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# PLJ

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## OPINIONS

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## Commonwealth of Pennsylvania v. Jayquon Massey

### Recusal

Only an individual judge may recuse him or herself from a case, and a judge cannot order the recusal of other judges.

(Lynn E. MacBeth)

Michael Streily for the Commonwealth.  
Matthew W. Debbis for Defendant.

No. CC200803771. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

### MEMORANDUM OPINION

Manning, A.J., August 27, 2009—This matter is before the Court as a result of a letter sent to the Court by counsel for the defendant, Matthew W. Debbis, Esquire. Mr. Debbis requested that this Court issue an opinion explaining why the Court denied the defendant's pre-trial Motion seeking the recusal of all Allegheny County Judges from his case. This Court did itself recuse from this matter, but refused to enter an Order declaring that all Judges in this Judicial District be recused from presiding over the defendant's case. After this Court recused, the case was assigned by the Administrative Judge of this Division, the Honorable Donna Jo McDaniel, to Judge John K. Reilly, a Senior Judge who formerly served in Clearfield County and who has been hearing criminal cases in this county off and on for several years. The matter proceeded to verdict and sentence before Judge Reilly. The defendant appealed and raised in his 1925(b) statement the claim that the Court erred in refusing to recuse all Allegheny County Judges. Because he did not make that ruling, Judge Reilly declined to address it in his opinion and counsel for the defendant requested that this Court do so.

The explanation for why this Court refused to recuse all other Allegheny County Judges from participation in this matter is quite simple: it would have been wholly improper to do so. Whether or not a jurist should recuse is a decision that only that jurist can make. Recusal is properly directed to and decided by the jurist whose participation the moving party is challenging. *Commonwealth v. Travagila*, 661 A.2d, 352, 370 (Pa. 1995). Our Supreme Court held in *Commonwealth v. Darush*, 459 A.2d 727, 731 (Pa. 1983), that:

"In general, a Trial Judge should recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case or whenever he believes his impartiality can be reasonably questioned. *Commonwealth v. Goodman*, 454 Pa. 358, 361, 311 A.2d 652, 654 (1973) (quoting from A.B.A. Standards relating to the function of the Trial Judge §1.7).

Only the judge presented with that request could possibly know whether he or she has "any doubt" as to his or her "ability to preside impartially." It is a personal decision that must be made by the judge who is challenged.

This Court granted the request that it recuse, but could not make that determination for any other jurist in this Court. If the defendant had doubts as to the impartiality of the Judge to whom this matter was assigned, he was required to give that judge the opportunity to recuse. According to the dockets in this matter, no such request was made to Judge Reilly. The defendant's failure to make this request should result in a waiver of this claim. Moreover, the claim that the Court erred in refusing to recuse all other Judges in this judicial district is a moot question because

none of the other judges in this district had anything whatsoever to do with the defendant's case. The defendant could not possibly have suffered prejudice from the fact that the Judges *who did not preside over his case* did not recuse. This is an absurd argument. The one Judge whose impartiality the defendant challenged did recuse. The defendant's failure to seek to have the new Judge assigned to the case recuse as well should be fatal to his ability to raise this claim on appeal.

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

## In the Interest of F.C., III, a minor

*Denial of Due Process—Right to Counsel—  
Constitutionality of 71 P.S. 1690.112a (Act 53)*

1. Legal Guardian (Grandmother) of F.C. III, age 16, filed a Petition pursuant to 71 P.S. 1690.112a (Act 53) to have him involuntarily committed for treatment, alleging that F.C. III needed treatment for drug abuse. F.C. III was picked up by Sheriff's deputies, restrained in handcuffs and leg irons and delivered to the Juvenile Court Facility in a secured area, not occupied by adults or by juveniles charged with delinquent activities.

2. F.C. III was interviewed by Ms. Morgano, a court expert on substance abuse and dependency, immediately prior to his hearing as part of a drug assessment ordered by the court. At the hearing she testified regarding the interview and F.C.'s admissions and made a recommendation of inpatient therapy. The court followed her recommendations.

3. During the hearing F.C. remained in the restraints despite a request by his court appointed counsel to have them removed.

4. Counsel for F.C. appealed, challenging the constitutionality of Act 53 in that it fails to provide advance notice, a preliminary hearing or probable cause determination and an opportunity for the respondent to be heard prior to an assessment being completed.

5. The court found that, although there was little legal authority addressing Act 53, holdings in cases attacking the Mental Health Procedures Act (MHPA) provided support for Act 53 in that both acts have similar goals, i.e., to guarantee adequate treatment to the mentally ill (MHPA); to aid parents of children suffering from substance abuse to secure treatment (Act 53). Therefore, Act 53, which provides the procedures and standards to be followed, meets the requirements of the constitution.

6. Counsel also argued that F.C. III was denied due process and the right to counsel because he was removed from his home without adequate notice, was compelled to undergo a drug assessment without a meaningful opportunity to consult with his attorney, and remained shackled throughout his hearing. The court found that the proceeding protected the minor's due process rights and right to counsel.

(Mary K. McDonald)

William R. Crum, Jr. for F.C. III

No. 1081-07. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

### OPINION

DeAngelis, J., June 12, 2007—The juvenile at issue in the present matter, F.C. was born October 23, 1992. As of May 30, 2007, F.C. had been in the custody and care of his legal guardian, his grandmother, for approximately 10 years. Recent behavior of F.C. caused grandmother concerns to the extent that she contacted health services for assistance. Grandmother filed a petition pursuant to 71 P.S. 1690.112(a), (herein after Act 53), setting forth that F.C. was truant from school, engaged in drug use, running away from home, and stealing.

Due to her inability to maintain control of F.C., grandmother requested assistance in securing F.C.'s attendance at the hearing on her petition. On June 12, 2007, an attachment order was entered directing the sheriff of Allegheny County to take custody of F.C. and transport him to Juvenile Court for attendance at the hearing.

On that date, Sheriff's deputies traveled to the home of F.C., took him into their custody, and delivered him to a secured area within the Juvenile Court facility. F.C. was held in an area that was not occupied by adults, nor was it occupied by other juveniles that were charged with delinquent activities. This Court, upon learning that F.C. was in custody, directed that he be brought to the courtroom at the earliest available time. Pursuant to the policies of the Allegheny County Sheriff's Department F.C. was transported to the courtroom handcuffed. This Court was able to observe that the juvenile had the ability to communicate with his counsel and though handcuffed, was not restrained in a cruel or unusual manner. Counsel for F.C. objected to his client attending the hearing in handcuffs. This Court found that given the short duration of the hearing, the concern of flight risk, and injury to himself, the handcuffs were not inappropriate.

Prior to F.C. being delivered to the courtroom, he was interviewed by Josie Morgano, a Court Expert on substance abuse and dependency. The Court, in the presence of the juvenile, his counsel, Ms. Morgano, and the Act 53 coordinator, took testimony as to the facts supporting the petition filed.

Ms. Morgano testified that during her interview, F.C. confirmed that he used marijuana on a daily basis. She concluded that inpatient therapy was needed, and that F.C. was incapable of completing his requisite treatment on an outpatient basis. Upon conclusion of the testimony, this Court ordered F.C. committed to inpatient treatment for marijuana dependency with a review scheduled within one (1) month. F.C. was thereafter taken to an inpatient facility.

Counsel for F.C. filed a Notice Of Appeal and after order of Court, filed a Concise Statement Of Matters Complained Of On Appeal. Counsel challenges the factual findings of this Court as well as the constitutionality of Act 53 and raises issues as follows:

1. The Pennsylvania Drug and Alcohol Abuse Control Act as applied to minors, 71 Pa. Cons. Stat. Ann. 1690.112a, on its fact and as applied to F.C., deprives minors of their liberty in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution by failing to require notice, a preliminary hearing or probable cause determination, and an opportunity for the minor to be heard to test the sufficiency of the allegations in the petition before ordering that the minor undergo an assessment that will serve as the sole basis for court-ordered involuntary commitment.

2. F.C. was deprived of his liberty, his right to pri-

vacy, and was subjected to an unlawful seizure when removed from his home in handcuffs and leg irons by the Allegheny County Sheriff's Department without adequate notice and prior to any hearing related to the Section 1690.112a Petition.

3. F.C. was deprived of his right to due process, including his right to counsel, when he was compelled to undergo a drug assessment, while shackled in a delinquency isolation cell in the basement of family court, without a meaningful opportunity to consult with the attorney assigned to represent his legal interests.

