VOL. 157 NO. 13 *Supplement to the Lawyers Journal* JUNE 19, 2009

PITTSBURGH LEGAL JOURNAL

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PLJ

The Pittsburgh Legal Journal is a supplement to the Lawyers Journal, which is published fortnightly by the Allegheny County Bar Association
400 Koppers Building
Pittsburgh, Pennsylvania 15219
(412)261-6255
www.acba.org

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Circulation 6,667

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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

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Shelby L. Jones, a Minor, by her Parent and Natural Guardian, David Jones, v. Gateway School District and Gateway School District Board of School Directors

Student Expulsion

1. Student was found to be in possession of a handwritten entry in her personal journal and on her person entitled "People to Kill." Student was initially suspended for violation of the Student Code of Conduct, which specifically refers to conduct which results in violence to another person or property or which poses a direct threat to the safety of others in the school. Following a formal hearing, student was expelled.

2. Student filed a local agency appeal. The Court based its opinion on briefs submitted, as well as transcripts of the formal hearing which resulted in student's expulsion.

3. The transcript revealed that the school principal testified that the student had not distributed the list of "People to Kill" in any way, and that the list did not contain any specific plan. The student had never threatened any of the people on the list, and never been suspended before, nor disciplined for any violent behavior. When the list was discovered, there was no lock down of the school, no classes were cancelled, and the teacher whose name appeared on the list did not take any time off of work. Finally, there were no weapons found in student's locker.

4. The School District contacted the parents of all the children whose names appeared on the list via letter and phone. However, the School District could not directly correlate the existence of the list with any quantifiable school absences by children whose names appeared on the list.

5. The Court sustained the student's appeal because there was no evidence to support the expulsion. The Court went further to point out that the very actions complained of resulting in disruption in the school were caused by the School District and not the student. The student had not acted on her private thoughts and had not disseminated the contents of her notebook. Rather, it was the School District that publicized the list.

(Jana S. Pail)

Lisa M. Petruzzi for Appellants.
Anthony Giglio for Appellees.

No. SA2008-545. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Friedman, J., March 6, 2009—This case was presented to the undersigned as a Local Agency Appeal from a decision of Gateway School District and the Gateway School District Board of School Directors (hereinafter collectively referred to as "Gateway"), pursuant to 42 Pa.C.S.A. §933 of the Local Agency Law. The parties who filed the Appeal were Shelby L. Jones, an 8th grade student in the school district, and her father David Jones (hereinafter, "Shelby," "Mr. Jones," or "the Joneses"). Gateway has now filed an appeal to the Commonwealth Court from an Order of the undersigned sustaining the Joneses' appeal. For purposes of clarity, we will refer to the parties throughout by their names, rather than appellant or appellee.

In their Appeal of Gateway's decision, the Joneses averred as follows: Shelby was alleged to have been in possession of a handwritten list entitled "People to Kill!" that was contained in her notebook and kept on her person. (¶11) On March 12, 2008, Shelby was suspended from Gateway High School for three days, allegedly for violating Discipline Code Level IV of the Code of Student Conduct, which is described as conduct which results in violence to another person or property or which poses a direct threat to the safety of others in the school. (¶7)

After an informal hearing with Shelby, her father, and the administration on March 17, 2008, her suspension was extended for an additional seven days. (¶8) A formal hearing was then held on March 27, 2008 before the Gateway School District Board of Directors, at which Shelby, her father, and her attorney were present. (¶10) Following the hearing, Shelby was expelled.

The Joneses filed their Local Agency Appeal on May 14, 2008, and it was assigned to the undersigned for disposition. We held a status conference with counsel on June 25, 2008, and it was agreed that the parties would submit briefs and that the undersigned would decide the matter on the briefs, without a hearing. On October 10, 2008, we entered an Order sustaining the Joneses' Appeal of Gateway's decision and vacating Shelby's expulsion, and denying the Joneses' request for counsel fees. This appeal to the Commonwealth Court followed.

The transcript of the formal hearing which was held on March 27, 2008 before the Gateway School District Board of Directors is a part of the Record filed in this case. In that transcript, the Principal of Gateway Middle School, Aaron Johnson, testified that to the best of his knowledge, copies of the list were not distributed to other students at the school or posted on any kind of web site, and that the list did not contain any specific plan of how to kill the people on it. (Transcript, pp. 16–17.) To the best of his knowledge, Shelby had never threatened any of the individuals on the list directly. (Transcript, p. 17.) Shelby had never been suspended before, nor had she been disciplined for any violent behavior. (Transcript, p. 18.) Following the discovery of the list, there was no lock down at the school, no classes were cancelled, and the teacher whose name was on the list did not take time off work. (Transcript, p. 19.) The Principal was not aware of whether Shelby had any access to weapons which could be used to carry out any threat, and no weapons were discovered in Shelby's locker when it was searched. (Transcript, p. 19.)

The Assistant Superintendent for Secondary Education, Dale Lumley, testified that in the letter he wrote to Shelby's father, he stated that Shelby was charged with terroristic threats to students and staff. (Transcript, p. 23.) The letter also stated that Shelby's conduct seriously disrupted the education process of the School District. (Transcript, p. 24.) He testified that the nature of the disruption included the following: "All of the students that were listed, their parents were contacted, informed that they were on the list. Subsequently we also sent a letter to all the parents of the students in the school indicating that lists were created. It created a sense of fear and anxiety by especially the parents that were contacted by phone to tell them they existed on the list. And also by the parents of other students who awaited the letter or awaited some kind of information." (Transcript, p. 25.) Mr. Lumley could not directly correlate the list with any unusual absences on the part of the students. (Transcript, p. 26.) Mr. Lumley also testified that Shelby's records showed that she had no disciplinary incidents during either the seventh or the eighth grades. (Transcript, p. 38–39.)

Gateway has raised five issues in its Statement of Matters Complained of on Appeal. However, these issues miscast the

record. The issues, as worded by Gateway, are as follows:

> 1. The record contains sufficient evidence to support the expulsion where the student admitted to possessing the "hit list" on school grounds and produced said list.
>
> 2. The record supports the School Board's finding that the possession of a "People to Kill!" list on school grounds is a serious expression of intent to inflict harm, and therefore a violation of the District's Code of Conduct. Expulsion is an appropriate disciplinary measure for this violation of the Code of Conduct where such an express intent to inflict harm or death exists.
>
> 3. The record supports the School Board's finding that the "hit list" caused actual and substantial disruption of the work of the school. Testimony of school administration demonstrates the measures that were required to be taken to ensure the safety of school students and teachers. In addition to the investigation required surrounding the "hit list," school administrators telephones the parents of over 50 students included in the lists, as well as sent letters to the parents of the entire student body. These measures were taken to avoid any further disruption and panic that can arise where such a list is found on school grounds. While these administrators were supposed to be educating the students of the District, they were forced to concentrate their efforts on protecting the safety of the students because of the "hit list" on school grounds.
>
> 4. The Court of Common Pleas, upon reviewing a disciplinary decision of a school board, is not supposed to be a "super" school board and substitute its own judgment for that of a school district; therefore, in the absence of a gross abuse of discretion, courts should not second-guess school policies. *Hoke ex rel. Reidenbach v. Elizabethtown*, _____ Pa. Cmwlth. ___ , 833 A.2d 304, 313 (2003) *citing Flynn-Scarcella v. Pocono Mountain School District*, 745 A.2d 117 (Pa.Cmwlth. 2000). There was no gross abuse of discretion in expelling S.J. By substituting its judgment and labeling the District's action a "mistake of judgment," this Court violated sound appellate court principles prohibiting such court intervention. This Court's Order effectively finds that where students bring "hit lists" on school grounds, they are not violating schools' codes of conduct, and should not be expelled for such behavior.
>
> S.J. admitted to possessing the "hit list" on school grounds, it is hard to imagine what other evidence is necessary to support the expulsion. If the District had not expelled S.J., it would be exposing all other students and teachers to potential harm that may arise from a troubled student who may act on such an expression to harm or kill. The School Board and District cannot be placed in the position of guessing when a student will go through with his or her expression to harm or kill other teachers or students. Undoubtedly, such conduct violates the Code of Conduct. If the issue is with the severity of the punishment, the School Board and District are best equipped to determine the appropriateness and severity of the punishment for clear Code of Conduct violations. The School Board and District are granted the statutory authority to expel students for such violation. *See*: 24 P.S. Section 13-1318 of the Public School Code. This Court should not substitute its judgment for the School Board which has the responsibility of acting for the safety of all its students and teachers. The School Board and District acted within the scope of its authority in expelling S.J.
>
> 5. The record supports a finding that no First Amendment or Constitutional violations result from the expulsion where a "hit list" is not protected by the First Amendment. The harm expressed in the list is a true terroristic threat that resulted in substantial disruption to the work of the school. The School Board could reasonably foresee substantial disruption resulting from the "hit list" on school grounds, and immediately acted to prevent chaos that would arise from the existence of the list, and to protect the safety of all students and teachers.

