PITTSBURGH LEGAL JOURNAL

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PLJ

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

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Mark A. Bartholomaei v. Land Rover North America, Inc.

Motion to Compel Discovery—Class Action Certification

1. Plaintiff filed a class action suit on behalf of himself and all purchasers of a Range Rover equipped with an air suspension system, asserting that it failed to perform properly due to a design defect.

2. The parties engaged in discovery on class certification. Plaintiff submitted discovery requests and a Motion to Compel complete responses to two particular Interrogatories.

3. Plaintiff's first interrogatory requested names, addresses and telephone numbers for dealers previously identified by number, asserting that this information is relevant to commonality and typicality, two requirements of class certification. Defendant objected to this interrogatory as irrelevant to the ultimate merits as well as outside the scope of the discovery regarding class certification, and that it would require Defendant to assist Plaintiff in locating additional plaintiffs. The Court agreed, finding that, although the discovery may be relevant to the ultimate merits of the case, Plaintiff's explanations were inadequate for pre-certification discovery.

4. Plaintiff's second interrogatory requested that Defendant set forth the search procedures, parameters and criteria used to accumulate and assemble copies of emails provided in a previous discovery response. Defendant did not object and asserted that a manual search was conducted of all potentially responsive documents. The Court found the response incomplete as to the specific subparts relating to the procedure and parameters of the search criteria and ordered Defendant to respond in full.

(Angel L. Revelant)

James E. DePasquale for Plaintiff.
David McClenahan for Defendant.

No. GD 03-006834. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM OPINION

Ward, J., February 26, 2008—Plaintiff has brought the above captioned case as a class action on behalf of himself and all persons nationwide who purchased or own a Range Rover sport utility vehicle built on or before June 13, 2003 that is equipped with an air suspension system. Plaintiff alleges that the Range Rover's air suspension system fails to perform properly due to a design defect. Currently, the parties are engaged in discovery on issues pertaining to class certification.

Before the Court is Plaintiff's Motion to Compel Full and Adequate Responses to Plaintiff's Third Set of Interrogatories. Specifically, Plaintiff is requesting that Defendant provide full and complete substantive responses to Interrogatories #1 and #2 contained in the Plaintiff's Third Set of Interrogatories.

Interrogatory #1

Interrogatory #1 of the Plaintiff's Third Set of Interrogatories requests that the Defendant produce the names, mailing addresses, and telephone numbers of Range Rover dealers previously identified by the Defendant by dealer number. Defendant objects to Interrogatory #1 on the grounds that it seeks information that is entirely irrelevant both to the ultimate merits of the action and with regard to the present scope of discovery, the class certification stage of these proceedings. Further Defendant also objects to Interrogatory No. 1 on the grounds that it transparently has been propounded to assist Plaintiff's counsel in an improper effort to utilize Defendant's resources to locate additional named plaintiffs.

Pre-certification discovery is often necessary in order to provide the court with sufficient information to determine whether certification is appropriate. *See Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 571 (2nd Cir. 1982)[1] Pre-certification discovery must be sufficiently broad to give the plaintiff a realistic opportunity to meet the requirements of class certification, but at the same time, a defendant should be protected from overly burdensome or irrelevant discovery. *See McCray v. Standard Oil Co.*, 76 F.R.D. 490 (N.D.Ill. 1977).

Plaintiff contends that the names, addresses, and telephone numbers of the dealers are relevant to commonality and typicality. In their brief in support of the Motion to Compel, Plaintiff states that it "has the right to establish commonality and typicality, and has a right to go to each dealer, once identified, to ascertain the individual owners." This Court fails to see how individual owner information is relevant to commonality or typicality. The Defendant previously provided the Plaintiff with a listing of all vehicles upon which repairs were made to the air spring at issue in this case. The Plaintiff has failed to adequately explain how the requested information is relevant to commonality and typicality or any of the other the prerequisites of class certification detailed in Pa. R.C.P. No. 1702.[2]