4. The trial court violated F.C.'s right to privacy under the Pennsylvania Constitution when a) it ordered F.C. to undergo a drug assessment without an initial hearing to test the sufficiency of the allegations in a two sentence, Section 1690.112a Petition that did not set forth sufficient facts and good reason for commitment; and b) it refused to suppress F.C.'s incriminating statements made while he was shackled during the court-ordered assessment.

5. Assuming, arguendo, F.C.'s incriminating statements are suppressed because they violated his right to privacy, the trial court's commitment determination must be reversed because there was insufficient evidence of F.C.'s drug dependency.

6. The trial court violated the due process provisions of the federal and state constitutions, including F.C.'s right to a fair and impartial tribunal, by ordering F.C. remain shackled during the commitment determination and commenting "I'm not going to go ahead and have his cuffs and shackles released for five or ten minutes only to be re-imposed."

7. The trial court's commitment determination must be reversed because Section 1690.112a (c)(1)(ii) requires clear and convincing evidence that a minor be "incapable of accepting or unwilling to accept voluntary treatment services" and during the commitment determination hearing F.C. expressed his willingness to accept voluntary treatment services.

8. The lower court erred as a matter of law and fact because it failed to require that F.C. be committed to the least restrictive placement that also meets his treatment needs, and failed to set forth any proof to the required showing in Section 1690.112a(c)(2) that F.C. would benefit from involuntary in-patient treatment.

Initially, it should be noted that subsequent to the hearing of May 30, 2007, new procedures were adopted for the manner in which petitions and proceedings were commenced pursuant to Act 53.<sup>1</sup> While this Court agrees with and commends the new procedures that have been adopted, nonetheless for the reasons that will be set forth in this opinion, the manner in which the hearing was conducted on behalf of F.C., was proper in all respects.

Though the issues complained of on appeal are set forth in multiple paragraphs, they can, and will be addressed in a more concise fashion.

The first issue raised on appeal asserts a constitutional challenge to the manner in which the hearing proceeded, as

well as a constitutional challenge to the Act itself. Specifically it is claimed that 71 P.S. 1690.112a “violates the 14th amendment of the United States Constitution by failing to require notice, a preliminary hearing, or probable cause determination, and an opportunity for the minor to be heard to test the sufficiency of the allegations in the petition before ordering the minor undergo an assessment that will serve as the sole basis for court ordered involuntary commitment.”

When a challenge to the constitutionality of a statute is raised, the statute will be upheld unless it is clearly, and plainly violative of the individual’s constitutional rights. There is a strong presumption that legislative enactments do not violate the Constitution. As such, there is a heavy burden of persuasion upon the party raising the constitutional challenge to the Act. *Commonwealth v. Leddington*, 908 A.2d 328 (Pa.Super. 2006). Where such a challenge has been raised, the Courts are instructed to view the statute by giving plain meaning to the words contained therein.

Though this Court has found little legal authority directly addressing Act 53 and the specific constitutional attack presented, it finds support in those cases that address challenges to the Mental Health Procedures Act. In fact, language within Act 53, at 1690.105, provides that the admissions and commitment provisions shall be in accordance with the Mental Health Procedures Act. Our Courts have in the past been called upon to address the infringement of personal liberties for those suffering from mental illness. Those Courts have found a distinction between rights that are infringed in the enforcement of criminal statutes that provide punitive sanctions versus infringements that occur in an effort to protect both society and the individual whose rights are at issue in mental health related proceedings.

The Superior Court defining the due process distinction set forth in *In Re: R.D.*, 739 A.2d 598, 1999 Pa.Super. 226, “It is well-settled that involuntary civil commitment of mentally ill persons constitutes deprivation of liberty and may be accomplished only in accordance with due process protections.” *In Re: Hutchinson*, 500 Pa. 152, 156, 454 A.2d 1008, 1010 (1982). However, “[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. [D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (citations omitted). We must be mindful that the fundamental purpose of any protections we apply is to minimize the risk of erroneous decisions. *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). To discern the demands of due process, we must adjudge the necessity of the protection sought in view of the nature and purpose of the underlying deprivation and the potential consequences in the absence of that protection. See *Id.* at 418, 425-27, 99 S.Ct. 1804, (mandating standard of proof by “clear and convincing evidence” to civil commitments of indefinite term based on adverse social consequences to individual committed and risk that fact-finder might commit individual based on “a few isolated instances of unusual conduct”); *Allen v. Illinois*, 478 U.S. 364, 373-74, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1986) (declining to adopt privilege against self-incrimination under commitment statute for “sexually dangerous persons” because statute’s objective was therapeutic rather than penal); *In re J.M.*, 556 Pa. 63, 75-76 n. 9, 726 A.2d 1041, 1047-48 n. 9 (1999) (declining to require showing of probable cause for issuance of warrant under section 302 “[i]n light of the emergency nature, therapeutic purpose and short duration” of warrant); *Hutchinson*, 500 Pa. at 157, 454 A.2d at 1011 (providing right to effective assistance of counsel under section 304 because

without it individual’s procedural due process rights “would be rendered worthless”); *In re Hancock*, 719 A.2d 1053, 1057 (Pa.Super. 1998) (applying clear and convincing evidence standard of proof to twenty day commitment under section 303 to reduce risk that in relaxed setting of an informal conference “fact-finder may be blinded by a set of isolated incidents”). *Id.* at 554.

Much as the Legislature’s purpose for enacting the Mental Health Procedures Act was to guarantee adequate treatment to those who are mentally ill, it has set forth an equal concern to aid parents of children who are suffering from substance addiction. As with both Acts, it is the goal of the state to achieve those objectives within the constraints of due process, while utilizing a flexible application that will insure that those protections strengthen with the length of time a person may be deprived of their liberty. The purpose of both of these Acts is to provide immediate aid to protect those in need from potential injury. As these matters are civil commitments, the initial infringement upon liberty is viewed as a necessity to allow the opportunity to avoid life threatening actions by the individual.

Act 53 provides both the procedure, and standard to be followed by the courts when making a determination as to whether to involuntarily commit a juvenile to a treatment facility:

“A parent or legal guardian who has legal or physical custody of a minor may petition the court of common pleas of the judicial district where the minor is domiciled for commitment of the minor to involuntary drug and alcohol treatment services, including inpatient services, if the minor is incapable of accepting or unwilling to accept voluntary treatment. The petition shall set forth sufficient facts and good reason of the commitment. Such matters shall be heard by the division or a judge of the court assigned to conduct proceedings under 42 Pa.C.S. Ch 63 (relating to juvenile matter), involving children who have been alleged to be dependent or delinquent.

(b) Upon petition pursuant to subsection (a), the court:

(1) Shall appoint counsel for the minor.

(2) Shall order a minor who is alleged to have a dependency on drugs or alcohol to undergo a drug and alcohol assessment performed by a psychiatrist, a licensed psychologist with specific training in drug and alcohol assessment and treatment or a certified addiction counselor. Such assessment shall include a recommended level of care and length of treatment. Assessments completed by certified addiction counselors shall be based on the Department of Health approved drug and alcohol level of care criteria and shall be reviewed by a case management supervisor in a single county authority.

The court shall hear the testimony of the persons performing the assessment under this subsection at the hearing on the petition for involuntary commitment.

(c) Based on the assessment defined in subsection (b), the court may order the minor committed to involuntary drug and alcohol treatment, including inpatient services, for up to forty-five days if all of the following apply:

(1) The court finds by clear and convincing evidence that:

(i) the minor is a drug-dependent person; and (ii) the minor is incapable of accepting or unwilling to accept voluntary treatment services.

(2) The court finds that the minor will benefit from involuntary treatment services.

(3) Where the court decision is inconsistent with the level of care and length of treatment recommended by the assessment, the court shall set forth in its order a statement of facts and reasons for its disposition.” 71 P.S. 1690.112a.

The Act provides that if a parent or legal guardian has

sufficient concerns that they are unable to address without the aid of the Commonwealth, then they shall file a petition that must allege sufficient facts, and good reason to permit Court intervention. Once this has been done, the Court shall order an assessment, as set forth in the statute. Because this statute is not penal in nature, the interview and assessment in no way carries the same state action as is associated with an interview conducted by law enforcement. While it is true that a juvenile does share many of the same constitutional protections afforded an adult in a criminal prosecution, it must never be forgotten that this Court has an underlying mandate to act within the best interest of the child. This mandate is not only a requirement of the state, but also of every parent. It is for this reason that while we do not place criminal responsibility upon adults who fail to provide adequate medical care for a sibling or spouse in certain situations, we will hold a parent criminally responsible for that same failure. *Commonwealth v. Nixon*, 563 Pa. 425, 761 A.2d 1151 (2000).

