

PITTSBURGH LEGAL JOURNAL

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PLJ

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

OPINIONS

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

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**JD & RM, Inc. v.
Commonwealth of Pennsylvania, et al.**

Forfeiture Act—Purchase/Sales Agreement—Right of First Refusal

1. The property at 1937 Babcock Boulevard had been forfeited by Order of Court dated July 22, 2008, which the owner, Nauman, did not contest.

2. JD & RM filed civil suit against the Commonwealth based on its two contracts regarding the property—a Lease Agreement and a Purchase/Sales Agreement—which Sales Agreement was for the business, defined as the liquor license, equipment, list of suppliers and goodwill, but not the real estate, as a result of which the Commonwealth Court ordered immediate repossession of the property by JD & RM.

3. Section 6208 of the Forfeiture Act does not permit JD & RM to remain in possession of the property as a tenant since it only applies to third-party creditors who have a valid lien on the property and whose ownership interests are protected.

4. The right of first refusal in the Lease Agreement of JD & RM was never triggered since the forfeiture proceeding could not be construed as an offer to purchase the property.

5. After Nauman's interest in the property was extinguished by the forfeiture, he could not sell what he no longer owned.

6. JD & RM were not the innocent owners of real estate to whom Section 6802(k) provides relief so their arguments were meritless.

(Carol Sikov Gross)

Louis P. Vitti for Plaintiff.

Andrea F. McKenna for the Commonwealth.

No. CC20050004349. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Rangos, J., May 21, 2009—On February 25, 2005, the owner of the above-captioned property, William Nauman, was arrested for violations of the Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. §780-102 (2000). He was also served personally with a seizure order, dated December 8, 2004, on that day. March 9, 2005, a Petition for Forfeiture was filed on the above-captioned property. The Petition was served on Nauman's counsel on April 8, 2005. Subsequently, on April 25, 2005, Appellant entered into two contracts regarding the property, a Lease Agreement and a Purchase/Sales Agreement. The Sales Agreement was for the business, defined as the liquor license, equipment, list of suppliers and goodwill. Importantly, sale of the real estate itself was not a part of the Sales Agreement. Appellant contends that §6208 of the Forfeiture Act permits it to remain in possession of the property as tenant. We hold that it does not.

MATTERS COMPLAINED OF ON APPEAL

Appellant raises eleven separate issues complained of on appeal, many of which can be consolidated. Appellant generally complains about the fairness of the decision and the adequacy of the record. This Court shall address each issue in turn.

DISCUSSION

42 Pa.C.S.A. §6802 (k) states as follows:

(k) Court-ordered release of property.—If a person claiming the ownership of or right of possession to or claiming to be the holder of a chattel mortgage or contract of conditional sale upon the property, the disposition of which is provided for in this section, prior to the sale presents a petition to the court alleging over the property lawful ownership,

right of possession, a lien or reservation of title and if, upon public hearing, due notice of which having been given to the Attorney General or the district attorney, the claimant shall prove by competent evidence to the satisfaction of the court that the property was lawfully acquired, possessed and used by him or, it appearing that the property was unlawfully used by a person other than the claimant, that the unlawful use was without the claimant's knowledge or consent, then the court may order the property returned or delivered to the claimant. Such absence of knowledge or consent must be reasonable under the circumstances presented. Otherwise, it shall be retained for official use or sold in accordance with section 6801(e) or 6801.1(f).

Untangling the procedural history of this case will hopefully shed some light on the issues now being presented for consideration. On December 15, 2008, a hearing was held before the Honorable Edward J. Borkowski to determine whether JD & RM, Inc. could continue to occupy the premises of 1937 Babcock Boulevard. The property had been previously forfeited by Order of Court dated July 22, 2008. The owner of the property, James Nauman, did not contest the forfeiture. JD & RM responded to the forfeiture by filing a civil suit against the Commonwealth, the result of which was that Commonwealth Court ordered immediate repossession of the property by JD & RM, and remanded to this Court on the issue of relief under §6802 (k).

This Court must consider first whether or not §6802(k) applies to JD & RM. *Brown v. Commonwealth*, 940 A.2d 610 (Pa.Cmwlth. 2008) held that 6802(k) only applies to third party creditors who have a valid lien on the property and whose rights are protected under §6801(a)(6)(iii). Tenants are not third party creditors with a valid lien on the property. Tenants have no ownership interest in the property they rent.

Appellant argues that provisions in the Lease, particularly a right of first refusal, establish it as a third party creditor. The relevant provision in the Lease, by its terms, applies when the owner receives an offer to purchase the building from a third party. It does not pertain to the land itself, only the structure sitting thereon. Furthermore, no offer was made to purchase the building. A forfeiture proceeding cannot be construed as an offer to purchase, therefore, the Lease provision was never triggered. Regardless, the provision could not be triggered once the owner consented to the forfeiture of the property. After forfeiture, Nauman's interest in the property is extinguished, and he cannot sell that to which he no longer holds legal title.

Furthermore, the Sales Agreement, dated April 25, 2005, between Nauman and JD & RM is for the liquor license, business inventory, equipment, customer lists and goodwill. The Sales Agreement does not cover the land or the building at 1937 Babcock Boulevard. Even if the Sales Agreement did purport to transfer the structure on the property, it would be invalid as Nauman entered into the Sales Agreement after a forfeiture petition was filed on March 9, 2005. Also, the Sales Agreement was contingent upon the transfer of the liquor license, which never happened. The license was made inactive on May 31, 2005 and revoked effective November 13, 2006. Any arguments that the April 25, 2005 Sales Agreement entitles Appellant to relief under §6802(k) are completely meritless. Appellant is not the innocent owners of real estate to whom §6802(k) provides relief.

Turning to Appellant's arguments regarding the sufficiency of the record, the test for a sufficiency of the evidence claim is well settled:

[W]hether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences favorable to the Commonwealth, the [factfinder] could reasonably have determined all elements [] to have been established beyond a reasonable doubt.... This standard is equally applicable to cases where the evidence is circumstantial rather than direct. *Commonwealth v. Hardcastle*, 546 A.2d 1101, 1105 (Pa., 1988) (citations omitted)

Com. v. Torres, 617 A.2d 812, 236-237 (Pa.Super. 1992)

The somewhat tortured procedural history of this case belies any argument by Appellant that it has not had a full opportunity to develop an argument. The Order of Court dated January 15, 2009 was Appellant's second trip to the Court of Common Pleas, having previously argued this case before the Honorable Edward J. Borkowski on December 15, 2008, with a subsequent argument before the Commonwealth Court. The record developed at the earlier hearing before Judge Borkowski was submitted to this Court. Counsel for Appellant was offered the opportunity for argument on the record, however, after a meeting with co-counsel and counsel for the Commonwealth in Chambers, Mr. Vitti declined that opportunity.

CONCLUSION

For all of the above reasons, no reversible error occurred and the findings and rulings of this Court should be AFFIRMED.

BY THE COURT:
/s/Rangos, J.

Allegheny Demolition, Inc. v. LVI Environmental Services, Inc.

Arbitration Award—Modification

1. The arbitration award was not finalized until the Arbitrator issued his modification of the amount of the award taking into account a fifth payment made by LVI Environmental Services, Inc., (LVI) to Allegheny Demolition, Inc. (ADI).

2. LVI was not required to file a motion to modify or vacate in this Court within 30 days of the original, superseded award.

