

PITTSBURGH LEGAL JOURNAL

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PLJ

The Pittsburgh Legal Journal is a supplement to the Lawyers Journal, which is published fortnightly by the Allegheny County Bar Association

400 Koppers Building
Pittsburgh, Pennsylvania 15219
(412)261-6255

www.acba.org
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Circulation 6,759

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OPINIONS

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**Frank Bryan Inc. v.
Pittsburgh Terminal Properties
t/d/b/a Riverwalk Corporate Center**

*Easement—Adverse Possession—Vacation of Street—
53 P.S. §§1946-1949*

1. Plaintiff, a tenant, claimed an easement by operation of law and adverse possession rights in the leased property.

2. Part of Plaintiff's theory of easement by operation of law relied on the existence of Water Street, which was vacated 125 years ago on petition of abutting owners.

3. 53 P.S. §§1946-1949 provide that any action for an easement against vacated land must be brought within five years.

4. Any alleged easement had been abandoned by Plaintiff's obstruction thereof.

5. The doctrine of reverse adverse possession applied, as well as estoppel and laches. Reverse adverse possession occurs where a possible claim of adverse possession is met with an exercise of dominion whereby the owner reacquires the easement.

(Lynn E. MacBeth)

Todd T. Zwikl for Plaintiff.

Joseph F. McDonough and James G. McLean for Defendant.

No. GD 08-9531. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Folino, J., June 18, 2009—This Opinion sets forth the rationale and findings behind my Non-Jury Verdict dated October 27, 2008, wherein I found in favor of Defendant, Pittsburgh Terminal Properties ("Pittsburgh Terminal") and against Plaintiff, Frank Bryan, Inc. ("Bryan").

For 27 years Bryan had leased a particular parcel of Pittsburgh Terminal's property. After Pittsburgh Terminal terminated the lease, Bryan claimed that it continued to have the right to use that property, contending that it had acquired easement rights by operation of law or rights under the doctrine of adverse possession. I rejected those claims. As the lease has now been terminated, Plaintiff Bryan no longer has the right to use that property.

I.

In order to follow the claims and defenses in this case, a clear understanding of the parties' properties is necessary, particularly regarding their physical characteristics, their chain of ownership and their manner of use over the years.

Plaintiff Bryan and Defendant Pittsburgh Terminal own adjacent properties in the South Side of Pittsburgh on the southern bank of the Monongahela River. Pittsburgh Terminal's property is bounded by Carson Street, South Fourth Street, the Monongahela River and South Third Street; Bryan's property by South Third Street, the Monongahela River, South Second Street and McKean Street. See Plaintiff's Exhibit No. 34; Defendant's Exhibit 59B.

Both properties are intersected by railroad tracks that have been in place since the late 1800's. These tracks were installed pursuant to an 1877 City of Pittsburgh ordinance; the ordinance granted the Pittsburgh & Lake Erie Railroad Company the right to install tracks on what was then "Water Street."¹ Trial Testimony of Robert J. Garvin, Esq., given September 17, 2008, at 279-81; Joint Exhibit No. 24. Although Water Street was later vacated and some of the railroad tracks removed, two of the railroad track lines remain to this day and, as a result, a portion of both

Plaintiff's and Defendant's properties sit between the railroad tracks and the Monongahela River. Plaintiff's Exhibit No. 34.

Defendant Pittsburgh Terminal acquired its property from Pittsburgh Terminal Warehouse, Inc. in 1963. Defendant's Exhibit No. 59B. Currently, this property is improved with buildings that were constructed in 1906 as railroad and river terminal buildings. Defendant's Exhibit No. 55, p. 2. The property also includes a multi-story power plant in the area between the railroad tracks and the Monongahela River. Defendant's Exhibit No. 65, Slide No. 2. An elevated roadway (named "Terminal Way") crosses above the railroad tracks and connects Pittsburgh Terminal's main buildings with its Power Plant. *Id.* The United States Government granted a permit for a river dock wall for this property; this river wall was constructed around 1904. Trial Testimony of David Lackner, given September 18, 2008, at 412.

While the buildings on Defendant Pittsburgh Terminal's property have been in continuous use since 1906, the use has evolved over the years: from a heavy industrial use in the beginning, to its use today as a modern office complex. In particular, in the last few years, Defendant has undertaken major improvements and has spent several million dollars to provide its tenants the modern amenities they demand. Trial Testimony of David Lackner, given September 18, 2008, at 470.

Plaintiff Bryan acquired its property in 1986 from Dravo Corporation. (For about five years prior to its purchase, Plaintiff leased the property from Dravo. Thus, Plaintiff has operated its business at this location since 1981.) Trial Testimony of Thomas J. Bryan, given September 17, 2008, at 145. Dravo had acquired the property from Keystone Sand & Supply Company in 1936. Trial Testimony of Robert J. Garvin, Esq., given September 17, 2008, at 297. Keystone Sand & Supply had acquired the property from the Pittsburgh & Lake Erie Railroad Company in 1926. *Id.* at 295.

Plaintiff Bryan's property includes two parcels that were identified at trial as "Parcel 1" and "Parcel 2." See, e.g., Joint Exhibit No. 12, p. 2; Trial Testimony of Robert J. Garvin, Esq., given September 17, 2008, at 295; Trial Testimony of Thomas J. Bryan, given September 17, 2008, at 161-78. These two parcels are separated from each other by railroad tracks. Parcel 1 lies to the south of the intersecting tracks: its borders are the tracks, McKean Street, South Third Street and South Second Street. Parcel 2 is located to the north of the tracks, and thus lies between the tracks and the Monongahela River. Joint Exhibit No. 12, p. 2. Since approximately 1928, Parcel 2 has been improved with large high-walled concrete storage bins, an elevated gantry crane that sits on tracks, and a river wall. These improvements remain in place on Parcel 2 today. Trial Testimony of Thomas J. Bryan, given September 17, 2008, at 162 & 164-68. Parcel 1 (the parcel located to the south of the intersecting railroad tracks) is the location of Plaintiff's concrete mixing plant. *Id.* at 176.

The 1926 deed from Pittsburgh & Lake Erie Railroad to Keystone Sand & Supply (for what is now Plaintiff's property) was the first deed to identify Parcel 1 and Parcel 2. Trial Testimony of Robert J. Garvin, Esq., given September 17, 2008, at 295. This 1926 deed contained a provision that permitted the construction of a conveyor belt system over the railroad tracks from Parcel 2 to Parcel 1. Joint Exhibit No. 12, p. 3. The 1926 deed explicitly states that "no other crossings of any kind whatsoever" across the railroad tracks are permitted. *Id.*; Trial Testimony of Robert J. Garvin, Esq., given September 17, 2008, at 166. Thus, Keystone Sand &

Supply (the predecessor-in-title to Plaintiff Bryan) was willing to take title to Parcel 2 knowing that the only access to Parcel 2 was: 1) by way of the Monongahela River or 2) through a conveyor belt system that allowed the delivery of materials between Parcels 1 and 2.

The credible evidence at trial demonstrated that prior to the acquisition of the property by Keystone Sand & Supply in 1926, the properties now owned by Plaintiff Bryan were unimproved and not in use. Defendant's Exhibit No. 65, Slide Nos. 4-6; Trial Testimony of David Lackner, given September 18, 2008, at 445-46; Trial Testimony of Thomas J. Bryan, given September 17, 2008, at 181. Sometime after it acquired the property, Keystone Sand & Supply installed the concrete plant that remains there today. (The exact date of the installation is apparently not known, but 1928 appears to be a reasonable estimate.) See, e.g., Joint Exhibit No. 12, p. 3. Thus, Keystone Sand & Supply was willing to purchase Parcel 2 even with the limitations to access as reflected in the deed. Materials required for the concrete plant on Parcel 1 could be off-loaded from barges on the Monongahela River onto Parcel 2, stored in the large concrete storage bins located on Parcel 2, and then delivered by the conveyor belt (permitted by the 1926 deed) to the concrete plant on Parcel 1. *Id.*

Land access to Parcel 1 itself (for deliveries, for personnel, etc.) was available through access on South Third Street and McKean Street. Such access remains available today. But no credible evidence was introduced at trial that land access was available for Keystone Sand & Supply to Parcel 2. Also, there was no credible evidence that Keystone Sand & Supply made use of Defendant's property during the time period that Keystone Sand & Supply owned Parcels 1 and 2. See, e.g., Trial Testimony of David Lackner, given September 18, 2008, at 445-59; Trial Testimony of Thomas J. Bryan, given September 17, 2008, at 172-75 & 178.

In fact, I found no credible evidence supporting Plaintiff's contention that Defendant's property in the area between the railroad tracks and the river has "always been" used by Plaintiff's predecessors for access to Plaintiff's property. Rather, the credible evidence was to the contrary: Keystone Sand & Supply operated its business with only water access to Parcel 2, land access to Parcel 1, and the conveyor system connecting the two parcels. Keystone Sand & Supply simply made no use of Defendant's property. Trial Testimony of David Lackner, given September 18, 2008, at 445-59; Trial Testimony of Thomas J. Bryan, given September 17, 2008, at 172-75 & 178.

Dravo then acquired Parcels 1 and 2 from Keystone Sand & Supply in 1936. Dravo was, of course, bound by the access restrictions set forth in the 1926 deed. Joint Exhibit No. 13, p. 2 (1936 deed expressly incorporates the 1926 access restrictions). And the credible evidence at trial was to the effect that for some period of time Dravo operated the business in much the same way Keystone Sand & Supply had: water access to Parcel 2, land access to Parcel 1, and no land access to Parcel 2 across Defendant's property. Plaintiff's Exhibit Nos. 16 & 17; Trial Testimony of David Lackner, given September 18, 2008, at 445-59; Trial Testimony of Thomas J. Bryan, given September 17, 2008, at 172-75. There was no credible evidence to the contrary.

In the mid-1960's, however, Dravo expanded its concrete-mixing plant operations, and acquired a number of additional parcels of property, including, in 1968, a parcel of property under the Liberty Bridge that is central to one of Plaintiff's claims in this case. Trial Testimony of Thomas J. Bryan, given September 17, 2008, at 189-90 & 194-95. (Plaintiff claims that it has the right to drive its trucks across Defendant's property to the formerly leased parcel of

Defendant's property, so that it can then reach Plaintiff's Parcel 2, and then drive across Parcel 2 to reach the area under the Liberty Bridge. Plaintiff would like to continue to operate its trucks in this manner so that it can pick up and drop off by truck various materials that it stores under the Liberty Bridge.) Plaintiff Bryan produced absolutely no credible evidence that Dravo "claimed" Defendant's property as its own. Rather, all credible evidence introduced at trial showed that Dravo used Defendant's property only with Defendant's *permission* through written leases. Testimony of Thomas J. Bryan, given September 17, 2008, at 198-202; Defendant's Exhibit Nos. 5-9; Defendant's Exhibit Nos. 10-11.

First, Defendant's "rent rolls" show the above fact to be true: those rolls clearly show that Dravo rented the 8,650 square foot "Rear River Dock" from Defendant Pittsburgh Terminal. Defendant's Exhibit Nos. 10-11. Moreover, the fact that Dravo rented Defendant's land is also evident from the very first lease signed between Plaintiff Bryan and Defendant Pittsburgh Terminal. Defendant's Exhibit No. 9. As has been stated above, when Plaintiff Bryan first started its concrete operations on the land, Plaintiff Bryan did not own the land – rather, Bryan was leasing the land from Dravo. However, at the same time Plaintiff Bryan was leasing Dravo's land, Plaintiff Bryan also entered into leases with Defendant Pittsburgh Terminal; these leases were for the 8,650 square foot "open concrete dock area" owned by Pittsburgh Terminal. Thus, when Plaintiff Bryan first began operating on the land, Plaintiff Bryan *knew* that Dravo did not own, use or traverse freely over the "open concrete dock area": otherwise, Plaintiff Bryan would not have paid to lease that area from Defendant Pittsburgh Terminal. Further, and importantly, Plaintiff Bryan introduced no credible evidence that could have put the above facts, or the inferences that can be properly drawn from those facts, into any doubt whatsoever.

In short, I did not find persuasive Plaintiff's argument that Keystone Sand & Supply and Dravo had always made use of Defendant's property. No credible evidence supported that contention. All credible evidence (such as maps, surveys, rent rolls, a 1967 *Pittsburgh Post-Gazette* article) and all circumstantial inferences properly drawn from the direct evidence, showed that Keystone Sand & Supply never made use of Defendant's property and that Dravo did so only with permission through a lease. Plaintiff argued that both Dravo and Keystone Sand & Supply moved equipment onto Defendant's property (before being allowed to do so by written lease) in order to repair the gantry crane located on Parcel 2. Yet Plaintiff offered no credible evidence to support this. Surveys, maps and photographs show that, before at least 1950, there was no railroad crossing at Fourth Street and no way for vehicles or equipment to access Defendant's property by land; and thus, the evidence demonstrated there was no land access from Defendant's property to Plaintiff's Parcel 2. See, e.g., Plaintiff's Exhibit Nos. 16 & 17; Defendant's Exhibit No. 65, Slide Nos. 15-30; Trial Testimony of David Lackner, given September 18, 2008, at 445-59; Trial Testimony of Thomas J. Bryan, given September 17, 2008, at 172-75. Moreover, Plaintiff's old photographs support the conclusion that, for most of the period prior to the mid-1960's, access to Parcel 2 across the property now owned by Pittsburgh Terminal was physically blocked by a combination of buildings, railroad tracks, surface terrain and overgrown vegetation. Plaintiff's Exhibit Nos. 16 & 17. Access across Parcel 2 to the area behind the Liberty Bridge was precluded by all of these reasons as well the fact that Parcel 2, itself, was totally occupied by a combination of large concrete bins, a

crane and numerous railroad tracks (more tracks than exist there today). *See, e.g.*, Defendant's Exhibit No. 48; Defendant's Exhibit No. 65, Slide Nos. 15-30; Plaintiff's Exhibit Nos. 16 & 17.

In addition, Plaintiff Bryan offered no credible evidence that it (or its predecessors-in-title) used Defendant's property (except by permission through a lease) when it performed repairs on its gantry crane.