It is with this burden, obligation, and responsibility in mind that we review the actions that have been taken in the present case. Grandmother filed a petition alleging that she had concerns for truancy, theft and drug addiction. Based upon past performance she made representations that she did not believe the child would voluntarily attend a hearing on the petition and may in fact flee. Due to these concerns a body attachment order was issued. The sheriff's proceeded to the residence and upon taking the child into custody utilized handcuffs. When the child was brought to the juvenile courthouse, he remained in a separate area, segregated from both adults and juveniles. When the child attended the hearing the handcuffs remained. This Court was informed that when transporting persons in their care, the sheriff's department policy always utilizes handcuffs. This Court had the opportunity to observe the juvenile and did not notice any undue distress given the situation in which the child was treated.

Though it is complained of on appeal that the handcuffs during the hearing were a violation of due process counsel fails to set forth in what manner it prejudiced his right to a fair and impartial tribunal. At the time of the hearing this Court heard the assessment of the court-appointed expert whose qualifications were stipulated to buy counsel. That assessment included statements by the juvenile of daily marijuana use and a recommendation of inpatient treatment. This Court found the expert to be credible and agreed with her recommendation. Though the child indicated that he was willing to seek outpatient treatment, the court did not find he was capable of responsibility complying with his obligations. Given his history, as well as his statements, this Court felt his offer was disingenuous. The Court saw this as nothing more than an example for the occasion where the spirit is willing but the flesh is weak.

Additionally, this Court rejects Counsel's request to suppress any statements made by the juvenile to the court expert as being without any legal support and in contravention of the entire purpose of the statute itself. It is for these reasons that the court entered the order that it did, as well as take those actions as set forth on the record.

BY THE COURT:  
/s/DeAngelis, J.

Date: June 12, 2009

<sup>1</sup> NEW PROCEDURES FOR ACT 53-INVOLUNTARY  
COMMITMENT FOR DRUG & ALCOHOL  
TREATMENT MATTERS

1. At the time of the filing of the petition, the motions judge will supplement the petition by asking questions of the peti-

tioner on the record. This will insure that there is an adequate basis for issuing the preliminary order and scheduling the case for a hearing.

2. If a preliminary order is issued and the case is scheduled for a hearing, the parent(s) or guardian(s) will be directed by the court to serve a copy of the order upon the minor within a reasonable period of time prior to the time of the hearing, so that the minor has notice of the hearing.

3. If a preliminary order is issued and the case is scheduled for a hearing, counsel will be appointed to represent the minor. Counsel shall be provided with a copy of the petition and a copy of the court order granting the preliminary relief. The petitioner shall provide the minor with notice of the hearing within a reasonable period of time prior to the hearing.

4. Effective immediately, no attachments will be issued prior to the hearing date and time.

5. The minor and his/her parent(s) or guardian(s) will be directed to appear for the hearing at 8:30 A.M. If the minor fails to appear, the court will issue an attachment and direct the sheriff to serve the attachment and transport the minor to court.

6. If the attachment is served and the minor is transported to court on the original hearing date, the case will proceed in the usual manner (drug assessment and hearing.) If the court grants the petition, the court will have the option of having the minor transported by the sheriff to the treatment facility.

7. If the attachment is not served on the date of the original hearing date, the case shall be continued (for not more than 30 days) and the attachment will remain in effect. Once the attachment is served, the judge has the option of returning the minor home or having the minor placed into shelter pending the hearing. If the minor is placed into shelter, the hearing date can be accelerated, if necessary.

**E.B., a minor, E.D.B. as parent, and  
E.D.B., in his own right v.  
Woodland Hills School District,  
Woodland Hills Board of School Directors,  
Dr. Walter M. Calinger, David W. Johnston,  
and Allison Kline**

*Statutory Appeal—School Suspension/Expulsion—  
Misconduct—Disobedience—Self-Defense—  
Substantial Evidence Rule*

Appellant appealed from minor's suspension and expulsion from the School District. The asserted basis for the expulsion was failure to cease and desist from a fight with another student. The expulsion transcript showed the appellant was not the aggressor in the fight. The Court ordered reinstatement stating that self-defense is a valid exception to the general no fighting rule.

(Linda A. Michler)

*Eugene A. Lincoln* for Appellants.  
*Frank G. Adams* and *Howard J. Schulberg* for Appellees.

No. SA 08-816. In the Court of Common Pleas of Allegheny County, Civil Division.

**MEMORANDUM ORDER**

O'Reilly, J., July 28, 2009—This matter is before me on the Statutory Appeal filed by Attorney Eugene Lincoln on behalf of a minor child, E.B., minor, ("EB"), E.D.B. as parent, in regard to his suspension and expulsion from Woodland Hills High School in the Woodland Hills School District ("District") on June 18, 2008. The asserted basis for that expulsion is failure to cease and desist from a fight that he was in with another student, designated as "CH," and or "Andrew," and the fight itself. The fight occurred on April 17, 2008.

EB was first given a 3 day out of school suspension, by action of the High School principal. Thereafter, he received an additional 7-day out of school suspension. He was then expelled from the District by action of the Woodland Hills Board of School Directors, ("Board") at a hearing held on May 6, 2008. Attorney Frederick Wolfe, as Hearing Examiner, conducted the hearing. At the close of the hearing the Board took a short recess and then returned with a fully prepared typed resolution [like Minerva springing fully armed from the forehead of Jupiter], which Mr. Wolfe read into the record. It is as follows:

Mr. Wolfe: Okay. Thank You. With that we are going to close the record and adjourn.

(Whereupon, a short recess was taken)

Mr. Wolfe: The committee has concluded its deliberations and has arrived at a decision. Based on the evidence and testimony offered here at this evening's hearing, that decision is in the form of a resolution I'm going to read into the record. And if appropriate, somebody would make a motion to adopt that resolution as the decision of the committee I would appreciate that.

Results of the following be approved and adopted at the next session of the Board of School Directors of Woodland Hills School District. In the matter of Eric Briston, on the basis of the testimony and evidence presented at this hearing and after a full, fair and impartial consideration thereof, the Board finds that the charges of disobedience and misconduct against Eric Briston have been sustained by the clear weight of the evidence.

On the basis of the facts established by the clear weight of the evidence, the Board concludes that Eric Briston has engaged in conduct constituting disobedience and misconduct within the meaning of Section 1318 of the Public School Code of 1949 as amended. Eric Briston has engaged in acts of disobedience and misconduct, which constitutes serious violations of the Code of Student Conduct of the Woodland Hills School District. And exclusion of Eric Briston from the public schools of the Woodland Hills School District enforces the student's awareness he has important responsibilities as a student to conform to school rules and regulations and these responsibilities are essential in an orderly school society. And any violations of these responsibilities must and will result in discipline. The following is the decision on discipline.

It's the decision of the Board that Eric Briston will be permanently expelled from the public schools of the Woodland Hills School District.

PARAGRAPH 2: If the parents are unable to provide for the student's education, they should make

arrangements with the superintendent for some other program and instruction.

PARAGRAPH 3: The solicitor is.... [here ended the filed transcript].

I note the specific finding of misconduct, and disobedience within the meaning of Section 13.8 of the School Code as well as violating the Code of Student Conduct of the District.

Attorney Lincoln filed a timely appeal from the Board action, and the transcript of that proceeding was duly filed with the Court. He also assigned numerous procedural errors to the way in which the discipline was conducted. See paragraphs 14 and 16.

During the pendency of the case, I conducted numerous conferences with counsel, and counsel advised that EB was receiving some kind of "off site" schooling consisting of 4 hours a week in core subjects. In those conferences, it was asserted by the District that EB was not having difficulty in school at the time of the incident, and the District alluded to a report from its guidance counselor (Exhibit 3.H, 4th pg.) for support. In addition to that Guidance counselor's opinion (a one time cryptic report), I examined EB's grade transcript, and his attendance prior to this incident. (Exhibits 3 H, and 3 I). They showed me a student who was in academic trouble, but who had good attendance. Indeed, he was failing English, Algebra 2, Spanish 2, and Chemistry. He appeared to be performing adequately in world cultures, art and industrial arts.

As a result, I questioned the sufficiency of the "off site" schooling he was receiving, and was assured that the individualized element to that schooling made up for the time limitations involved. Counsel for EB anticipated this inadequacy in paragraphs 17 through 24 in his Appeal.