3. ADI waived its right to challenge the Arbitrator's superseding award by failing to file a motion to modify or vacate the arbitration award.

4. Except for recalculating the interest on the lower amount owing on the original contract, the Arbitrator did not change any other findings to dollar amounts.

5. Since ADI never disputed that it received a fifth payment from LVI in the amount of \$134,550, which had never been credited to LVI, the Arbitrator did not violate the *functus officio* doctrine, and it was proper to deny ADI's Petition to confirm the original higher award.

(Carol Sikov Gross)

Thomas E. Weiers, Jr. for Petitioner.

Jeffrey J. Ludwikowski for Respondent.

No. GD 08-026787. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

PROCEDURAL BACKGROUND

O'Brien, J., June 10, 2009—Petitioner, Allegheny Demolition, Inc. (ADI), has filed an appeal to the Superior Court from this Court's Order of February 18, 2009, denying ADI's Petition to Confirm Arbitration Award. ADI entered into a contract with Respondent, LVI Environmental Services, Inc. (LVI), to provide demolition services on a project for which LVI was the prime contractor. When disputes arose, the matter was submitted to the American Arbitration Association. As part of ADI's case before the Arbitrator for monies owed, ADI submitted an exhibit which acknowledged four payments made by LVI to ADI. On October 28, 2008, the Arbitrator entered an award for ADI in the net amount of \$345,086.00.

After receiving the award, LVI discovered that ADI had failed to disclose that LVI had made a fifth payment to ADI in the amount of \$134,550.00. (ADI does not dispute that it received this fifth payment). By letter dated November 13, 2008, LVI requested a modification of the amount of the award pursuant to Rule R-47 of the American Arbitration Association Construction Industry Arbitration Rules, based on a "clerical, typographical, technical or computational" error, i.e., the failure to include the fifth payment in computing the award. By letter dated November 17, 2008, ADI filed a response to LVI's request, contending that LVI was not asking for a correction of a computational error, but was asking the arbitrator to redetermine the merits of an already decided claim based on new evidence, which was outside the scope of the Arbitrator's powers. On December 10, 2008, the Arbitrator filed a Disposition of Application for Modification of Award in which he credited LVI for the fifth payment of \$134,550.00 and reduced the interest accordingly.

ADI never challenged the award as modified. Instead, on December 16, 2008, it filed a petition in this Court to confirm the initial award entered on October 28, 2008. The petition did not mention the modified award of December 10, 2008.

DISCUSSION

ADI concedes that 1) it misrepresented (albeit unintentionally) to the Arbitrator the full number of payments it received from LVI and 2) the Arbitrator failed to credit LVI with a payment made to ADI. ADI nevertheless asked me to confirm that original award, ignoring the Arbitrator's rectification of this injustice in his modified award.

ADI first contends LVI cannot now attack the validity of the original award because LVI filed no petition to modify or vacate that award, essentially arguing waiver. LVI counters that "this argument entirely overlooks the undisputed fact that LVI requested [and was granted] a modification of that award pursuant to the AAA Rules.... Accordingly, the original award of October 28, 2008 has been modified and is no longer valid in its present form..." LVI's brief at 6. LVI further points out that ADI has failed to "attack the validity [of the] modified award of December 10, 2008." *Id.* In effect, LVI is also arguing waiver. I agree with LVI.¹

Rule R-47 of the American Arbitration Association Construction Industry Arbitration Rules provides as follows:

Within twenty calendar days after the transmittal of an award, the arbitrator on his or her initiative, or any party, may request that the arbitrator correct any clerical, typographical, technical or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided.

If the modification request is made by a party, the other parties shall be given ten calendar days from

transmittal by the AAA to the arbitrator of any request and any response thereto.

If applicable law provides a different procedural time frame, that procedure shall be followed.

The relevant statutory subsection relating to common law arbitration provides as follows:

(b) Confirmation and judgment. On application of a party made more than 30 days after an award is made by an arbitrator under § 7341...the court shall enter an order confirming the award and shall enter a judgment or decree in conformity with the order...

42 Pa.C.S.A. § 7342(b).

This section has consistently been interpreted to require that any challenge to the arbitration award be made in an appeal to the Court of Common Pleas by the filing of a petition to vacate or modify the arbitration award within 30 days of the date of the award. Specifically, a party must raise alleged irregularities in the arbitration process in a timely petition to vacate or modify the arbitration award.

Sage v. Greenspan, 765 A.2d 1139, 1142 (Pa.Super. 2000).

Under Rule R-47, a party to an arbitration proceeding may request modification of the award within 20 days. An opposing party may respond within 10 days of that request. The arbitrator then has 20 days to dispose of the request for modification. Thus, the rule contemplates that up to 50 days may elapse from transmittal of the original arbitration award to disposition of the request for modification. The arbitrator may deny the request or modify the award. Since modification is always a possibility where such a request is made, it makes no sense to start the running of the 30 day period under section 7342(b) before a ruling on the modification request is made. This principle applies to the instant case, where the award was not finalized until the Arbitrator issued his modification. LVI was not required to file a motion to modify or vacate in this Court within 30 days of the original, superseded award. ADI, however, waived its right to challenge the Arbitrator's superseding award by failing to do so within 30 days. Where an arbitration award is made and not appealed from, the obligation becomes fixed. See *Sutica v. Erie Insurance Company*, 39 Pa. D. & C. 4th 217 (1998); and *Browne v. Nationwide Mutual Insurance Company*, 713 A.2d 663 (Pa.Super. 1998).

ADI cites *Sage*, *supra*, in support of its waiver argument. In *Sage*, client filed a legal malpractice action against individual attorneys and their law firms. The parties agreed to submit the case to arbitration. On July 27, 1999, the arbitrator found in client's favor. The individual attorneys requested the Arbitrator to reconsider his award against them. On September 22, 1999, the Arbitrator issued an amended award clarifying that the award was against both the individual attorneys and the law firms. The individual attorneys failed to file a petition to modify or vacate in common pleas court within thirty days. When client petitioned common pleas court to confirm the award, the individual attorneys opposed the petition. The trial court refused to confirm the award as to the individual attorneys. The Superior Court reversed because the individual attorneys failed to challenge the award within thirty days. ADI interprets *Sage* to hold that the individual attorneys' failure to petition common pleas court to vacate or modify the July 27, 1999, award resulted in the waiver of their right to challenge the September 22, 1999, clarification. It was the amended award in *Sage* which specified that the original award was against both the individual attorneys and the law firms. Superior

Court obviously confirmed the award over the objection of the individual lawyers because they failed to challenge the amended award within thirty days.

In the event an appellate court disagrees with the foregoing waiver analysis, I will turn to ADI's argument that the arbitrator exceeded his authority by issuing the modified award.

The *functus officio* doctrine prevents arbitrators from taking any further action once an arbitration award has been issued. There are three specific exceptions to the doctrine: (1) an arbitrator can correct a mistake which is apparent on the face of his award; (2) where the award does not adjudicate an issue which has been submitted, then as to such issue the arbitrator has not exhausted his function and it remains open to him for subsequent determination; and (3) where the award, although seemingly complete, leaves doubt whether the submission has been fully executed, an ambiguity exists which the arbitrator is entitled to clarify. *Stack v. Karavan Trailers, Inc.*, 864 A.2d 551 (Pa.Super. 2004).