Alternatively, Plaintiff asserts that discovery of the requested information is relevant because it may lead to the discovery of potential witnesses to the Plaintiff's claim. Although discovery of the dealers' names, addresses, and telephone numbers may be relevant to the merits of the case, at this stage of the proceedings we believe it to be imprudent for the parties to engage in discovery related solely to the merits of the case. ("Discovery into aspects of the merits unrelated to certification delays the certification decision and can create extraordinary and unnecessary expense and burden." *Manual for Complex Litigation (Fourth)* §21.14).[3] Thus, for the forgoing reasons, Plaintiff's Motion to Compel a response to Interrogatory #1 will be denied.

Interrogatory #2

Interrogatory #2 of Plaintiff's Third Set of Interrogatories requests that Defendant "set forth the protocol and procedures used by the Defendant to accumulate and assemble copies of all e-mails previously provided to Plaintiff, and (b) if a key word search was used, explain in detail its manner of functioning, which search method was used, *i.e.*, Boolean, etc, and which keywords were used, and (c) if a "subject line" search was used, what was the search used?"

Defendant answered Interrogatory #2 by stating: "based upon the specific document request and interrogatories propounded by Plaintiff, Land Rover, through its employees, conducted a manual search of all potentially responsive files, including without limitation electronic files (e-mail and otherwise), pursuant to the instruction of counsel."

Pa. R.C.P. No. 4006(a)(2) provides that "[e]ach interrogatory shall be answered fully and completely unless objected to, in which event the reasons for the objection shall be stated in lieu of an answer. Here, Defendant's answer Interrogatory #2 is incomplete. Defendant has failed to directly address subparts (b) and (c) of the interrogatory. Therefore, with respect to Interrogatory #2 Plaintiff's Motion to Compel will be granted and Defendant will be

directed to answer Plaintiff's Interrogatory #2 in full.

BY THE COURT:
/s/Ward, J.

[1] Federal precedent is instructive in construing the Pennsylvania Rules governing class actions. GOODRICH §1701:4.

[2] The prerequisites of certification of class action are (1) the class is so numerous that the joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately assert and protect the interests of the class; (5) the class action provides a fair and efficient method for adjudication of the controversy. Pa. R.C.P. No. 1702

[3] Depending on the particulars of the request, discovery relevant to both certification and the merits may be appropriate at the class certification stage. Here, however, no overlap of certification/merits issues is present because the requested information is wholly unrelated to the class certification requirements.

R. Charles and Susan B. Richey, et al. v. George R. and Robin S. Kenny and North Eastern Uniforms & Equipment, Inc.

Shareholder Dispute—Breach of Contract—Wrongful Discharge

1. Shareholder dispute arose from alleged breach of fiduciary duty/forced buyout, breach of fiduciary duty/appointment of custodian, waste, accounting, breach of implied contract, wrongful discharge and removal of directors.

2. Defendants filed preliminary objections to claims of breach of implied contract and wrongful discharge arguing that there is no express agreement establishing minority shareholder's expectation of lifetime employment and no public policy exception to the at-will employment doctrine applied.

3. The Court granted the Defendants' preliminary objections finding no express agreement of implied promise of lifetime employment for the benefit of the minority shareholder, and public policy exceptions do not apply to this case because there is no evidence that the minority shareholder was discharged in retaliation for exercising rights under a valid Pennsylvania law.

(Robert A. Crisanti)

Kevin K. Douglass for Plaintiffs.
Bernard M. Schneider for Defendants.