We sustained the Joneses' appeal because there was no evidence on the record to support the decision below. The evidence *of record* was undisputed and was that the actions complained of – causing disruption in the school – were not those of Shelby, but rather, those of Gateway. *Shelby's* actions – writing a "hit list" in her personal notebook, and keeping the list private – were a barely tangible evidence of a thought in her mind. She did not act on those thoughts nor did she threaten others. The testimony against Shelby was mere hearsay (prohibited by the Commonwealth Court as discussed below). Furthermore, even that flawed testimony indicated that Shelby had no apparent plans or means to carry out the "threat." It was Gateway who publicized the list, creating the disruption complained of. There was no evidence that Shelby had any propensity for violence. The "threats" were not communicated to anyone. By using Shelby's "bad thoughts" as a reason for permanent expulsion, Gateway abused its discretion, and the hearing officer had *no* basis for upholding the decision of Gateway to blame Shelby for its own actions.

Gateway is a local agency subject to the provisions of the Local Agency Law, 2 Pa.C.S.A. §551 *et seq.* The standard for admissibility of evidence at proceedings under the Local Agency Law is set forth at §554 of that Law:

> Local agencies shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received. Reasonable examination and cross-examination shall be permitted.

In *Commonwealth v. Contakos*, 21 Pa. Commw. 422, 346 A.2d 850 (1975), the Commonwealth Court has interpreted an identical provision contained in the Administrative Agency Law, 71 P.S. §1710.32. The Commonwealth Court stated very clearly:

> **The hearsay rule, however, is not a technical rule of evidence but a fundamental rule of law** which ought to be followed by administrative agencies at those points in their hearings when facts crucial to the issue are sought to be placed upon the record and an objection is made thereto.

21 Pa. Commw. at 425, 346 A.2d at 852 (citations omitted; emphasis added). A "fundamental rule of law" should not be abrogated by a local agency just as it may not be abrogated by a state administrative agency.

Since there was *no* evidentiary basis here for the Board's Adjudication, the appeal was properly sustained.

BY THE COURT:
/s/Friedman, J.

Dated: March 6, 2009

HHI Trucking Supply, Inc. v. The Borough Council of the Borough of Oakmont

Zoning—Conditional Use Application—Reasonableness of Conditions

1. HHI Trucking sought zoning variance to construct and operate a ready-mix concrete plant on its property. Planning Commission approved Plaintiff's plans subject to several conditions, to which Plaintiff objected.

2. Planning Commission sought to limit operation of the plant from 7:00 a.m. to 5:00 p.m. Monday through Friday; limit delivery of supplies to plant to once per week; control dust by requiring wetting down of materials on dry days; limit idling of vehicles to 15 minutes; require widening of the whole length of a road leading to the plant; and pay for road improvements and engineering fees.

3. The Court found the conditions imposed by the Planning Commission unsupported by the evidence. An adjacent top soil business was permitted to operate under expanded hours, and limiting deliveries of supplies to once weekly would impose hardship if the plant ran out of supplies. There was no evidence that wetting materials would improve air quality, and that requirement was vague. Also, given the number of vehicles that already operate in the vicinity, there was no evidence that restricting idling of HHI vehicles would affect air quality. Finally, the Court found that the Municipalities Planning Code (MPC) does not permit a governing body to attach conditions relating to offsite road improvements, such as widening the entire length of a road. The MPC also prohibits the condition that engineering fees be reimbursed.

4. The Court upheld the Planning Commission's conditional use approval of the asphalt project, but reversed the imposition of conditions.

(Jana S. Pail)

Patricia L. Dodge for HHI Trucking & Supply, Inc.
Shawn N. Gallagher for Borough Council of Borough of Oakmont.

No. SA2008-776. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

James, J., February 20, 2009—This appeal arises from the decision of the Borough Council of the Borough of Oakmont ("Borough Council") dealing with Property located at 109 Dark Hollow Road in the Borough of Oakmont. The Property is zoned I-Industrial and consists of approximately 3.2 acres and is currently vacant. Anthony Folino owns the Property. Mr. Folino operates a topsoil business on the property immediately adjacent to the Property at issue. Appellant, HHI Trucking & Supply, Inc. ("HHI"), who intends to lease the Property from Mr. Folino, proposed to construct and operate a ready-mix concrete plant on the Property. On March 7, 2007, they submitted a Conditional Use and Land Development Application ("Application") to the Oakmont Planning Commission who recommended approval subject to several conditions. Hearings were held before the Borough Council and on June 10, 2008 they granted the Application, subject to conditions. HHI claims that the conditions are unreasonable and has appealed their decision.

When the trial court takes no additional evidence, the scope of its review is limited to determining whether the Board committed an error of law, abused its discretion or made findings not supported by substantial evidence. *Mars Area Residents v. Zoning Hearing Board*, 529 A.2d 1198, 1199 (Pa.Cmwlth. 1987). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Valley View Civic Association v. Zoning Board of Adjustment*, 462 A.2d 637, 640 (Pa. 1983).

HHI claims that the Borough Council abused its discretion in attaching conditions to its approval of their conditional use Application. Specifically, they assert that the conditions are not supported by substantial evidence of record and are not reasonably related to the health, safety and welfare of the community. The Borough Council placed the following conditions upon HHI's operation of the Plant: they may only operate between the hours of 7:00 a.m. and 5:00 p.m., Monday through Friday; all deliveries must occur between 7:00 a.m. and 5:00 p.m., Monday through Friday; cement may only be delivered to the Plant once a week; and HHI must control dust by wetting down materials on "dry days." As far as air quality goes, the Borough Council placed the following conditions: HHI must equip all diesel vehicles with diesel particulate filters; diesel vehicles shall not idle for more than 15 minutes; and yearly air quality reports shall be submitted to the Borough. Finally, Borough Council imposed several conditions dealing with traffic. Specifically, they imposed the following conditions: HHI shall widen the entire length of Dark Hollow Road prior to the start of operations; HHI shall submit a plan to determine the structural soundness of Dark Hollow Road; HHI shall enter into an agreement with the Borough stating how to pay for the Dark Hollow Road improvements and the Traffic Engineering Requirements.

At hearings before Borough Council, the Oakmont Commons Homeowners' Association, as well as additional protestants ("Objectors"), presented testimony in opposition to the Application. Specifically, they expressed concerns regarding the safety, health and noise levels associated with the operation of the proposed Plant.

The Borough Council may attach reasonable conditions and safeguards to the granting of a conditional use to ensure the protection of adjacent uses from adverse impacts that may be determined from credible testimony. *See* Ryan, *Pennsylvania Zoning Law and Practice* § 5.2.7. 53 P.S. §10913.2.(a) of the MPC provides that:

> …[I]n granting a conditional use, the governing body may attach such reasonable conditions and safeguards, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act in the zoning ordinance.

In this case, the Borough Council limited the hours of

operation to between the hours of 7:00 a.m. and 5:00 p.m., Monday through Friday. However, HHI never agreed to this limitation and the evidence shows that Mr. Folino's topsoil business commences between 4 a.m. and 5 a.m. HHI contends that by limiting their hours of operation, the Borough Council has restrained them from fairly competing in this industry. There is no evidence that commencing operations before 7:00 a.m. will cause any harm to the public. Further, by restricting HHI to cement deliveries to only once per week, Borough Council could preclude them from operating at all in a given week if they exhaust their supplies. Additionally, the Borough permits this type of use in the Industrial Zoning District. Finally, HHI claims that Borough Council's requirement that they control dust by wetting down materials on "dry days," is not supported by the evidence and is vague. HHI produced evidence that the operation of the Plant does not negatively impact air quality.

The Borough Council also imposed various restrictions regarding air quality. However, HHI produced evidence establishing that the Plant does not pose any air quality harm to the public. Borough Council's requirements that HHI equip all diesel vehicles with diesel particulate filters and that they limit idling of vehicles to less than 15 minutes, are not supported by substantial evidence of record. Given the number of commercial vehicles that already use Dark Hollow Road, there is no evidence that HHI's vehicles will adversely affect the air quality.

Borough Council's condition that HHI widen the entire length of Dark Hollow Road is also unsupported by substantial evidence of record. HHI contends that it agreed to widen the road along the Property that it controls and not the entire length. Moreover, Section 603(c)(2) of the MPC does not permit a governing body to attach conditions relating to "off-site transportation or road improvements."

Our Supreme Court has provided guidance to evaluate traffic concerns in the context of a special exception:

> *Any* traffic increase with its attendant noise, dirt, danger and hazards is unpleasant, yet, such increase is one of the 'inevitable accompaniments of suburban progress and of our constantly expanding population' which, *standing alone,* does not constitute a sufficient reason to refuse a property owner the legitimate use of his land.

Appeal of O'Hara, 131 A.2d 587, 596 (Pa. 1957).