Counsel for EB, however, recently brought to my attention that this "off site" schooling was minimal indeed, and EB himself was dissatisfied with it. Thereafter, for the summer of 2009, he was enrolled in a different program with purported improved academics. I entered an Order on May 26, 2009, to that effect.

Turning to the merits of this case, I have analyzed closely the transcript of the expulsion hearing, which, along with the exhibits, is the *only* evidence before me, and the only evidence in support of the Board's decision. It consists of 58 pages of which the first 11 pages are devoted to opening statements and preliminary matters. The analysis shows that the other student, (CH) also known as Andrew was the aggressor in the fracas and indeed "sucker punched" EB when they passed in the hall at the change of class. (N.T. P. 14). His continued aggression against EB was the gravamen of the incident. As CH/Andrew continued to pummel EB, teacher Lindsey Love called for the two boys to stop. Her request was ignored, and she made an effort to pull EB away, but she could not. Another teacher, Mr. Amadeo Dideiuliis attempted to get between them. A third teacher, Mr. Clawson also became involved, and tried to get between the boys. The four of them then fell to the floor. When they fell, Clawson hit his knee on a heating register causing injury to him. This latter condition of Clawson is regarded as an "aggravated assault" by EB. School security ultimately arrived and quelled the incident.

Teacher Clawson also testified and corroborated the "sucker punch" as described by Love, and in his words, "...first time I became aware of the fight, I just saw Andrew (CH) rush toward Eric (EB). I'm not even sure what Eric was doing at the time. Andrew was swinging his fist and shouting." (N.T. p. 22 ll 6-8). Clawson also recounted his efforts to separate the boys and said: "...so I pushed Andrew,

because he was closer to me. I began trying to pull him off. He was engaged in attacking.” (N.T. p. 22, ll 20-22).

Clawson suffered injury to his knee, but the transcript shows this candid interrogation:

Q. (By Mr. Palmer). Had Eric obeyed your direction to stop fighting, is it fair to say that you would not have been thrown into the heater during the course of the incident?

A. (By Mr. Clawson). I can't say. (N.T. pp. 23, 24).

The third teacher, Amato Dideiuliis, who came on the scene after Ms. Love had screamed, and who also attempted to separate the boys, opined that it was a “violent fight.” (N.T. p. 26). He also said that he suffered a concussion from being hit by one of the boys. He did not identify who.

The High School co-principal, Allison Kline also testified that she was the administrative person responsible for the suspensions of EB, and opined as to the seriousness of the conduct. She cited violations of the Student Code of Conduct in failing to comply with a request of staff, and fighting, and assault, and misconduct. The Code was received as Exhibit 6. [while called Exhibit 6 in the transcript, it appears to be Exhibits 3 F. I also note an Exhibit D, attached to the transcript, which appears to be the Code of Student Conduct from the Calvert County Public Schools. I assume District has adopted this Code in *toto*, and just never re-named it]. The Section that deals with fighting excludes from the definition of fighting, “...a fight does *not* occur where one student is pushing, punching, kicking, or committing other aggressive actions upon another student who is not responding in kind *other than in self-defense*.” [EMPHASIS SUPPLIED].

Ms. Kline determined that level 2 discipline applied here, because Mr. Clawson fell into the heat register, and hurt his knee, and Mr. Dideiuliis said he had a concussion. Conspicuous by its absence is *any* report of injury to the two combatants.

After analysis, I find that the Appeal of EB should be sustained, and he should be returned to school. In essence, he was engaged in self-defense, and needed to defend himself from the violent, unprovoked attack by Andrew, who, after he “sucker punched” EB, continued to attack. Under the circumstances, it is understandable that EB may not have heard Ms. Love or Mr. Clawson, or if he did, he could not simply drop his hands, and receive additional blows from Andrew. The Board in its adjudication dated June 18, 2008, alludes to “self-defense” in paragraph 35 and says “...The Board finds that while student EB did not start the fight, his actions in fighting after being directed to stop by staff and under the circumstances of the case, went beyond self-defense.” I find this analysis unrealistic, and misrepresents what EB had to do to protect himself. Had he simply dropped his hands, as Ms. Love requested, he might have received a concussion too, or worse.

At his hearing, EB expressed his regret and apology for the incident. It was not contested that the “sucker punch” by EB, and his continued aggression was the gravamen of the incident.

EB's counsel has argued that the District's own rules and regulations recognize self-defense as a valid exception to the general no fighting rule. I recognize that the “substantial evidence” rule applies here *See, D.O.F. v. Lewisburg Area School District Board of School Directors*, 868 A.2d 28 (Pa.Cmwlth. 2004), but find, from the evidence, that no “fighting” occurred here. By its own regulations, the District excepts self-defense from the definition of “fighting.” Therefore, there is no evidence of “fighting.” Thus my ruling.

Counsel for EB in his appeal has raised other procedural points and also pointed out that the District has an obligation to provide alternative education to EB if he is to be expelled.

Further, EB has been out of school for an entire year, and has not received anything close to an adequate substitute education. Moreover, his poor grades coupled with his good attendance show he needs some special attention, and he should receive it. I find this alternative education to be inadequate, as asserted in paragraphs 17 through 25 of the Appeal.

In view of my decision to sustain the appeal, and to ORDER the reinstatement of EB, I need not address these issues. It does appear, however, that the alternative education offered was woefully inadequate, particularly when EB was struggling with most of his classes while he was in the High School.

Thus, I find that this is a case of self-defense, and EB's Appeal is SUSTAINED, and EB needs to be returned to the High School in the District, and placed in an appropriate educational setting, suitable to his academic performance and needs. SO ORDERED.

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

Date: July 28, 2009

### **Biodun Adewumi and Sam Ashaolu v. Duquesne University, et al.**

*Discovery—Motion to Compel—Meeting Minutes—Report—Attorney-Client Privilege—Work Product Doctrine—Pa. R.C.P. 4003.3*

1. Report and minutes of meeting of Security Review Committee not protected by attorney-client privilege because it was otherwise available to third parties who did not treat the information as confidential.

2. Report not considered attorney's work product where it was not written by the attorney, did not consist of statements only respecting the value or merit of a claim or defense or strategy or tactics, and was disseminated to persons who would not be involved in any decisions in response to legal advice.

3. Pennsylvania does not recognize the self-critical analysis privilege. Even if it did, the three basic requirements of the privilege were not met, and the document was not kept confidential, an additional requirement for application of the privilege.

(Lynn E. MacBeth)

*William F. Goodrich and Joshua P. Geist* for Plaintiffs.  
*Frederick W. Bode, III and Steven W. Zoffer* for Duquesne University and Duquesne University Black Student Union.  
*Michael Magulick* for Brittany Jones.

No. GD 08-018960. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

#### **OPINION AND ORDER OF COURT**

Wettick, J., September 1, 2009—Plaintiff's Motion to Compel the production of an eleven-page December 2006 Report of a Security Review Committee and the minutes of four Security Review Committee meetings are the subject of this Opinion and Order of Court.

This litigation arises out of a shooting that occurred on the campus of Duquesne University on September 17, 2006,

following a campus event sponsored by the Black Student Union. Plaintiff alleges that Duquesne University and the Black Student Union failed to provide adequate security on campus and for the event.

After the shooting, the University President appointed members to a Security Review Committee. Duquesne states that the purpose of the Committee was to collect information for Duquesne's General Counsel.

The Committee held meetings on October 11, 2006, October 25, 2006, November 7, 2006, and November 28, 2006. Minutes were taken at each meeting. Subsequently, an eleven-page Report was prepared in December 2006 by Dr. Eileen Zungolo, a Committee member and Dean of the School of Nursing.

The members of the Committee were as follows:

James Crutchfield—University Board Member and Chair of the Student Life Committee of the Board of Directors;

James Caputo—Director of Public Safety;

Linda S. Drago, Esquire—Duquesne University's General Counsel and Secretary;

David DiPetro—Executive Director of the A.J. Palumbo Center;

Ralph Gigliotti—President of the Student Government Association;

Dr. Judith Griggs—Director of the Gussin Spiritan Program;

Jari Haile—President of the Black Student Union;

Dr. Douglas Harper—Chair of the Sociology Department;

Paul King—Director of Environmental Health and Safety;

Dr. Paula Witt-Endergby—President of the Faculty Senate;

Dr. Eileen Zungolo—Dean of the School of Nursing.

In addition to the Committee members, approximately twelve other people attended the four meetings. These persons included basketball players, University police personnel, and representatives from the Athletic Department.

