Criminal Law—Driving Under the Influence

Order dismissing DUI counts on a finding that 75 Pa. C.S. §3802 *et seq.* was unconstitutional was reversed and case was remanded for further proceedings where Pennsylvania Supreme Court upheld the constitutionality of Section 3802 of the Vehicle Code in another case during the pendency of appeal in this case.

(Laura A. Meaden)

James Gilmore for the Commonwealth.
Stephen Begler for the Defendant.

No. CC-200414788. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Sasinoski, J., January 3, 2008—On July 30, 2004, Douglas Richard Kennedy (Appellee) was arrested and charged with

two counts of driving under the influence, one count of driving with a suspended license and a blood alcohol content (BAC) greater than .02%, and one summary count of driving vehicle at an unsafe speed.¹ Prior to trial, defense counsel made an oral motion on February 8, 2006, challenging the constitutionality of Section 3802 (c) (concerning driving after imbibing alcohol general impairment with BAC level range of .10% but less than .16% within two hours of driving, operating or actual physical control of the movement of a vehicle). Appellee complained that this provision was unconstitutional under the Due Process Clause of the United States Constitution, as well as Article I, Section 9 of the Pennsylvania Constitution.

After hearing argument by both the Commonwealth and defense counsel, the trial court entered an order that same day dismissing the DUI counts on a finding that Section 3802 was unconstitutional, based exclusively on the Allegheny County Common Pleas Court decision in *Commonwealth v. Duda*, CC No. 200413158 (C.P. Allegheny, Aug. 9, 2005) (declaring Section 3802 void for vagueness and overbroad), *reversed*, 923 A.2d 1138 (Pa. 2007).

The Commonwealth filed a timely appeal to the Pennsylvania Supreme Court pursuant to 42 Pa.C.S. §722(7) (providing that the Supreme Court shall have exclusive jurisdiction of appeals from final orders of common pleas court holding a statute unconstitutional). After the trial court's decision was rendered, but while the Commonwealth's appeal was pending in this case, the Supreme Court reversed the Allegheny County Common Pleas Court decision in *Duda*, upheld the constitutionality of Section 3802 of the Vehicle Code, 75 Pa.C.S. §3802, and remanded that case for further proceedings. *See Duda*, 923 A.2d at 1152. Consequently, the decision in the case *sub judice* likewise should be reversed and remanded for further proceedings.

BY THE COURT:
/s/Sasinoski, J.

¹ 75 Pa.C.S. §§3802 (a)(1) and (c), 1543 (b)(1.1), and 3361, respectively.

Commonwealth of Pennsylvania v. John H. Ford

Criminal Law—Insufficient Evidence

1. Although evidence presented by the Commonwealth was primarily circumstantial, it was sufficient to prove beyond a reasonable doubt that the defendant was guilty of third-degree murder where defendant was the last person to see the victim alive, the victim's body was found in an abandoned building owned by the defendant's father and defendant admitted that he and the victim had "gotten into it."

2. Defendant's contention that the Commonwealth failed to prove malice was erroneous where Commonwealth established victim was fatally stabbed by twelve-inch knife; malice may be inferred when an individual uses a deadly weapon on another's body.

(Laura A. Meaden)

Michael Streely for the Commonwealth.
Erin Morey for Defendant.

No. CC 200214183. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Cashman, J., January 29, 2008—On December 5, 2006, following a jury trial,¹ the appellant, John Ford, (hereinafter referred to as “Ford”), was convicted of third degree murder. A presentence report was prepared and on March 1, 2007, Ford was sentenced to a period of incarceration of not less than twenty nor more than forty years. From the imposition of sentence, Ford filed an appeal and was directed to file a concise statement of matters complained of on appeal. In that statement, Ford raises one issue and that is the question of whether or not the evidence was sufficient to sustain his conviction for the crime of third degree murder. In particular, Ford maintains that the evidence was insufficient to demonstrate that the killing was a malicious one and that he was the individual who perpetrated this crime.

Ford and the victim, Katrice Lester, (hereinafter referred to as “Lester”), had been involved in a tumultuous and, unfortunately often violent, romantic relationship for over five years. During that period of time, Lester’s mother repeatedly told her to end her relationship with Ford and obtain a protection from abuse order against Ford. In December of 2001, Lester moved out of the residence that she shared with Ford in Clairton and moved back into her mother’s home with her two children, telling her mother that she had ended her relationship with Ford. In the five years that Lester was involved with Ford, Ford had never phoned Lester’s mother, Eugena Hawkins, (hereinafter referred to as “Hawkins”).