Finally, the Borough Council's condition upon HHI requiring them to reimburse them for certain engineering fees is also unsupported by substantial evidence of record. MPC Section 617(e) entitled "Finances and Expenditures" permits the governing body to prescribe reasonable fees. However, it clearly states that those costs "shall not include …expenses for engineering…" Therefore, HHI is not required to reimburse the Borough for engineering fees.

Based upon the foregoing, the decision of the Borough Council of the Borough of Oakmont is affirmed in part and reversed in part. Specifically, the granting of the conditional use is affirmed but the imposition of the conditions is reversed.

ORDER OF COURT

AND NOW, this 20th day of February, 2009, based upon the foregoing Opinion, the decision of the Borough Council of the Borough of Oakmont is affirmed in part and reversed in part. Specifically, the granting of the conditional use is affirmed but the imposition of the conditions is reversed.

BY THE COURT:
/s/James, J.

Emerson Fazekas, Mayor, Borough of Versailles v. Borough Council of the Borough of Versailles

Injunctive Relief—Furlough of Police Department—Veto Power of Mayor

1. Mayor brought Petition for Injunctive Relief against Borough Council for furloughing entire police department and entering into a contract with a neighboring borough to provide police services.

2. Council contended its actions were administrative in nature, and not legislative, and, therefore, not subject to veto.

3. The court found that, although there was some authority for administrative acts of a borough council furloughing part of a police department, this case more closely resembled abolition cases, which required legislative action.

4. The court denied the request for preliminary junction because, *inter alia*, plaintiff could not show that council's actions caused irreparable harm.

(Lynn E. MacBeth)

Thomas M. Castello for Plaintiff.
George S. Gobel for Borough Council of the Borough of Versailles.

No. GD 09-3406. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM

Wecht, A.J., March 16, 2009—In his capacity as Mayor of the Borough of Versailles, Plaintiff Emerson Fazekas ["Fazekas"] filed a petition for injunctive relief, requesting both preliminary and permanent injunctions, and a complaint for declaratory judgment against Defendant Borough Council of the Borough of Versailles ["Council"]. Fazekas protests Council's action in furloughing the entire Versailles police force and in entering into a contract with the Borough of White Oak ["White Oak"] to provide police services. Fazekas contends that Council's act was legislative in character, and accordingly subject to his veto. Council argues in opposition that its action was administrative in character, and not subject to Fazekas' veto.

On March 5, 2009, this Court heard argument on Fazekas' Petition for a Preliminary Injunction.[1] The parties submitted a stipulation of facts. The issue now before this Court is whether a preliminary injunction should issue prohibiting assets to be transferred to or used by the White Oak police, prohibiting funds to be paid to White Oak for police services, and reinstating the furloughed Versailles police officers.

The requirements for a preliminary injunction are well-settled. To obtain this equitable relief, the plaintiff must prove that: "1) relief is necessary to prevent immediate and irreparable harm; 2) a greater injury will occur from refusing the injunction than from granting it; 3) the injunction will restore the parties to the status quo; 4) the alleged wrong is manifest and the injunction is reasonably suited to abate it; and 5) the plaintiff's right to relief is clear." *Ambrogi v. Reber*, 932 A.2d 969, 976 (Pa.Super. 2007). The grant of a preliminary injunction is extraordinary relief, and should only be entered when each prong is fully and completely established. *City of Philadelphia v.*

Commonwealth, 922 A.2d 1, 9 (Pa.Cmwlth. 2003). All prongs must be satisfied. *Norristown Mun. Waste Auth. v. West Norriton Twp. Mun. Auth.*, 705 A.2d 509, 512 (Pa.Cmwlth. 1998) ("The requisites of a preliminary injunction are cumulative, and if one element is lacking, relief may not be granted.").

This memorandum first addresses the last three prongs. On the issue of the status quo [prong 3], Fazekas argues that a grant of the injunction will restore the status quo, because it will end the contract with White Oak and return the Versailles police department to where it was prior to Council's actions. Council has not rebutted this argument in any meaningful way. This prong is satisfied. The injunction would restore the situation to the status quo *ante* by reinstating the Versailles police department.

As to the issue of plaintiff's right to relief [prong 5], Fazekas cites *Emert v. Hatfield Township*, 19 Pa. D&C 2d 182 (C.P. Montgomery 1957). In *Emert*, the trial court decided that the abolition of a police force was not an administrative act, but rather a legislative one. *Id.* at 186. In a similar case, the Commonwealth Court decided that a council had authority to abolish a police department pursuant to its legislative power, a power to which a mayor's veto authority applies. *Appeal from Ordinance #384 of the Borough of Dale, Cambria County*, 382 A.2d 145, 148 (Pa.Cmwlth. 1978).

Elsewhere, the Commonwealth Court has decided that a furlough of some (but not all) officers in a police department did not amount to abolition of the department, that such a furlough was not legislative in character, and that the mayor accordingly had no right to veto it. *Almy v. Borough of Wilkinsburg*, 416 A.2d 638, 640-41 (Pa.Cmwlth. 1980).

Council argues that the instant transaction with White Oak is merely a temporary, year-long furlough and therefore does not amount to abolition of Versailles' police department. Council asserts that its actions fall under Council's exclusive control per *Almy*.

Council's arguments are unconvincing. This dispute appears more closely to resemble the abolition cases than the furlough cases. Council's action involves the entire police department. While it purports to extend initially for only one year, its terms provide for extensions beyond that year. Crafting a label to characterize the contract as a "furlough" does not avoid the plain fact that Council has attempted to eliminate the Department and contract its function out to White Oak. As the Supreme Court of Georgia observed in different circumstances: "You can call a camel an elephant, but that won't make its hump disappear. Labels do not change substance." *Houston General Ins. Co. v. Brock Const. Co., Inc.*, 246 S.E.2d 316, 319 (Ga. 1978) (Undercofler, P.J., concurring). Fazekas' right to relief on the merits is clear. This prong is satisfied.

As to the issue of the alleged wrong being manifest and the injunction reasonably suited to abate it [prong 4], it appears that this prong also is satisfied. As stated above, Council has attempted to characterize legislative acts as administrative for the purpose of depriving Fazekas of his veto power. That end run is the manifest alleged wrong. The preliminary injunction would return the situation to the status quo, reinstating the Versailles police department. This would abate the wrong and allow Fazekas to pursue the declaratory judgment and permanent injunction which would clarify the parties' legal rights.

As to the prong of immediate and irreparable harm [prong 1], Fazekas argues that Council's refusal to recognize the powers of the mayor, particularly his veto power, constitutes irreparable harm. Fazekas further asserts that the uncertainty of White Oak's police authority creates the risk of civil lawsuits and the risk that arrests could be undone. Further, Fazekas argues that there is financial harm because public funds are going to White Oak under the contract, while at the same time, Versailles police could sue for back pay for improper furloughs. Additionally, Fazekas asserts that ongoing cases initiated by the Versailles police may not progress properly.

In opposition, Council avers that the Borough would be irreparably harmed if the injunction were granted. Council fears that an injunction could lead to civil suits for false arrest because White Oak would not have valid police authority in Versailles. The Versailles police car was transferred to White Oak under the contract, so that Versailles allegedly would have to purchase a new police car, costing additional funds. The 2009 Versailles budget now does not cover the wages and other costs for the police department, so revenue would have to be raised.

For a preliminary injunction to issue, there must be actual proof of harm, not mere speculation. *Reed v. Harrisburg City Council*, 927 A.2d 698, 706 (Pa.Cmwlth. 2007). In *Reed*, there was no actual proof that there would be financial harm, but merely speculation about potential harm; hence, there was no finding of irreparable harm. *Id.* at 705-06. In the *City of Philadelphia* case, there was irreparable harm when there would have been unquantifiable, but nonetheless certain, financial harm. *City of Philadelphia*, 922 A.2d at 14. However, the risk of increased crime attendant to the closure of a police station was not deemed certain enough to threaten irreparable harm. *West Pittsburgh Partnership v. McNeilly*, 840 A.2d 498 (Pa.Cmwlth. 2004).

In a case that arose in Delaware County, the borough council passed an ordinance restricting access to police files for reasons of security and confidentiality. As a result, the mayor no longer had access. The trial court granted a preliminary injunction because it found both that the mayor had the duty to assure that the police carried out their duties, and that the mayor's ability to fulfill the duties of her office was irreparably harmed by the lack of access to the police files and records. *Green v. Prospect Park Borough Council*, 46 Pa. D&C 3d 558, 562 (C.P. Delaware 1987).

Here, Fazekas' claims of irreparable harm due to risk of civil litigation and alleged liability for back pay are speculative at this early date. At this time, the merits of any prospective lawsuits, let alone the probability that any such claims will be brought, are wholly unknown. This is not a case where the mayor's ability to discharge his duties is hampered, as in *Green*. Council has authority to pass the budget and authority to reduce the police force. Fazekas' claim is that Council has subverted his veto power by guising its contracting activity as an administrative act when it is in law and in fact a legislative one. While Council's subversion of Fazekas' veto power is apparent, it does not suffice to constitute irreparable harm. The standard for granting a preliminary injunction is high. This prong is not met.