No. GD 08-001282. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM

Ward, J., April 8, 2008—This case arises from a shareholder dispute of North Eastern Uniforms & Equipment, Inc. ("North Eastern"). On January 18, 2008, the Plaintiffs filed a seven count complaint against the Defendants, setting forth causes of action for breach of fiduciary duty/forced buyout, breach of fiduciary duty/appointment of custodian, waste, accounting, breach of implied contract, wrongful discharge and removal of directors. The Complaint alleges that majority shareholder, Defendant George Kenny ("Defendant Kenny"), engaged in self-dealing to benefit his immediate family members and himself, while oppressing and squeezing out the minority shareholder, Plaintiff Charles Richey ("Plaintiff Richey"), from ownership and employment in the business. Specifically, Plaintiffs contend that Defendant Kenny wrongfully terminated Plaintiff Richey after Richey refused to execute an amendment to their shareholders agreement that would have enabled Defendant Kenny to transfer his majority shares to family members without triggering Plaintiff Richey's right of first refusal to purchase the shares. It is Plaintiffs' contention that Plaintiff Richey and Defendant Kenny intended that their employment with North Eastern would continue through retirement and that each would participate in the management and operation of the business and receive compensation through salary and bonuses.

Currently before the Court are the Defendants' preliminary objections to the Plaintiffs' claims for breach of implied contract and wrongful discharge.

Defendants preliminarily object to Plaintiffs' claim for breach of implied employment based on Pa.R.C.P. 1028(a)(4) (legal insufficiency). Specifically, Defendants contend that absent an express agreement, a minority shareholder's expectation of lifetime employment is unreasonable. In response, Plaintiffs argue that the Complaint sufficiently states a claim for breach of lifetime employment, a cause of action recognized by Pennsylvania courts.

Under Pennsylvania law there is a strong presumption of employment-at-will for all employer-employee relationships. *Bair v. Purcell*, 500 F.Supp.2d 468, 479 (M.D. Pa. 2007). "The presumption, however, may be overcome by express contract, implied-in-fact contract (that is, the surrounding circumstances of the hiring may indicate that the parties did not intend it to be at-will), and additional consideration passing from the employee to the employer (that is, if the employee bestows a legally sufficient benefit or incurs a sufficient detriment for the benefit of the employer beyond the services for which he was hired, a court may infer that the parties intended to overcome the at-will presumption)." *Scott v. Extracorporeal, Inc.*, 376 Pa.Super. 90, 95, 545 A.2d 334, 336 (1988).

Here, Plaintiffs do not allege that an express employment contract exists between the parties. Further, the Plaintiffs have failed to allege circumstances to suggest that an implied contract for lifetime employment existed between the parties. Plaintiffs cite circumstances in the Complaint including Plaintiff Richey's contribution of capital to the business and decision to leave his job at Sol Neft (Plaintiff Richey and Defendant Kenney's previous employer), the continuous payment of salary and bonuses to the business owners-rather than dividends-, the closely held status of the business, the formation of the Kenny/Richey Partnership,[1] and Richey's continuous and uninterrupted status as an employee, shareholder, officer and director of North Eastern for 18 years. None of these facts suggests that the parties intended that the employment be anything other than at-will. The circumstances surrounding Plaintiffs' employment with North Eastern are not unusual in closely held corporations. In support of their allegation of an implied contract, Plaintiffs further allege in their Complaint that Plaintiff Richey and Defendant Kenny understood and impliedly agreed that their employment with North Eastern would continue through retirement. However, it is well-established Pennsylvania law that an understanding that employment was to be for life, alone,

is insufficient to overcome the at-will employment presumption. *See Scott*, 376 Pa.Super. at 96, 545 A.2d at 337. The circumstances offered by the Plaintiffs, either individually or in combination, are insufficient to establish an implied-in-fact contract.

Additionally, the facts and circumstances alleged by Plaintiffs do not suggest that Plaintiff Richey bestowed a legally sufficient benefit or incurred a sufficient detriment for the benefit of the employer beyond the services for which he was hired. "One type of consideration often discussed is the relocation of an employee, particularly when accompanied by relocation of a family. Other relevant factors include abandonment of other job opportunities and the sale of a home." *Bair*, 500 F.Supp.2d at 479. We recognize that the Plaintiffs do allege in Count V of the Complaint, Plaintiff Richey's decision to leave his previous employment at Sol Neft as a circumstance to overcome the at-will presumption. However it is clear from the totality of the Complaint that Plaintiff Richey left his previous employment at Sol Neft for the express purpose of starting a new uniform business with Defendant Kenney not because he was being guaranteed lifetime employment by North Eastern. None of the other factors plead by the Plaintiffs constitute a legally sufficient detriment to Plaintiff Richey or a detriment to him beyond the services for which he was hired.