The Report prepared by Dr. Zungolo was provided to each of the twelve members of the Security Review Committee and Duquesne University's Cabinet. The Report was discussed orally with Duquesne University's Board of Directors.

The record includes an affidavit of Linda S. Drago, General Counsel of Duquesne University. She avers that she was General Counsel as of September 17, 2006. Following the shooting, the Administration of Duquesne University consulted with her in her capacity as General Counsel. To facilitate her providing legal advice concerning the September 17, 2006 shooting, she encouraged establishment of the Security Review Committee. She served on the Security Review Committee and provided legal advice, including analysis, to the Administration of Duquesne University in connection with the September 17, 2006 shooting. The purpose of the Security Review Committee was to evaluate generally potential liability stemming from the September 17, 2006 shooting, to consider specifically whether the shooting could have been prevented, and to promote the continued safety of Duquesne University's campus. She further avers that the Report, including its supporting documentation, was prepared at her request, under her direction, and for the

purpose of providing legal advice to Duquesne University.

#### I.

I initially consider Duquesne's contention that the information which plaintiff seeks is protected by the attorney-client privilege. The portion of Duquesne's response that addresses this contention is set forth in two pages and is devoid of any legal analysis.

Under Pennsylvania case law, a communication is not protected by the attorney-client privilege unless it meets the criteria set forth in the oft-cited case of *United States v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 358-59 (D. Mass. 1950) (Wyzanski, J.):

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

See *Commonwealth v. Mrozek*, 657 A.2d 997, 998 (Pa.Super. 1995); *Hopewell v. Adebimpe*, 18 D.&C.3d 659, 660-61, 129 P.L.J. 146, 147 (1981), and cases cited therein.

The attorney-client privilege protects only confidential communications and disclosures made by a client to his or her legal advisor for the purpose of obtaining his or her professional aid or advice. *Commonwealth v. Maguigan*, 511 A.2d 1327, 1333-34 (Pa. 1986). Once the attorney-client communication has been disclosed to a third party, the privilege is deemed waived. *Id.* at 1333.

The presence of Duquesne's General Counsel at the meetings of the Security Review Committee does not bring communications made at the meetings within the scope of the attorney-client privilege. Most, if not all, persons attending these meetings had no individual interest in the legal problems being discussed, were not seeking legal advice, and were not clients of Linda S. Drago, Esquire. Furthermore, no one present at these meetings would have believed that what they said and heard was confidential.

I recognize that case law holds that information corporate counsel obtains from lower ranking corporate employees will be protected where: (1) corporate management had directed the employees to provide information to corporate counsel, (2) the lower level employees are told that the investigation is highly confidential, (3) the responses are furnished only to counsel, and (4) the information collected by counsel is disseminated only to those in upper management who will play a substantial role in deciding and directing a corporation's response. *Upjohn Company v. United States*, 449 U.S. 383 (1981).

This line of cases does not apply. Most of the persons present at the meetings of the Security Review Committee had no knowledge of the incident; some were not employed by Duquesne; none were directed by upper management to furnish information to counsel; and none of the information furnished at the meetings would be viewed as being confidential. Furthermore, counsel never treated the information as confidential because whatever one person said was heard by the others at the meeting.

Also, Duquesne cannot contend that the Report is a con-

fidential document. While a report prepared by or under the direction of counsel following the meetings of the Security Review Committee might be protected by the attorney-client privilege if it contained legal advice and was distributed only to officers and directors who would play a substantial role in deciding and directing Duquesne's response, this is not what occurred. Instead, copies of the Report were furnished to each of the members of the Security Review Committee, most of whom were not high-level managers who make decisions governing the operation of Duquesne. The distribution of the Report to every member of the Security Review Committee shows that the Report was never intended to be a confidential report prepared for management. Furthermore, even if it had been intended to be a confidential report prepared for management, the attorney-client privilege has been waived through its distribution to the members of the Security Review Committee.

Finally, if plaintiff's counsel, through discovery, would seek the production of the Report at depositions from members of the Security Review Committee, there would be no basis for not producing the documents. For example, Dr. Douglas Harper—Chair of the Sociology Department—was a member of the Committee. He could not refuse to produce the Report on the ground of the attorney-client privilege because he had no need for legal advice and he was never a client of Linda Drago with respect to matters involving the shooting.

## II.

Duquesne contends that the Report is protected by the work product protections of Pa. R.C.P. 4003.3.

The Report was not written by counsel. Consequently, the scope of the work product protection is governed by the last sentence of Rule 4003.3 which provides that discovery shall not include disclosure of a representative's "mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics."

Nothing or almost nothing in the Report could constitute statements only respecting the value or merit of a claim or defense or strategy or tactics. See *Bowser v. Ryder Truck Rental, Inc.*, 141 P.L.J. 316 (1993).

Furthermore, the claim that any portion of the Report is protected by Rule 4003.3 cannot be raised because the Report was disseminated to persons who would not be involved in any decisions that the University would make in response to legal advice.

## III.

Duquesne contends that the Report is protected from disclosure by the self-critical analysis privilege.

The term *privilege*, as used in the discovery rules, refers only to a privilege based on constitutional or statutory provisions or existing common law.<sup>1</sup> See *Azen v. Lampenfield*, 129 P.L.J. 461 (1981), and cases cited therein. No Pennsylvania state court case has ever recognized this privilege. *VanHine v. Dept. of State of the Cmwth.*, 856 A.2d 204 (Pa.Cmwth. 2004); *Joe v. Prison Health Services, Inc.*, 782 A.2d 24, 34n.7 (Pa.Cmwth. 2001).

In *Joe*, the Court stated that those courts that have recognized the self-critical analysis privilege generally require that the party asserting the privilege demonstrate that the material to be protected satisfies at least three criteria: (1) the information must result from a critical self-analysis undertaken by the party seeking protection; (2) the public must have a strong interest in preserving the free flow of the type of information sought; and (3) the information must be of the type whose flow would be curtailed if discovery were allowed. *Joe* also referred to a Ninth Circuit opinion which added the proviso that no document should be accorded a

privilege unless it was prepared with the expectation that it would be kept confidential and has in fact been kept confidential. *Id.*

In this case, even if the self-critical analysis privilege were recognized, the document has not been kept confidential. In addition, the information that Duquesne seeks to protect was provided under circumstances in which there was no expectation of confidentiality.

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

### ORDER OF COURT

On this 1st day of September, 2009, it is hereby ORDERED that plaintiff's Motion to Compel is granted, and Duquesne University shall produce the minutes from the Security Review Committee meetings and the eleven-page Report of the Security Review Committee within ten (10) days.

BY THE COURT:  
/s/Wettick, J.

<sup>1</sup> The scope of discovery is generally governed by Pa. R.C.P. 4003.1. It provides for a party to obtain discovery of relevant matters "not privileged" (Rule 4003.1(a)). Under Pa. R.C.P. 4011(c), no discovery is permitted which is beyond the scope of discovery set forth in Rule 4003.1.

## Mark Wutz and Susan Wutz v. Robert Smith and Robert Smith d/b/a Rob Smith Construction and State Farm Insurance Company

*Underinsured Motorist Claim—Bad Faith—42 Pa.C.S. §8371*

Plaintiffs' motion to compel information in State Farm's file as to evaluation ranges established for plaintiffs' UIM claim is denied pending trial of the UIM claim. Immediately upon submission of the UIM case to the jury, State Farm is ordered to furnish its unredacted file to plaintiffs for the non-jury trial to be held after the UIM claim is decided.

(Lynn E. MacBeth)

Rudolph L. Massa and Bruce H. Gelman for Plaintiffs.

Jeffrey A. Ramaley for Robert Smith.

Daniel L. Rivetti and Mark A. Martini for State Farm Mutual Insurance Company.

No. GD 07-021766. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

### OPINION AND ORDER OF COURT

Wettick, J., September 9, 2009—Plaintiffs' Motion for *In Camera* Review is the subject of this Opinion and Order of Court. The Motion should be titled a *Motion to Compel* because through this Motion, plaintiffs seek all information in the State Farm file as to the evaluation ranges established by State Farm for plaintiffs' UIM claim and all other relevant information redacted by State Farm, including the factors that were considered in making the evaluation of the claim and strengths and weaknesses of the claim.

This lawsuit includes a breach of contract claim against State Farm for failure to pay underinsured motorist benefits and a bad faith claim against State Farm based on State Farm's failure to act on plaintiffs' claim for underinsured motorist benefits in good faith in violation of 42 Pa.C.S. §8371.