ADI has never disputed that it received a fifth payment from LVI in the amount of \$134,550, which has never been credited to LVI. In response to LVI's request for modification, ADI merely contended that to modify the award would constitute redetermining the merits of a claim already decided because evidence of the fifth payment was not submitted during the arbitration proceedings. In its brief in support of its petition, ADI contends that the *functus officio* doctrine applies because there was no mistake apparent on the face of the original award.

During the arbitration hearing, ADI submitted an Exhibit entitled "CONTRACT BALANCE SUMMARY [and] ADI PAY APPLICATIONS/LVI PAYMENTS." In the initial "AWARD OF ARBITRATOR," the Arbitrator found the balance of the original contract to be \$264,222.00. This amount could only have been calculated by subtracting "Change Order No. 1," "Credit for Not Removing Buildings 1 & 3 Footers," and the total LVI Payments listed by ADI from the original contract price, i.e., \$961,300 minus 607,077.10. It is evident that the Arbitrator and ADI wanted to give LVI credit for the payments it made to ADI.

When LVI sought modification of the original award, it sought only to receive credit for the additional payment it discovered after receiving the award, and an adjustment for the interest. In the "DISPOSITION OF APPLICATION FOR MODIFICATION OF AWARD," the Arbitrator found as follows:

[ADI] omitted receiving a check for \$134,550.00 payable against the original contract amount due. [ADI's] original claim was for \$264,222.00 balance of original contract. This reduced the original contract amount due to \$129,672.00. The interest judgment was based partially on the contract amount due.

Except for recalculating the interest, the Arbitrator did not change any other findings or dollar amounts. Nor did he change his finding that ADI was owed a balance on the original contract. He only changed the amount owing on the original contract to include an additional payment which ADI failed to include in its list of payments received from LVI.

In *First National Bank of Clarion v. Brenneman*, 7 A. 910 (Pa. 1886), cited in *Stack*, *supra*, the Supreme Court held as follows:

In regard to matters of fact, the judgment of the arbitrators is ordinarily deemed conclusive. If, however, there is a mistake of material fact apparent upon the face of the award, or if the arbitrators are themselves satisfied of the mistake and state it, (although it is not apparent on the face of the award,) and if in their own view it is material to the

award, then, although made out by extrinsic evidence, courts of equity will grant relief...

Id. at 912, emphasis added. Cases in other jurisdictions have held that an arbitrator could modify an award where the error was not apparent on the face of the award.

In *Eastern Seaboard Construction Co., Inc. v. Gray Construction, Inc.*, 553 F.3d 1 (1st Cir. 2008), the arbitrator amended the award to give Eastern Seaboard a credit for \$66,613, the amount remaining on the parties' subcontract. Gray did not take issue with Eastern Seaboard's claim, but contended that pursuant to Rule R-47, the arbitrator was precluded from revisiting the initial award, which was not ambiguous and did not require clarification. The Court found that Gray's assertion belied the reality that even seemingly complete awards may omit information or overlook contingencies, failures that Rule R-47 would allow the arbitrator to remedy. The Court determined that the arbitrator's omission of the subcontract balance in the initial award, rather than being a redetermination of the merits, was the type of clerical, typographical, technical or computational error which Rule R-47 permitted him to amend or clarify. In upholding the amended award, the Court noted that Gray did not seriously dispute the \$66,613 figure and that failure to give Eastern Seaboard the credit would have resulted in a windfall to Gray. The amendment did not reopen the merits of the case, but rather clarified a latent ambiguity. See *LaVale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569 (3rd Cir. 1967). (Where arbitration award contained apparent ambiguity as to whether payment by one of the parties was considered in making the award, arbitrator was entitled to clarify the matter).

In *Waveform Telemedia, Inc. v. Panorama Weather North America*, 2007 WL 678731 (S.D.N.Y. 2007), Panorama made Application for Modification of Award by Arbitrator, contending that the arbitrator did not take a salary into account when calculating consequential damages. The arbitrator found error and modified the award. Although Waveform never disputed the failure to include the salary in the computation of damages, it contended that the error did not appear on the face of the award and that the arbitrator did not merely correct a mathematical error, but reevaluated evidence and made substantive changes to the award. The Court found that this overstated the extent of the modification. The modification did not change the spirit and basic effect of the award. It simply modified the award to make it consistent with the arbitrator's intent, but maintained the underlying resolution of the dispute, which was to award Waveform consequential damages offset by Waveform's preexisting expenses. See also *Clarendon National Insurance Co. v. TIG Reinsurance Co.*, 183 F.R.D. 112 (S.D.N.Y. 1998).

In *Zehren and Associates, Inc. v. Braeburn Real Estate Development, LLC*, 2009 WL 42690 (D.Colo. 2009), the arbitrator modified awards to include attorney's fees and additional costs against Braeburn. Braeburn argued that AAA Commercial Arbitration Rule R-46, the same as Rule R-47, precluded the panel from redetermining the merits of any claim already decided. The Court found that there was ample case law in which arbitrators were permitted to subsequently explain or clarify an issue related to damages and that the panel did not redetermine the merits of a claim already decided when it included an award of attorney's fees and additional costs in its final award.

CONCLUSION

Assuming, arguendo, that ADI has not waived its right to challenge the award as modified, I conclude that the Arbitrator did not violate the *functus officio* doctrine. ADI's

petition to confirm the original award was therefore properly denied.

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

Date: June 10, 2009

¹ Although ADI filed its petition to confirm the original award within 30 days of the issuance of the Arbitrator's modified award, the petition did not mention the modified award. The petition cannot, therefore, be considered a challenge to the modified award.

Joan M. Pelly, et al. v. The Pittsburgh Harlequins Rugby Football Association, et al.

Preliminary Objections—Summary Judgment—No-Duty Rule for Sports Stadiums

1. Preliminary objections will be overruled without prejudice to file a Motion for Summary Judgment where the same preliminary objections were previously sustained and Plaintiffs' complaint dismissed with prejudice.

2. Although *Jones v. Three Rivers Management Corporation*, 483 Pa. 75, 394 A.2d 546 (1978) upheld the "no-duty" rule with respect to injured patrons at a baseball stadium, in this case an exception found in *Craig v. Amateur Softball Association of America*, 951 A.2d 372 (Pa. Super. 2008) applies. Plaintiff is entitled to attempt to prove that at the time in question there was an "established custom" in the sport of rugby that barred a player with a recent head injury from playing again without prior clearance.

(Lynn E. MacBeth)

Patrick K. Cavanaugh and Richard A. Swanson for Plaintiffs.
Thomas P. Birris for Pittsburgh Harlequins Rugby Football Association & the Pittsburgh Harlequins.

No. G D 0 8-20515. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM IN SUPPORT OF ORDER

Friedman, J., July 13, 2009—We previously vacated two Orders dismissing the captioned action as to all of the Defendants so that we could reconsider the exception to the "no-duty" rule set forth in *Jones v. Three Rivers Management Corporation*, 483 Pa. 75, 394 A.2d 546 (1978). Both sides have filed supplemental briefs on that issue. After a review of those briefs and of *Jones*, we conclude that the Orders were improvidently entered and that the Preliminary Objections should have been overruled for the reasons discussed herein.

We also note that we have considered whether this is a matter that should be certified for an immediate appeal and have concluded that the question of the existence (or not) of an "established custom" will require evidence and is therefore better suited for a motion for summary judgment. We therefore are not inclined to certify the Order at this early stage.