In fact, as mentioned above in the discussion of Dravo's use of Defendant's property, the parcel of Defendant Terminal's property that is in question here – the open concrete river dock area (bounded by the railroad tracks, Third Street, the Monongahela River and Pittsburgh Terminal's Power Plant Building) – has been occupied by Plaintiff Bryan *only* through written lease. Defendant's Exhibit Nos. 1-9. Specifically, ever since Plaintiff began occupying its property, Plaintiff has always leased the subject adjoining dock area from Defendant Pittsburgh Terminal. These leases began in 1981, when Plaintiff Bryan first occupied its own property, and continued without interruption thereafter. The most recent lease is dated April 19, 1993, and is a month-to-month lease. That is the lease that Defendant finally terminated, which led Plaintiff to file the instant lawsuit claiming, for the first time ever, a right of easement to use the leased property even after termination of the lease. Trial Testimony of Thomas J. Bryan, given September 17, 2008, at 210-11.

This governing 1993 lease is identical in material respects to the prior Pittsburgh Terminal/Bryan leases dating back to 1981. Under these leases, Defendant Terminal leased to Plaintiff Bryan the "open concrete dock area measuring approximately 8,650 sq. ft. located in the northwesterly portion of the Pittsburgh Terminal Properties bounded by P&LE spur line, 3rd Street, Monongahela River wall and the Pittsburgh Terminal Properties Power Plant Building." Defendant's Exhibit No. 1, § 2; *see also* Defendant's Exhibit Nos. 2-9. Each lease also specified that Plaintiff Bryan "shall have the privileges of access to and using the platforms." *See, e.g.*, Defendant's Exhibit No. 1, § 3; Defendant's Exhibit No. 9, § 3. The leases stated that the platforms and "the sidings, tracks, truck ways, sidewalks and passage-ways upon Lessor's property (including those on the premises hereby demised) shall be in the possession of," and under the control of, lessor Pittsburgh Terminal. *See, e.g.*, Defendant's Exhibit No. 1, § 3; Defendant's Exhibit No. 9, § 3. Moreover, the governing lease also required Plaintiff, as lessee, to install and maintain "a barge fendering system along the entire Monongahela River wall consisting of approximately 370 feet." Defendant's Exhibit No. 1, § 16; Defendant's Exhibit 2, § 16. This is the river wall fendering system constructed on Defendant's property that Plaintiff used to moor its barges.

And, by leasing this "open concrete dock area" from Defendant, Plaintiff was provided with at least four benefits. First, Plaintiff obtained an additional parcel of land, conveniently located adjacent to Plaintiff's Parcel 2, to store materials it used in its concrete business. Also, because part of the leased "open concrete dock area" was located immediately adjacent to Plaintiff's large gantry crane, a second benefit of the lease was that it provided Plaintiff with a place where it could more easily repair this gantry crane. That is, Plaintiff could station heavy equipment on the leased parcel adjacent to the gantry crane, and with this heavy equipment so stationed, more easily perform repairs on the gantry crane.

Third, by leasing the subject parcel, Plaintiff was, of course, granted access to that leased parcel. It would seem that "access" to a parcel of property one has leased would be

implied in almost every lease. *See Schuster v. Pa. Tpk. Comm'n*, 149 A.2d 447, 453 (Pa. 1959); *see also Squires v. Lafferty*, 121 S.E. 90, 91 (W.Va. 1924) (reciting the principle "that, when a thing is granted, all the means to obtain it and all the fruits and effects of it are also granted"). But this lease went further and specifically provided that Plaintiff Bryan was also granted "privileges of access" and "truck ways" and "passage ways." *See, e.g.*, Defendant's Exhibit No. 1, § 3; Defendant's Exhibit No. 9, § 3.

Moreover, within its Amended Complaint, Plaintiff Bryan acknowledged that the lease was "for the use, storage and/or access on or to 'The Pad' [i.e. the open concrete dock area.]" Plaintiff's Amended Complaint, at ¶ 82 (emphasis added). And by obtaining land access to the leased parcel, Plaintiff thereby obtained land access to Plaintiff's own property: Parcel 2 and the area under the Liberty Bridge. *Schuster*, 149 A.2d at 453. Given the expanding scope of its concrete operations, land access to Parcel 2 was beneficial to Plaintiff: as noted above, Parcel 2 was otherwise landlocked (as was the parcel under the Liberty Bridge, which is adjacent to Parcel 2); but, by leasing property located adjacent to Parcel 2, Plaintiff obtained land access to the leased parcel, and therefore land access from the leased parcel to Parcel 2, and therefore land access from Parcel 2 to the area under the Liberty Bridge. Thus, by leasing the subject parcel of Defendant's property, Plaintiff obtained land access that allowed it to move materials by truck from Parcel 2 (and from the area under the Liberty Bridge) to the concrete plant located on Parcel 1. Absent this lease, Plaintiff would have been able to move materials from Parcel 2 (and from the parcel under the Liberty Bridge) to Parcel 1 only by way of the conveyor belt system provided for in the 1926 deed.³

The fourth benefit provided by the lease was that it afforded Plaintiff the ability to moor barges along Defendant's river wall. That is, the subject lease specifically provided that the leased property included that part of Defendant's concrete dock area bounded by the "Monongahela River wall." Defendant's Exhibit Nos. 1-9. In addition, the lease provided that Plaintiff was required to install and maintain "a barge fendering system along the entire Monongahela River wall consisting of approximately 370 feet." Defendant's Exhibit No. 1. So, by leasing Defendant's concrete dock area, and by maintaining a barge fendering system on it, Plaintiff obtained an expanded area in which it could moor its barges.

The credible evidence at trial revealed that during the entire terms of the consecutive leases, beginning with the first lease in 1981, both parties' actions were consistent with such an interpretation of the subject leases. That is, both parties understood that under the leases, Plaintiff was permitted to use the leased parcel: (1) to store materials and aggregate, (2) to gain easy access to its gantry crane, (3) to gain access by land to the leased parcel, and from there to gain land access to Parcel 2 (and the parcel under the Liberty Bridge) and (4) to moor barges at the river dock.

The parties performed in this manner under the subject leases, and co-existed peaceably, for nearly 28 years. Very recently, however, with the continued development of Defendant's property, and the investment of millions of dollars into that property as a modern office complex, Defendant has apparently become less comfortable with leasing its open concrete dock area to Plaintiff. Accordingly, in February 2008, as permitted by the lease, Defendant Pittsburgh Terminal gave written notice that the month-to-month lease would terminate effective June 1, 2008. Defendant's Exhibit Nos. 1 & 23.

Plaintiff Bryan responded by filing the instant lawsuit on May 13, 2008, claiming that despite the termination of the lease, it continued to enjoy the right to use Defendant's property in essentially the same way as it had during the 27 years when the lease was in effect. Plaintiff claimed this right under several legal theories.

In its Original Complaint, Plaintiff claimed that it had acquired rights to use the subject parcel "in the northwesterly corner" of Defendant's property under the theories of: Easement by Necessity (Count I); Easement by Implication (Count II); Prescriptive Easement for River Wall Access (Count III); and Adverse Possession for River Wall Access (Count IV). Plaintiff sought a Preliminary Injunction (Count V) and a Permanent Injunction (Count VI) to allow Plaintiff's continued access to the subject parcel of Defendant's property. Plaintiff Bryan's "Complaint in Equity," filed May 13, 2008 (hereinafter "Plaintiff's Original Complaint"). Plaintiff claimed in its Original Complaint that without continued access to the formerly leased open concrete dock area: Plaintiff would not have access to its derrick to conduct repairs; Plaintiff would be unable to store excess materials and/or aggregate; would be unable to access the river wall; *etc.* Plaintiff's Original Complaint, at ¶ 80.

Thus, Plaintiff claimed: that by virtue of the theories of easement by necessity and easement by implication, even after Defendant terminated the lease, Plaintiff continued to enjoy the right to use the leased parcel of Defendant's property as it had under the lease. Plaintiff also claimed in its Original Complaint that, by virtue of the doctrines of prescriptive easement and adverse possession, it continued to enjoy the right to use the river wall, as it had under the lease, to moor barges. In the Complaint, Plaintiff identified the subject parcel of Defendant's property to which it sought continued access as "The Pad." Plaintiff has acknowledged that "The Pad" is its designation for the same parcel identified in the leases as the "open concrete dock area." Plaintiff designated the location of this parcel in blue on Exhibit A to its Complaint and specifically acknowledged that this is the same parcel that was covered by the lease between the parties. Plaintiff's Original Complaint, at ¶¶ 66 & 71. Plaintiff also acknowledged that the lease included rights of access. *Id.* at ¶ 71.

On July 24, 2008, shortly before trial, Plaintiff filed an Amended Complaint in Equity which repeated the legal theories set forth in the Original Complaint, but also added a new theory, "easement by operation of law," under which it claimed the right to use the formerly leased parcel of Defendant's property. Plaintiff's Amended Complaint, at ¶¶ 104-19.

At the close of trial, Plaintiff conceded that it was unable to prove essential elements of its claims for Easement by Necessity (Count I) and Easement by Implication (Count II). Trial Transcript, September 18, 2008, at 522-23 & 545-46. Therefore, at the close of trial, Plaintiff's new theory, Easement by Operation of Law, was the only theory put forward to prove its claim that, even after lease termination, it still had the right to use the leased Parcel as it had under the lease – to gain access to Parcel 2 and to gain access to its derrick crane.⁴

II.

Easement by Operation of Law: The Water Street Theory. Plaintiff's claim that it has the right to continue to use the leased parcel as a means of gaining access by truck to its Parcel 2 and as an area from which it may more easily repair its gantry crane.

Plaintiff argues that it has the right to cross Defendant

Terminal's property onto its own property because a street (known as "Water Street") previously crossed through both properties and, Plaintiff claims, still today provides Plaintiff with a private easement to do so. There are, however, at least five independent reasons why Plaintiff's Water Street theory fails.

Water Street appears to have been first identified on a plan that was developed from an 1844 partition proceeding in the Estate of Jane Ormsby in the Orphan's Court of Allegheny County. See Joint Exhibit No. 3; see also *City of Pittsburgh v. Pittsburgh & Lake Erie R.R. Co.*, 106 A. 724, 725 (Pa. 1919). Water Street is described there as a street, 100 feet wide more or less, to the low water line of the Monongahela River; it is depicted as running, generally, in an east-west direction along the banks of the Monongahela River and extending from 10th Street to the property of Knox, Kim & Co. (approximately First Street). Joint Exhibit No. 3, p. 10; Defendant's Exhibit No. 63. In claiming a private right of easement to cross Defendant's land, Plaintiff is apparently attempting to invoke the following principle of law: if a street, not previously opened or projected, is laid out in a "plan of lots," the owner of a lot sold according to that "plan of lots" has a right of easement across those streets that have been laid out in the plan. See *Cox's Inc. v. Snodgrass*, 92 A.2d 540, 541 (Pa. 1952).

The first reason why this principle of law is inapplicable to our case, and why Plaintiff's theory fails, is that Water Street was formally vacated in 1882. All rights to use the former Water Street were thus eliminated more than 125 years ago.

It appears that as early as 1881 the abutting landowners of the former Water Street understood the value of the 100-foot wide property along the river, and therefore sought to obtain fee title to this property so they could develop it for their own purposes. Thus, in 1881, these private property owners filed a petition with the court to have the street vacated. Under the governing statute, the interested private property owners had to aver and establish that the road in question had "become useless to the public and those having lands bounding thereon..." Act of May 8, 1854, P.L. 645, No. 630. In pertinent part, this Act of May 8, 1854, provided:

That whenever any private or public lane, alley, road or highway shall, by reason of forming town plots or otherwise, become useless to the public and those having lands bounding thereon, it shall be lawful for any twelve freeholders of the vicinity, to petition the court of quarter sessions of the proper county, setting forth such fact, and whether the same was laid out by the public or private owners, whereupon, the said court shall grant a rule to show cause why such lane, alley, road or highway be not closed up and vacated,...and upon hearing all parties interested, it shall be lawful for the court to decree the vacation of any such lane, alley, street or highway...

Id.

The 1881 petition was then brought by these property owners whose land either abutted or was in the vicinity of Water Street. It is undisputed that these petitioners, who sought to "close[] up and vacate[]" Water Street, included Plaintiff Bryan's predecessor-in-interest and Defendant Pittsburgh Terminal's predecessor-in-interest. In particular, the 1881 petitioners included the South Pittsburgh Planning Mill Co. (Plaintiff Bryan's predecessor-in-interest) and

Oliver Wire Co. (Defendant Pittsburgh Terminal's predecessor-in-interest).⁵

Notice of the vacation petition was published in the *Pittsburgh Times* in the issues of "February 24th, 25th, March 1st, 2nd, 8th, 9th, 14th and 15th, 1882"; this notice provided that the Court had granted a rule upon "those parties interested" to show cause why Water Street between Tenth Street and the property of Knox Kim & Company [First Street] "should not be closed up and vacated." "*City of Pittsburgh v. Pgh. & W.Va. Ry. Co.* 1925 Appellate Record," at 313a-314a. No exceptions were filed by any interested persons; therefore on April 15, 1882, the Court of Quarter Sessions entered a decree that this portion of Water Street was "hereby declared to be vacated." *Id.* at 312a.

Almost immediately upon the entry of the vacation decree, with the various abutting property owners thus becoming owners in fee to their particular section of the 100-foot wide property along the river, the owners began to occupy fully and to develop this waterfront property. *City of Pittsburgh v. Pittsburgh & W.Va. Ry. Co.*, 128 A. 827, 827-28 (Pa. 1925).

In fact, there is a 1925 Supreme Court of Pennsylvania case that discusses this precise section of the former Water Street, and, in particular, addresses the 1882 vacation proceedings. In *City of Pittsburgh v. West Virginia Railway Co.*, the City of Pittsburgh brought a bill in equity (in 1919) asserting that this precise section of Water Street (between Tenth Street and First Street) remained a public street, and therefore could not be used and occupied by the abutting property owners, who had already begun to use, develop and occupy the area of the former Water Street. 128 A. at 827-28. The case is valuable for its holding: the Pennsylvania Supreme Court held that the City of Pittsburgh was barred by laches from asserting a position contrary to the 1882 vacation of Water Street. *Id.* at 828. But the case is perhaps even more important for the historical information it provides.