The dispute between plaintiffs and State Farm is over the value of the UIM claim. This information which plaintiffs

seek is relevant only to the bad faith claim.

In *Gunn v. The Automobile Ins. Co. of Hartford*, 156 P.L.J. 381 (2008), discussed at 971 A.2d 505 (Pa.Super. 2009), I considered Hartford's motion to stay discovery that was relevant only to the plaintiff's bad faith claim until the UIM claim has been decided. Hartford's position was that, as a matter of law, the court must in every case try the bad faith claims at a later time following resolution of the UIM claims in order that a plaintiff, in trying the UIM claim, does not have the benefit of information within the insurance company's files. I rejected Hartford's position that in all cases the bad faith claim must be tried at a later time rather than in a back-to-back trial. I stated that in the case before me, the controlling issue in the bad faith claim was likely to be whether Hartford had a basis for offering less than the policy limits. The resolution of this issue is likely to depend upon a judge's assessment of the evidence offered to the jury in the UIM proceedings. The judge who tries the UIM claim is in the best position to evaluate the evidence for purposes of the bad faith claim if a nonjury trial of the bad faith claim is conducted immediately after the jury trial of the UIM claim.

In *Gunn*, I stated that a court, in its discretion, will not necessarily permit discovery of all information in the files of the insurance company relevant to the bad faith claim. The insurance company should have the opportunity to show that discovery of certain information relevant to the bad faith claim will unduly prejudice the insurance company in its defense of the UIM claim.

In this case, counsel for State Farm states that State Farm would be unfairly prejudiced for purposes of negotiations and trial if it is required prior to the trial of the UIM case to furnish information as to the values it has placed on plaintiffs' UIM claim, how it arrived at these values, and its opinions and conclusions on the strengths and weaknesses of the UIM claim. According to counsel, this would be akin to requiring the defense in a football game to furnish its defensive formation for the upcoming play to the plaintiff before the plaintiff selected the play that it would call.

I agree with State Farm that it should not be required to furnish the information which plaintiffs seek until after the UIM claim is submitted to a jury. Immediately after the case is submitted to the jury, State Farm shall provide the discovery described in plaintiffs' Motion for *In Camera* Review. Once the jury has returned its verdict, the trial court judge will begin the nonjury trial of plaintiffs' bad faith claim.

There may be instances where a plaintiff believes that he or she cannot be in a position to try the bad faith claim immediately after a jury verdict is rendered in the UIM case because of the court order postponing the production of discovery as to certain requests for discovery until the beginning of jury deliberations. In this situation, a plaintiff, in response to this court order, should promptly file a motion under Rule 213 to stay the trial of the bad faith claim on the ground that he or she cannot adequately prepare for the trial of the bad faith claim if this discovery is not furnished until after the completion of the UIM trial. Also, a court may postpone the trial of the bad faith claim where counsel for the plaintiff, upon receipt of the discovery following the trial of the UIM case, offers compelling explanations as to why he or she cannot proceed with the bad faith claim at this time and as to why the request for a later trial of the bad faith claim was not made shortly after the issuance of the court order postponing discovery.

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

#### ORDER OF COURT

On this 9th day of September, 2009, it is hereby ORDERED that:

(1) plaintiffs' Motion for *In Camera* Review is denied;

(2) at the beginning of the UIM trial, State Farm Insurance Company's counsel shall have in its possession an unredacted copy of the activity log attached to plaintiffs' Motion and, unless instructed to the contrary by the trial judge of the UIM claim, shall furnish these documents to plaintiffs immediately after the beginning of jury deliberations of the UIM claim; and

(3) counsel for State Farm Insurance Company is not required to furnish documents protected by the attorney-client privilege provided that State Farm Insurance Company is not raising advice of counsel as a defense to the bad faith claim.

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

### **American Coal and Minerals Company v. Henderson Brothers, Inc., Industry Terminal & Salvage Co. and International Marine Underwriters/ One Beacon**

*Discovery—Work Product—Pa. R.C.P. 4003.3—  
Inadvertently Produced Documents*

1. Inadvertently provided documents were not returned upon demand because the requesting party took the position they should have been provided, and were not protected as work product.

2. In deciding whether or not documents are protected as work product, the court, in applying Pa. R.C.P. 4003.3, only protects statements that are limited to "mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics."

3. The amended rule does not protect conclusions as to material fact merely because they implicitly contain the investigator's conclusions respecting the value and merit of claims and defenses.

4. The court preferred affidavits of counsel over an in-camera inspection procedure for resolving motions for production of documents where portions of a document have been deleted or entire documents withheld.

(Lynn E. MacBeth)

Michael L. Magulic and Jeffrey A. Kubay for Plaintiff.

John Cromer for Henderson Brothers.

Margaret Boyle for ITS and Industry Terminal & Salvage Co. and International Marine Underwriters/One Beacon.

No. GD 06-021826. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

#### OPINION AND ORDER OF COURT

Wettick, J., September 14, 2009—The subject of this Opinion and Order of Court is a motion by Industry Terminal & Salvage Company ("ITS") and International Marine Underwriters/One Beacon ("One Beacon") for a court order compelling plaintiff ("American Coal") to return documents that One Beacon inadvertently produced and prohibiting plaintiff from utilizing these documents in this litigation.

American Coal stored petroleum coke at a facility operated by ITS. American Coal contends its petroleum coke that

was stored at ITS's facility washed away in a September 2004 flood.

One Beacon furnished insurance to ITS. Henderson Brothers was ITS's insurance broker.

This lawsuit was instituted in 2006. Through discovery, One Beacon inadvertently provided documents (or portions of documents) to American Coal and Henderson that it intended to withhold on the ground that they are work product protected under Pa. R.C.P. 4003.3.

Upon learning of the inadvertent production, One Beacon requested that the documents be returned. Henderson did not object. American Coal, on the other hand, declined to return some of the documents that One Beacon had inadvertently produced solely on the ground that the protection afforded work product does not apply.<sup>1</sup>

In support of their position that the documents identified in their motion are protected, ITS and One Beacon rely solely on Rule 4003.3 which provides:

With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.<sup>2</sup>

In *Bowser v. Ryder Truck Rental, Inc.*, 141 P.L.J. 316 (1993), I discussed the scope of the provision in Rule 4003.3 that discovery shall not include "mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics" in considering deletions the defendants made to expert reports. One report contained two deletions which are in bold type.

#### FIRST DELETION

The scene of the occurrence was the exterior of the insured bank in an area between the sidewalk and a manhole cover which is located in the entrance exit driveway next to the parking lot. **The manhole is slightly lower than the driveway and water accumulates in this area and sometimes freezes in the area where it accumulates which is lower than level area of the traveled portion of the road.** (Deletion is in bold type.) *Id.* at 318.

#### SECOND DELETION

The Bank Manager further defines that the sidewalks are heated and this heating process keeps normally ice and snow off the sidewalks, however the blacktop road area where the fall occurred does create a hazardous condition during ice and snow conditions. As the light snow and freezing rain condition was occurring at the time of the accident, **it appears that it would have been impossible for the contractor to have had the area spotlessly clean at the time this accident occurred.** (Deletion is in bold type.) *Id.*

I ruled that the deleted provisions were not protected by Rule 4003.3. The defendant was apparently reading Rule 4003.3 as protecting all mental impressions, conclusions, and opinions of a party's representative. This is not what the Rule protects. The Rule protects only mental impressions, conclusions, and opinions "respecting the value or merit of a claim or defense or respecting strategy or tactics."

I rejected the argument that these conclusions which defendant deleted should be protected because they implicitly contain the investigator's conclusions respecting the value and merit of claims and defenses. If I had accepted this argument, I would have been resurrecting the tradition-

al work product rule. However, it is clear from Explanatory Comment—1978 to Rule 4003.3 that Rule 4003.3 was intended to allow discovery of relevant information obtained in anticipation of litigation even though this could allow the party obtaining discovery to learn how the opposing party is preparing and evaluating the case. The Explanatory Comment states that this "amended Rule radically changes the prior practice as to discovery of documents, reports and tangible things," that the "Rule is carefully drawn and means exactly what it says," and that the Rules Committee was aware of the policy behind the federal rule that each side's informal evaluation of its case should be protected and "after long and careful deliberation, rejected this view which would impose more court time on lawyers and additional burdens on judges in the motion court." *Id.* at 319.