Jones involved a fan at a baseball game, not a player in a rugby match. However, the question of whether or not the "no-duty" rule applied in the circumstances was nevertheless the issue in *Jones*. The defendants managed the baseball

stadium where Ms. Jones was injured. At trial, those defendants presented no evidence and moved for nonsuits and directed verdicts which were denied. The jury found that defendants were negligent in allowing the creation of the situation that led to her being struck by a ball hit in batting practice while she was walking within the stadium, near concession stands and not in the seating area.

The defendants' contention on appeal in *Jones* was that "batted balls in baseball stadiums do not present an unreasonable risk of harm, and thus, do not create liability...for negligence."

The Supreme Court in *Jones* summarized "settled principles which apply to all cases involving [injuries to patrons] in a *place* of amusement for which admission is charged." 483 Pa. at 81, 394 A.2d at 549 (emphasis added). The Supreme Court also considered the law of other jurisdictions as it was a question of first impression in Pennsylvania.

Jones, however, has nothing to do with injuries to participants in a sport. We must therefore return to *Craig v. Amateur Softball Association of America*, 951 A.2d 372 (Pa.Super. 2008), which *does* involve an injury to a participant. Implicit in *Craig* is acceptance by our Superior Court that, if the plaintiff there had produced evidence to show that there was a violation of an established custom, summary judgment might not have been appropriate. See 951 A.2d at 378, discussion under headnote 7.

Craig followed *Jones* even though *Jones* involved a stadium's duties to a spectator and *Craig* involved a game organizer's duties to a player. The basic principle is that "inherent risks are *by definition* foreseeable." 951 A.2d at 379. In other words, everyone who plays in a rugby game is deemed to have foreseen that he could fall or be hit in such a way that he would receive a head injury. The *only* exception to this "no-duty" rule, according to the *Craig* court's interpretation of *Jones*, is the existence of an "established custom" that addresses the conduct said to be negligent.

We conclude that Plaintiff is entitled to attempt to prove that at the time in question there was an "established custom" in the sport of rugby that barred a player with a recent head injury from playing again without prior clearance from a physician. We therefore overrule the Preliminary Objections in the nature of a demurrer, without prejudice to Defendants' right to address the sufficiency of Plaintiff's evidence in support of the existence of an "established custom" in a motion for summary judgment after all discovery has been completed.

See Order filed herewith.

BY THE COURT:
/s/Friedman, J.

Dated: July 13, 2009

ORDER OF COURT

AND NOW, to-wit, this 13th day of July 2009, after reconsideration of our Orders of January 21, 2009, which sustained Defendants' Preliminary Objections and dismissed Plaintiffs' Complaint with prejudice, we conclude that the Orders were erroneous given the holdings in *Jones v. Three Rivers Management Corporation*, 483 Pa. 75, 394 A.2d 564 (1978) and *Craig v. Amateur Softball Association of America*, 951 A.2d 372 (Pa.Super. 2008), and we therefore OVERRULE Defendants' Preliminary Objections to the Complaint, without prejudice to Defendants' right to file a motion for summary judgment in accordance with our attached Memorandum in Support of Order.

BY THE COURT:
/s/Friedman, J.

Commonwealth of Pennsylvania v. Jennifer Marie Ballard

Insufficient Evidence—Inventory Search—Suppression

1. When the police found marijuana, cocaine, and a digital scale after stopping the van the defendant was driving, based upon the defendant's proximity to the drugs inside the van, their value and how they were packaged, there was sufficient evidence to support the defendant's convictions for possession, possession with intent to deliver, and possession of paraphernalia.

2. The search of the van the defendant was driving was a proper inventory search in order to secure the van and its contents before having the van towed to the station; the drugs and paraphernalia were legally seized and the denial of the defendant's motion to suppress was not error.

(Carol Sikov Gross)

Michael W. Streily for the Commonwealth.
Aaron D. Sontz for Defendant.

No. C C200604318. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION PROCEDURAL HISTORY

Borkowski, J., May 22, 2009—A criminal information was filed against Jennifer Marie Ballard ("Ballard") on December 26, 2005, charging her with two (2) counts of Possession with Intent to Deliver, 35 P.S. §780-113(a)(30); two (2) counts of Possession of a Controlled Substance, 35 P.S. §780-113(a)(16); one (1) count of Possession of Drug Paraphernalia, 35 P.S. §780-113(a)(32); two (2) counts of Retail Theft, 18 Pa.C.S.A. §3929(A)(1); one (1) count of Receiving Stolen Property, 18 Pa.C.S.A. §3925; two (2) counts of Theft by Deception, 18 Pa.C.S.A. §3922; and one (1) count of Bad Checks, 18 Pa.C.S.A. §4105.

Ballard's case was joined for trial with her co-defendants, Charles Jackson ("Jackson") at CC 200604322, and Douglas Ray ("Ray") at CC 200604317. All three co-defendants proceeded to a jury trial on September 10, 2007, in front of the Honorable Cheryl Allen.¹ The jury convicted Ballard of all charges on September 13, 2007.

Judge Allen imposed a period of probation of five (5) years at four of the counts, with all probationary periods to run concurrent. No further penalty was imposed at the remaining counts.

Thereafter, Ballard filed a motion for new trial and/or in arrest of judgment. Judge Allen entered an Order dated October 26, 2007, denying the motion and allowing trial counsel to withdraw. The Public Defender's Office was appointed to represent Ballard on appeal.

A timely Notice of Appeal was filed on November 8, 2007. This timely appeal follows.

STATEMENT OF ERRORS ON APPEAL
Appellant's Concise Statement lists the following issues for appellate review:

1. The evidence was insufficient to convict [Ballard] of the two counts of possession and the two counts of possession with intent to deliver.
2. The evidence was insufficient to prove that [Ballard] possessed the drugs with the intent to deliver them.
3. The evidence obtained as a result of the search of the vehicle should have been suppressed because the search was not conducted as part of an inventory search.

FINDINGS OF FACT

On December 26, 2005, Jackson, Ballard and Ray went into the Walmart in Scott Township. Walmart security guard Ronald Hargenrader noticed the three in the electronics department acting suspiciously, e.g. putting high-priced items into a shopping cart without looking at the prices. One of the men then placed a blanket on top of the shopping cart to cover the items. See Jury Trial Transcript, September 10-13, 2007, pp. 51-53. (hereafter "T.T.") Hargenrader notified his supervisor, Tina Jordan, that the three suspicious individuals were heading to the check-out counter in electronics. (T.T. 52-53, 67-68) Jordan viewed the live security video, spotted the trio, then notified the check-out clerk at the register where the three were waiting in line. (T.T. 68) Jordan notified the store manager about the situation and proceeded to the check-out counter. (T.T. 69)

Ballard attempted to pay for the items using a stolen check, driver's license and social security card belonging to Marlene Gillock. (T.T. 71, 81-83, 158-159) The driver's license photograph had been altered so that Gillock's face was burned off. (T.T. 159) When the assistant store manager realized that Ballard, Ray and Jackson were attempting to purchase the merchandise by check, using altered identification, he would not let the sale proceed. The three then immediately left the store, leaving behind the check, driver's license and social security card. (T.T. 53, 73-73)