The defendants in the 1925 *City of Pittsburgh* case included the predecessors-in-interest of the properties now owned by Plaintiff Bryan and the properties now owned by Defendant Pittsburgh Terminal.⁶ The City argued that the 1882 vacation did not vacate the entire width of Water Street, but that a portion of it (the portion along the edge of the river) remained a street. In its opinion denying the City's requested relief, the Supreme Court noted that there was no limitation in the 1882 decree as to the width of the street to be vacated and that the 1882 vacation decree applied to the entire street. The Supreme Court stated: "There is no dispute that, following the decree [in 1882], all of the street was actually vacated and that defendants have constructed thereon improvements running in value into millions of dollars." *Id.* at 827-28.

In fact, Plaintiff Bryan's predecessor-in-interest (Pittsburgh & Lake Erie Railroad) submitted court papers in direct opposition to the City's assertion that some portion of Water Street should remain open as a street. Plaintiff Bryan's predecessor-in-interest asserted that it and its predecessors had long been in possession of the property. Moreover, Bryan's predecessor-in-interest averred:

Defendant [Pittsburgh & Lake Erie Railroad Co.] and its predecessors in title, who had long been in possession of the property theretofore included in said alleged "Water Street," believing that the said [1882] decree of vacation had settled any doubt as to their title thereto, and relying upon said vacation proceedings...acquired title to the property originally

occupied by its railroad within the limits of said alleged street and other property adjacent thereto within the limits of said alleged street and with the full knowledge and acquiescence of the plaintiff, improved the same and expended large sums of money thereon; and continuously to the present time without interference or protest on the part of the plaintiff or other persons, has remained in possession of said land and improvements.

Exhibit No. 64: "Answer of The Pittsburgh & Lake Erie Railroad Company," filed February 18, 1919, in "*City of Pittsburgh v. Pgh. & W.Va. Ry. Co.* 1925 Appellate Record" (hereinafter "P&LE Answer"), at ¶ 26.

In the case before me, Plaintiff Bryan has taken a position inconsistent with that taken by its predecessor-in-interest in the 1925 *City of Pittsburgh* case. Plaintiff Bryan now argues that the 1882 vacation proceedings vacated only the public's right to use Water Street, such that the petitioning abutting land owners (including Plaintiff Bryan's predecessor-in-interest) retained the right to use the 100-foot wide former Water Street as a private easement.

Plaintiff Bryan's position is unpersuasive for a number of reasons. First there is nothing in the writings of the Court of Quarter Sessions, nothing in the opinion of the Pennsylvania Supreme Court, nothing in the briefs or pleadings of the parties to those cases, and nothing in the historical developments following either the 1882 decree or the 1925 opinion that in any way hints or suggests that the right to use the former Water Street as a street or easement was retained by any person. In fact, all evidence leads to the contrary conclusion. In the 1882 vacation proceedings, the verified pleadings of the abutting landowners asserted that Water Street was "useless to the public and those having lands bounding thereon." "*City of Pittsburgh v. Pgh. & W.Va. Ry. Co.* 1925 Appellate Record," at 311a. In fact, such an averment was specifically required for a vacation proceeding brought under the Act of May 8, 1854, by "any twelve freeholders of the vicinity." Act of May 8, 1854, P.L. 645, No. 630. Moreover, Plaintiff's predecessor-in-interest submitted court papers in the 1925 case asserting that the abutting landowners had, in reliance on the vacation proceedings, improved their property and remained in possession of the improvements "continuously to the present time without interference or protest on the part of the Plaintiff [City] or other persons." P&LE Answer, at ¶ 26.

In addition, the clear purpose of the Act of May 8, 1854, was to allow the abutting owners of a useless private or public lane or road to become the fee owners of that property, so that the fee owners could then use the property as they saw fit. If, as Plaintiff Bryan argues, vacation proceedings under the Act of May 8, 1854 had the effect of vacating only public rights to the useless road or lane, such that the road or lane was simply transformed to a private easement or right-of-way for the exclusive use of the abutting property owners, then the petitioners under the Act of May 8, 1854 would have received very little benefit from all of their effort. In other words, if the 1882 decree simply transformed the 100-foot wide Water Street into a 100-foot wide private easement, the abutting landowners would remain precluded (even after entry of the vacation decree) from improving, occupying and developing the waterfront property. Plaintiff Bryan's predecessor could not have erected its gantry crane and its large concrete bins across a private easement. Defendant Pittsburgh Terminal's predecessors could not have constructed its buildings, power plants and other improvements as it did, or grown its vegetation and

shrubs as it did, if this 1882 vacation decree was intended to keep the property open as a private right-of-way. *See, e.g., Croyle v. Dellape*, 832 A.2d 466 (Pa.Super. 2003)(holding that a property owner may not obstruct a private easement in any manner).

It seems obvious that the purpose and effect of the 1882 vacation proceedings was to vacate all rights in the “useless” “private or public lane, alley, road or highway” so that the property could be occupied and improved by the private landowners who, in fact, initiated the proceedings. Act of May 8, 1854, P.L. 645, No. 630.

Plaintiff Bryan argues that there is Pennsylvania precedent for its contention that private easement rights survive vacation proceedings. In fact, however, in every case where private easements were found to survive, the vacation of the street was undertaken in the very different circumstances of a *municipality* seeking vacation by legislative act. *See Trs. of the Second Presbyterian Congregation v. Pub. Parking Auth.*, 119 A.2d 79, 80-81 (Pa. 1956)(Pittsburgh City Council vacated the alleyways by ordinance); *Cox’s Inc. v. Snodgrass*, 92 A.2d 540, 541 (Pa. 1952)(City of McKeesport vacated the alley); *Cohen v. Simpson Real Estate Corp.*, 123 A.2d 715, 716-17 (Pa. 1956)(City of Scranton vacated an alley by ordinance); *Gailey v. Wilksburg Real Estate & Trust Co.*, 129 A. 445, 447 (Pa. 1925)(Borough of Edgewood vacated the street); *O’Donnell v. H.K. Porter Co.*, 86 A. 281, 282-83 (Pa. 1913)(City of Pittsburgh ordinance vacated the street); *Chambersburg Shoe Mfg. Co. v. Cumberland Valley R.R. Co.*, 87 A. 968, 969 (Pa. 1913) (Borough of Chambersburg vacated the streets via ordinance); *O’Donnell v. City of Pittsburgh*, 83 A. 314, 316-18 (Pa. 1912)(City of Pittsburgh vacated the street).

These decisions simply hold that if a street is laid out in a plan such that private easements are created, a subsequent vacation of the street *by the municipality* does not eliminate the private easements. These decisions do not involve vacation proceedings brought by the private freeholders abutting a useless road. The logic of and purpose to be served by the cases involving municipal vacation have no principled similarity to cases brought under the Act of 1854 and its requirement that there be averment and judicial finding that the road in question has “become useless to the public *and those having lands bounding thereon.*” Act of May 8, 1854, P.L. 645, No. 630 (emphasis added).

Plaintiff’s Water Street theory fails for a second, independent, reason: if any private easement rights existed in Water Street after its 1882 vacation, then these rights were certainly extinguished, by statute, five years after Water Street was vacated and closed.

The statutory provisions of 53 P.S. §§ 1946-1949 address the status of “Private Rights and Easements in Vacated Streets.” Section 1946 of Title 53 provides that, where “any street, lane, or alley laid out by any person...in any village or town plot” has been made into a public street and where that public street has afterward been vacated:

any action at law or equity by any person to enforce any right in said street, lane, or alley so vacated, or *easement in the ground* embraced within the boundaries of the same, by reason of ownership of or interest in any lot or lots in said plan, or otherwise, *shall be brought within five years after the vacation of said street, lane, or alley as a public highway and the closing of the same on the ground, and not thereafter...*

53 P.S. § 1946 (emphasis added).

As Section 1947 then declares, after the expiration of the

five year period “*all easements in the ground covered by said street, of every nature and kind whatsoever, and either public or private, shall cease and determine.*” 53 P.S. § 1947 (emphasis added).

There was no credible evidence at trial that Water Street was ever actually used as a street or right-of-way. However, even if any such use was made of it prior to 1882, all the credible evidence at trial demonstrated that immediately following its vacation in 1882, Water Street was closed upon the ground, and the abutting property owners (who, with the vacation, owned the property in fee), began to occupy and improve their respective sections of this waterfront property. In the 1925 Supreme Court of Pennsylvania case referenced above, the abutting landowners stated that since the vacation of Water Street in 1882, the land formerly within the lines of the street had been in their possession and that they had erected buildings within the lines of the vacated street. *City of Pittsburgh*, 128 A. at 827-28. The Supreme Court concluded in that 1925 case: “[t]here is no dispute that, following the decree [in 1882], *all of the street was actually vacated and that defendants have constructed thereon improvements running in value into millions of dollars.*” *City of Pittsburgh*, 128 A. at 827-28 (emphasis added).

All of this demonstrates that Water Street was long ago “vacated and closed upon the ground” as a street or right-of-way, such that the owners were then able to construct their own valuable improvements on the property. Moreover, every relevant map and photograph showed that the property now owned by Defendant Pittsburgh Terminal was fully occupied and was not being used as a street or access way, and that Plaintiff and its predecessors likewise fully occupied the area of the former Water Street and made no use of the area as a street or private easement. *See, e.g., Defendant’s Exhibit No. 65, Slide Nos. 2 (1912 Flood Map), 3 (1916 Pittsburgh map), 4-6 (1928 photographs), 12 (1932 City of Pittsburgh Planning map), 15 (1940 U.S. Harbor Lines drawing), 20 (1953 Dravo Corporation photograph), 21-22 (1955 Pan Handle Bridge photograph and close-up); Plaintiff’s Exhibit No. 16 (Keystone Sand & Supply Co. photograph).*

Thus, because Water Street was so long ago vacated and closed upon the ground, and because Plaintiff’s predecessor-in-interest brought no action within five years of the closing to assert any rights in the street as an easement, “all easements in the ground covered by said street, of every nature and kind whatsoever, and either public or private, [have long ago] cease[d] and determine[d].” 53 P.S. § 1947.

Bryan argues that the former Water Street has not to this day been “closed upon the ground.” Although there is apparently no Pennsylvania appellate authority interpreting the phrase, I have interpreted the phrase to mean that a street or right-of-way is “closed upon the ground” when it is no longer treated as an access way, but is instead treated by the owner as private fee property, through the erection of structures, the growth of vegetation, etc. In our case, this closing occurred immediately upon the entry of the vacation decree. Indeed, under the Act of May 8, 1854, the effect of the petition brought by the “twelve freeholders” was for the court to then “grant a rule to show cause why such lane, alley, road or highway be not *closed up and vacated.*” Act of May 8, 1854, P.L. 645, No. 630 (emphasis added).

If not immediately with the entry of the vacation decree in 1882, Water Street was certainly “closed on the ground” when the owners of the property erected power plants and concrete storage bins on the property, grew vegetation, and otherwise developed this area for their private use. All of this development took place directly following the 1882

vacation and, according to the Supreme Court opinion in *City of Pittsburgh*, by 1925 the property owners had already spent millions of dollars in so occupying and developing the former Water Street. *City of Pittsburgh*, 128 A. at 828.

Bryan argues that Defendant Pittsburgh Terminal's portion of Water Street does not become closed on the ground until all theoretical access is completely blocked. In other words, Plaintiff Bryan argues that despite the erection of buildings and power plants by Defendant, and despite the growth of vegetation and other development of the former Water Street by Defendant, Water Street remains open as a private right-of-way so long as Plaintiff Bryan can circumnavigate a route around the power plants, buildings, vegetation and other developments constructed on the property. While this does not seem to be a reasonable interpretation of the phrase "closed upon the ground," even this interpretation does not help Bryan in this case. The evidence in this case, including old photographs, shows that this section of Water Street had been long ago completely blocked off as a right-of-way. Photographs show that passage along Defendant's portion of the former Water Street was completely blocked by buildings, overgrown vegetation and a raised platform. Passage over this area was blocked by the presence of these structures many years ago, and no party (including Plaintiff's predecessors) brought any action to assert an easement within five years of such closing. Accordingly, even if Plaintiff had acquired private easement rights in Water Street after its vacation in 1882, such rights have been extinguished by operation of 53 P.S. §§ 1946-49.

The third, independent, reason why Plaintiff's Water Street claim is unpersuasive is that Plaintiff long ago abandoned any right to assert such a claim. It is settled Pennsylvania law that rights to an easement may be lost by abandonment. Abandonment will be found where there is a:

showing of intent of the owner of the dominant tenement to abandon the easement, coupled with...(1) adverse possession by the owner of the servient tenement; or (2) affirmative acts by the owner of the easement that renders...use of the easement impossible; or (3) obstruction of the easement by the owner of the easement in a manner that is inconsistent with its further enjoyment.

Ruffalo v. Walters, 348 A.2d 740, 741 (Pa. 1975).

In the case before me, the credible evidence showed that for an extended period of time, access to and egress between the Plaintiff's property and Defendant's property was impossible because of the structures and improvements placed on Plaintiff's property. *See, e.g.*, Plaintiff's Exhibit Nos. 16 & 17; Defendant's Exhibit No. 48; Defendant's Exhibit No. 65, Slide Nos. 15-30; Trial Testimony of David Lackner, given September 18, 2008, at 445-59; Trial Testimony of Thomas J. Bryan, given September 17, 2008, at 172-75. Thus, if there had been an easement, the owner of the easement had obstructed it and had taken affirmative steps rendering its use impossible.

The fourth reason that Plaintiff's Water Street claim must fail is that even if Plaintiff's predecessors had easement rights over Defendant's section of the former Water Street, those rights were lost as a result of the doctrine of reverse adverse possession.

The applicable law is well-settled: an adverse possessor acquires another's property where there is actual, continuous, exclusive, visible, notorious, distinct and hostile possession of the land for twenty-one years. *Recreation Land Corp. v. Hartzfeld*, 947 A.2d 771, 774 (Pa.Super. 2008). In the

case before me, Plaintiff Bryan has filed a complaint asserting a private easement right over the very same property that it has been leasing from Defendant Terminal for the last 27 years. Indeed, Plaintiff claims that it will be irreparably harmed by the termination of the lease. Yet, by acting as landlord and leasing this property to Plaintiff, Defendant has clearly exercised dominion over the property. The leases acknowledged that Defendant Pittsburgh Terminal was the owner of the property, that Defendant Pittsburgh Terminal had the right to control the area and that Plaintiff's use of the property was non-exclusive. Defendant's Exhibit Nos. 1-9. For nearly 28 years, Plaintiff Bryan had paid Defendant Pittsburgh Terminal monthly rent; clearly Plaintiff Bryan knew that its ability to use Defendant Pittsburgh Terminal's property was permitted only by the governing lease. At no time prior to termination of the lease by Defendant did Plaintiff ever assert that it had an easement right to use this property. In fact, the credible evidence at trial showed that, on several occasions, Plaintiff Bryan attempted to purchase a portion of this property from Defendant, or swap other land for it, again thereby acknowledging Defendant's ownership rights and the absence of any rights in the property by Plaintiff, except by virtue of the governing lease. Defendant's Exhibit Nos. 62 & 68; Trial Testimony of Thomas J. Bryan, given September 17, 2008, at 202-06; Trial Testimony of David Lackner, given September 18, 2008, at 421-22.