The remaining prong of the preliminary injunction test concerns the issue of whether greater injury results from refusing the injunction than from granting it [prong 2]. This prong also has not been satisfied. Both parties claim that, depending on whether the injunction is granted or not, civil actions may be filed, with the Borough carrying serious financial exposure (through money damages, through funding the return of the officers and the vehicle, etc.). It is not clear at this early date whether the greater threat of injury lies in granting or refusing the injunction.

An Order follows.

ORDER OF COURT

AND NOW, this 16th day of March, 2009, following argument and briefing, and in accordance with the foregoing Memorandum, it is hereby ORDERED, ADJUDGED and DECREED that Fazekas' petition for preliminary injunction is DENIED. Fazekas' action for declaratory judgment shall proceed in accordance with the Rules of Court.

Jurisdiction is retained by the undersigned.

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

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[1] At the argument date, Council had not yet filed its responsive pleading to Fazekas' Complaint for Declaratory Judgment.

Marilyn Conley, Executrix of the Estate of Ethel B. Shaw v. St. Barnabas Nursing Home, Inc., et al.

Enforceability of Arbitration Agreement—Power of Attorney

1. Defendant sought to enforce an arbitration agreement signed by a patient's daughter, who had power of attorney. The arbitration agreement contained specific language relating to the arbitration of medical malpractice claims, and also contained a provision that signing of the arbitration agreement was not a requirement for admission or furnishing of services.

2. The Court held that provisions of the statute authorizing the principal to consent to medical treatment and pursue medical claims do not support the principal's authority to enter into arbitration agreements, partly because when the agreement represents a waiver of rights, and when the agreement is signed, a medical claim has presumably not yet arisen. However, another provision of the statute confers upon the principal "all other powers that may be delegated to an agent." Thus, since the principal (patient) could have signed the agreement, the daughter had the power to sign on the patient's behalf.

3. Plaintiff also asserted that the arbitration agreement amounted to a contract of adhesion in part because the arbitration rules allow costs to be imposed on the Plaintiff. However, the Defendant agreed to assume a waiver of any claims for fees and costs. Moreover, the agreement contained a provision that damages shall be determined according to applicable state and federal law, and that the Court would appoint one or more of the arbitrators.

4. The Court found that the power of attorney authorized execution of the arbitration agreement, and that the terms were not unreasonably favorable to the drafter, and, therefore, not a contract of adhesion.

(Jana S. Pail)

Peter D. Giglione for Plaintiff.
David J. Berardinelli for Defendant.

No. GD2008-5278. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION AND ORDER OF COURT

Wettick, J., April 23, 2009—The subject of this Opinion and Order of Court is a Motion to Compel Arbitration in nursing home litigation.

Defendants seek to enforce an arbitration agreement signed by Marilyn Conley who held a Power of Attorney for her mother, Ethel B. Shaw.[1] The arbitration agreement provides that the resident agrees to arbitrate any claims arising out of the diagnosis, treatment, or care of the resident by the nursing home with the arbitration proceeding to be conducted in accordance with the American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Service Rules of Procedure for arbitration. The arbitration agreement contains a specific provision stating that the arbitration agreement includes medical malpractice claims, including whether healthcare services were unnecessary or were improperly, negligently, or incompetently rendered or omitted. The agreement contains language stating that the resident understands that "the execution of this Arbitration Agreement is not a precondition to the furnishing of services to the Resident by the SBNH."

In *Freeman-Whitted v. Beverly Enterprises-Pennsylvania, Inc.*, 156 P.L.J. 360 (2008), I addressed the issue of whether a power of attorney empowers the holder to execute, on behalf of the principal, an arbitration agreement that is not a requirement for admission or the furnishing of services to the principal. In that case, the nursing home relied on the following: (i) paragraph 2 of subsection 2.3 of the power of attorney which granted the power "to authorize my admissions to a medical, nursing, residential or similar facility and to enter into agreements for my care"; (ii) 20 Pa.C.S. §5602(a)(8) of the legislation governing powers of attorney which permits a principal to empower an agent "to authorize my admission to a medical, nursing, residential or similar facility and to enter into agreements for my care"; and (iii) 20 Pa.C.S. §5603(h) which provides for the holder of a power of attorney to execute any consent or admission forms required by such facility which are consistent with this paragraph and enter into agreements for the care of the principal by such facility.

I ruled that these provisions do not authorize the agent to execute an arbitration agreement, which was not a condition to admission, waiving the resident's right to litigate her claims through court proceedings. I stated:

> While Mr. Owens was authorized to authorize Ms. Freeman's admission, the separately executed Arbitration Agreement did not involve Ms. Freeman's admission. Her admission was governed by a separate Resident Admissions Agreement form. Because of the provisions in the Arbitration Agreement that execution of this Agreement is not a precondition to admission or to the furnishing of services to the resident, the provision in the power of attorney authorizing Mr. Owens to enter into agreements for Ms. Freeman's care did not authorize Mr. Owens to execute the Arbitration Agreement.
>
> I reach the same result when I look to §5603(h) which defines the power conferred in §5602(a)(8). Subsection (h) authorizes the agent to sign any consent or admission forms "required" by the facility. This provision does not authorize an agent to execute an Arbitration

> Agreement that is not required to be executed as a condition of admission. *Id.* at 360-61 (footnote omitted).

I.

In the present case, the Nursing Home relies on the specified power in §5602(a)(20) ("to pursue claims and litigation") as defined in §5603(s) which reads as follows:[2]

> (s) Power to pursue claims and litigation.–A power to "pursue claims and litigation" shall mean that the agent may:
>
> (1) Institute, prosecute, defend, abandon, arbitrate, compromise, settle or otherwise dispose of, and appear for the principal in, any legal proceedings before any tribunal regarding any claim relating to the principal or to any property interest of the principal.
>
> (2) Collect and receipt for any claim or settlement proceeds; waive or release rights of the principal; employ and discharge attorneys and others on such terms (including contingent fee arrangements) as the agent deems appropriate.
>
> (3) In general, exercise all powers with respect to claims and litigation that the principal could if present.

I initially consider the Nursing Home's reliance on §5602(a)(20). The waiver of a right to institute court proceedings for claims that may arise in the future does not constitute the exercise of a power "to pursue claims and litigation" within the meaning of §5602(a)(20). To the contrary, an arbitration clause restricts the agent's power to pursue claims.

The Nursing Home also relies on the provisions within §5603(s)(1) stating that the agent may "arbitrate" any claim relating to the principal and §5603(s)(2) stating that the agent may waive or release rights of the principal. However, these provisions are part of a comprehensive list of powers an agent may exercise for the benefit of the principal in connection with claims and litigation that the agent has chosen to pursue. As I previously stated, a waiver that restricts the ability of the agent to pursue future claims against the Nursing Home does not constitute an exercise of the power to pursue claims and litigation.

Assume, for example, that an arbitration agreement included a provision limiting recovery of non-economic damages to $1,000. The Nursing Home, in seeking to enforce this provision, would need to raise the same argument that it is raising in this case: The agent was authorized to limit recovery of non-economic damages for claims that have not yet arisen pursuant to the power "to pursue claims and litigation." However, a promise–with respect to claims that have not arisen–to restrict the manner in which the claim will be pursued is not the exercise of a power "to pursue claims and litigation." The power to pursue claims refers to advancing claims which the law recognizes. The power to pursue litigation refers to engaging in legal proceedings. An agreement, as to possible future claims, restricting recovery of non-economic losses to $1,000 does not advance claims which the law recognizes or constitute engaging in legal proceedings.

For these reasons, I find that a power of attorney conferring all of the powers referred to in 20 Pa.C.S. §5602 does not authorize an agent to enter into an arbitration agreement that is not a requirement for admission or the furnishing of services to the resident.

II.

Plaintiff next relies on a provision in the Power of Attorney (paragraph 25) conferring additional powers beyond those listed in §5602:

> 25. To do and perform all other matters and things and transact all business which may be requisite or proper to effectuate or carry on any matter or thing appertaining or belonging to me, with the same power, and to all intents and purposes, with the same validity as were I personally present, and I do hereby ratify and confirm whatsoever any acts which my said agent shall and may do by virtue hereof.

I agree with the nursing home that under 20 Pa.C.S. §5601(a) a power of attorney may confer not only the powers referred to in §5602(a) but also "all other powers that may be delegated to an agent." Thus, under paragraph 25, the agent is authorized to take any action that the principal could take.[3] Since the principal could have signed the arbitration agreement, Ms. Conley was permitted to do so. Thus, I find that pursuant to paragraph 25 of the Power of Attorney, the resident's daughter had the power to sign the arbitration agreement on behalf of the resident.