Hargenrader and Jordan followed the three out of the store and into the parking lot. (T.T. 54, 74) As Jordan pursued the three actors, she telephoned the Scott Township Police Department from her cell phone, requesting that a patrol officer call her back regarding the incident. (T.T. 71) Scott Township Police Officer Alan Ballo immediately telephoned Jordan on her cell phone and was informed that Jordan and Hargenrader were following the actors through the Walmart parking lot. (T.T. 72-75, 150-151) Officer Ballo drove in a marked cruiser toward the Walmart, while talking on the phone with Jordan. (T.T. 151) En route, Jordan informed Officer Ballo that the actors got into a van with an Ohio license plate. (T.T. 75) Officer Ballo spotted a van with an Ohio license plate and stopped the van on I-79 near the Carnegie exit. (T.T. 152, 213) Ballard was in the driver's seat of the van, Ray was in the passenger seat, and Jackson was crouched in the back of the van. (T.T. 152)

Ballard, Jackson and Ray were removed from the vehicle and taken into custody. (T.T. 213) Officer Eric Davis of the Collier Township Police Department was one of the officers who responded to a request for back-up and proceeded to the scene of the stopped van on I-79. (T.T. 213) Officer Davis and the other responding officers began to conduct an inventory search of the van because, consistent with Scott Township Police Department policy, it had to be impounded and transported to the Scott Township Police Department. (T.T. 213) Officer Davis entered the van from the rear and found Ray's jacket sitting between the two front seats. (T.T. 260, 263) The jacket pocket contained four small bags of marijuana. (T.T. 214, 239) Officer Ronald Zygmuntowicz of the Collier Township Police Department, who also responded to the request for back-up, was inside the van attempting to inventory the items located in the rear of the van. (T.T. 220, 222) Officer Zygmuntowicz found a black bag between the front and back seats which contained small baggies of marijuana and crack cocaine, and a CD case which opened into a digital scale. (T.T. 222-223, 242) He then noticed a small baggie of crack cocaine inside the door handle on the front passenger side. (T.T. 224) When Officer Davis and Officer Zygmuntowicz discovered the drugs, they stopped the inventory search and handed over the contraband to Officer Shawn Arlet of the Scott Township Police Department, who

then had the van towed to the Scott Township Police Department for closer inspection. (T.T. 214, 226, 238-239)

On December 27, 2005, Officer Paul Abel of the Scott Township Police Department executed a search warrant on the van. The search revealed mink coats, Snow King boots, two pairs of brown work gloves, a gold necklace, and two Walmart receipts. (T.T. 317) Officer Abel did not find any drug paraphernalia, such as a crack pipe, during the search. (T.T. 315)

The total weight of the marijuana was 164.88 grams, packaged into smaller bags with each containing approximately 1.25 grams. The street value of the marijuana was \$10 per bag with an approximate total value of \$1319. (T.T. 288) The total weight of the crack cocaine was 29.03 grams, divided among 13 baggies. Each bag contained approximately 20 pieces of crack cocaine, valued at \$20 per piece. Consequently, the approximate value of the crack cocaine was \$4460. (T.T. 289) Detective Martin Zimmel, based upon his 27 years of experience with the Allegheny County Police Department, testified as an expert in the area of narcotics trafficking and concluded that the drugs had been possessed for purposes of sale. His opinion was based upon the amount and value of the drugs, the packaging, and the digital scale. (T.T. 283, 292)

Ballard and Ray admitted to going into Walmart with Jackson and filling two shopping carts with items, including a computer. (T.T. 342, 354-356, 475, 477-478) Ballard also admitted to using Ms. Gillock's check, driver's license and social security card to attempt to purchase the items. (T.T. 345)

DISCUSSION

I.

Ballard's initial claim contends that there was insufficient evidence to support a conviction for possession and possession with intent to deliver. This claim is without merit.

The standard of review for a challenge to the sufficiency of the evidence is to consider the evidence in the light most favorable to the Commonwealth, as verdict winner, including all reasonable inferences drawn from the evidence. The reviewing court may not substitute its judgment for that of the fact finder; but rather to discern whether sufficient evidence supports the verdict, mindful of the fact that the fact finder was free to believe all, part, or none of the evidence presented. *Commonwealth v. Hartle*, 894 A.2d 800, 803-804 (Pa.Super. 2006).

When the police stopped Jackson, Ballard and Ray in Jackson's van after they fled Walmart, Ballard was sitting in the driver's seat. Inside the van, the officers found marijuana, cocaine, and a digital scale. Some of the drugs were found in the passenger side door handle of the van; some of the drugs were found in the pocket of Ray's denim jacket, which was laying between the front seats; and some of the drugs, as well as a digital scale, were found in a black bag located in between the front and back seats of the van. (T.T. 213-214, 222-224, 242) Detective Martin Zimmel, based upon his 27 years of experience with the Allegheny County Police Department, concluded that the drugs had been possessed for purposes of sale, based upon the value and amount of the drugs, the packaging, and the digital scale. (T.T. 283, 292) Based upon Ballard's proximity to the drugs inside the van, coupled with the value and packaging of the drugs, there was sufficient evidence to support the convictions for possession, possession with intent to deliver, and possession of paraphernalia. *Commonwealth v. Hutchinson*, 947 A.2d 800, 806-807 (Pa.Super. 2008). (evidence of co-defendant's proximity to drugs stashed in rafters of a pavilion was sufficient to support conviction for possession and possession with intent to deliver the drugs)

The jury had ample evidence to support their guilty ver-

dict. Ballard's issue is without merit.

II.

Next, Ballard claims that the evidence was insufficient to prove that she possessed the drugs with intent to deliver. The analysis for Issue I is incorporated herein by reference. The issue is without merit.

III.

Finally, Ballard claims that the evidence obtained pursuant to the search of the van should have been suppressed because it was not a proper inventory search. This issue fails.

The Superior Court reviews the denial of a motion to suppress to establish whether the record supports the trial court's findings and is otherwise free of legal error. The review is limited to the prosecution's evidence and that part of the evidence from the defense, which remain uncontradicted. The reviewing court is bound by factual findings that are substantiated by the record. *Commonwealth v. Henley*, 909 A.2d 352, 357-358 (Pa. 2006).

Ballard maintains that the search of the van was not a proper inventory search. However, the record in this case and applicable law of this Commonwealth supports Judge Allen's determination.

Jackson, Ballard and Ray were stopped in Jackson's van on I-79 after the three actors had attempted to steal merchandise from Walmart. Scott Township police officers were assisted by Collier Township police officers on I-79 where the van was stopped on the side of the road. See Suppression Hearing Transcript, June 12-13, 2007, pp. 23-24 (hereafter "H.T. .") Since the three occupants of the van were taken into custody, the van could not be left on the side of I-79 and was to be towed back to the police station. (H.T. . 110) Based upon the Scott Township Police Department's inventory search policy, the officers were required to inventory the items inside the van in order to secure the vehicle and to insure that they account for the items inside the vehicle. (H.T. 101, 103, 110)

Consequently, the responding officers began to inventory the items inside the van while at the scene. (H.T. 24, 54, 170) When the officers discovered the drugs, they stopped their inventory search and had the van towed to the Scott Township Police Department in order to obtain a search warrant to conduct a search of the van. (H.T. 24, 37, 55-56, 178) Additionally, the officers felt it would be safer to tow the vehicle before completing the inventory search, due to heavy traffic at that hour as well as the fact that it was getting dark outside. (H.T. 56)

Based upon these facts, the suppression court correctly concluded that the officers were conducting an appropriate inventory search of Jackson's van in order to secure the van and its contents before having it towed to the station. *Commonwealth v. Chambers*, 920 A.2d 892, 895 (Pa. Super. 2007) (inventory search was proper when police needed to tow defendant's vehicle for safety purposes, rather than to leave the vehicle precariously parked on the side of the road) Consequently, the drugs and paraphernalia discovered incident to this lawful inventory search were legally seized, and Judge Allen's denial of Ballard's motion to suppress was not error.