Thus, even assuming that Plaintiff Bryan had somehow, at some point, acquired easement rights over Defendant's property, Defendant Pittsburgh Terminal has re-acquired that easement by virtue of the doctrine of adverse possession.

The final reason why Plaintiff Bryan's Water Street theory must fail is that Plaintiff Bryan's attempt to assert a private easement right over Defendant's property is barred by the doctrines of estoppel and laches.

As noted above, the credible evidence at trial clearly established that Plaintiff Bryan never made use of Defendant Pittsburgh Terminal's property except by lease. At no time prior to the filing of its Complaint in May of 2008, did Plaintiff ever assert that it had an easement right in Defendant's property. Trial Testimony of Thomas J. Bryan, given September 17, 2008, at 210-11.

Back in 1881, Plaintiff's predecessor was one of the original petitioners requesting the court to vacate Water Street so that it could become the owner in fee of the property. As noted above, this fact is undisputed. *See infra* at **13-14. Plaintiff's predecessor could then fully occupy and develop the property without interference of anyone attempting to use the property as a street or right-of-way. *See* P&LE Answer. Following the vacation decree in 1882, Plaintiff Bryan's predecessors (and later Plaintiff itself) did just that: they fully occupied the property with railroad lines, large concrete bins, a large gantry crane, etc., and spent large sums of money in the process.

Similarly, Defendant Pittsburgh Terminal's predecessors (as well as Pittsburgh Terminal itself) spent millions of dollars to fully occupy and develop the property. During the term of the leases with Plaintiff Bryan, Pittsburgh Terminal has substantially renovated and improved its property, including the recent expenditure of several million dollars, all with the understanding that it had a terminable month-to-month lease with Plaintiff Bryan.

At no time during their long relationship did Bryan ever assert that it had an easement right in Pittsburgh Terminal's property. Plaintiff Bryan never asserted that it had any right to use the property separate from the rights granted by the lease. Trial Testimony of Thomas J. Bryan, given September 17, 2008, at 210-11. Rather, Plaintiff Bryan

stood mute and allowed Pittsburgh Terminal to put more and more money into the substantial renovation of its property. Under these circumstances, Plaintiff Bryan is barred by the doctrines of estoppel and laches from asserting such rights now.

In the 1925 *City of Pittsburgh* case, the City argued that some part of Water Street (that part closest to the river) remained a street despite the 1882 vacation. The Pennsylvania Supreme Court held that, after 40 years, the City was barred by laches from challenging the vacation decree. The Supreme Court reasoned that it would be unjust if the City could challenge the decree after all those years because the abutting landowners had already moved to occupy and improve the land. *City of Pittsburgh*, 128 A. at 827-28. Now, 125 years after the ever continuing occupation and improvement by the abutting landowners of the former Water Street, Plaintiff Bryan argues, for the first time, that the vacation decree did not apply to all persons. Specifically, it argues that the abutting property owners (such as Plaintiff) have retained their right to use the former Water Street as their own private street. If laches were applied by the Supreme Court after 40 years, it is obviously even more appropriately applied after 125 years.

Finally, I should note that even if this Court were to conclude that Plaintiff did acquire, after the 1882 vacation, a private easement to use Water Street, any such right would allow Plaintiff only to use the vacated Water Street as a street: that is, for passage only. See *Gailey*, 129 A. at 447 (easement of lot owners is merely one of passage); *Schumacher v. Ploplis*, 87 Pa.Super. 265, 270 (1926) (“owner of a lot purchased according to a plan on which streets are plotted has an *easement of access* in the streets”)(emphasis added). Thus, even if I were to conclude that Plaintiff’s Water Street theory is correct, Plaintiff still would not enjoy the right to use Defendant Pittsburgh Terminal’s property located within the former Water Street as a location for storing materials or as a location for stationing heavy equipment used for repairing and maintaining the gantry crane.

In summary then, in its Amended Complaint Plaintiff Bryan set forth three legal theories why, despite the termination of the 1993 lease, it continued to enjoy the right to: use Defendant Pittsburgh Terminal’s property to store aggregate and materials; station equipment; and gain access by truck to Plaintiff’s Parcel 2. Those legal theories were: Easement by Necessity (Count I); Easement by Implication (Count II) and the Water Street Theory (Count III). At trial, Plaintiff conceded that it was unable to prove an essential element as to the Count I and Count II causes of action: specifically, it could not prove that, as of 1844 when the properties now owned by Plaintiff and Defendant were severed, there existed any need for an easement. Trial Transcript, September 18, 2008, at 522-23 & 545-46. At the conclusion of trial, Plaintiff conceded that only the Water Street theory remained as a way for Plaintiff to attempt to prove its right to continue to enjoy the use of Defendant’s property in these ways.

After trial, however, including a view of the premises by this Court, I determined that Plaintiff had not established the Water Street theory. Therefore, upon the termination of the lease by Defendant Pittsburgh Terminal, Plaintiff Bryan no longer enjoyed the right to store aggregate and materials on Defendant’s property, the right to station heavy equipment on Defendant’s property (to be used in maintenance and repair of Plaintiff’s crane) or the right to drive trucks onto Defendant’s property (and from Defendant’s property to gain truck access to Plaintiff’s Parcel 2).

III.

Adverse Possession and Easement by Prescription: Plaintiff’s claim that it continues to enjoy the right to moor barges along the leased parcel.

Plaintiff’s Amended Complaint also included two legal theories (Adverse Possession, Count IV, and Easement by Prescription, Count V) through which, it contended, it had acquired the right to moor barges at the dock located on Defendant Pittsburgh Terminal’s property.

“Adverse possession is an extraordinary doctrine which permits one to achieve ownership of another’s property by operation of law.” *Flannery v. Stump*, 786 A.2d 255, 258 (Pa.Super. 2001). “It is a serious matter indeed to take away another’s property. That is why the law imposes such strict requirements of proof on one who claims title by adverse possession.” *Id.* The grant of this extraordinary doctrine must be based upon “clear evidence.” *Id.*

“One who claims title by adverse possession must prove actual, continuous, exclusive, visible, notorious, distinct and hostile possession of the land for twenty-one years.” *Recreation Land Corp.*, 947 A.2d at 774. “If the use is the result of some lease, license, indulgence, or special contract given by the owner, it is not adverse.” *Flannery*, 786 A.2d at 258-259.

An easement by prescription is also created only by adverse, open, notorious, continuous and uninterrupted use for a period of twenty-one years and is thus similar to adverse possession. The principal distinction between the two doctrines is that the adverse possessor claims the land as fee holder and must show exclusivity, whereas in prescription, the claimant makes some easement-like use of the land and need not show exclusivity. *Newell Rod & Gun Club, Inc. v. Bauer*, 597 A.2d 667, 670 (Pa.Super. 1991).

In the context of this case, it is very clear that Plaintiff’s claims of adverse possession and easement by prescription must fail. First, it is highly questionable that Plaintiff could obtain rights in Defendant’s property simply by mooring barges alongside Defendant’s river dock. After all, the barges sit on navigable waters, and the river dock was under lease. See, e.g., *Torch v. Constantino*, 323 A.2d 278, 279 (Pa.Super. 1974)(holding: “There is no question that adverse possession will not lie against lands held by the Federal Government...Nor can a claim of adverse possession be asserted against the Commonwealth”); see also, *Lehmann v. Keller*, 684 A.2d 618, 620 (Pa.Super. 1996)(holding: a “lease constitutes [lessor’s] permission for [lessee] to use the land; [lessee’s] occupation is not hostile, and there can thus be no adverse possession”). Plaintiff’s claim is something akin to the argument that one can obtain an easement right to park a truck at a particular location on a public street just by regularly parking at that location. Plaintiff has not cited any authority to support the proposition that one may acquire rights to moor vessels on navigable waters at a particular location.

Even if it were theoretically possible to acquire title to moor barges at a particular location, that proposition could have no application where, as here, the location in question was under lease. (If, for example, a tenant leases a warehouse from the warehouse owner, the tenant may find it convenient to park his truck on the public street in front of the warehouse. But, after the lease ends, the former tenant cannot plausibly argue that he has a *right* to continue to park there. This is obviously true whether the lease lasted 10, 21 or even 100 years.) *Lehmann*, 684 A.2d at 620. The clear evidence at trial established that during the entire time Plaintiff Bryan moored barges at Defendant’s river

dock, Plaintiff Bryan was leasing that river dock from Defendant Pittsburgh Terminal. Defendant's Exhibit No. 1. The leases obviously constitute an acknowledgement by Plaintiff Bryan that Pittsburgh Terminal is the owner of the property; moreover, the leases establish that Plaintiff's use of the river dock was by consent. There could be no clearer indication of Pittsburgh Terminal's intent to hold the land for itself than its insistence that Plaintiff Bryan pay rent to Pittsburgh Terminal for the privilege of using the property.

Having found that Plaintiff failed to meet its burden of proving the elements of adverse possession or easement by prescription, I found in favor of Defendant on Plaintiff's claims in Count IV and Count V of the Amended Complaint.

IV.

Plaintiff's Post-Trial Attempt to Assert New Cause of Action:

On September 29, 2008, more than 10 days after Plaintiff rested and the trial ended, Plaintiff Bryan filed "Plaintiff's Post-Trial Motion to Conform the Pleadings to the Evidence Proffered at Time of Trial." Filed October 15, 2008 (hereinafter "Plaintiff's Post-Trial Motion to Conform the Pleadings"). In this post-trial motion, Plaintiff Bryan sought to add, not just factual allegations, but a new legal theory. In the proposed new cause of action, Plaintiff sought to assert, for the first time, access rights "on the basis of prescriptive easement and/or adverse possession" in an unspecified "area which abounds" a newly defined lease area. "Plaintiff, Frank Bryan, Inc.'s Brief in Support of Its Post-Trial Motion to Conform the Pleadings to the Evidence Proffered at Trial," filed October 15, 2008 (hereinafter "Plaintiff's Brief in Support of Post-Trial Motion to Conform"), at 8.

On the first day of trial, Thomas J. Bryan, General Manager of Frank Bryan Incorporated, testified that "the pad" was the "area that is directly the subject of this lawsuit," was the property that Bryan had been leasing from Defendant, and is the area depicted in blue on Plaintiff's Exhibit 34. Trial Testimony of Thomas J. Bryan, given September 16, 2008, at 6, 73, 76 & 78. Exhibit 34 shows that the area in blue (*i.e.* the leased area) is located in the Northwesterly portion of Pittsburgh Terminal's property and is bounded by the P&LE spur line, Third Street, Monongahela River wall and Pittsburgh Terminal Properties' power plant building. Plaintiff's Exhibit No. 34.

Under Plaintiff's newly proposed post-trial legal theory, Plaintiff sought to continue to call the leased area "the pad." However, under this new theory, the leased area was to be redefined: it would *not* be bounded as was testified at trial and would *not* be located in the northwesterly portion of Defendant's property. Rather, in the proposed claim, Plaintiff sought to assert that the leased area was exactly 8,553 square feet, contained no specified boundary lines and was located sufficiently to the *south* and to the *east* that it would leave a "100 foot path" on Defendant's property that Plaintiff could use. According to Plaintiff, since the 100-foot path was not part of the re-defined "pad," it was not part of the lease and, therefore, must have been occupied by Plaintiff openly, hostilely and adversely. "Plaintiff's Brief in Support of Post-Trial Motion to Conform," at 4-8. Moreover, even though Plaintiff's Amended Complaint averred that the lease included use of the pad, storage of materials on the pad and/or access to the pad, Plaintiff sought to assert post-trial that the lease *did not* allow access to the pad. *Id.*; see also Plaintiff's Amended Complaint, at ¶¶ 80 & 82.

In my Order dated October 27, 2008, I denied Plaintiff's

motion to add this new cause of action after trial. Trial Court Order, dated October 27, 2008, Folino, J. While Pennsylvania law allows for liberal amendment of pleadings, it does not favor the assertion of new causes of action after trial. See *Smith v. Athens Twp. Auth.*, 685 A.2d 651, 655 (Pa.Cmwlth. 1996)(stating: "where amendment is sought after the testimony has been concluded, prejudice will always result to the extent that the opposing party has not contemplated the subject matter of the proposed amendment in the preparation and trial of the case"); see also *Newcomer v. Civil Serv. Comm'n*, 515 A.2d 108, 111-12 (Pa.Cmwlth. 1986)(holding: "it may be entirely appropriate to permit an amendment which will cure a purely technical defect, or will merely conform the pleadings to the evidence already offered or admitted,...but yet inappropriate to permit an amendment which will present an entirely new theory of recovery and raise hitherto un contemplated issues of law and/or fact.").

In the case before me, I determined that it would be prejudicial to allow Plaintiff to assert a new cause of action, after the close of evidence and after closing argument, when Defendant would thereby be precluded (because of the timing) from introducing evidence to meet the new theory and from addressing the new theory in its closing argument.

However, my Order also stated that even if I had allowed the proposed amendment, it would not have changed the outcome of the case: I still would have found in favor of Defendant Pittsburgh Terminal. Trial Court Order, dated October 27, 2008, Folino, J. Certainly, even if Plaintiff had amended its Amended Complaint to include the new cause of action of "prescriptive easement and/or adverse possession," this new count would have failed, as Plaintiff failed to prove the elements of this new claim at trial. Plaintiff's proposed new cause of action is not only convoluted and vague, but it was also contradicted by the credible evidence at trial. For example, contrary to the new claim that the leases were "for storage only," the express language of the leases provided for "the privileges of access to and of using the platforms." See, *e.g.*, Defendant's Exhibit No. 1, § 3; Defendant's Exhibit No. 9, § 3. Also, the conduct of the parties was entirely consistent with an understanding on both sides that the leases included a right to access the leased property. The testimony of Thomas Bryan that the lease was for storage of materials only, and not also for a means to access its property by land, was simply not credible.