Both Lester and her mother worked at UPMC, but on different shifts. Lester was a highly motivated and active woman who was meticulous in her record keeping. Lester kept a calendar with her at all times where she made notes with respect to her appointments and things that she intended to do. On the morning of January 18, 2002, Hawkins took her daughter to McKean Honda so that she could have some work done on her car. Lester then went to the bank and cashed her paycheck, depositing some of the money back into the bank and retaining some of the money for her personal use since she had beauty appointments scheduled later that day. Lester’s calendar revealed that at 3:30 p.m. that afternoon she had an appointment to have her nails done and that at 4:30 p.m. she had a hair appointment to have her hair done. These two appointments were scheduled since she had made arrangements with her girlfriends to go out and party later that evening. Lester’s calendar also revealed that she had purchased tickets for the Ice Capades for the following day, January 19, 2002, and that she intended to take her two children to that show.

After receiving a call that the work had been completed on her car, Lester’s mother drove her to the dealership where Lester picked up her car. Lester then went to her nail appointment at S&T Nails and was in the process of having her nails done when Ford appeared. Ford walked into the nail salon, sat down and waited with Lester while her nails were being done. When the person doing her nails asked Lester who Ford was, she was advised by her that he was Lester’s ex-boyfriend. Lester’s appointment to have her nails done took approximately one hour since she had a highly decorative and intricate pattern placed on her nails, with the primary color being red. When Lester’s nails were done, she and Ford left the nail salon and walked to her car and they both got in the car and she drove away.

Lester never appeared for her 4:30 p.m. hair appointment nor did she meet up with her girlfriends to go out that evening. Lester did not call her mother to inform her of her whereabouts and she did not show up at her home on January 19, 2002 to take her children to the Ice Capades. Lester’s mother called the police and filed a missing persons

report in the hopes of having them aid her in finding out where her daughter was. Over the next several days, Ford called Lester’s mother approximately twenty times demanding to know where Lester was since he had not heard from her since January 18, 2002.

The Pittsburgh Police undertook an investigation with respect to the disappearance of Lester and two detectives went to the ARC House in New Kensington where Ford was residing.² During the course of a very brief interview, Ford acknowledged that he had seen Lester at the nail salon on January 18, and that after they left that salon she gave him a ride to his car and that he got into his car and she went on her way, and that was the last time he saw her. In getting some basic information from Ford, the detectives asked him whether or not he was employed and Ford indicated that he worked for a company called Bill’s Landscaping and provided the detectives with that company’s phone number. In checking this information out, it was determined that that phone number did not belong to a company called Bill’s Landscaping and that Ford was not employed by that company or any other company.

In early February of 2002, Dorothy Sanders, (hereinafter referred to as “Sanders”), the property manager of the Center Grove Apartments, located in Versailles Borough, received complaints from a number of residents that there was a car illegally parked in one of the designated parking spots. Sanders went out and investigated and noticed that a green Honda was parked in parking spot number forty, which was a designated parking spot for one of the residents of the apartment complex. Sanders called the police to advise them that this car had been there for a considerable period of time and that no one claimed ownership to that car. On February 11, 2002, William Kruzak, (hereinafter referred to as “Chief Kruzak”), the Chief of Police of the Versailles Borough Police Department, went to the Center Grove Apartments and was told where the green Honda was parked. Chief Kruzak went to the car, got its license plate number and then radioed that number back to his department so that he could get information as to the owner of the vehicle. Information was relayed back to Chief Kruzak that Lester was the owner of the vehicle and he confirmed that information once he was able to open the glove compartment to see the owner’s card, registration and other personal papers. Phone calls were made to attempt to locate Lester, however, the Chief was unsuccessful in ever contacting her. Chief Kruzak then wrote out a parking ticket and attempted to place it on the windshield to only have the wind blow the ticket off of the windshield. He retrieved the ticket and then placed it on the inside of the car. While leaning into the car to put the ticket down, he noticed that there was a twelve inch knife between the passenger and driver’s seats. Chief Kruzak picked up the knife and noticed a reddish-brown stain on the blade of that knife. The Chief took possession of the knife, put it in an evidence bag and put it in the trunk of his car. A tow truck service was called to tow the vehicle and that vehicle along with the knife eventually was turned over to the Pittsburgh Homicide Detectives who were investigating the disappearance of Lester.