The Plaintiffs have not plead sufficient facts to overcome the presumption of at-will employment presumption. Thus, the Preliminary Objections of the Defendants to Count V (Breach of Implied Employment Contract) of the Plaintiffs' Complaint will be sustained.

Defendants also preliminarily object to Plaintiffs' claim for Wrongful Discharge (Count VI). Defendants contend that the Plaintiffs' claim for wrongful discharge is legally insufficient because the public policy exception to the at-will employment doctrine does not apply to this case. Plaintiffs argue that the public policy exception to the at-will employment doctrine applies because the Complaint alleges that Plaintiff Richey was discharged for exercising his legal rights under the Pennsylvania Business Corporation Law ("BCL"). Specifically, Plaintiffs claim that that Plaintiff Richey was terminated in retaliation for exercising his right to refuse a restriction on the transfer of his shares of stock, a right conferred by Section 1529(b) of the BCL.

"It is well established that Pennsylvania does not recognize a common law cause of action against an employer for the termination of an at-will employee. However, where it is clear that a well-established public policy would be subverted, a court may find an exception to this normally rigid edict." *Weaver v. Harpster,* 885 A.2d 1073, 1076 (Pa.Super. 2005). To state a public policy exception to the at-will employment doctrine, the employee must point to a clear public policy articulated in the constitution, in legislation, an administrative regulation, or a judicial decision. *Id.* The exception is applicable where an employer discharges employee in retaliation for the employee's exercise of his rights under a valid Pennsylvania statute. *Shick v. Shirey,* 552 Pa. 590, 716 A.2d 1231 (1998); *Highhouse v. Avery Transp.,* 443 Pa.Super. 120, 660 A.2d 1374 (1995).

15 Pa.C.S.A. §1529(b) states:

> Transfer restrictions generally.—A restriction on the transfer or registration of securities of a business corporation may be imposed by the bylaws or by an agreement among any number of security holders or among them and the corporation. A restriction so imposed shall not be binding with respect to securities issued prior to the adoption of the restriction unless the holders of the securities are parties to the agreement or voted in favor of the restriction.

Plaintiffs interpret this section of the BCL to bestow a right on a minority shareholder to freely decline or accept a restriction on his stock if proposed by a majority shareholder. This Court however, does not read 15 Pa.C.S.A.(b) to grant such a right. This Court reads 15 Pa.C.S.A.(b) to only confer the right to impose a restriction through bylaws or agreement among the shareholders on the transfer of stock. Thus, it is this Court's ruling that Plaintiff Richey was not fired for exercising legal rights 15 Pa.C.S.A. §1529(b) and, therefore, the public policy exception is inapplicable. The Defendants Preliminary Objections to Count VI of the Plaintiffs' Complaint will be sustained.

BY THE COURT:
/s/Ward, J.

Dated: April 7, 2008

AND NOW, this 7th day of April 2008, upon consideration of Defendants' Preliminary Objections to Plaintiffs' Complaint, all responses in oppositions, and in accordance with the Memorandum Opinion being contemporaneously filed of record, it is hereby ORDERED, ADJUDGED and DECREED that the Defendants' Preliminary Objections to the Plaintiffs' Complaint are SUSTAINED.

BY THE COURT:
/s/Ward, J.

[1] It is alleged by Plaintiffs that in January 1991 Plaintiff Richey and Defendant Kenny formed a 50/50 partnership to purchase real estate located at 3040 Smallman Street Pittsburgh, PA that North Eastern had leased since 1989.