In addition, while the proposed new cause of action claimed that the leased area was of unspecified boundary lines, the evidence at trial (including Plaintiff's evidence) showed that the leased area included all of the property within the boundaries explicitly set forth in the lease. That is, according to the explicit terms of the lease, the leased area included all of the area "bounded by P&LE spur line, 3rd Street, Monongahela River wall and the Pittsburgh Terminal Properties Power Plant Building." See, *e.g.*, Defendant's Exhibit No. 1; Defendant's Exhibit No. 9. Here too, the parties' actions were consistent with such an interpretation. There was no credible evidence at trial that Bryan used any of the property within these boundaries adversely or hostilely. Moreover, Plaintiff Bryan itself introduced testimony at trial that the leased area was *all of* the area "bounded by the P&LE spur line, 3rd Street, Monongahela River wall and the Pittsburgh Terminal Properties Power Plant Building." Trial Testimony of Thomas J. Bryan, given September 16, 2008, at 73, 76 & 78. So, here too, Plaintiff's proposed new claim was contradicted by all of the credible evidence.

In addition, the leases state that the property under lease was the entire “open concrete dock area” as described by the above boundary lines. *See, e.g.*, Defendant’s Exhibit No. 1; Defendant’s Exhibit No. 9. The lease did not limit the leased area to something called “the pad.”

Furthermore, the leases identify the “leased area” as located in the “northwesterly portion” of Defendant’s property. *See, e.g.*, Defendant’s Exhibit No. 1; Defendant’s Exhibit No. 9. In fact, all of the credible evidence at trial (including Plaintiff’s evidence) showed that the area under lease was located in the northwesterly corner of Defendant’s property. *See, e.g.*, Plaintiff’s Exhibit No. 34. Plaintiff’s new post-trial cause of action would place the leased area to the south and east.

While it is true that the leases estimate the area “bounded by P&LE spur line, 3rd Street, Monongahela River wall and the Pittsburgh Terminal Properties Power Plant Building” to be approximately 8,650 square feet, it may be that the actual square footage is somewhat larger.⁸ Defendant’s Exhibit No. 1. This technical error in the estimate of the square footage does not, however, change the fact that all of the area within the boundary lines was covered by the leases.

Ultimately, under Plaintiff’s proposed post-trial claim, I would have had to determine which of the differing interpretations of the lease was correct. Under Plaintiff’s proposed new interpretation, the leased property: comprised only a portion of Defendant’s open concrete dock area; had unidentified and unspecified boundary areas; was not the area the parties understood, for the last 27 years, to have been the leased property; and was an area that the Plaintiff only “realized” after trial to be the “leased area.”

On the other hand, I could interpret the leased parcel: to be the area explicitly described by the boundary lines in the lease; to be the area located in the northwesterly portion of Defendant’s property as explicitly described in the lease; to be the area that the parties understood as the leased area during the 27 years of the leases; and to be the area that the parties, through their actions over the years, obviously interpreted the leased area to include. It was clear to me that even if I allowed Plaintiff’s new claim to be pleaded, I would have chosen the latter interpretation and denied Plaintiff’s new claim.

Plaintiff Bryan argues that I must interpret any ambiguity in its favor. However, by interpreting the lease to give Bryan the relatively larger area specifically set forth by the leased boundary lines, I am interpreting the lease in its favor. In other words, where a lease can be interpreted to give the lessee a relatively larger and more desirable parcel of property or to give the lessee a relatively smaller and less desirable parcel, it would seem obvious that the interpretation that gives the lessee the larger and more desirable parcel is the more favorable interpretation to the lessee. In our case, it is only Plaintiff’s new, contrived and after-the-fact claim of “adverse possession and for easement by prescription” that causes Plaintiff to argue for the otherwise less favorable interpretation of the lease. More importantly, I am interpreting the lease in the same manner as (the evidence showed) the parties had themselves interpreted it for 27 years, and in the same way that Bryan itself had interpreted it until after the trial ended.

Among the numerous problems with Plaintiff’s new cause of action is that a person cannot have occupied a particular area notoriously, adversely or hostilely for the 21 years before trial if he just realized for the first time during the trial itself that he had been so occupying the property. In our case, all credible evidence demonstrated that Plaintiff’s possession of the land was permissive (and not hostile), and

held under the terms of a lease.

In short, Plaintiff Bryan did not meet its burden of proving, by clear evidence, that it held Defendant’s property by adverse possession or prescriptive easement; therefore, it would have been futile to have Plaintiff amend its complaint, after trial, to assert such a claim.

V.

Issues on Appeal

In its “Concise Statement[] of Matters Complained of on Appeal Pursuant to Pa.R.A.P. § 1925(b),” Plaintiff Bryan set forth seven errors; the errors actually fall into three categories.

In its first four assignments of error, Plaintiff claims that this Court erred by rendering a verdict in favor of Defendant. It is, of course, the province of the trial court in a bench trial to weigh the conflicting testimony. *Palladino v. Palladino*, 713 A.2d 676, 678 (Pa.Super. 1998). As set forth in some detail above, in this case Plaintiff simply did not carry its burden of proof, and there was ample evidence supporting a verdict for Defendant.

In its fifth assignment, Plaintiff states: “The trial court committed error of law when it improperly admitted the complete record, including but not limited to, pleadings and trial briefs, of prior litigation involving the vacation of Water Street, instead of limiting or solely taking note of the verdict, judgment or holding therein.”

As noted above, the 1882 Water Street vacation proceedings and its legal effect were addressed in the 1925 decision and opinion of the Pennsylvania Supreme Court in *City of Pittsburgh v. Pittsburgh & West Virginia Railway Co.*, 128 A. 827 (Pa. 1925). Defendant offered into evidence at trial portions of the paper books from the 1925 Supreme Court case, including the reproduced record filed with the Supreme Court and the briefs of the parties. Defendant’s Exhibit Nos. 63 & 64. Both were offered on the basis that they are publicly available records of the type commonly considered by courts in Pennsylvania, and that the Court could determine the weight and significance to give to them. Trial Transcript, September 18, 2008, at 510.

Plaintiff objected to the admission of Exhibit 64 – the briefs from the 1925 proceedings – but did not object to Exhibit 63. *Id.* at 509. According to Plaintiff, the briefs constituted mere argument and were not relevant evidence to the matter at hand. I overruled Plaintiff’s objection; now, Plaintiff attempts to attribute error to this Court’s ruling. The argument fails for a variety of reasons.

Initially, these briefs were a very minor part of this overall case. They were admitted to the extent that they might aid the Court by providing some small background through which I could understand Plaintiff’s claim regarding the meaning of the 1882 vacation decree. Therefore, any error would not mandate reversal: the admission of these documents did not prejudice Plaintiff in any manner. *See Kopytin v. Aschinger*, 947 A.2d 739, 744 (Pa.Super. 2008)(holding: appellate court’s “standard of review in assessing the trial court’s evidentiary rulings is extremely narrow. Such decisions are referred to the court’s discretion, and will not be disturbed absent both error and harm or prejudice to the complaining party”). Secondly, there was simply no “error” in this case: the briefs were filed in the Pennsylvania Supreme Court and, thus, constitute “public documents”; as such, this Court had “the right” to admit the documents into evidence. *Bykowski v. Chesed, Co.*, 625 A.2d 1256, 1258n.1 (Pa.Super. 1993)(holding: a “court has the right to take judicial notice of public documents”); *see also Kopytin*, 947 A.2d at 744. Finally, and contrary to Plaintiff’s current argument, the briefs were

indeed relevant evidence in this case. Certainly, the briefs recite averments made by the Pittsburgh & Lake Erie Railroad Company – Plaintiff’s predecessor-in-interest. Moreover, these documents show that, in reliance upon the 1882 vacation decree, P&LE: had “occupied” Water Street; had spent “large sums of money” on improving the former Water Street; believed that it owned the former Water Street property “in fee” and had possessed the land “continuously to the present time without interference or protest on the part of...other persons.” P&LE Answer, at ¶ 26. It would seem to be well within the discretion of the trial court to review these materials.

In its sixth and seventh assignments, Plaintiff argues that this Court erred in denying “Plaintiff’s Post-Trial Motion to Conform the Pleadings to the Evidence Proffered at time of Trial,” and in concluding that even if the proposed amendment had been granted, the non-jury verdict in favor of Defendant would have remained the same. These matters have been addressed above in Part IV of this Opinion.

For the foregoing reasons, this Court’s Non-Jury Verdict of October 27, 2008 should be upheld and the final judgment should be affirmed.

Date Filed: June 18, 2009

¹ In 1882, a few years after the tracks were put in, Water Street was vacated, and thus the abutting property owners to the former Water Street, including Bryan’s and Pittsburgh Terminal’s predecessors, became fee owners of that property. This will be discussed in detail below.

² In its court papers and in its testimony at trial, Plaintiff Bryan sometimes refers to the leased parcel as “the pad,” rather than the terminology “open concrete dock area,” which is used in the leases. Plaintiff has acknowledged, however, that they are one and the same. See Trial Testimony of Thomas J. Bryan, given September 16, 2008, at 78 & 84; Trial Testimony of Thomas J. Bryan, given September 17, 2008, at 149-50; Plaintiff’s Exhibit No. 34 (area depicted in blue is identified as the leased area, and shows boundaries of P&LE spur line, 3rd Street, Monongahela River wall, and the Pittsburgh Terminal Properties Power Plant Building); see also Plaintiff Bryan’s “Amended Complaint in Equity,” filed July 24, 2008 (hereinafter “Plaintiff’s Amended Complaint”), at ¶¶ 77 & 82. Because “open concrete dock area” is the actual language used in the lease, I shall use that designation in this Opinion.

³ As noted above, this 1926 deed permitted the construction of a conveyor belt system over the railroad tracks from Parcel 2 to Parcel 1. The 1926 deed explicitly states that “no other crossings of any kind whatsoever” across the railroad tracks are permitted. Joint Exhibit No. 12, p. 3.

⁴ Plaintiff also pursued its claim that it continued to enjoy the right to moor its barges along Defendant’s river wall, but Plaintiff claimed this right by virtue of the doctrines of prescriptive easement and adverse possession. This river wall claim is addressed below. Plaintiff is apparently no longer claiming, as it had in its Amended Complaint, that it continues to enjoy the right to store aggregate and material on the formerly leased parcel. “Plaintiff’s Brief in Support of Motion for Post-Trial Relief Pursuant to Pa.R.C.P. 227.1” (hereinafter “Plaintiff’s Post-Trial Brief”), at 29.

⁵ See Defendant’s Exhibit 63: Supreme Court of Pennsylvania Appellate Record in *City of Pittsburgh v. Pittsburgh & W.Va. Ry. Co.*, No. 55 March Term, 1925, (hereinafter “*City of*

Pittsburgh v. Pgh. & W.Va. Ry. Co., 1925 Appellate Record”), at 310a (listing “South Pittsburgh Planning Mill Co.” as petitioner in the 1882 action); Trial Testimony of Robert J. Garvin, Esq., given September 17, 2008, at 278 (testifying: the “deed dated March 1, 1871...[f]rom W.J. Anderson to South Pittsburgh Planning Mill Company...[is a] deed within the Frank Bryan, Incorporated chain of title”); “*City of Pittsburgh v. Pgh. & W.Va. Ry. Co.* 1925 Appellate Record,” at 310a (listing “Oliver Wire Co.” as petitioner in 1882 action); Defendant’s Exhibit No. 59B, p. 1 (establishing that the lands owned by the Oliver Wire Co. are within the Pittsburgh Terminal Properties chain of title).

⁶ The 1925 *City of Pittsburgh* case concerned the same land that was at issue in the 1882 vacation proceedings. However, by 1919 (when the *City of Pittsburgh* case was first instituted), the respective deeds had changed hands: the land that used to be owned by the South Pittsburgh Planning Mill Company was, in 1919, owned by the Pittsburgh & Lake Erie Railroad Company; the land of the Oliver Wire Company was, in 1919, owned by the Pittsburgh Terminal Warehouse and Transfer Company. Trial Testimony of Robert J. Garvin, Esq., given September 17, 2008, at 293; Defendant’s Exhibit 59B. Obviously however, since we are still talking about the same tracts of land, the Pittsburgh & Lake Erie Railroad Company (like the South Pittsburgh Planning Mill Company before it) is Plaintiff Bryan’s predecessor-in-interest with respect to the property; the Pittsburgh Terminal Warehouse and Transfer Company (like the Oliver Wire Company) is Defendant Pittsburgh Terminal’s predecessor-in-interest with respect to the property. Trial Testimony of Robert J. Garvin, Esq., given September 17, 2008, at 293; Defendant’s Exhibit 59B. These facts are undisputed.

⁷ The statute uses both phrases, “closed upon the ground” and “closed on the ground,” apparently interchangeably.

⁸ The actual square footage was not an issue because, at the time of trial, both parties agreed that the area under lease was the entire “open concrete dock area” and agreed that the boundaries of this leased area were the P&LE spur line, Third Street, Monongahela River wall and the Pittsburgh Terminal Properties Power Plant Building.

Citizens Bank of Pennsylvania v. Pamela H. Jasiewicz

Judgments—Execution on Judgments—Fraudulent Transfers—Pa. R.C.P. 3118—12 Pa. C.S.A. §5101 et seq.—Pa. R.C.P. 2002

The Court sustained preliminary objections to the Motion for Supplementary Relief in Aid of Execution, filed pursuant to Pa. R.C.P. 3118, finding that in order to adjudicate claims under the Uniform Fraudulent Transfer Act, a separate plenary action under that act must be brought. The court also noted that Plaintiff’s assignee should file the new action in its own name, pursuant to Pa. R.C.P. 2002.

(Lynn E. MacBeth)

Thomas V. Gebler, Jr. for Plaintiff.

Patrick K. Cavanaugh for Defendant.