CONCLUSION

Based on the foregoing, the judgment of sentence should be affirmed.

BY THE COURT:
/s/Borkowski, J.

Date: May 22, 2009

¹ This Court was assigned this case at the post-sentence phase given Judge Allen's election to the Superior Court of Pennsylvania.

Commonwealth of Pennsylvania v. David Trice

Sufficiency of Evidence

1. Defendant was observed by police driving erratically and upon being stopped smelled of alcohol, slurred his words, had bloodshot eyes and an open can of beer on the seat of the car.

2. No breathalyzer test was administered because Defendant refused it.

3. Case law has established that despite the lack of a breathalyzer test, evidence presented by the arresting officer as to intoxication is sufficient to convict.

(Rhoda Shear Neft)

Michael Streilly for the Commonwealth.

RaKeisha Jennie Foster for Defendant.

No. CC 200618382. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Mariani, J., June 5, 2009—This is a direct appeal where-in the defendant, David Trice, appeals from the judgment of sentence of January 13, 2009. The defendant was convicted after a non-jury trial of two counts of driving under the influence of alcohol and a vehicle code offense of failing to use proper signals. This Court sentenced the defendant to a term of intermediate punishment for 23 months. On February 11, 2009, the defendant filed a timely Notice of Appeal. On May 11, 2009, the defendant filed a timely Concise Statement of Errors Complained of on Appeal raising the following issue:

Because there were [sic] no field sobriety testing and no inquiries into whether or not Mr. Trice was drinking when he was arrested on November 21, 2006, the evidence was not sufficient to show Mr. Trice was rendered incapable of safe driving.

During the trial of this case, the following credible facts were adduced: On November 21, 2006, City of Pittsburgh Police Officer Michael Burford, while on routine patrol, observed a vehicle driven by the defendant make a right turn onto Frankstown Avenue without utilizing a turn signal. The defendant had been driving erratically in the middle of the road just prior to making the turn. Officer Burford effectuated a traffic stop of the vehicle. Officer Burford approached the vehicle and observed the defendant sitting in the driver's seat. The defendant appeared to be intoxicated. Officer Burford noticed that the defendant smelled of alcohol and his speech was slurred. The defendant had bloodshot, glassy eyes. He also noticed an opened can of Budweiser beer in the vehicle. The officers asked for identification but the defendant refused to provide the officers with his identification. The defendant did, however, advise the officers his name was "James" Trice. Officer Burford and his partner then returned to their police vehicle to check the defendant's information. The officers learned that there was an existing arrest warrant for James Trice.

As the officers were about to return to the defendant's vehicle, they noticed that the defendant had exited his vehicle and was walking down the sidewalk, attempting to enter a bar located about ten yards from the area of the traffic stop. The defendant was staggering. The officers approached Mr. Trice and advised him he was under arrest. Because the defendant was being taken into custody due to the existing arrest warrant, the officers did not conduct field sobriety tests on the defendant. The defendant became very aggressive and hostile toward the officers.

The officers transported the defendant to their station where the defendant threatened to kill the officers and their families. The defendant made various other threats at the police station as well. While at the police station, the defendant refused the administration of the intoxilyzer test stating, "No, I ain't taking no fucking test." The defendant was read chemical test warnings and signed a document acknowledging his rights concerning the refusal of chemical testing.

The defendant was charged as set forth above and proceeded to trial. At the conclusion of the trial, the defendant was convicted of Counts One and Two and the vehicle code offense.

The defendant challenges the sufficiency of the evidence relative to his convictions for driving under the influence of alcohol. The test for sufficiency is whether viewing the evidence, and all reasonable inferences therefrom, in the light most favorable to the Commonwealth, the fact-finder reasonably could have determined that all the elements of the crime were established beyond a reasonable doubt. *Commonwealth v. May*, 584 Pa. 640, 647, 887 A.2d 750, 753 (2005); *Commonwealth v. Mackert*, 781 A.2d 178, 186 (Pa.Super. 2001). It is for the trier of fact to make credibility determinations. *Commonwealth v. Schoff*, 911 A.2d 147, 159 (Pa.Super. 2006). Any doubts concerning a defendant's guilt are to be resolved by the fact-finder unless the evidence was so weak and inconclusive that, as a matter of law, no probability of fact may be drawn from the evidence. *Id.* Credibility determinations must be given great deference. While passing upon the credibility of witnesses and the weight of the evidence produced, the trier of fact is free to believe all, part or none of the evidence. See *Commonwealth v. O'Bryon*, 2003 Pa.Super. 139, 820 A.2d 1287, 1290 (Pa.Super. 2003).

The defendant was charged with and convicted of driving under the influence of alcohol under 75 P.S.A. §3802(a)(1), which provides:

§ 3802. Driving under influence of alcohol or controlled substance

(a) General impairment.—

(1) An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle.

In order to establish the crime of driving under the influence of alcohol, the Commonwealth must prove: (1) that defendant was operating a motor vehicle, (2) after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving. *Commonwealth v. Kerry*, 906 A.2d 1237, 1241 (Pa.Super. 2006).

As set forth in *Kerry*, "[a]s this Court noted with respect to the predecessor statute to § 3802(a)(1),

[t]o establish that one is incapable of safe driving...the Commonwealth must prove that alcohol has substantially impaired the normal mental and physical faculties required to operate the vehicle safely; "substantial impairment" means a diminution or enfeeblement in the ability to exercise judgment, to deliberate or to react prudently to changing circumstances and conditions.

Id.; citing *Commonwealth v. Gruff*, 2003 Pa.Super. 126, 822 A.2d 773, 781, (Pa.Super. 2003), *appeal denied*, 581 Pa. 672, 863 A.2d 1143 (2004). "[The] meaning [of substantial impairment] is not limited to some extreme condition of disability." *Commonwealth v. Griscavage*, 512 Pa. 540, 545, 517 A.2d 1256, 1258 (1986). Section 3802(a)(1), like its predecessor

"is a general provision and provides no specific restraint upon the Commonwealth in the manner in which it may prove that an accused operated a vehicle under the influence of alcohol to a degree which rendered him incapable of safe driving." *Commonwealth v. Loeper*, 541 Pa. 393, 402-403, 663 A.2d 669, 673-674 (1995).

In *Kerry*, the Superior Court concluded that there was sufficient evidence demonstrating that the defendant was under the influence of alcohol to an extent rendering him incapable of safe driving because

Appellant's actions in illegally operating an ATV on a highway on snow covered roads evidenced a diminution or enfeeblement in his ability to exercise judgment. The Court also noted that Appellant had concealed four cans of beer on his person and he exhibited signs of intoxication including bloodshot and glassy eyes, slurred speech, and an odor of alcohol. He also refused to submit to a breath test. From such evidence the trier of fact could reasonably infer that alcohol had substantially impaired Appellant's normal mental and physical faculties required to operate the vehicle safely.