I stated that the conclusions which defendant sought to protect are conclusions as to material facts. Rule 4003.3 does not protect such conclusions—it is limited to conclusions respecting the value or merits of a claim or defense. An investigative report may consist of (1) factual observations, (2) mental impressions, conclusions, and opinions as to the material facts based on the factual observations, and (3) mental impressions, conclusions, and opinions concerning the value or merits of a claim based on an analysis of the factual observations and the mental impressions, conclusions, and opinions as to the material facts. Only the third category is protected. This means, for example, that only the final sentence of the following report would be protected:

Light snow and freezing rain were occurring at the time of the accident so it would not have been possible for the contractor to have had the area spotlessly clean at the time of the accident. Consequently, I think we have a very weak claim against the contractor. *Id.* at 319-20.

In summary, Rule 4003.3 does not protect from discovery mental impressions, conclusions, or opinions simply because they may shed some light on the manner in which a person offering the impression, conclusion, or opinion is assessing aspects of the case.<sup>3</sup> The Rule means what it says—mental impressions, conclusions, and opinions are discoverable unless they only address the value or merit of a claim or defense or strategy or tactics.<sup>4</sup> This means that any mental impression, conclusion, or opinion which has evidentiary value or which could assist a party in the preparation or trial of the case is probably discoverable.

In the present case, ITS and One Beacon seek to protect the following provision in page five of a six-page report dated September 30, 2005 prepared by SGS Marine Services:

**SGS International Marine Underwriters**  
**Ref: 206013**  
**Page 5**

Opinion/Cause of damage:

In review of the information at hand at this time we remain of the same opinion as to the cause of the loss as outlined in our preliminary report, hat the reported loss of a portion of the stored petroleum coke product from the Assured's facility would appear to be the direct result of the flooding of the facility on September 17th and 18th 2004.

In regard to the possibility of minimizing the loss prior to the commencement of the flooding we are of the opinion that in view of the layout of the facility, the shear volume of the material reportedly stored in Area D, and the rapid rise of the river, attempts to move any sizeable volume of material

our of the facility would have had little effect on the ultimate outcome.

It appears in our opinion that unless there was sufficient time to move the entire amount of product from Area D either to another facility or to the ultimate receiver, beginning days prior to the arrival of Hurricane Ivan in the in the Gulf, any remaining smaller pile would have been in jeopardy to almost completely carried away.

According to Mr. Busatto some attempt to move some of the material to the higher Area A was made with limited effect, and other efforts to protect the smaller piles had proven unsuccessful.

Some attempt to move a portion of the material from Area B to higher ground may have minimized that portion of the loss; however there was still a large pile in the primary flood area.

Mr. Busatto has now indicated that a some limited discussions had been held with USNR to discuss arrangements to increase the rate of deliveries or movement of product to their plant which was on high ground on the opposite side of the river.

It should be noted that for this increased movement transfer to have had any significant benefit, the deliveries would have had to commence days prior to September 16th the time of the issuance of the earliest flood watch, when the direction of the approach of Ivan was still not certain, particularly where landfall was to be made.

ITS/IMU-0025

**Exhibit #3, filed under seal on 6/16/09.**

This entire page is subject to discovery because it contains only factual observations or mental impressions, conclusions, and opinions as to material facts.

Factual observations include the statements that according to Mr. Busatto some attempt was made to move some of the material to a higher area with limited effect, that other efforts to protect the smaller piles had proven to be unsuccessful and that Mr. Busatto now indicates that some limited discussions had been held with USNR to discuss arrangements to increase the rate of deliveries or movement of product to their plant which is on high ground. Other statements such as that the reported loss would appear to be the direct result of the flooding of the facility and that attempts to move any sizeable volume of material out of the facility would have had little effect on the ultimate outcome are either factual observations or mental impressions, conclusions, and opinions as to the material facts. Nowhere on page five is there a specific statement respecting the value or merit of a claim or defense or respecting strategy or tactics.

ITS and One Beacon also contend that the following provision in a December 15, 2004 letter from Davis Marine Surveyors, Inc. is protected under Rule 4003.3:

**Conclusion:**

The following comments must be made regarding the flood/high water conditions of September 17, 2004.

—There was sufficient warning of the impending conditions where as Industry Terminal & salvage could have taken preventive measures to prevent and or at the very least minimize any possible loss of inventory, i.e.:

—Load the stockpile or a portion there of back into barges for temporary storage.

—Move the stored Coke to a different location.

—Possibly cover the stockpiles with large tarpaulins to keep the water from eroding away the Coke.

As a further example, the Arrow Terminal facility is located immediately downriver (1/4 mi.) from I.T.S. and they proceeded to move material as soon as they heard of the impending conditions, thus minimizing their losses.

Therefore, it must be concluded that since Industry Terminal & Salvage Co. apparently did not attempt to take any preventive measures, while other facilities under the same conditions did, and as such, Industry & Salvage Co. were “NEGLIGENT” in their handling of this situation. Exhibit #4, filed under seal 6/16/09.

The provision that “as such, Industry & Salvage Co. were ‘NEGLIGENT’ in their handling of this situation” is protected because it is only an opinion as to the merit of a claim.

The remaining provisions are not protected because they are either factual observations or impressions, conclusions, and opinions as to the material facts. This includes the first portion of the final paragraph which states, “it must be concluded that since Industry Terminal & Salvage Co. apparently did not attempt to take any preventive measures, while other facilities under the same conditions did.” This portion of the final paragraph is not protected because it involves either factual observations or conclusions based on factual observations.

In the *Bowser* opinion, I stated that it is not my practice to conduct in-camera reviews of documents that contain deletions because judges are not comfortable making decisions without the participation of both parties. We have not been involved with the case the way that counsel has. Thus, without input from counsel, we are frequently not in a position to make an informed decision concerning the discoverability of a document. A judge’s review of documents in-camera is likely to raise more questions than answers. *Bowser*, 141 P.L.J. at 324.

In addition, if an in-camera inspection becomes a widely used tool for resolving motions for the production of documents, responding parties are less likely to assume responsibility for compliance with the discovery rules. They may take the position that compliance has become the court’s responsibility and will withhold documents (subject to court review) on the basis of any colorable claim. *Id.*

In *Bowser*, I stated that affidavits of counsel are a preferable procedure. Where portions of a document have been deleted or where entire documents have been withheld based on Rule 4003.3, it is my practice to require counsel for the responding party to file an affidavit which (1) avers that counsel has personally reviewed those documents and deletions and (2) describes the factual or legal basis for withholding the information. This affidavit assures me that counsel of record (rather than the client or in-house counsel who may not be familiar with Pennsylvania law governing the discovery of work product) has assumed responsibility for the decision. Also, I believe that counsel will not file such an affidavit without carefully reviewing the documents. *Id.*

In *Bowser*, I stated that the *Bowser* opinion was intended to provide direction to counsel in determining whether information within a report may be deleted pursuant to Rule 4003.3. Consequently, parties who receive reports containing

deletions or are advised that an entire report has been withheld based on Rule 4003.3 are entitled to ask counsel for the party providing the reports to submit an affidavit which avers (1) that counsel has reviewed the entire report, including the deletions; (2) counsel has read the *Bowser* opinion; and (3) the deletions involve only disclosures of the representatives' mental impressions, conclusions, or opinions respecting the value or merit of a claim or defense or respecting the strategy and tactics within the meaning of Rule 4003.3 as construed in *Bowser v. Ryder Rental. Id.*

In the future, counsel may request that the affidavit also include a reading of this Opinion in *American Coal v. Henderson*.

The remaining writings that were inadvertently produced involve documents that One Beacon furnished Henderson Brothers or that Henderson Brothers furnished One Beacon. One Beacon contends they are protected under Rule 4003.3 because Henderson Brothers was acting as a representative of ITS.

I agree that Henderson Brothers was ITS's insurance broker. However, the writings were between Henderson Brothers and One Beacon at a time when the interests of ITS/Henderson Brothers were adverse to the interests of One Beacon.

It is clear from the writings that Henderson Brothers was acting on ITS's behalf. See, for example, the January 24, 2005 letter from Bruce C. Marshall (Henderson Brothers) to Thomas Kula (One Beacon) which identifies the insured as ITS and states that ITS did nothing to protect the product at their landing, so he does not understand why this claim has not been settled. Exhibit #6, filed under seal 6/16/09.