No. GD 06-14319. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM IN SUPPORT OF ORDER

INTRODUCTION

Friedman, J., September 17, 2009—Defendant in the captioned action in confession of judgment has filed Preliminary Objections to Plaintiff's Assignee's Motion/Petition for Supplementary Relief in Aid of Execution, which is governed by Pa. R.C.P. 3118. The basis for the objection is that this ancillary summary proceeding is inappropriate and that a separate plenary *action* under the Uniform Fraudulent Transfer Act, 12 Pa. C.S.A. §5101 *et seq.* ("UFTA"), is the only method by which to obtain the relief sought, a finding by the Court that a transfer by Defendant of certain proceeds of sale to herself and her husband, was fraudulent and that those proceeds should therefore be made available for attachment to satisfy the judgment in this matter. For the reasons set forth herein, we conclude that the objections are well-taken and must be sustained.

DISCUSSION

Plaintiff's Assignee argues that Defendant's objection puts form over substance. In particular, Assignee cites to a Philadelphia Common Pleas case *Continental Bank v. Berman*, 25 Phila. Co. Rptr. 80 (C.P. Phila. 1992), and a Superior Court case, *Patterson v. Hopkins*, 247 Pa.Super. 163, 371 A.2d 1378 (1977). In both those cases, the issue was viewed as one of form versus substance, with substance supposedly winning, although the better statement would be that form lost.

Defendant relies primarily on *Greater Valley Terminal Corp. v. Goodman*, 415 Pa. 1, 202 A.2d 89 (1964). There, the Pennsylvania Supreme Court considered a case virtually on all fours with the instant matter and held that the summary proceedings permitted by Rule 3118 were merely intended to maintain the status quo as to property that was unquestionably owned by a judgment debtor. The Supreme Court held that Rule 3118 is not the way to finally adjudicate claims under the UFTA that property titled in others, such as property held by the entireties, should be re-titled in the debtor.¹

The Supreme Court noted that proceedings to void a fraudulent transfer are an attempt to *change* the status quo, and "of necessity involve adjudication of title," with the possibility that the title to the transferee will be voided and re-vested in the judgment debtor and thereby made available for execution by the judgment creditor. Therefore, despite the fact that in *Greater Valley* there had already been an evidentiary hearing below under Rule 3118, the Supreme Court reversed the trial court, holding that, absent waiver by the debtor, a full plenary proceeding must occur via a new action raising a claim to adjudicate *title*. The judgment creditor was then permitted to institute an appropriate action.

The current version of Rule 3118 is virtually identical to that considered by the Supreme Court and continues to be directed at maintaining the status quo. Therefore, *Greater Valley* is the case that must be followed.² The Defendant's Preliminary Objections to the Motion/Petition of Plaintiff's Assignee are sustained, without prejudice to the Assignee's right to file a new action under the UFTA. See Order filed herewith.

We also note that Assignee should file the new action in its own name. See Pa. R.C.P. 2002. See also our Memorandum in Support of Order filed at GD 07-24839, *Huntington National Bank v. Apple*, GD 07-24839 (C.P. Allegh. Co. January 29, 2009).

The Assignee's Motion for Leave to Amend the Motion/Petition to join a non-debtor, Defendant's husband, as a respondent is moot.

BY THE COURT:
/s/Friedman, J.

Dated: September 17, 2009

ORDER OF COURT

AND NOW, to-wit, this 17th day of September, 2009, the Defendant's Preliminary Objections to Plaintiff's Assignee's "Motion for Supplementary Relief in Aid of Execution" are hereby SUSTAINED without prejudice to the Assignee's right to bring a new action (at a new docket number) under the Uniform Fraudulent Transfer Act.

BY THE COURT:
/s/Friedman, J.

¹ The Supreme Court's opinion is extremely interesting and exhaustive and well worth reading or re-reading. Our brief summary here cannot begin to do it justice.

² We respectfully disagree with the understanding of *Greater Valley* set forth in *Continental Bank*.

Commonwealth of Pennsylvania v. Bridget Mitchell

Simple Assault—Sufficiency of the Evidence

1. Defendant appealed conviction for simple assault alleging insufficient evidence.

2. The Court found sufficient evidence to support conviction for simple assault where the Commonwealth presented testimony that the Defendant chased the victim with a 12-inch butcher knife screaming, "I'm going to kill you."

(Robert A. Crisanti)

Kevin Allen Chernosky for the Commonwealth.
Thomas Matthew Dugan III for defendant.

No. CC-2008-4144. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Durkin, J., May 28, 2009—The Defendant was charged with one (1) count of Simple Assault.¹ On October 14, 2008, the Defendant proceeded to a bench trial, and was found guilty as charged. On December 10, 2008, after receiving and reviewing a pre-sentence report, the Defendant was sentenced to 9 months probation.

A timely Notice of Appeal was filed on January 5, 2009. On May 26, 2009 a Statement of Errors Complained of on Appeal was filed, arguing that the evidence was insufficient to support the conviction, and that the Court made an error in not finding that the Defendant acted in self-defense.

The evidence introduced at trial showed that the Defendant lived in Apartment 803 of a high-rise building located at 1014 Sheffield Street in the City of Pittsburgh. On two separate occasions, the City of Pittsburgh Housing Authority who managed the building received complaints of flooding inside the building as a result of water from the Defendant's apartment. It had been found that the Defendant would clog the drains to her tub and sinks while letting the water run causing water to overflow.

On February 7, 2008, another complaint of water coming from the Defendant's unit was received by building management. On that date, Dana Morehead, the Housing

Authority's site manager and another employee went to investigate. When they arrived at the Defendant's apartment, they saw water rushing from underneath the door. Ms. Morehead and her assistant knocked and banged on the door, shouting, "it's housing" (T.T. 23, 24, 25). When there was no response, Ms. Moorehead entered, using her key, and saw water dripping to the floor from clogged sinks and the tub. Ms. Morehead also saw the Defendant sitting in a chair and eating something.

Ms. Morehead told the Defendant that she would need to shut off the water. In response, the Defendant shouted that she was going to kill Ms. Morehead. With a 12-inch butcher knife in hand, the Defendant came at Ms. Morehead and the other employee. The Defendant then chased them down the hall. Ms. Morehead testified that she was terrified by the Defendant's actions.

As to Defendant's argument about the sufficiency of the Commonwealth's evidence:

A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt.... When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

Commonwealth v. Dale, 836 A.2d 150, 153 (Pa.Super. 2003) quoting *Commonwealth v. Widmer*, 744 A.2d 745, 751 (Pa. 2000) (citations omitted)

As is obvious from the summary provided above, the Commonwealth introduced more than sufficient evidence at trial to support Defendant's conviction. The Defendant put Ms. Morehead in fear of imminent serious bodily injury when the Defendant chased Ms. Morehead with a butcher knife yelling that she was going to kill Ms. Morehead. The defense's argument to the contrary is simply ludicrous.

As to the Defendant's second argument:

The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

18 Pa.C.S. § 505(a)

"The issues of whether a defendant acts out of an honest, *bona fide* belief and whether such belief was reasonable are questions properly resolved by the finder of fact." *Commonwealth v. Hill*, 629 A.2d 949 (Pa.Super. 1993) *appeal denied* 645 A.2d 1313 (Pa. 1994) In this case, the Court does not believe that the Defendant acted out of an honest and *bona fide* belief. The Defendant was never placed in danger either by Ms. Morehead or anyone else at the scene. The Court finds the testimony of the Defendant wholly unbelievable. Therefore, the Court did not err in finding the Defendant guilty.

For all of the above reasons, the Judgment of Sentence in this matter must be AFFIRMED.

BY THE COURT:
/s/Durkin, J.

Date: May 28, 2009

Commonwealth of Pennsylvania v. Benjamin Mayhew

Suppression of Evidence—Vehicular Stop Without Reasonable Suspicion of a Motor Vehicle Code Violation

1. The Defendant filed a suppression motion challenging the acquisition of evidence secured as a result of a stop of his motor vehicle.

2. The police did not have reasonable suspicion to stop the Defendant's vehicle where the only evidence of a violation of the motor vehicle code is a momentary crossing of the fog line and traveling through a parking lot to avoid a police roadblock.

(Robert A. Crisanti)

David Belczyk for the Commonwealth.
Michael E. Moser for Defendant.

No. CC-2008-11540. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Williams, J., May 29, 2009—On May 20, 2009, an evidentiary hearing was held on the Defendant's motion to suppress. The Defendant claims his vehicle, which he was driving, was stopped without reasonable suspicion. Such a stop, according to the Defendant violated his rights against an unreasonable search and seizure under the 4th Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution.¹ The remedy the Defendant seeks is the exclusion of all evidence resulting from the traffic stop from the evidentiary arsenal of the government's prosecution of him for driving after imbibing alcohol in violation of 75 Pa.C.S. § 3802(a)(1) and 75 Pa.C.S. § 3802(c). For the reasons that follow, the defendant's request for suppression will be granted.

In 2004, our Legislature adopted changes to Section 6308 of the Vehicle Code. The change impacted the amount of justification a police officer needs to stop a citizen who is driving an automobile. Prior to 2004, a police officer needed probable cause. *Commonwealth v. Gleason*, 785 A.2d 983, 989 (Pa. 2001). Since February 1, 2004, a police officer needs only reasonable suspicion that a motor vehicle code violation has happened in order to stop a car. *Commonwealth v. Chase*, 960 A.2d 108, 112 (Pa. 2008). The statute that brought about that change is 75 Section 6308. Subsection (b) is the pertinent provision and it provides as follows:

Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

75 Pa.C.S. § 6308(b)(2006). The constitutional viability of this legislative change was challenged in *Chase, supra*, and our Supreme Court said:

"the legislature constitutionally determined that the reasonable suspicion standard adequately balances citizens' privacy in a vehicle and law enforcement's ability to briefly investigate an alleged violation of the Vehicle Code."

¹ 18 Pa.C.S.A. §2701(a)(3)

Id., at 120. Thus, the state Supreme Court concluded, that §6308(b) was immune from attack under the Fourth Amendment to the United States Constitution and under Article 1, Section 8 of the Pennsylvania Constitution.

“To establish ‘reasonable suspicion’...the officer must articulate observations which, in conjunction with reasonable inferences derived from these observations, led him to reasonably conclude, in light of his experience, that criminal activity was afoot and the person stopped was involved in that activity.” *Commonwealth v. Little*, 903 A.2d 1269, 1272 (Pa.Super. 2006). In making this assessment, the totality of the circumstances must be considered. *In the Interest of D.M.*, 781 A.2d 1161, 1163 (Pa. 2001).

At the suppression hearing, the government presented one witness, Officer Shener Ulke. His testimony allows the Court to make the following findings of fact. In the early morning of June 15, 2008, Mayhew was traveling on Fifth Avenue in Coraopolis, Pennsylvania. The local police had set-up a DUI roadblock ahead of where Mayhew was driving. Ulke was working the DUI roadblock. He saw a vehicle, later identified as being driven by Mayhew, cut through a parking lot and travel in a direction away from the roadblock. Ulke’s suspicion was raised even though no motor vehicle code violation was observed. Ulke decided to follow Mayhew.

Officer Ulke followed the vehicle for several minutes. The road was curvy. The fog was heavy. The night was late. Mayhew’s vehicle never exceeded the speed limit. He appropriately passed through two traffic lights and made a proper lane change while using his turn signal. Ulke felt the vehicle was favoring the fog line and saw it cross the fog line on one occasion for a moment. A traffic stop was conducted.²

The Commonwealth believes reasonable suspicion was present. Their argument is predicated upon the favoring of the fog line, the momentary cross of that line and the vehicle not proceeding towards the roadblock. These facts, in the government’s eyes, justify the holding in *Commonwealth v. Angel*, 946 A.2d 115 (Pa.Super. 2008) to apply.³ In *Angel*, the court found reasonable suspicion was present after a Pennsylvania state police officer saw a vehicle cross the fog line twice and make a lane change without use of his turn signal. *Id.*, at 117. These observations all happened within a half-mile of following *Angel*’s car.

Based upon the court’s recitation of the present facts, *Angel* becomes distinguishable. We have a momentary crossing of the fog line whereas in *Angel* there were two transgressions. We have other manifestations of good driving behavior whereas in *Angel* there was a lane change without use of one’s turn signal. We have the police officer following Mayhew for several minutes whereas in *Angel* the critical observations took place within a very short period of time. The present facts do not command that *Angel* applies.

From the facts found herein, the Court rules the officer did not have reasonable suspicion to stop Mr. Mayhew’s vehicle on June 15, 2008. An order consistent with this opinion will be issued.

BY THE COURT:
/s/Williams, J.

¹ Defendant also alleges that the stop violated his due process rights under the 14th Amendment to the United States Constitution.

² The court’s factual findings are greatly influenced by the Court’s view of the videotape from the police car mounted camera.

³ The stop of *Angel*’s vehicle took place after February 1, 2004 and thus the version of 75 Section 6308 requiring reasonable suspicion was applicable.

Commonwealth of Pennsylvania v. David R. Baldwin

Concise Statement of Matters Raised on Appeal—Waiver of Issues on Appeal Due to Vagueness of Concise Statement

1. Defendant filed pro se appeal from the denial of a P.C.R.A. Petition after appointed counsel withdrew from the case after filing a no-merit letter.

2. Counsel appointed for purposes of the appeal found there to be no meritorious issues and filed a Concise Statement raising those issues taken verbatim from the Defendant’s correspondence.

3. When the Concise Statement alleges putative errors which are nothing more than gibberish, no meaningful appellate review can be undertaken.

(Robert A. Crisanti)

Matthew John Wholey for the Commonwealth.
Alan R. Patterson, III for Defendant.

No. CC-2006-6749 and CC-2007-2007. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Cashman, J., June 3, 2009—On January 29, 2008, the appellant, Daniel Baldwin, (hereinafter referred to as “Baldwin”), plead guilty to three counts of robbery which were filed against him in two separate criminal complaints. Pursuant to a plea agreement, Baldwin was sentenced to a period of incarceration of not less than five nor more than ten years, to be followed by a period of probation of three years at the first case and a concurrent period of probation of three years at his second case. Baldwin was advised of his post-sentencing rights and indicated that he had no questions concerning those rights. Baldwin also indicated that he was satisfied with the representation that he had received from his private counsel on one case and the Public Defender’s Office on his other case.