I next consider plaintiff's claim that I should not enforce the arbitration agreement because it is a contract of adhesion that is substantively unconscionable.[4]

I will assume that the arbitration clause was a contract of adhesion. Under Pennsylvania case law, a contract of adhesion (i.e., procedural unconscionability) will be enforced unless the party challenging the clause demonstrates that the terms of the agreement are unreasonably favorable to the drafter of the agreement. *Bayne v. Smith*, 965 A.2d 265, 270 (Pa.Super. 2009); *Huegel v. Mifflin Const. Co., Inc.*, 796 A.2d 350, 357 (Pa.Super. 2002); *Todd Heller, Inc. v. United Parcel Service, Inc.*, 754 A.2d 689, 700-01 (Pa.Super. 2000).

In this case, the arbitration agreement provides that the resident's claims against the Nursing Home arising out of the diagnosis, treatment, and care of the resident shall be resolved by arbitration "in accordance with the American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Service Rules of Procedure for arbitration which are hereby incorporated into this agreement."

Plaintiff contends that AHLA arbitration is substantively unconscionable because, according to plaintiff, the rules of AHLA permit the costs of the arbitration proceedings to be imposed on the plaintiff. However, the Nursing Home has agreed to assume full responsibility for fees and costs, including the waiver of any claims that costs may be imposed on the loser. Consequently, I need not decide plaintiff's claim that the arbitration agreement is substantively unconscionable because of the possibility that the arbitrators may require plaintiff to make payments that would significantly exceed those made through court proceedings.[5] See *McNulty v. H&R Block, Inc.*, 843 A.2d 1267 (Pa.Super. 2004).

Plaintiff also contends that AHLA arbitration is unconscionable because AHLA procedures limit damages that may be awarded and use a clear and convincing standard for the award of punitive damages. However, the Nursing Home concedes that the provision in its arbitration agreement that the damages awarded "shall be determined in accordance with the provisions of the state or federal law applicable to a comparable civil action, including any prerequisites to, credit against or limitations on, such damages" trump any provisions to the contrary in the AHLA rules of procedure.

Finally, as I will discuss, the AHLA will not be administering the arbitration. Because of the AHLA's lack of involvement in the arbitration proceedings, at oral argument (at which a court reporter was present) counsel for the Nursing Home stated that if plaintiff desired, the arbitration would be governed by Pennsylvania substantive law and the Pennsylvania Rules of Civil Procedure governing discovery.

Plaintiff's final argument in support of her position that I should not enforce the arbitration agreement relates to the appointment of arbitrators.

Both parties agree that the arbitration agreement should be read as an agreement that the AHLA will administer the arbitration, including its use of its procedures for selecting one or more arbitrators. However, the AHLA has altered its policies so that it now will administer the arbitration of a consumer healthcare liability claim only if all parties have agreed in writing to arbitrate the claim after the injury has occurred.

Plaintiff contends that a court shall not enforce an arbitration clause where the provisions in the arbitration agreement governing the appointment and composition of the arbitrators cannot be enforced. The Nursing Home, on the other hand, contends that in this instance the court is required to appoint one or more arbitrators.

The Nursing Home relies on 42 Pa.C.S. §7305 (applicable to common law arbitration pursuant to §7342) which reads as follows:

> §7305. Appointment of arbitrators by court
>
> If the agreement to arbitrate prescribes a method of appointment of arbitrators, the prescribed method shall be followed. In the absence of a prescribed method or if the prescribed method fails or for any reason cannot be followed, or when an arbitrator appointed fails to act or is unable to act and his successor has not been appointed, the court on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers of an arbitrator specifically named in the agreement.

I agree with the Nursing Home that this legislation authorizes (and requires) the court to appoint one or more arbitrators.[6]

SUMMARY

A power of attorney that specifically or implicitly authorizes an agent to perform the powers set forth in §5602(a) does not authorize the agent to execute an arbitration agreement that is not a requirement for admission or the furnishing of services to the principal. However, a power of attorney may authorize the agent to exercise additional powers that are not set forth in §5602(a).

In this case, paragraph 25 of the Power of Attorney authorized the agent to execute an arbitration agreement that was not required for admission or the furnishing of services.

I am enforcing the arbitration agreement, as modified by the Nursing Home, because the terms are not unreasonably favorable to the drafter of the agreement.

ORDER OF COURT

On this 23rd day of April, 2009, it is hereby ORDERED that proceedings in this court are stayed pending arbitration. If the parties cannot agree on an arbitrator, either party may file a petition for the appointment of arbitrators by the court.

BY THE COURT:
/s/Wettick, J.

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[1] Ms. Conley signed two identical arbitration agreements in the year 2006. In this Opinion, I will use the term *arbitration agreement.*

[2] In the *Freeman-Whitted* litigation, the nursing home did not rely on these provisions. Consequently, they were not discussed in my opinion.

[3] Unless subsection (e.1) or (e.2) applies, an agent is subject to the provisions of 20 Pa.C.S. §§5601(c) and 5601(d). In this case, plaintiff did not make any claim or offer any evidence with regard to 20 Pa.C.S. §5601(c) ("your agent must use due care to act for your benefit") or 20 Pa.C.S. §5601 (d) (agent will "exercise the powers for the benefit of the principal").

[4] In my opinion in *Fetterman v. ManorCare Health Services, Inc.*, GD07-027943, 157 P.L.J. 254 (2009), I rejected the plaintiff's contention that agreements requiring arbitration of personal injury claims brought by residents of a nursing home are against public policy.

[5] In my opinion in *Fetterman v. ManorCare, supra,* pursuant to a severance clause, I severed provisions in the arbitration agreement that were substantively unconscionable rather than voiding the entire arbitration agreement.

[6] My statements in *Fetterman, supra,* regarding the court's appointment of an arbitrator were made without reference to 42 Pa.C.S. §7305.

Five Star Quality Care, Inc. d/b/a Overlook Green v. Joyce Yablonski and Charles Yablonski

Nursing Home Expense Liability—Duty to Support a Parent —Indemnification Requirements

1. A son is not contractually bound to pay for his mother's nursing home care simply because he signed an agreement prepared by the nursing home naming him as a "Responsible Party" and stating that he will "assist in/assume" payment.

2. The term "Responsible Party" was not defined in the agreement. A regulation exists defining that term as one who makes decisions. The ambiguity of this term, together with the ambiguous words "assist in/assume," and the absence of any clear language such as the term "guarantor" led the court to find that the agreement did not clearly and unambiguously provide that son was obligated to pay for his mother's expenses.

3. Under 23 Pa.C.S. §4603, certain relatives, including a child, have the responsibility to care for, or financially assist, an indigent person. Such a claim requires the consideration of numerous factors by a judge and will be transferred out of compulsory arbitration to the general docket.

(Lynn E. MacBeth)

Robert W. Deer for Plaintiff.
Thomas J. Michael for Defendants.

No. AR 08-016828. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION AND ORDER OF COURT

Wettick, J., May 12, 2009—The preliminary objections of defendant Charles Yablonski seeking dismissal of Counts 2 and 3 of Plaintiff's First Amended Complaint are the subject of this Opinion and Order of Court.

Plaintiff ("Five Star") operates a private for profit assisted living facility. Defendant Joyce Yablonski is a resident of the facility. Defendant, Charles Yablonski, is her son.

Five Star has filed an amended three-count complaint. The first count is a breach of contract claim against the resident for failure to pay for her care. The second count is a breach of contract claim against the resident's son based on allegations that he signed a provision in the Resident's Agreement in which he agreed to make payments to Five Star for his mother's care in the event his mother did not do so. The third count is a petition to impose liability on the resident's son for the support and care of his mother pursuant to the Pennsylvania Support Law, 23 Pa.C.S. §4603.

I.

I initially consider the claim raised in Count 2 that the son is contractually obligated to make payments to Five Star for his mother's care in the event his mother fails to do so. In Count 2, Five Star seeks a judgment in the amount of $10,356 plus $87 per day beyond November 1, 2008 in addition to incidental and ancillary charges.

The mother became a resident of Five Star on or about August 9, 1999. On this date, she executed a seven-page, twenty-three paragraph, Resident/Provider Agreement.

The final page also included the following provision which the son executed:

> CO-SIGN, I ___________, hereby agree, as the Resident's Payor/Responsible Party or Referral Agency, to assist in/assume the responsibility for payment of all previously mentioned fees.

Five Star contends that the Agreement's use of the term *Responsible Party* imposes an obligation on the son to make any payments that the mother has failed to make. This term is not defined in the Agreement. However, Five Star contends that this is a term of art with a generally accepted meaning—a responsible party is one who assumes the obligation to pay for the resident's care if the resident cannot do so.

This is incorrect. The term *responsible party* is frequently used in nursing home agreements, and it has no generally accepted meaning.

A regulation in Title 28 of the Pennsylvania Administrative Code (28 Pa. Code §201.24(a)) permits a resident to name a responsible person. The term *responsible person* is defined in 28 Pa. Code §201.3 as follows:[1]

> Responsible person—A person who is not an employe of the facility and is responsible for making decisions on behalf of the resident. The person shall be so designated by the resident or the court and documentation shall be available on the resident's clinical record to this effect. An employe of the facility will be permitted to be a responsible person only if appointed the resident's legal guardian by the court.