906 A.2d at 1241.

The *Kerry* Court cited various other opinions commenting on the threshold of evidence sufficient to sustain the Commonwealth's burden of demonstrating that a defendant was incapable of safe driving. See *Gruff*, *supra* (finding conviction for DUI under former statute was supported by evidence of his bloodshot eyes, smell of alcohol, inappropriate responses, refusal to take a blood test, and driving at a high rate of speed); *O'Bryon*, *supra* (holding that evidence supported defendant's conviction under § 3731(a)(1) where officer testified that defendant ran her car into parked car and left scene, and where defendant was confused and staggering, had alcohol on breath, and could not maintain balance); *Commonwealth v. Leighty*, 693 A.2d 1324 (Pa.Super. 1997) (holding evidence of glassy and bloodshot eyes, admission of alcohol consumption, failure of two field sobriety tests and minor accident before arrest was sufficient to support conviction for driving under the influence of alcohol under former § 3731(a)(1)); *Commonwealth v. Feathers*, 442 Pa.Super. 490, 660 A.2d 90 (Pa.Super. 1995), *affirmed*, 546 Pa. 139, 683 A.2d 289 (1996) (finding evidence was sufficient to sustain conviction under § 3731(a)(1), where defendant had glassy eyes and slurred speech, staggered as she walked, smelled of alcohol and failed field sobriety tests, notwithstanding absence of evidence of erratic or unsafe driving); *Commonwealth v. Rishel*, 441 Pa.Super. 584, 658 A.2d 352 (Pa.Super. 1995) (holding evidence sufficient to sustain conviction under § 3731(a)(1), where defendant smelled of alcohol, appeared confused, was involved in an automobile accident, failed two field sobriety tests and admitted to consuming two 16-ounce beers) *vacated on other grounds*, 546 Pa. 48, 682 A.2d 1267 (1996).

In this case, the police officers observed the defendant driving his vehicle. They observed the defendant driving erratically in the middle of the road and fail to use a turn signal before making a right turn. Upon approaching the defendant in his vehicle, the officers observed an opened can of beer in the vehicle. The defendant smelled of alcohol, had slurred speech, bloodshot and glassy eyes. The defendant provided a false name to the officers. Despite being questioned by the police, the defendant attempted to leave the scene on foot and was observed staggering as he attempted to enter a bar. The defendant became belligerent, threatening violence toward the police officers. He then refused chemical testing. This Court believes that evidence is suf-

ficient to demonstrate that the defendant was under the influence of alcohol to a degree that rendered him incapable of safe driving. Accordingly the evidence was sufficient to convict the defendant for a violation of driving under the influence of alcohol.

For the foregoing reasons, the judgment of sentence should be affirmed.

BY THE COURT:
/s/Mariani, J.

Commonwealth of Pennsylvania v. Ronald Restieri, Jr.

Municipal Police Jurisdiction Act—Suppression

1. When an off-duty police officer travels outside of his jurisdiction, following a driver who the officer believes is intoxicated, parks to prevent the driver's vehicle from leaving the scene, identifies himself as a police officer, and attempts to take the driver's keys, the officer has conducted an investigatory detention and acts under color of state law.

2. Based on the evidence, the off-duty officer, even if acting in good faith with proper law enforcement objectives, violated the Municipal Police Jurisdiction Act and suppression, while a drastic remedy, must be ordered in this case.

(Carol Sikov Gross)

Ann Steiner for the Commonwealth.
Kevin R. Zinski for Defendant.

No. CC2007015060. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Mariani, J., June 12, 2009—This matter is before the Court on a timely direct appeal filed by the Commonwealth of Pennsylvania after this Court granted defendant's motion for reconsideration asking this Court to reconsider its decision upholding the constitutionality of defendant's detention and/or arrest. This Court previously issued an opinion in this case in which this Court explained that it was constrained to grant the defendant's motion to reconsider. This Court entered an order vacating the defendant's sentence and this Court suppressed all evidence obtained as a result of the defendant's detention and/or arrest.¹ In this appeal, the Commonwealth claims that this Court was in error when it ultimately determined that suppression was the correct remedy in this case.

At the suppression hearing, Officer Dennis Lynch testified about his interaction with the defendant. Officer Lynch testified that on April 22, 2007, he was employed as a patrolman with the Penn Hills Police Department. He testified that just after 7:00 p.m. on that date, he encountered the defendant. At the specific time he encountered the defendant, he was off-duty, not in uniform and was driving his personal vehicle. He testified that he was traveling on New Texas Road in Plum Boro, Pennsylvania (outside of the municipality which employed him as a police officer), and was about to make a left turn onto Lindsey Lane. He observed the vehicle operated by the defendant pull out from Lindsey Lane and into his lane of traffic. He testified that he had to swerve onto the berm of the road to avoid the defendant's vehicle. He observed the defendant holding a clear bottle of alcohol between his legs. The defendant's vehicle appeared to overcompensate the turn and traveled onto the berm of the road

as well. Officer Lynch then turned his vehicle around and followed the defendant's vehicle, which was traveling at a high rate of speed, along New Texas Road. Officer Lynch observed the defendant's vehicle travel in the oncoming lane of traffic and nearly cause a head-on collision. Officer Lynch believed the defendant to be intoxicated. He telephoned the Plum Boro Police Department and provided a description of the defendant's vehicle. The defendant's vehicle continued to drive turning on various roads in Plum Boro until it stopped in a parking lot of an apartment complex. Officer Lynch pulled his vehicle behind the defendant's vehicle to prevent the defendant from leaving the scene. Officer Lynch approached the vehicle and stood behind the vehicle to observe the defendant. Officer Lynch identified himself as a police officer and told the defendant to remain inside the defendant's vehicle. Intending to prevent the defendant from leaving the scene, Officer Lynch attempted to grab the defendant's hand and keys to the vehicle. At that time, an officer from Plum Boro Police Department appeared on the scene. Officer Lynch informed the Plum Boro police officer of his observations and left the scene. The Plum Boro police officer administered field sobriety tests to the defendant after which the defendant was arrested and charged.

The suppression issue in this case turns on the applicability of the Municipal Police Jurisdiction Act (hereinafter "MPJA").² The Superior Court has explained that "[w]hen a police officer acts under color of state law outside his jurisdiction, his actions are unlawful pursuant to the MPJA." *A. Commonwealth v. Bradley*, 724 A.2d 351, 353. (Pa. Super. 1999) citing *Commonwealth v. Price*, 543 Pa. 403, 672 A.2d 280 (1996); *Commonwealth v. Brandt*, 456 Pa. Super. 717, 691 A.2d 934 (Pa. Super. 1997), appeal denied, 549 Pa. 695, 700 A.2d 437 (1997). There are exceptions to this act but the Commonwealth did not raise any such exceptions in this case. In determining whether an off-duty police officer acts under the color of state law the Pennsylvania Supreme Court has explained that a law enforcement officer acts accordingly if, "in light of all the circumstances, [the officer] must be regarded as having acted as an 'instrument' or agent of the state." *Id.* citing *Price*, 543 Pa. at 410, 672 A.2d at 283 (quoting *Commonwealth v. Corley*, 507 Pa. 540, 548, 491 A.2d 829, 832 (Pa. 1985)).