No post-sentencing motions were filed nor was a direct appeal filed to the Superior Court from the imposition of sentence. Baldwin did, however, file a document entitled writ of habeas corpus ad subjiciendum and on August 13, 2008, this Court appointed counsel for him to represent him in connection with this document which was treated as his first petition for post-conviction relief. After reviewing that document and the record in the instant case, his appointed counsel filed a no merit letter pursuant to *Commonwealth v. Turner*, 544 A.2d 927 (1988); and *Commonwealth v. Finley*, 550 A.2d 213 (1988), indicating that there were no meritorious issues being raised in this proceeding. Baldwin’s counsel also filed a brief in support of his no merit letter and requested that he be allowed to withdraw as counsel, which was granted.

After reviewing Baldwin’s PCRA counsel’s brief in support of his no merit letter, this Court agreed that there were no meritorious issues to be raised in this particular proceeding and dismissed that petition on December 1, 2008. Baldwin filed a pro se appeal on December 22, 2008, and his current appellate counsel was appointed on March 26, 2009 and directed pursuant to Pennsylvania Rule of Appellate Procedure 1925(b) to file a concise statement of matters complained of on appeal. In complying with that directive, Baldwin’s current appellate counsel has indicated that he too has reviewed the record in this matter and could find no meritorious issues that could be advanced on appeal and has set forth those issues which Baldwin has asked him to raise

in this appeal. In his concise statement of matters complained of on appeal, Baldwin's appellate counsel has set forth the issues Baldwin wishes to raise as taken verbatim from correspondence that he received from Baldwin and those issues are as follows:

1. Did the lower court erred in not granting a Habeas Corpus Hearing or some sort of relief or resolution as we given to Tartleson Vs Mercer, as it would be inequitable to allow Mr. Tartleson relief and not the appellant?
2. Did the lower court erred in finding the issues raised in the State Writ of Habeas Corpus frivolous or without "Merit Letter"?
3. Was all prior counsel was constitutionally ineffective for no raising the issues raised by the applicant?
4. Did the lower court violate the petitioners first amendment right to his religious belief for it's failure to settle the dispute between the appellant and appellee's under the oath to his God and in accordance to the Holy Bible?
5. Was the appellant denied due process fundamental fairness, denial to access to open court and the Writ of Habeas Corpus U.S. const. Art I. Section 14., then the courts order and opinion is in conflict with Pa. 42. PA personal const., right the PA. Constitution Since 1968, never gave the Judiciary or the court of Common Pleas the right to convene criminal trial for a suspect alleged vindication of the criminal code the arrest tied conviction and incarceration were and in violation of both PA/U.S. no saving clause.

On July 25, 2007, Pennsylvania Rule of Appellate Procedure 1925(b) was amended to require greater specificity in articulating issues that could be raised on appeal. The amended rule provides a section which outlines the requirements for identifying those meritorious issues so as to preserve them for appellate review. Pennsylvania Rule of Appellate Procedure 1925(b)(4) sets forth the requirements for preserving appellate issues for review as follows:

(4) *Requirements; waiver.*

- (i) The Statement shall set forth only those rulings or errors that the appellant intends to challenge.
- (ii) The Statement shall concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge. The judge shall not require the citation to authorities; however, appellant may choose to include pertinent authorities in the Statement.
- (iii) The judge shall not require appellant or appellee to file a brief, memorandum of law, or response as part of or in conjunction with the Statement.
- (iv) The Statement should not be redundant or provide lengthy explanations as to any error. Where non-redundant, non-frivolous issues are set forth in an appropriately concise manner, the number of errors raised will not alone be grounds for finding waiver.

(v) Each error identified in the Statement will be deemed to include every subsidiary issue contained therein which was raised in the trial court; this provision does not in any way limit the obligation of a criminal appellant to delineate clearly the scope of claimed constitutional errors on appeal.

(vi) If the appellant in a civil case cannot readily discern the basis for the judge's decision, the appellant shall preface the Statement with an explanation as to why the Statement has identified the errors in only general terms. In such a case, the generality of the Statement will not be grounds for finding waiver.

(vii) Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived.

The comment to this particular Rule also underscores the necessity for specificity in identifying issues for appeal since without clearly framing the issues the appellant seeks to have reviewed, the Trial Court is left without the ability to conduct a meaningful review of the record and file an intelligent opinion in response to those claims of error.

Paragraph (b)(4) This paragraph sets forth the parameters for the Statement and explains what constitutes waiver. It should help counsel to comply with the concise-yet-sufficiently-detailed requirement and avoid waiver under either *Lineberger v. Wyeth*, 894 A.2d 141, 148-49 (Pa.Super. 2006) or *Kanter v. Epstein*, 866 A.2d 394, 400-03 (Pa.Super. 2004), allowance of appeal denied, 584 Pa. 678, 880 A.2d 1239 (2005), cert. denied sub nom. *Spector Gadon & Rosen, P.C. v. Kanter*, 546 U.S. 1092 (2006). The paragraph explains that the Statement should be sufficiently specific to allow the judge to draft the opinion required under 1925(a), and it provides that the number of issues alone will not constitute waiver—so long as the issues set forth are non-redundant and non-frivolous. It allows appellants to rely on the fact that subsidiary issues will be deemed included if the overarching issue is identified and if all of the issues have been properly preserved in the trial court. This provision has been taken from the United States Supreme Court rules. See Sup. Ct. R. 14(1). This paragraph does not in any way excuse the responsibility of an appellant who is raising claims of constitutional error to raise those claims with the requisite degree of specificity. This paragraph also allows—but does not require—an appellant to state the authority upon which the appellant challenges the ruling in question, but it expressly recognizes that a Statement is not a brief and that an appellant shall not file a brief with the Statement. This paragraph also recognizes that there may be times that a civil appellant cannot be specific in the Statement because of the non-specificity of the ruling complained of on appeal. In such instances, civil appellants may seek leave to file a supplemental Statement to clarify their position in response to the judge's more specific Rule 1925(a) opinion...

Paragraph (c)(4) This paragraph clarifies the

special expectations and duties of a criminal lawyer. Even lawyers seeking to withdraw pursuant to the procedures set forth in *Anders v. California*, 386 U.S. 738 (1967) and *Commonwealth v. McClendon*, 495 Pa. 467, 434 A.2d 1185 (1981) are obligated to comply with all rules, including the filing of a Statement. See *Commonwealth v. Myers*, 897 A.2d 493, 494-96 (Pa.Super. 2006); *Commonwealth v. Ladamus*, 896 A.2d 592, 594 (Pa.Super. 2006). However, because a lawyer will not file an *Anders/McClendon* brief without concluding that there are no non-frivolous issues to raise on appeal, this amendment allows a lawyer to file, in lieu of a Statement, a representation that no errors have been raised because the lawyer is (or intends to be) seeking to withdraw under *Anders/McClendon*. At that point, the appellate court will reverse or remand for a supplemental Statement and/or opinion if it finds potentially non-frivolous issues during its constitutionally required review of the record.

Subdivision (d) was formerly (c). The text has not been revised, except to update the reference to Pa.R.A.P. 1112(c).

The 2007 amendments attempt to address the concerns of the bar raised by cases in which courts found waiver: (a) because the Statement was too vague; or (b) because the Statement was so repetitive and voluminous that it did not enable the judge to focus on the issues likely to be raised on appeal. See, e.g., *Lineberger v. Wyeth*, 894 A.2d 141, 148-49 (Pa.Super. 2006); *Kanter v. Epstein*, 866 A.2d 394, 400-03 (Pa.Super. 2004), allowance of appeal denied, 584 Pa. 678, 880 A.2d 1239 (2005), cert. denied sub nom. *Spector Gadon & Rosen, P.C. v. Kanter*, 546 U.S. 1092 (2006). Courts have also cautioned, however, “against being too quick to find waiver, claiming that Rule 1925(b) statements are either too vague or not specific enough.” *Astorino v. New Jersey Transit Corp.*, 912 A.2d 308, 309 (Pa.Super. 2006).

While conciseness and vagueness are very case-specific inquiries, certain observations may be helpful. First, the Statement is only the first step in framing the issues to be raised on appeal, and the requirements of Pa.R.A.P. 2116 are even more stringent. Thus, the Statement should be viewed as an initial winnowing. Second, when appellate courts have been critical of sparse or vague Statements, they have not criticized the number of issues raised but the paucity of useful information contained in the Statement. Neither the number of issues raised nor the length of the Statement alone is enough to find that a Statement is vague or non-concise enough to constitute waiver. See *Astorino v. New Jersey Transit Corp.*, 912 A.2d 308, 309 (Pa.Super. 2006). The more carefully the appellant frames the Statement, the more likely it will be that the judge will be able to articulate the rationale underlying the decision and provide a basis for counsel to determine the advisability of appealing that issue. Thus, counsel should begin the winnowing process when

preparing the Statement and should articulate specific rulings with which the appellant takes issue and why. Nothing in the rule requires an appellant to articulate the arguments within a Statement. It is enough for an appellant—except where constitutional error must be raised with greater specificity—to have identified the rulings and issues that comprise the putative trial court errors.

To say that Baldwin has failed to comply with this directive would only be to state the obvious. The alleged or putative errors supposedly committed by this Court are nothing more than gibberish and, accordingly, no meaningful appellate review¹ of those issues can be undertaken. *Commonwealth v. Steele*, 961 A.2d 786 (Pa. 2008).

Cashman, J.

Dated: June 3, 2009

¹ To the extent that any review could have been made of these putative claims of error, this Court believes that the brief filed in support of the *Turner/Finley* letter by Baldwin’s appointed counsel, addresses these errors as best as possible considering the lack of clarity at setting forth his claims of error.

Commonwealth of Pennsylvania v. Tequilla Fields a/k/a Tequilla Newsome

Claim of Ineffective Assistance of Counsel

1. Defendant was convicted of second degree murder and arson for setting grandmother’s dog on fire. The dog ran into the home and set house on fire killing two children. Defendant and son lived with grandmother despite son’s allergy to the dog. Grandmother refused to give dog away.

2. Defendant raised claim of ineffective assistance of counsel for failure of counsel to raise defense of justification in setting dog on fire to protect son’s health. Court found that justification was not applicable to fact situation and rejected claim of ineffective assistance of counsel.

(William F. Barker)

Michael W. Streily for the Commonwealth.

Defendant *pro se*.

No. CC200503061 and 200505726. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

O’Toole, J., June 9, 2009—The Defendant, Tequilla Fields a/k/a Tequilla Newsome, was charged with Criminal Homicide (2 counts), 18 Pa.C.S.A. §2501, Arson—Endangering Persons (2 counts), 18 Pa.C.S.A. §3301(A), Arson—Endangering Property, 18 Pa.C.S.A. §3301(C), Causing a Catastrophe, 18 Pa.C.S.A. §3302, Cruelty to Animals: Killing, Maiming or Poisoning, 18 Pa.C.S.A. §5511, and Criminal Conspiracy, 18 Pa.C.S.A. §903. After the Court denied the Defendant’s Motion to Suppress and granted the Co-Defendant’s Motion to Sever, the Defendant proceeded to a trial by jury on October 17, 2005. At the conclusion of the trial on October 19, 2005, the Defendant was found guilty of Murder in the Second Degree and all other counts. On the same day, the Court sentenced the Defendant to life

imprisonment.

A direct appeal was filed. In a Memorandum Opinion dated January 22, 2007, the Superior Court affirmed the judgment of sentence and the convictions for Murder in the Second Degree, Arson—Endangering Persons, Arson—Endangering Property, and Criminal Conspiracy. The convictions for Causing a Catastrophe and Cruelty to Animals were overturned.

A Petition for Allowance of Appeal to the Supreme Court was denied on June 26, 2007.

On May 10, 2008, the Defendant filed a *pro se* Petition under the Post-Conviction Relief Act. In said Petition, the Defendant specifically refused the appointment of counsel, stating that she desired to represent herself. At a *Grazier* hearing on September 12, 2008, the Court held an on-the-record colloquy and granted the Defendant's request to represent herself. The Defendant then filed a Petition, to which the Commonwealth filed an Answer. After review of the Petition, Answer, and the court record, the Petition was dismissed without a hearing on March 26, 2009.

The facts of this case, as set forth in our previous Opinion and adopted by the Superior Court in its opinion, can briefly be summarized as follows:

Detective J.R. Smith, of the City of Pittsburgh Police Department, testified that he and his partner, Detective Timothy Rush, were assigned to the "cold case" homicide squad in 2004. They were assigned to reinvestigate seven old unsolved homicide cases, including the within case, which involved the death of two young children in a house fire in the early morning hours of July 11, 1990. After reviewing the old files from 1990, the detectives contacted the Defendant's Mother, Sharon Fields, on February 8, 2005, who put them in contact with the Defendant. The Defendant was very happy that the case was being reopened and she offered her assistance in finding the "killers of her babies."

After doing additional investigation and other interviews, the detectives contacted the Defendant again on February 15, 2005. They requested that she provide them with photographs and accompany them to their office for an interview. The Defendant was advised of her constitutional rights and the detectives began to question her. The Defendant stated that she and her children were living on the north side of the City of Pittsburgh with her grandmother (Minnie Bivins), who had a dog named Fay Lou. The Defendant's son, Montelle, was allergic to the dog, but her grandmother would not agree to get rid of the dog. So, she and a friend, Lachan Russell (the Co-Defendant), who was dating her brother, plotted how to get rid of the dog. Initially, they took the dog to a convenience store downtown, but he found his way home. Then, they decided that they would douse the dog with kerosene and set the dog on fire until it died.

Late in the evening on July 10, 1990, the Defendant and the Co-Defendant took a bus to the home of the Defendant's mother, who resided in the Hill District section of the city. They picked up the Defendant's two young children and took another bus to the home of the Defendant's grandmother, arriving after midnight. While on the bus, the two Defendants decided to carry out their plan that evening. When they arrived at the home of the Defendant's grandmother, the front door was locked and they had to pound on the door to awaken Ms. Bivins. While the Defendant was pounding on the door, the Co-Defendant poured kerosene on the dog, who was tied up on a leash on the front porch. Ms. Bivins opened the door and they went into the house. The Defendant bathed the children and put them to bed—Montelle in a bedroom on the second floor and Charita with

Ms. Bivins. As the two Defendants left the residence purportedly to go to the store, they set the dog on fire. Both Defendants ran toward "the city steps." The dog tried to follow them, but he was tethered on the porch. Very quickly, the entire house was engulfed in flames. The two Defendants returned to the house, where they spoke with Ms. Bivins, who was standing outside. They attempted to rescue the children, but were unable to do so. The Defendant's brother, Andre, jumped out a third story window. Once the emergency and fire vehicles arrived, the Defendants met and they made a "street pact" never to tell anyone how the fire started.