The investigation continued through the summer of 2002 without any significant progress. In early September of 2002, Morris Jones, a cousin of Ford, was arrested on a drug charge and when he was lodged in the Allegheny County Jail, he indicated to the police that he might have some information on a potential homicide. Jones was disclosing this information because he had been disturbed about the fact that Lester had not been seen in almost nine months and that he felt that she was like a sister to him. Jones told the police that during the winter of 2001 and 2002, Jones, while driving

Ford's truck, would pick him up at the ARC House in New Kensington at 6:00 a.m. in the morning and drop him off wherever Ford directed and then return him to the ARC House at 6:00 p.m. in the evening. This was because Ford had work release privileges from the ARC House, despite the fact that he was not employed.

On January 18, 2002, Jones picked him up in New Kensington and then drove Ford to his mother's house in Clairton. Jones got a call from Ford later in the day asking that he be picked up. Jones, with a friend of his, drove to Ford's mother's home, picked Ford up and then drove him approximately one block from his mother's house to where Lester's car was parked. Ford then got into Lester's car and told Jones and his friend, Chuck, to follow him. Ford then drove to the Center Grove Apartment complex in Versailles Borough and parked Lester's car, taking the keys with him. He then got into the other vehicle with Jones and told Jones that he had made a mistake. He then said that he and Lester had got into it and that he punched her. They then proceeded to take Ford back to the ARC House. Jones also told the police that he suspected that Lester was dead and that she was probably buried on the grounds of the property owned by Ford's father in Clairton. The reason that they suspected her body might be there was that the Clairton police had searched the area unsuccessfully in February and when Ford found out that the police were searching that home, he became extremely nervous. In addition, Jones said that there were numerous rumors on the street that that was where Lester might be.

On September 7, 2002, the Pittsburgh Police went to 233 St. Clair Avenue in Clairton, Pennsylvania, to search the property in the hopes of finding the body of Lester. The police had a search dog with them and asked the Clairton police to contact the owner of the property to obtain consent to search the abandoned structure. The property owner, Ford's father, said that he was at work at the time and that he could not get there for a couple of hours. When the police informed him that there was an open window in the back of the building, he told them that they could go in and search the premises if they could get through that window. The police entered the building through that window and used the search dog to conduct a search of the three floors of the building. Nothing was found on the first two floors, however, the search dog hit on an object on the third floor and when ceiling tiles, rugs and other debris were pulled away, the body of Lester was discovered in a mummified condition. Since all of her organs and most of her tissue had liquefied, the police cut away the rug upon which the body was laying and put her remains together with that rug in a body bag and then sent it to the coroner's office so that an autopsy could be conducted.

Shawn Latham, M.D. of the Allegheny County Coroner's Office conducted the autopsy on Lester's remains and discovered that there appeared to be a knife wound of the left, tenth rib. When examining the clothing that Lester was wearing, he also identified two separate knife wounds that went through the leather jacket, blouse and bra that Lester was wearing. Based upon Latham's finding, he was of the opinion that there were two stab wounds and that the knife that was used to inflict these wounds would have punctured her heart and her left lung, both of which would have been fatal wounds. Latham also discovered another cut mark in the back of the blouse that Lester was wearing. DNA testing was done on samples that were submitted to the Crime Lab and it was determined that the remains that were located at Ford's father's abandoned home were, in fact, Lester. The clothing that she was wearing and the very distinctive design of her fingernails also identified her.

Ford has suggested that the evidence was insufficient to convict him of the crime of third degree murder since it could not establish malice or his identity as the perpetrator of this particular crime. In *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745, 751-752 (2000), the Pennsylvania Supreme Court set forth the standard by which a claim challenging the sufficiency of the evidence is to be viewed:

A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict. *Commonwealth v. Whiteman*, 336 Pa.Super. 120, 485 A.2d 459 (1984). Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner. *Tibbs*, 457 U.S. at 38 n. 11, 102 S.Ct. 2211.^{FNS} An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. *Commonwealth v. Brown*, 538 Pa. 410, 648 A.2d 1177 (1994). A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. *Thompson, supra*. A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that "notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." *Id.*

Similarly, in *Commonwealth v. Lyons*, 833 A.2d 245, 258 (Pa.Super. 2003), the Superior Court recognized not only the difference between a claim that the evidence was insufficient and that the verdict was against the weight of the evidence and the fact that the Commonwealth could sustain its burden of proof based solely upon circumstantial evidence. The Commonwealth's case against Ford was, in fact, one predicated almost exclusively on circumstantial evidence. In order to prevail on this claim, the circumstantial evidence must have been of such quality and quantity that the elements of the crime were proven beyond a reasonable doubt. *Commonwealth v. Dawson*, 464 Pa. 254, 346 A.2d 545 (1975).