Under this definition, a responsible party is not obligated to make payments for a Resident's care; he or she is responsible only for making decisions on behalf of the Resident.

There is also federal legislation which has resulted in the use of the term *responsible party* in nursing home admission agreements. For nursing homes certified as eligible for Medicare or Medicaid reimbursement,[2] federal legislation provides: "With respect to admissions practices, a skilled nursing facility must…not require a third party guarantee of payment to the facility as a condition of admission (or expedited admission) to, or continued stay in, the facility." 42 U.S.C. §1395i-3(c)(5)(A)(ii); 42 U.S.C. §1396r(c)(5)(A)(ii); 42 C.F.R. §483.12(d)(2).[3]

This federal legislation does not prohibit a nursing home governed by the legislation from having a third person voluntarily guarantee payments. Nursing homes' responses to the federal law prohibiting mandatory third-party guarantees, while allowing voluntarily third-party guarantees, is described in Katherine C. Pearson, *Traps for the Unwary in Nursing Home Admission Agreements-Guarantor, Agent or Separate Promisor?* 74 Pa.B.A.Q. 139 (October 2003). The author states that the admission agreements of nursing homes have added signature lines for a *responsible party.* Her review of more than twenty admission agreements from nursing homes in Pennsylvania revealed that all had signature lines for *responsible party* while using language that may confuse the signing party about the scope of his or her undertaking. She found that there is no uniformity in the contract language and the provisions that nursing homes later seek to characterize as a voluntary promise to guarantee payments are at best vague and at worst misleading.[4]

A relative asked to sign as a responsible party is likely to view his or her role to be a healthcare decision maker for the resident once the resident cannot make these decisions. The relative may also believe that he or she is agreeing to make payments to the nursing home from the resident's funds to which this relative has access, and to complete paperwork for the resident to obtain government funds for the nursing home. However, a relative is unlikely to believe that he or she has agreed to guarantee payments to the nursing home for the resident's care in a writing that does not even use the term *guarantor*. This is particularly true in the present case where the provision upon which Five Star relies states that the son agrees "to *assist* in/assume the responsibility for payment of all previously mentioned fees" (emphasis added). This provision may be reasonably construed as only imposing an obligation on the son to make his mother's funds, to which he has access, available to the facility.[5]

If the language of the Agreement had clearly and unambiguously provided that a responsible party guarantees the obligations of the resident to make payments due under the Agreement, it would be necessary next to consider whether the son understood that he was assuming this obligation. However, I need not reach this issue because the language does not impose an obligation on the son to make payments due under the Residency Agreement.

II.

I next consider the son's preliminary objections seeking dismissal of Count 3 of Plaintiff's Complaint—Five Star's petition to establish a duty of support under 23 Pa.C.S. §4603 (formerly 62 P.S. §1973).

This legislation provides that certain relatives, including a child, have the responsibility to care for and maintain or financially assist an indigent person. This legislation per-

mits a nursing home caring for an indigent person to bring a support action against that person's child for the purpose of obtaining a court order securing payment for future support. This legislation also permits a nursing home to bring a suit in assumpsit against a child of an indigent resident based on §4603 for reimbursement of sums expended for the support of the indigent parent. See *Presbyterian Medical Center v. Budd*, 832 A.2d 1066, 1075 (Pa.Super. 2003); *Savoy v. Savoy*, 641 A.2d 596, 599 (Pa.Super. 1994); and *Albert Einstein Medical Center v. Foreman*, 243 A.2d 181, 184 (Pa.Super. 1968).

Plaintiff's Amended Complaint alleges that Joyce Yablonski is an indigent person who cannot pay for care and services at Five Star as agreed to under the Resident/Provider Agreement, Charles Yablonski is her son, he has the financial ability to support his mother, and Five Star qualifies as a person or organization having an interest in the care, maintenance, or assistance of Joyce Yablonski. In the complaint, plaintiff seeks damages of $10,356.60 plus $87.00 per day from November 1, 2008 in addition to incidental and ancillary charges.

Defendants' preliminary objections request that this count be stricken because it fails to set forth facts sufficient to state a cause of action. I disagree. See *Presbyterian Medical Center v. Budd*, 832 A.2d at 1075-77, *supra*, where the Court reversed a ruling of the trial court dismissing a claim of a long-term care nursing facility based on the provisions of §1973 imposing liability on relatives for the support of indigent persons.

The final issue that I address is the son's contention that this matter may not be considered in compulsory arbitration proceedings. I agree. The factors that should be considered, assuming that the mother is found to be an indigent person, include the son's financial ability to make payments, taking into consideration other persons dependent upon the son for their support; the financial status of any other children of the mother; and the amount required for the reasonable support of the mother taking into account her assets and the benefits available to meet her needs. The son correctly states that these factors must be considered by a judge.

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

ORDER OF COURT

On this 12th day of May, 2009, it is hereby ORDERED that the preliminary objections of Charles Yablonski seeking dismissal of Count 2 are sustained and that his preliminary objections to Count 3 are overruled. It is further ORDERED that this case is transferred to the General Docket.

BY THE COURT:
/s/Wettick, J.

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[1] Plaintiffs do not raise and I do not decide whether a facility governed by 28 Pa. Code §201.3 may use its own definition of *Responsible person*.

[2] It appears from the record that Five Star is not certified to receive Medicare or Medicaid reimbursement.

[3] However, a facility may require an individual, who has legal access to the resident's income or resources available to pay for care in the facility, to sign a contract, without incurring personal financial liability, to provide payments to the facility from the resident's income or resources.

[4] She also questions whether a voluntary agreement to guarantee payments is supported by consideration. Pearson, 74 Pa.B.A.Q. at 143.

[5] The First Amended Complaint does not allege that the son misused or otherwise failed to make available to Five Star money or other property of his mother.

Commonwealth of Pennsylvania v. Ivan Milton Hale

Motion to Suppress—Brief Stop and Handcuffing Does Not Constitute Arrest

1. Defendant was convicted of firearms and other offenses and sentenced to 5 to 10 years imprisonment.

2. Defendant was a passenger in an automobile that was lawfully stopped with the consent of the driver. Police ordered passengers out of the vehicle and handcuffed Defendant, whom they suspected had an outstanding warrant and who was acting suspiciously.

3. While seated on a curb, Defendant attempted to flee but was overtaken by officers who patted him down and found a fully loaded .45 caliber firearm located in his front pants pocket.

4. Defendant asserted that he was under arrest during the stop, and that such arrest was without probable cause, requiring suppression of the firearm. The court found that the Defendant was not under arrest, but was being lawfully detained so that he could be identified and other information obtained.

(Lynn E. MacBeth)

Michael W. Streily for the Commonwealth.
Kirk J. Henderson for Defendant.

No. CC200712588. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

PROCEDURAL HISTORY

Borkowski, J., February 26, 2009—Appellant was charged by criminal information filed November 27, 2007 with one count each of: Person Not To Possess A Firearm, 18 Pa. C.S. §6105(a)(1) and (b); Carrying Firearm Without A License, 18 Pa. C.S. §6106; and Disorderly Conduct, 18 Pa. C.S. §5503(a)(1)(2)(3)(4) and (b).

A suppression hearing was held on June 25, 2008, after which Appellant's motion to suppress was denied. Appellant immediately proceeded to a non-jury trial. The Court found Appellant guilty of all charges and imposed an aggregate sentence of five (5) to ten (10) years imprisonment. Appellant filed a timely Notice of Appeal to the Superior Court of Pennsylvania on July 18, 2008. This timely appeal follows.

STATEMENT OF ERRORS ON APPEAL

Appellant's Concise Statement lists a single issue for appellate review:

> 1. Appellant alleges that the trial court erred by denying his motion to suppress maintaining that he was under arrest when he was handcuffed and ordered to sit on the curb while the officer processed others at the scene.