At the time these writings were exchanged, the interests of ITS were adverse to those of One Beacon. Henderson, acting on behalf of ITS, was requesting One Beacon to meet its obligations under the policy it had issued to ITS by making payments to American Coal that would resolve all present and future claims of American Coal against ITS. One Beacon's response described its continuing investigation of the case and reminded Henderson that, if necessary, it will provide the best possible defense against American Coal's claims. Exhibit #5, dated February 13, 2005 and filed under seal 6/16/09. There is no factual basis for treating One Beacon as serving as a representative of ITS in the furnishing and receipt of the writings that One Beacon seeks to protect (see Motion for Protective Order ¶¶22-23).

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

#### ORDER OF COURT

On this 14th day of September, 2009, it is hereby ORDERED that the motion for a protective order of Industry Terminal & Salvage Company and International Marine Underwriters/One Beacon is denied.

BY THE COURT:  
/s/Wettick, J.

<sup>1</sup> American Coal did not raise waiver as a ground for denying One Beacon's motion.

<sup>2</sup> ITS and One Beacon do not rely on Pa. R.C.P. 4003.5 which addresses discovery of expert testimony.

<sup>3</sup> In many instances, any effort to draw a line between factual observations and conclusions based on factual observations is next to impossible. For example, an investigative report may say "if the only light that was working was at the head of the steps, it could have been difficult for the defendant to see the steps at the end of the hall," or "the only light that was working was at the head of the steps and it is very dark at the end of the hall," or "I turned on the light at the

top of the stairs; at night I expect that it would be dark at the end of the hall where the second set of steps are located," or "the only light is at the top of the stairs; there needed to be a light at the end of the hall."

<sup>4</sup> The first sentence of Rule 4003.3 provides that a party may obtain discovery of any matter discoverable under Pa. R.C.P. 4003.1 even though prepared in anticipation of litigation. The Explanatory Comment—1978 states that as to a representative of a party, Rule 4003.3 protects disclosure of his or her mental impressions, conclusions and opinions respecting the value or merit of a claim or defense or respecting strategy or tactics and nothing more.

## Reginald and Vermell Plato v. City of Pittsburgh

*Condemnation—Timeliness of Appeal—Pa. R.C.P. 227.1(g)*

1. City served property owners with Notice of Condemnation of property that was a danger to the owners and others in the area. Property owners were given time to make repairs to their property, by an order of court entered as a result of a status conference.

2. A hearing was held more than one year after the Notice of Condemnation in which credible evidence was presented in support of the condemnation. The court enforced the notice of condemnation and property owners filed a motion for post-trial relief, which was denied.

3. Pa. R.C.P. 227.1(g) provides that a motion for post-trial relief may not be filed in an appeal from the final adjudication on determination of a local agency or a Commonwealth agency as to which jurisdiction is vested in the Courts of Common Pleas. The court stated that, therefore, property owners' appeal to Commonwealth Court was untimely.

(Lynn E. MacBeth)

Reginald D. Plato and Vermell Plato, *pro se*.  
*Lawrence H. Baumiller* and *George R. Specter* for City of Pittsburgh.

No. SA 08-000400. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

#### MEMORANDUM

Folino, J., September 23, 2009—This case is a statutory appeal filed by Reginald and Vermell Plato to the City of Pittsburgh's condemnation of the Platos' former residence, 7905 Hamilton Avenue. The Notice of Condemnation was posted on March 6, 2008, and the Platos appealed to this Court (the Court of Common Pleas of Allegheny County) on April 4, 2008.

The Notice of Condemnation listed numerous serious defects to the property, making the property a danger to the Platos themselves and to others in the area. This Court scheduled a status conference for July 17, 2008. At that status conference, Mr. Plato expressed a desire to repair the defects described in the Notice of Condemnation. Accordingly, I scheduled a second status conference three months later, at which time, pursuant to my order: "Mr. Plato shall report on the progress he has made in addressing the issues identified in the Notice of Condemnation." Order of Court, dated July 17, 2008, Folino J. Unfortunately, as of October 2008, Mr. Plato had made no meaningful progress to address the deficiencies in the property. I then scheduled a

further status conference for December 15, 2008 to allow Mr. Plato more time to address the issues, but at the December 15, 2008 conference there was still no progress shown. As it became apparent that Mr. Plato was unable or unwilling to make the necessary repairs so that the building could be made safe and habitable, it was necessary to schedule this matter for evidentiary hearing.

That hearing was held before me on April 21, 2009, more than one year after the posting of the Notice of Condemnation. At the hearing, the City presented the testimony of City of Pittsburgh Building Inspector Russell Blaich who testified credibly as to the deteriorated state of the house (it had been boarded up, and no one was living there). Mr. Blaich testified credibly that, a full year after the posting, the Platos still had failed to address the serious problems with the house, as listed in the Notice of Condemnation. In fact, after posting of the Notice of Condemnation, no renovations were made by the Platos to the 7905 Hamilton Avenue property, and no building permits were taken out. Accordingly, on April 22, 2009, I issued an order denying the Platos' statutory appeal and enforcing the City's Notice of Condemnation.

On May 4, 2009, the Platos filed a Motion for Post-Trial Relief, which I denied by order dated June 30, 2009. The Platos then appealed to the Commonwealth Court of Pennsylvania.

For the reasons apparent in the recitation set forth above, however, I recommend that my order of April 22, 2009 be affirmed. In addition to the substantive problems with the Platos' statutory appeal, as set forth above, it also appears that the Platos' appeal to the Commonwealth Court is untimely. According to Pennsylvania Rule of Civil Procedure 227.1(g), "a motion for post-trial relief may not be filed in an appeal from the final adjudication on determination of a local agency or a Commonwealth Agency as to which jurisdiction is vested in the Courts of Common Pleas." And, the time period within which the Platos were permitted to appeal to the Commonwealth Court my order of April 22, 2009 was not extended by the Platos' pursuit of an improper motion for post-trial relief: I never requested that the Platos file a post-trial motion, I did not believe a post-trial motion would be "helpful" in this case and, as is evident from my June 30, 2009 Order, I did not "rule[] upon the merits of [the] post-trial motion[]." *Codispot v. Butler County Tax Claim Bureau*, 938 A.2d 499, 503-04 (Pa.Cmwlt. 2007); Order of Court, dated June 30, 2009, Folino, J. (stating: "Said ['Motion for Post-Trial Relief'] is DENIED. See Pa. R.Civ.P. 227.1(g).") (emphasis added). Thus, it appears that the Platos' post-trial motion did not toll the appeal period, and that the appeal is therefore untimely and must be quashed.

Date: September 22, 2009

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## CAPSULE SUMMARY

### **In Re: In the Interest of: D.S., a minor Appeal of D.S., a minor**

#### *Criminal Law—False I.D. to Law Enforcement—Juvenile*

1. D.S., A Juvenile, was identified on a targeted police suspect list for a recent armed robbery.

2. D.S. was “spotted” by police who approached D.S. asking for his name and birth date.

3. D.S. stated his name was D.B., and stated his birth date was 10/6/91.

4. D.S.’s mother arrived later on the scene and stated D.S.’s name was D.L.S. and his birth date was 10/15/92.

5. D.S. was lawfully on the street, but was not free to leave once the police were conducting an “investigatory detention” based on D.S.’s name being on a targeted suspect list, and his demeanor.

6. The police had prior knowledge of D.S., including his last name and address.

7. Defendant’s mother testified during a hearing that D.L.S.B. was listed on D.S.’s birth certificate, but did not produce the document at trial.

8. Defendant’s mother testified D.S.’s school records identified her son as D.S.B., and his report card had D.L.S. on it.

9. Mother of Defendant produced a Social Security Administration document showing D.S.’s name as “D.L.B...” indicating there was an omission after “D.L.B....”

10. The court found that a birth date is used by the police to confirm identity, and giving a false date of birth to police constitutes a violation of 18 Pa.C.S. §4914, False Identification to Law Enforcement Authorities.

11. The court found that defendant attempted to mislead police officers looking for D.S. when he affirmatively provided them with a partial name of D.B. and denied to police that he was D.S.

12. The court found that providing police with a partial name, denying that he was D.S. when asked, and giving a wrong date of birth was not “de minimus,” in that D.S. was attempting to “hide his identity” by such remarks.

13. Regardless of the fact that officers already knew D.S.’s name, and defendant’s mother later provided police with D.S.’s correct name and date of birth, D.S.’s intention and acts provided police with “false information about his identity,” and therefore a violation of 18 Pa.C.S. §4914.

*(Sharon Profeta)*

*Michael Streily* for the Commonwealth.

*Scott B. Rudolf* for the Minor, D.S.

No. 1106-08. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

Mulligan, J., September 11, 2009.