In the instant case, the Commonwealth proved that Lester had ended a five-year romantic affair with Ford shortly before her death. The Commonwealth established that on January 18, 2002, that Lester was having her nails done between 3:30 p.m. and 4:30 p.m. and that Ford appeared at that nail salon and waited with her until her nails were done. When asked by the woman who was doing her nails who Ford was, Lester referred to him as her ex-boyfriend. The Commonwealth also established that Ford and Lester left together and got into Lester's car and drove away. Lester never made her 4:30 p.m. hair appointment nor did she have any contact with her mother, children or friends after leaving the nail salon. The Commonwealth also proved that within two hours after Lester and Ford left the nail salon, that Ford drove her car to the Center Grove Apartments in Versailles Borough and abandoned the car in a parking lot. Moments after abandoning the car, Ford told his cousin, Jones that he had made a mistake, that he and Lester had gotten into it and that he had punched her.

When Lester's mother called the police to file a missing persons report, she then began to receive numerous phone calls from Ford asking where Lester was, despite the fact that in the previous five years, Ford had never called her.

When Lester's car was found abandoned in the Center Grove Apartment complex, a twelve-inch kitchen knife was found in the console area between the driver and passenger seats and the blade portion of that knife appeared to be bloodstained. When Lester's decomposed and mummified body was finally found and examined by the coroner, there were two stab wounds which could be identified by tears in her clothing and a knife mark on the tenth, left rib which led Dr. Latham to conclude that these were two fatal wounds which would have perforated Lester's heart and her left lung. In addition, he found a third stab wound in the back of Lester's shirt.

The evidence that the Commonwealth presented led to the inescapable conclusion that the individual who murdered Lester was Ford. He was the last person to see her alive, was with her when she left the nail salon, and she was found in an abandoned building owned by Ford's father. He admitted to his cousin that he and Lester had gotten into it, that he had punched her and that he had made a mistake. All this was being said less than two hours after Lester left the nail salon driving her vehicle. No keys to the car were found in Lester's purse because Ford was able to drive the car from his mother's residence to the Center Grove Apartment complex where he abandoned it with the murder weapon.

While the Commonwealth's case is based upon circumstantial evidence, which unmistakably demonstrated that Ford was the killer, his own words corroborated that finding. His contention that the Commonwealth did not prove the element of malice is also erroneous since Dr. Latham established unequivocally that the two stab wounds that were inflicted upon Lester from the front would have perforated her heart and left lung and that either one of those stab wounds would have been fatal. It is axiomatic that malice can be inferred when an individual uses a deadly weapon on a vital organ of a victim's body. Here that deadly weapon, the twelve-inch knife, was used on Lester's body to perforate her heart and her left lung.

Based upon the foregoing, it is clear that the Commonwealth, despite the fact that its case was based primarily on circumstantial evidence, proved beyond a reasonable doubt the elements of the crime of third degree murder and demonstrated that Ford was the individual who murdered Lester.

Cashman, J.

Dated: January 29, 2008

¹ This was Ford's second jury trial on the general charge of criminal homicide since his first trial resulted in a hung jury.

² During the course of the jury trial, the ARC House was not mentioned directly since the questions posed by the Assistant District Attorney were in the form of Ford being interviewed in the house where he was residing. The jury was never told that Ford was at the ARC House serving a sentence in alternative housing; however, during the testimony of Ford's cousin, Maurice Jones, he repeatedly mentioned the fact that Ford was residing at the ARC House in New Kensington.

CAPSULE SUMMARIES

Glenn Sieber v. Michele Sieber

Alimony and Equitable Distribution: 80% of Estate awarded to Wife with 24 months of modifiable alimony—\$50,000 counsel fee award

1. Parties were married for 12 years and Wife had not worked since their first child was born in 1994 while Husband is a Vice President at a company owned by Wife's family. Wife was 45 years old, had a BA in psychology, and was found to have no earning capacity at the support proceeding in 2003.