FINDINGS OF FACT[1]

On August 13, 2007, Police Officer Daniel Rich, a thirteen-year veteran of the McKeesport Police Department, was working a daylight shift in a uniformed capacity, and in a marked police vehicle. See Hearing Transcript dated June 25, 2008 at pages 3, 9 and 17 (hereafter "H.T.") At approximately 12:18 p.m., Officer Rich was seated in his vehicle in a parking lot at Grandview and Versailles Avenues when a vehicle pulled up to the officer's vehicle. (H.T. 4, 15) The driver of the vehicle indicated to Officer Rich: (1) that there was an active warrant out for his son; (2) that he would be picking up his son in the next few minutes; and, (3) that he wanted the officer to effectuate a traffic stop of his vehicle and apprehend his son without the son knowing that the father had provided the information and cooperation to the officer. (H.T. 4, 9-10, 15-16) The person also informed Officer Rich that his son would run if he had the chance. (H.T. 5, 16)

Officer Rich agreed to do this and followed the vehicle on Grandview Avenue. (H.T. 17) Shortly thereafter the vehicle stopped and picked up two individuals who got into the rear passenger seat of the vehicle. (H.T. 4, 9, 14-16) Officer Rich had anticipated that only one person was going to be picked up, and at that juncture did not know which of the two persons was the son who had the warrant outstanding. (H.T. 14-16)

Nonetheless Officer Rich followed the vehicle and initiated the traffic stop as planned and consented to by the driver of the vehicle. (H.T. 4, 16-17) The officer approached the driver of the vehicle and requested and obtained his license and insurance information. (H.T. 5, 10) Officer Rich then walked back to his vehicle to request additional police assistance. (H.T. 5, 11) As he did so he noticed that Appellant was nervously looking over his left and right shoulders, which from the officer's perception was an attempt to ascertain the officer's exact location. (H.T. 5, 11) The officer also noticed that Appellant had taken off his seat belt in "slow motion as if for [Officer Rich] not to see it." (H.T. 5-6, 11-12) As a consequence of Appellant's conduct the officer focused his attention more closely on Appellant, believing that he was the warrant suspect. (H.T. 6) The officer then noticed that Appellant had also slightly opened the rear passenger door. (H.T. 6-7) At that point, concerned for his safety and the possible flight of a wanted person, Officer Rich approached the vehicle and got Appellant out of the vehicle. (H.T. 7, 16-17) Appellant was handcuffed and instructed to sit on the curb until such time that Officer Rich could determine who he was and a back-up officer arrived. (H.T. 7, 12, 20) Appellant gratuitously remarked to Officer Rich that the person he was looking for was on the other side of the vehicle. (H.T. 7)

As Officer Rich walked around to the driver's side of the vehicle, Appellant stood up and ran from the area. (H.T. 7, 13) A foot chase over several blocks ensued in which Officer Rich was assisted by another officer. (H.T. 7-8, 13, 19) During the flight Appellant repeatedly attempted to put his cuffed hands into his right front pants pocket. (H.T. 7-8) Appellant was eventually taken to the ground between two (2) houses at which time he continued to attempt to reach into his pants pocket. (H.T. 8) Once Appellant was brought under control he was patted down and a fully loaded .45 caliber firearm was located in that right front pants pocket. (H.T. 8) Appellant was thereafter identified as Ivan Hale by assisting officers, and as having an outstanding warrant existent. (H.T. 8) Appellant was arrested and charged with the firearms violation for the .45 caliber firearm found in his pants pocket, and which is the subject of this appeal.

DISCUSSION

Appellant claims that he was subject to arrest without probable cause when he was handcuffed and ordered to sit on the curb while the officer processed others on the scene, and as a consequence this Court should have suppressed the evidence (.45 caliber firearm) subsequently seized by the officer.

The standard of review of the denial of a suppression motion is limited to a determination of whether the record supports the factual findings, and whether the legal conclusions are sound. *Commonwealth v. Bomar,* 826 A.2d 831, 842 (Pa. 2003). The reviewing court may consider the evidence presented by the Commonwealth as the prevailing party, along with the evidence presented by the defense that remains uncontradicted when viewed in light of the record as a whole. *Id.* Credibility determinations, as well as the weight afforded a witness' testimony, which are supported by the record, are left to the sound discretion of the trial court and will not be reversed, absent an error of law. *Commonwealth v. Bennett,* 827 A.2d 469, 475 (Pa.Super. 2003).

Appellant's claim fails because as a matter of fact and law Appellant was not arrested until, following his conduct at the scene and subsequent flight, he was apprehended and the .45 caliber firearm recovered from his person. Prior to that point Appellant was the passenger in a lawfully stopped vehicle, who was taken from the car and subject to a investigatory stop based on the suspicious and dangerous conduct he exhibited at the scene of the vehicle stop. *See generally Terry v. Ohio,* 392 U.S. 1 (1968), *Commonwealth v. Hicks,* 253 A.2d 276 (Pa. 1969).

The police officer's actions regarding Appellant were authorized under the rationale set forth in *Commonwealth v. Brown*, 654 A.2d 1096 (Pa.Super. 1995), wherein the court stated,

> Because the potential danger to police increases, rather than diminishes, when passengers are present in a car, and because the safest and, therefore, most appropriate method of mitigating that danger is to order the passengers to exit the vehicle so that they remain in full view of the officer, we hold today that police may request both drivers and their passengers to alight from a lawfully stopped car without reasonable suspicion that criminal activity is afoot. Our conclusion is grounded in the sound rationale of *Mimms II* which balanced the important interest in the safety of law enforcement officials against the *de minimus* intrusion to the occupants of the lawfully stopped car. We believe the Fourth Amendment is not violated by such a rule.

Brown, 654 A.2d at 1102 (citing *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), see also: *Commonwealth v. Pratt*, 930 A.2d 561, 569 (Pa.Super. 2007); *Commonwealth v. Rodriguez*, 695 A.2d 864, 868-869 (Pa.Super. 1997).

In this instance Officer Rich lawfully stopped the vehicle in which Appellant was a backseat passenger based on the consent of the driver of the vehicle, and the presumptively accurate information from the driver that his son had an active warrant existent. *Brown*, 654 A.2d at 1102.

Appellant apparently does not challenge the legality of the stop nor the principle set forth in *Brown*. Rather, he challenges the post stop conduct of Officer Rich in removing Appellant from the vehicle, handcuffing him, and ordering him to sit on the curb while he ascertained the identity of

Appellant and others in the vehicle. This precise claim fails by virtue of the facts of this case and applicable law as sent forth in *Brown*.

Beyond the authorization provided by *Brown*, the circumstances and Appellant's conduct once the vehicle was stopped provided the basis for an investigative detention. *See Commonwealth v. Dennis*, 432 A.2d 79, 82 (Pa.Super. 1981) (a brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information may be reasonable in light of the facts known to the officer at the time). At that juncture: (1) Officer Rich reasonably believed that at least one of the two back seat passengers had an outstanding warrant existent (H.T. 14-16); (2) Appellant was nervously looking over his left and right shoulders attempting to ascertain the exact location of the officer (H.T. 5, 11); (3) Appellant had taken off his seat restraint in slow motion as if for officer Rich not to see it (H.T. 5-6, 11-12); (4) Appellant had also slightly opened the rear passenger door (H.T. 6-7); and, (5) Officer Rich reasonably believed that the wanted person would flee (H.T. 5, 16). *See Commonwealth v. White*, 516 A.2d 1211, 1215 (Pa.Super. 1986) (a police officer who lacks the precise level of information necessary for probable cause is not required to simply shrug his shoulders and allow a crime to occur or a criminal to escape).

An analogous circumstance arose in *Commonwealth v. Rosas*, 875 A.2d 341, 344 (Pa.Super. 2005) where a state trooper made a vehicle stop for a speeding violation. While conducting a license check of Rosas the trooper became concerned as to the true identity of Rosas, and the possibility that Rosas may have been a deported felon wanted for immigration violations. *Rosas*, 875 A.2d at 344-345. The trooper ordered Rosas out of the vehicle, placed him in handcuffs, and informed Rosas that he was being detained until he could be positively identified. *Rosas*, 875 A.2d at 345-346. The Rosas court stated with presently applicable acumen,

> While we acknowledge that Trooper Henneman ordered Rosas out of the car and placed him in handcuffs, such facts, by themselves, do not support the conclusion that Rosas was under arrest. It is well established that when an officer detains a vehicle for violation of a traffic law, it is inherently reasonable that he or she be concerned with safety and, as a result, may order the occupants of the vehicle to alight from the car. Furthermore, for their safety police officers may handcuff individuals during an investigative detention. In addition, it must be remembered that every traffic stop and every *Terry* stop involves a stop and period of time during which the suspect is not free to go but is subject to the control of the police officer detaining him. In fact, it is worth noting that Trooper Henneman's testimony supports our conclusion that Rosas was not under arrest as Trooper Henneman noted it was his intention to detain Rosas until he could actually find out if this was actually him.

Rosas, 875 A.2d at 348 (citations and quotations omitted).

Here Officer Rich's conduct was reasonable in light of the information known to him and the Appellant's conduct at the scene of the vehicle stop. Consequently it was authorized by both state and federal law as set forth herein, and Appellant's claim is without merit.

CONCLUSION

Based upon the foregoing, the judgment of sentence imposed by this Court should be affirmed.

BY THE COURT:
/s/Borkowski, J.

Date: February 26, 2009

[1] As the trier of fact, the trial judge, while passing on the credibility of witnesses, is free to believe all, part, or none of the evidence. *Commonwealth v. Zingarelli*, 839 A.2d 1064, 1069 (Pa. Super. 2003).