In her PCRA Petition, the Defendant claims that trial counsel was ineffective for failing to raise the defense of justification and for failing to raise an evidentiary issue. Our Supreme Court, in *Commonwealth v. Kimball*, 724 A.2d 326, 333 (Pa. 1999), set forth the standard to be used in assessing a claim of ineffective assistance of counsel in the context of a PCRA Petition as follows:

The petitioner must still show, by a preponderance of the evidence, ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reasonable adjudication of guilt or innocence could have taken place. This requires the petitioner to show: (1) that the claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) that, but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceeding would have been different.

If Petitioner fails to meet one of the three prongs of the test, he has not overcome the presumption of effectiveness of counsel and an evidentiary hearing is not required. *Id.*

First, the Defendant claims that trial counsel was ineffective in failing to raise the defense of justification. Specifically, the Defendant claims that she was justified in her actions because she was protecting her son, Montelle, who suffered from asthma and was allergic to her grandmother's dog. While the Court understands that the Defendant wished to prevent her son from having an allergic reaction to her grandmother's dog, setting the dog on fire, in the middle of the night, on the front porch of her grandmother's residence, in which four people (including her two young children) were sleeping, was not an appropriate way to do so. In fact, the Defendant would not have been justified in harming the dog in any manner to protect her son from an asthma attack; rather, the Defendant should have protected her son by moving him from her grandmother's residence to a residence in which a dog was not present. As such, the Court does not find any ineffectiveness of counsel in failing to raise this defense.

The Defendant's second allegation is that trial counsel was ineffective in failing to raise a claim that the Commonwealth did not prove the chain of custody of certain evidence. At trial, Mary Kay Perrott, a police investigator, testified that she collected samples at the scene and removed several items, including the dog. She transported the samples to the Allegheny County Crime Lab for analysis. Joseph Abati, a chemist at the Crime Lab, listed the items of evidence that he received and from whom they were received. This testimony was more than adequate to demonstrate the chain of custody of the evidence taken from the scene and analyzed at the Crime Lab. Therefore, the Court finds that trial counsel was not ineffective in failing to raise this issue.

For the foregoing reasons, the Court finds that the Defendant's PCRA Petition was properly dismissed without a hearing.

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

Commonwealth of Pennsylvania v. Jerome Washington

Verdict—Appeal—Sufficiency of the Evidence—Cross-Examination—Sentence

1. Following a three-day jury trial for defendant and his co-defendant, defendant was found guilty of all charges filed against him and was sentenced. Defendant filed timely Post-Sentence Motions which were denied and then filed a timely Notice of appeal. Defendant raised three (3) main issues which the court addressed.

2. The verdict was not contrary to the weight of the evidence, nor was the Commonwealth's evidence of such low quality, tenuous, vague and uncertain as to make the verdicts of guilty pure conjecture. The jury, as the finder of fact, weighed all the testimony and credibility of the witnesses and evidence. The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. The appellate court is not permitted to substitute its judgment for that of the fact-finder and will not reverse the judgment of sentence unless the verdict is so contrary to the evidence as to shock the court's conscience.

3. The court did not err in allowing the Commonwealth, over objection, to cross-examine the defendant on issues that were outside the scope of direct examination. The court did not err by allowing the District Attorney to ask questions regarding one of the victims and the defendant's interaction with her since the direct examination was for the limited purpose of the defendant's mental state with regard to sex acts between him and the second victim. Upon direct examination, defendant opened the door to the issue of consensual sex with the other victim.

4. The sentence imposed was not manifestly excessive, unreasonable or an abuse of discretion insofar as the total confinement imposed and the sentence was consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous.

(William R. Friedman)

Jennifer DiGiovanni for the Commonwealth.
Carrie L. Allman for Defendant.

No. CC 200612114. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Machen, J., June 30, 2009—Defendant was charged at CC200612114 with Rape (18 Pa.C.S.A. §3121); Criminal Conspiracy (18 Pa.C.S.A. §903); Involuntary Deviate Sexual Intercourse (18 Pa.C.S.A. §3123); Robbery (18 Pa.C.S.A.

§3701); two counts of Unlawful Restraint (18 Pa.C.S.A. §2902); two counts of Terroristic Threats (18 Pa.C.S.A. §2706); and two counts of Recklessly Endangering Another Person (18 Pa.C.S.A. §2705). The matter proceeded to a three-day Jury Trial before this Court on July 29, 2008, for both defendant and his co-defendant, Jamie Chaffin.¹ On July 31, 2008, defendant was found guilty of all charges.

On October 30, 2008, Mr. Washington was sentenced as follows: Count 1 (Rape) 84 months to 20 years; Count 2 (Criminal Conspiracy) 72 months to 20 years; Count 3 (IDSI) 84 months to 20 years; Count 4 (Robbery) 84 months to 20 years; Count 5 (Unlawful Restraint) 12-60 months; Count 6 (Unlawful Restraint) 12-60 months; Count 7 (Terroristic Threats) 12-60 months; Count 8 (Terroristic Threats) 12-60 months; and Counts 9 and 10 (REAP) – No Further Penalty. All sentences were to run consecutively. Defendant filed timely Post-Sentence Motions on November 5, 2008, which were denied on January 29, 2009. A timely Notice of Appeal was filed March 2, 2009.²

In his Statement of Matters Complained of on Appeal, defendant raises three (3) main issues.

a. The verdict rendered was contrary to the weight of the evidence where the Commonwealth's evidence was of such low quality, tenuous, vague and uncertain as to make the verdicts of guilty pure conjecture.

The jury, as the finder of fact, weighed all the testimony and credibility of the witnesses and evidence presented at trial and found the defendant guilty of several charges and not guilty of others. "The finder of fact can believe all, part, or none of the testimony presented." *Commonwealth v. Jensch*, 322 Pa.Super. 304 (1983). "The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses." *Commonwealth v. Small*, 741 A.2d 666, 672 (Pa. 1999). When reviewing a claim that a verdict is against the weight of the evidence, an appellate court is not permitted to substitute its judgment for that of the fact-finder. *Id.* Thus, the appellate court will not reverse the judgment of sentence unless the verdict is so contrary to the evidence as to shock the court's conscience. *Id.*

Witness/Victim Burchette credibly testified that she was awakened by someone with a red shirt over their face pointing a gun at her (Jury Trial Transcript, hereinafter "JT," p. 28, 29); she was taken downstairs with the gun at her back (JT, p. 29); that it was a shotgun (JT, p. 29). She further testified that the two men in her home rifled through her belongings (JT, p. 30-32). Ms. Burchette also credibly testified that the person with the black shirt over his face (later identified as defendant Washington) had a gun on her (JT, p. 34); repeatedly threatened her (JT, p. 35); and tied her to her daughter's futon (JT, p. 36). She also credibly testified that the other man (in the camouflage shirt with the red shirt over his face) pointed a gun at her and asked her to perform oral sex on him (JT, p. 39). In addition, she testified credibly that she heard her daughter being raped by the men when they were not in the room with her, that she saw her daughter being taken into the bathroom by the two men.

Witness/Victim Diaz credibly testified that she was awakened by the front door being slammed open and two men were standing there with shotguns (JT, p. 87). She also credibly testified that she recognized the two men and identified them as Jamie Chaffin in the camouflage shirt with the red shirt over his face and Killa (nickname for Jerome Washington) with no shirt on and a black shirt around his

face. (JT, p. 87-88). She credibly testified to the repeated threats with the gun (JT, pp. 92-95). She credibly testified that she had a shotgun put in her mouth (JT, p. 95). Ms. Diaz credibly testified with clarity as to the many acts of forced oral, anal and vaginal sex that both intruders had with her (JT, pp. 96-103). Ms. Diaz also credibly testified that she saw her mother tied to the bed (JT, p. 106) and that she was tied to her mother's closet (JT, p. 109). She credibly testified to photographs of the items that were taken from their house (Exhibit 13) and that she never consented to sex with these men (JT, p. 124-125).

Additionally, Detective Halaszynski credibly testified as to the identification process by which the victims identified the defendants (JT, p. 156-158) and as to the statement made by co-defendant Jamie Chaffin (JT, p. 166-171). The expert witness, Robert Askew, credibly testified that a swab of spermatozoa from Ms. Diaz's neck was a match to defendant's DNA (JT, p. 197-198).

Finally, defendant testified that he had broken into the house, tied up the victims but was not credible in his denial that he and his co-defendant had weapons or that there was non-consensual sex (JT, p. 213-218).

Based upon the credibility assessments made by the factfinder and evidence presented in this case, this claim lacks merit.

b. The Court erred in allowing the Commonwealth, over objection, to cross-examine Mr. Washington on issues that were outside of the scope of the direct exam. Specifically, the Court erred in allowing the District Attorney to ask questions regarding Ms. Burchette and his interaction with her as his direct exam was for the limited purpose of his mental state with regard to the sex acts between him and Ms. Diaz.

Upon direct examination, defendant opened the door to the issue of consensual sex with Ms. Diaz as follows:

Q. What did you say to her?

A. Me and her, we were smoking a cigarette first and then I asked if she would be my girlfriend and she said, no, because I raped her.

Q. Did you think you raped her?

A. No, I didn't know that.

(JT, p. 213-214)

When the Assistant District Attorney began to question the defendant, defense counsel objected and there was a discussion at side-bar. After argument, this court allowed specific cross-examination as to the consensual aspect of the acts. (JT, p. 213-218).

c. The sentence imposed was manifestly excessive, unreasonable and an abuse of discretion where a sentence of total confinement was imposed and such a sentence was not consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the Defendant.

The Superior Court has stated, "We review a sentencing court's determination for an abuse of discretion." *Commonwealth v. Walls*, 926 A.2d 957 (Pa. 2007). "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be

clearly erroneous." *Id.* When reviewing sentencing matters, this Court must accord the sentencing court great weight as it is in best position to view the defendant's character, displays of remorse, defiance or indifference, and the overall effect and nature of the crime. *Commonwealth v. Hanson*, 856 A.2d 1254 (Pa.Super. 2004).

The relevant statute, 42 Pa.C.S.A. § 9781 (c), states:

(c) Determination on appeal.—The appellate court shall vacate the sentence and remand the case to the sentencing court with instructions if it finds:

(1) the sentencing court purported to sentence within the sentencing guidelines but applied the guidelines erroneously;

(2) the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable; or

(3) the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.

In all other cases the appellate court shall affirm the sentence imposed by the sentencing court.

42 Pa.C.S.A. § 9781(c).

In the present case, the defendant was sentenced to: Count 1 (Rape) 84 months to 20 years; Count 2 (Criminal Conspiracy) 72 months to 20 years; Count 3 (IDSI) 84 months to 20 years; Count 4 (Robbery) 84 months to 20 years; Count 5 (Unlawful Restraint) 12-60 months; Count 6 (Unlawful Restraint) 12-60 months; Count 7 (Terroristic Threats) 12-60 months; Count 8 (Terroristic Threats) 12-60 months; and Counts 9 and 10 (REAP) – No Further Penalty. Each sentence is to run consecutively. Each sentence imposed was at the high end of the standard range of the guidelines, taking into consideration the mandatory 5 years for use of a firearm which was applicable to Counts 1, 2, 3 and 4. Since this court did not deviate from the guidelines the question for review is if the sentence was manifestly excessive.

Because defendant's sentence was within the standard range, defendant must demonstrate that the "application of the guidelines [was] clearly unreasonable" pursuant to 42 Pa.C.S.A. § 9781(c)(2).

As the Superior Court recently reviewed in *Commonwealth v. Ventura*, ___A.2d___, 2009 WL 1451450 (Pa.Super. 2009):

Our Supreme Court in *Commonwealth v. Walls*, 592 Pa. 557, 568-9, 926 A.2d 957, 964 (2007) determined that a sentence can be deemed unreasonable after a review of the trial court's application of the factors contained in 42 Pa.C.S.A. §§ 9721(b) and 9781(d). Section 9721(b) states:

[T]he court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant [as well as] any guidelines for sentencing[.]

42 Pa.C.S.A. § 9721(b). Section 9781(d) provides that when we review the record, we must have regard for:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant[;] (2)[t]he opportunity of the sentencing court to observe the defendant, including any pre-sentence investigation[;] (3)[t]he findings upon which the sentence was based[;] (4)[t]he guidelines promulgated by the [sentencing] commission.

Commonwealth v. Ventura, ___A.2d___, 2009 WL 1451450 (Pa.Super. 2009)

In the instant matter, as in *Ventura*, the trial court had the benefit of a pre-sentence report. “Our Supreme Court has determined that where the trial court is informed by a pre-sentence report, it is presumed that the court is aware of all appropriate sentencing factors and considerations, and that where the court has been so informed, its discretion should not be disturbed.” *Commonwealth v. Ventura*, citing *Commonwealth v. Devers*, 519 Pa. 88, 546 A.2d 12 (1988).

In the present case, the trial court heard statements at the Sentencing Hearing from, Victim/Diaz, Victim/Burchette, defense counsel, defendant and the Commonwealth. The court had the additional benefit of a confidential behavior clinic report along with the Pre-Sentence Report which restated much of the substance of the pre-sentence report. As stated in *Commonwealth v. Devers*, 546 A.2d 12 (Pa. 1988):

In imposing sentence, the trial court is required to consider the particular circumstances of the offense and the character of the defendant. The trial court should refer to the defendant’s prior criminal record, age, personal characteristics, and potential for rehabilitation. However, where the sentencing judge had the benefit of a pre-sentence investigation report, it will be presumed that he or she was aware of the relevant information regarding the defendant’s character and weighed those considerations along with mitigating statutory factors.

This court considered the required circumstances of the offenses and the character of the defendant, along with the requisite consideration. The trial court relied upon the pre-sentence report, the statements made by and on behalf of defendant. Further, the sentence imposed was neither outside the applicable guidelines nor unreasonable. As such, there is no merit to defendant’s sentencing claims.

Based upon the foregoing, defendants claims lack merit.

June 30, 2009

¹ Co-Defendant Chaffin has also filed an appeal to his convictions at number 726 WDA 2009.

² The 30th day for filing the appeal was Saturday, February 28, 2009. As such, the filing deadline extended through Monday, March 2, 2009.