2. At the 5-day trial held in 2005, Wife presented her treating physician who testified that there is no cure for her fibromyalgia and chronic headaches and she is unable to perform activities for sustained periods because any stress causes migraines and increased pain. Wife's vocational expert's opinion was that Wife had no earning capacity. Husband produced no medical evidence to refute Wife's medical testimony. Husband's vocational expert stated Wife had an earning capacity in excess of \$30,000 annually.

3. Court concluded, over Husband's objections, that Wife's expert's testimony was properly admitted. The vocational expert based her opinion on a deposition transcript, the treating physician's medical report and a full interview with Wife. Physician's opinion was not inconsistent with her observations or medical records.

4. Husband's vocational expert's opinion as to Wife's earning capacity was discounted as it did not consider Wife's health or medical conditions but only Wife's education and work experience.

5. Court's equitable distribution award is within its discretion and pursuant to several factors, 23 Pa.C.S.A. §3502 (a)(3), (5) and (10), a substantial award in Wife's favor was mandated. Husband's future earnings and ability to acquire assets in the future are far superior; Husband has a separate estate almost as large as the marital estate (\$572,000); Wife has no separate assets and no earning capacity. Wife contributed to Husband's increased earning capacity by facilitating his employment in her father's business.

6. Court upheld award of child support to Wife where a) Husband earned \$10,500 net per month and Wife \$0.00; and b) the parties shared custody equally (per Father's testimony). Even if Father had an additional overnight per month (which Husband also argued) because the parent's earnings are significantly disparate an award of child support to the "noncustodial parent" is permissible. *Colonna v. Colonna*, 855 A.2d 648 (Pa. 2004).

7. Alimony award will be reviewed in two years. The award of \$3,162 per month recognized the following factors: Wife's reasonable needs (reduced by Master from Wife's submitted budget); that equitable distribution award was not sufficient to achieve economic justice (but did result in a reduction in the amount of alimony); Wife's contributions as Mother and homemaker in consideration of her debilitating medical condition rendering her unemployable.

8. Wife's attorney's fee and costs totaled \$126,000 and was granted in the amount of \$50,000. Fee award is separate and

distinct from an equitable distribution award and is designed to allow a dependent spouse to maintain equal footing in the litigation. *Anzalone v. Anzalone*, 835 A.2d 773 (Pa.Super. 2003).

(Hilary A. Spatz)

Daniel H. Glasser for Plaintiff.

Chris Gillotti for Defendant.

FD02-005672 (006). In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division. Eaton, J., January 14, 2008.

Rose Ann Lackovic v. Susan A. Czapko, James P. Czapko and Terence Dineen, Jr.

Custody—Contempt—Sanctions—Counsel Fees and Make-Up Time

1. Grandmother, who by consent order was awarded partial custody including a week of summer vacation, brought petition for contempt when Mother denied her summer period of custody.

2. Partial custody Hearing Officer found Mother in contempt determining that she allowed an 11 year old "to call the shots." Mother's testimony, that she encouraged the visit, was not credible and was rebutted by other family members' testimony. Hearing officer awarded grandmother \$750.00 in counsel fees and a make-up week during the summer of 2008.

3. The court held that the Hearing Officer is the ultimate fact-finder, to weigh the evidence and assess the credibility of the witnesses. The Hearing Officer's findings were supported by competent evidence and therefore the trial court did not disturb them. *Doran v. Doran*, 820 A.2d 1279 (Pa.Super. 2003)

4. Mother could have filed a request for modification of the order if she believed it was not in the child's best interest to spend the summer period. Informing grandmother that child did not want to go, at the door, at what should have been the commencement of the vacation week, constitutes a willful violation of the order.

5. A counsel fee award was appropriate where specific terms of the interim consent order provided fees as sanctions. Evidence of grandmother's actual fees supported the amount of the award.

6. An additional week of vacation in 2008 (in addition to the regularly scheduled week) was an appropriate remedy when proceedings ended and there was no summer time left to reschedule in 2007.

(Hilary A. Spatz)

Jay B. Kranich for Plaintiff.

Michael DeRiso for Defendant.

Chester V. Beattie for Additional Defendants.

No. FD 99-009449 (006). In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division. Eaton, J., January 22, 2008.