Commonwealth of Pennsylvania v. Bruce Proctor

Withdrawal of Guilty Plea—Coordinate Jurisdiction

1. Defendant initially entered into a negotiated plea agreement whereby he pled guilty in all five (5) cases pending against him. He was sentenced to an aggregate sentence of 5 to 10 years imprisonment. Just eight days later, Defendant filed a pro se motion to withdraw his plea. Judge O'Toole granted the motion without hearing on the merits.

2. The Commonwealth filed a Motion to Reconsider, which was granted. The matter was then scheduled for hearing to consider Defendant's motion to withdraw his plea. In the interim, Judge O'Toole was transferred to Orphan's Court, and the case was transferred to Judge Borkowski.

3. Judge Borkowski then held a hearing and denied the motion. Further, the Court reinstated the original sentence imposed by Judge O'Toole.

3. Defendant argued that the Court lacked jurisdiction to reconsider the decision of Judge O'Toole granting Defendant's motion to withdraw, due to the coordinate jurisdiction rule.

4. The coordinate jurisdiction rule prevents judges in coordinate jurisdictions from reconsidering and overruling each other's decisions. However, in this case, Judge O'Toole had not yet ruled on the merits prior to his transfer to Orphan's Court. Thus, the Court did have jurisdiction to reconsider withdrawal of the plea.

(Jana S. Pail)

Ted Dutkowski for the Commonwealth.
Frank C. Walker, II for Defendant.

CC200507847, 200413456, 200318202, 200306486, 200406354. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

RELEVANT PROCEDURAL AND FACTUAL HISTORY

Borkowski, J., April 13, 2009—On March 7, 2007, Appellant entered a negotiated guilty plea at the above-referenced cases. Pursuant to the agreement, the Honorable Lawrence J. O'Toole sentenced Appellant to an aggregate sentence of five (5) to ten (10) years imprisonment in exchange for Appellant's guilty plea to the charges in all five cases.

On March 15, 2007, Appellant filed a *pro se* Motion to Withdraw Guilty Plea. On March 19, 2007, Appellant's prior counsel filed a Motion to Withdraw Guilty Plea and a Motion to Withdraw as Counsel. Judge O'Toole entered an Order dated May 8, 2007 which granted the motion to withdraw the guilty plea, and a separate Order, which granted counsel's motion to withdraw representation.

On May 22, 2007, the Commonwealth filed a Motion to Reconsider requesting that the court vacate its order granting the motion to withdraw the plea, and to schedule a hearing. Judge O'Toole granted the motion for reconsideration and scheduled a hearing to consider Appellant's motion to withdraw the plea.[1]

On March 20, 2008, this Court held a hearing on the motion to withdraw the plea.[2] After taking the matter under advisement, this Court entered an Order on April 14, 2008, which vacated Judge O'Toole's May 8, 2007 Order, and denied Appellant's motion to withdraw the guilty plea. On April 24, 2008, this Court entered a clarifying Order directing that the sentence imposed by Judge O'Toole on March 7, 2007, was reinstated pursuant to this Court's Order of April 14, 2008.

Appellant filed a timely Notice of Appeal to the Superior Court of Pennsylvania. This timely appeal follows.

STATEMENT OF ERRORS ON APPEAL

Appellant raises two issues within his concise statement:

> I. The Court imposed an illegal sentence, after Appellant was permitted to withdraw his guilty plea.
>
> II. The Court lacked jurisdiction to reconsider an issue previously decided by a court of coordinate jurisdiction.

DISCUSSION

I.

The Appellant claims that the sentence imposed was illegal because this Court did not have jurisdiction to reinstate the sentence originally imposed, after Judge O'Toole had granted Appellant's motion to withdraw his guilty plea.

The crux of this claim is that this Court did not have jurisdiction to reconsider the Motion to Withdraw the Guilty Plea. Thus, Appellant claims that this Court did not thereafter have jurisdiction to reinstate the original sentence imposed by Judge O'Toole. As will be discussed in Issue II, this Court did have jurisdiction to reconsider the motion to withdraw the plea. Consequently once this court denied Appellant's motion, this Court properly reinstated the original sentence.

Since this Court did have jurisdiction to reconsider the motion and to reinstate the sentence, this claim is without merit.

II.

The Appellant claims that this court lacked jurisdiction to reconsider an issue previously determined by a court of coordinate jurisdiction.

The coordinate jurisdiction rule prevents judges of coordinate jurisdiction sitting from reconsidering and overruling each other's decisions. *Commonwealth v. Starr,* 664 A.2d 1326, 1331 (1995). Specifically, the Court in *Starr* held that prior rulings of an appellate court may not be overturned on remand to the trial court; on second appeal, a panel of the appellate court may not alter resolution of legal questions previously decided by another panel of that same appellate court; and upon transfer of a matter between trial judges of the same jurisdiction, the transferee trial court may not alter the resolution of a legal question previously decided by the transferor trial court. *Commonwealth v. Starr*, 664 A. at 1331.

Appellant claims that this Court, in reconsidering the motion and denying his request to withdraw the guilty plea, essentially altered a decision previously made by Judge O'Toole who had permitted him to withdraw his plea. Appellant's reliance on *Starr* is misplaced.

Initially, this Court points out that it was Judge O'Toole who granted the Commonwealth's motion to reconsider and scheduled a hearing on Appellant's motion to withdraw his plea. Thereafter, Judge O'Toole's cases were reassigned to this Court when he was transferred to Orphan's Court. Thus, this Court did not initially grant the Commonwealth's motion to reconsider; Judge O'Toole granted the motion for reconsideration.

Moreover, *Starr* applies to legal questions that have been litigated and disposed of on the merits. In this case, Judge O'Toole initially granted Appellant's motion to withdraw the plea after imposition of sentence without conducting an evidentiary hearing. The granting of the Motion to Reconsider obviously contemplated a hearing on the merits. The issue had not been litigated and the Commonwealth never had an opportunity to be heard on the merits. This was especially important given the procedural posture of the case, and clearly falls outside the dictates of *Starr. Commonwealth v. Starr,* 664 A. at 1331; *see also Commonwealth v. Yager,* 685 A.2d 1000, 1004 (Pa.Super. 1996)(defendant required to establish manifest injustice when requesting to withdraw a guilty plea after sentence has been imposed).

Consequently, this Court was correct in its determination that it had proper jurisdiction to consider the motion to withdraw the guilty plea, after Judge O'Toole had granted the Commonwealth's request for reconsideration.

CONCLUSION

For the aforementioned reasons, this Court's denial of Appellant's Motion to Withdraw Guilty Plea should be affirmed.

BY THE COURT:
/s/Borkowski, J.

Date: April 13, 2009

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[1] Judge O'Toole scheduled the hearing without entering an Order of record.

[2] Judge O'Toole was transferred to Orphan's Court and this Court assumed his docket of cases.

Commonwealth of Pennsylvania v. Shawn Graham

Motion to Reconsider—Person Not to Possess Firearms—Operability of Firearm

Defendant's acquittal was rescinded by the court because, on reconsideration, he raised *Commonwealth v. Stevenson*, 894 A.2d 759 (Pa.Super. 2006) which holds that in order to sustain a conviction under the Persons Not to Possess Firearms statute, the firearm in question must have been operable or capable of being converted into an object that could fire a shot. This case contravened the holding in the Federal Court decision *United States v. Rivera*, 415 F3d 284 (2d Cir. 2005) which previously controlled and was the

basis for the acquittal because the court had found that Defendant's firearm could be inoperable.

(Lynn E. MacBeth)

Matthew Robinowitz for the Commonwealth.
Jason Elliot Nard and *Robert W. Deer* for Defendant.

No. CC200707452. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Reilly, S.J., February 27, 2009—This matter comes before the Court on Defendant's Motion to Reconsider this Court's Opinion and Order filed January 23rd, 2009. Defendant Graham is charged with the offense of Person Not to Possess Firearms, 18 Pa.CS §6105. Following a nonjury trial, counsel for defendant moved for a judgment of acquittal on the basis that the firearm was inoperable, and, therefore, could not form the basis for a prosecution.

In its opinion and order this Court found that the firearm, in fact, was inoperable, but based on the Federal Court decision in *United States v. Rivera*, 415 F.3rd 284 (2d Cir. 2005), it would still be admissible to support the prosecution.

In his motion to reconsider, Defendant cites *Commonwealth v. Stevenson*, 894 A.2nd 759 (Pa.Super. 2006) wherein the Superior Court held that in order to sustain a conviction under the above statute, the firearm in question must have been operable or capable of being converted into an object that could fire a shot. Moreover, the Court went on to say that it might be considered operable if a damaged part were readily repairable. In lieu of this and the fact that the Court already determined the firearm could be inoperable, this Court is of the opinion that it is bound by the *Stevenson* case cited above and therefore enters the following:

ORDER

NOW, this 27th day of February, 2009, upon consideration of Defendant's Motion to Reconsider and the foregoing opinion, it is the ORDER of this Court that this Court's Order of January 23, 2009 shall be and is hereby RESCINDED and the Motion For Judgment of Acquittal GRANTED.

BY THE COURT:
/s/Reilly, S.J.