Two conflicting positions exist as to the proper determination of a remedy for a violation of the MPJA. See *Commonwealth v. Henry*, 943 A.2d 967, 971 (Pa. Super. 2008). *Bradley* held that the consequences of a violation of the MPJA invokes the applicability of the exclusionary rule and any evidence obtained as a result of such a violation must be suppressed. *Id.* at 354, citing *Brandt* 691 A.2d at 939. More recently, however, the Superior Court has clarified that suppression is not mandated where the MPJA is violated. Instead the decision to apply the exclusionary rule should be made on a case by case basis. See *Commonwealth v. Chernosky*, 874 A.2d 123 (Pa. Super. 2005) (*en banc*), appeal denied 588 Pa. 747, 902 A.2d 1238 (2006), citing *Commonwealth v. O'Shea*, 523 Pa. 384, 567 A.2d 1023 (1990). A trial court is to review "all the circumstances of the case," including the intrusiveness of the police conduct and the extent of deviation from the letter and spirit of the MPJA. *Chernosky*, *supra* at 130, quoting *O'Shea*, *supra* at 1030; see also *Commonwealth v. Henry*, 943 A.2d 967, 972 (Pa. Super. 2008); *Commonwealth v. Peters*, 915 A.2d 1213 (Pa. Super. 2007). The *Chernosky* Court explained that the purpose of the MPJA "is to proscribe investigatory, extraterritorial forays used to acquire additional evidence where probable cause does not yet exist." *Id.* at 130, citing *Commonwealth v. Laird*, 2002 Pa. Super. 116, 797 A.2d 995, 999 (Pa. Super. 2002).

Officer Lynch violated the MPJA. *A. Commonwealth v.*

Bradly, supra, is illustrative on this issue.³ In *Bradley*, the Superior Court was confronted with circumstances virtually identical to those before this Court. In that case, an off-duty police officer was traveling outside his jurisdiction and observed a vehicle he believed being operated by an intoxicated driver. After following the vehicle for some time, the off-duty officer followed the vehicle into a parking lot. In ruling that the off-duty police officer violated the MPJ A and granting suppression, the Superior Court determined that the off-duty police officer was acting under color of law outside his jurisdiction because

Daly stated that, based on his twenty-six years of experience as a police officer, he had concluded that Bradley was driving while intoxicated. Moreover, Daly's actions after reaching that conclusion (e.g., maintaining radio contact with the Haverford Township Police Department, following Bradley, stopping in front of Bradley's car, identifying himself as a police officer, taking Bradley's keys, and ordering Bradley to remain in the car while waiting for additional police officers to arrive) are consistent with those of a police officer who has been trained to conduct traffic stops and deal with intoxicated drivers.

Id. at 355.

The facts of this case demonstrate that Officer Lynch was off-duty and outside his jurisdiction at the time of his interaction with the defendant. Moreover, his testimony established that he believed the defendant was driving while intoxicated. He then contacted the Plum Boro Police Department and continued to follow the defendant's vehicle until it stopped in a parking lot. He then parked behind the defendant's vehicle to prevent him from leaving the scene. He identified himself as a police officer and ordered the defendant to remain in the vehicle. He testified that he attempted to take the defendant's keys so the defendant could not leave the scene until the Plum Boro police officers responded to the scene. The facts are virtually identical to those reviewed in *Bradley* and this Court finds that Officer Lynch conducted an investigatory detention and was acting under color of state law while off-duty and outside his jurisdiction.⁴ The evidence clearly supports a finding that Officer Lynch violated the MPJA in this case.

The Commonwealth claims that suppression was not required in this case. Although it does not cite the basis for this conclusion in its Statement of Matters Complained of on Appeal, the Commonwealth did allege in its Motion to Reconsider Opinion and Order of Court Dated February 24, 2009 that *Bradley* had been overruled and that the facts of the instant case were "nearly identical" to those evaluated by the Superior Court in *Commonwealth v. Chernosky*, 874 A.2d 123 (Pa. Super. 2003) wherein the Superior Court reversed a trial court's suppression order. In arguing that suppression is not warranted, the Commonwealth also relies on *Henry* and *Peters, supra*. While this Court believes that suppression is a drastic remedy in this case, this Court believes that the facts set forth in the cases relied on by the Commonwealth are sufficiently dissimilar to the facts of this case and no higher court has ruled that suppression is not appropriate in cases such as the one before this Court.

In *Chernosky*, *Peters* and *Henry*, the questioned police activities involved police officers who were on duty and traveled a very short distance outside of their jurisdictions while on official business. In *Chernosky*, the police officer received information that an offense occurred within the police officer's jurisdiction and the officer followed the defendant into a neighboring township. In *Peters*, an on-duty

officer traveled approximately one mile outside of his jurisdiction to investigate an incident that occurred within his jurisdiction. In *Henry*, the police officer observed the defendant run a stop sign just outside of his jurisdiction. He initiated a traffic stop approximately 1/8 of a mile outside of his own jurisdiction. All of these cases involve police officers working on official police business while on-duty. All of the incidents that led to the arrest of the defendants occurred either within the officer's jurisdictions or slightly outside of their jurisdiction.

This Court is to consider all of the facts of this case to determine whether suppression was the appropriate remedy in this case. In this case, Officer Lynch was not on duty and was traveling in his personal vehicle. He was not traveling in the municipality by which he was employed nor were any observations made by him or any other officers within his principal jurisdiction that an offense occurred within his jurisdiction. The officer was not on official police business at the time of the detention. These facts are markedly different from the fact in the cases relied on by the Commonwealth and, accordingly, this Court believes that the appellate case law on point requires that suppression must be ordered in this case.

This Court is keenly aware that the MPJA is to be liberally construed and this Court certainly endorses such an interpretation of the MPJ A. See *Commonwealth v. Lehman*, 870 A.2d 818 (Pa. 2005). However, despite the fact that this Court believes that Officer Lynch was acting in good faith with proper law enforcement objectives, this Court believes that until the Superior Court addresses facts similar to those present in this case, this Court was constrained to order suppression in this case.⁵

BY THE COURT:
/s/Mariani, J.

¹ On the record during the suppression hearing, this Court conveyed its reluctance to suppress evidence in this case based on policy considerations. This Court personally believes that suppression is a drastic remedy in this case and arguments could be made against suppression. However, until a higher court addresses facts similar to those before this Court and determines that suppression is not warranted, this Court believes that Superior Court precedent warrants suppression in this case.

² 42 Pa.C.S.A. §8953

³ No court has questioned *Bradley* insofar as the opinion discusses whether a violation of the MPJ A occurred under the facts of that case.

⁴ As set forth in *Bradley*, "[a]pplying the test specified in *Mendenhall* to this case, we conclude that a reasonable person in Bradley's circumstances would have felt restrained by Daly's actions. Daly, by parking his car in front of Bradley's, telling Bradley he was an off-duty police officer, taking Bradley's keys, and telling Bradley to "sit there" and not cause any trouble, demonstrated authority such that a reasonable person would have thought that he or she was not free to leave the scene. (citation omitted)" *Id.* at 356.

⁵ Unconstrained by prior case law, this Court would not have ordered suppression. The police officer's actions were, in this Court's view, reasonable and, perhaps more importantly, kept Mr. Restieri from continuing to drive his vehicle, thereby protecting Mr. Restieri and others from potential harm.