Frank R. Zokaites v. Pittsburgh Irish Pubs, LLC and Colm McWilliams

Execution Upon Limited Liability Company Member's Ownership Certificate

1. Judgment creditor ("Zokaites") attempted to execute upon a limited liability company (LLC) member's ownership certificate and, thus, assume that member's interest in the LLC.

2. In a case of first impression in the Commonwealth, the Court prohibited Zokaites' efforts, ruling that because execution would include both economic rights and the right to participate in the management of the LLC, such a transfer would conflict with Pennsylvania's Limited Liability Company statute.

(Robert A. Crisanti)

Jeffrey A. Hulton for the Plaintiff.
Kurt L. Sundberg for Colm McWilliams.

No. GD 05-030435. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Ward, J., April 29, 2008—Appellant, Frank R. Zokaites ("Zokaites") appeals this Court's Order of February 12, 2008 denying Zokaites' Motion to Compel Member Interest Transfer to Sheriff as Trustee for Sale to Satisfy Judgment.

On November 21, 2005 Zokaites obtained a judgment against Defendants Pittsburgh Irish Pubs, LLC and Colm McWilliams (the "Defendants").[1] On April 2, 2007, Zokaites filed a writ of execution and unsuccessfully attempted to collect his judgment. Thereafter, on September 4, 2006 Defendant Pittsburgh Irish Pubs LLC filed for bankruptcy under Chapter 11.

In an attempt to collect the outstanding judgment from Defendant Colm McWilliams, on September 24, 2007 Plaintiff presented to this Court a Motion to Compel Member Interest Transfer to Sheriff as Trustee for Sale to Satisfy Judgment ("Motion to Compel"). The Motion sought to compel Defendant Colm McWilliams to transfer his 20.05% outstanding member interests in Pittsburgh Irish Pubs LLC and Molly Brannigans LLC to the Allegheny County Sheriff for levy and sale. On September 24, 2007, this Court granted the Motion to Compel and ordered Defendant McWilliams to transfer his member interests in Pittsburgh Irish Pubs, LLC and Molly Brannigans, LLC to the Sheriff.[2] The Order noted that no one for the Defendants appeared to contest the motion.

On October 3, 2007, Defendant McWilliams filed a Motion for Reconsideration of the Court's September 24, 2007 Order. Subsequently, this Court granted the Motion for Reconsideration and vacated the order of September 24, 2007. Oral argument on the underlying Motion to Compel was held for October 4, 2007. At argument, bankruptcy attorney for Pittsburgh Irish Pubs informed this Court of his intention to file a motion for extension of the automatic stay to Defendant Colm McWilliams in Bankruptcy Court. Based upon the representation of bankruptcy counsel for Pittsburgh Irish Pubs that the Motion to Extend the Stay would be immediately filed with the Bankruptcy Court, this Court deferred a decision on the merits regarding the underling Motion to Compel pending a decision by the Bankruptcy Court regarding the stay.

On November 27, 2007, Jeffrey A. Deller, United States Bankruptcy Judge for the Western District of Pennsylvania, entered an order denying Defendant Pittsburgh Irish Pubs' Motion to Extend the Automatic Stay to Defendant McWilliams. This Court then scheduled re-argument on the Motion to Compel for February 11, 2008.[3]

After argument on February 11, 2008 and consideration of the briefs filed by the parties, this Court entered an order denying the motions to compel member interest on February 12, 2008.[4] On March 6, 2008 Zokaites filed a Notice of Appeal from the February 12, 2008 Order. Thereafter, on March 18, 2008, Zokaites timely filed a Concise Statement of Matters Complained of on Appeal.

The question raised by Zokaites' appeal is whether a judgment creditor may execute upon an LLC member's ownership certificate and therefore assume the member's ownership interest in the LLC. This appears to be a case of first impression in Pennsylvania as review of case law reveals that the Pennsylvania Appellate Courts have yet to rule on this issue.

The Pennsylvania Limited Liability Company statute does not directly address the question of whether a judgment creditor may execute upon a member's ownership certificate in a limited liability company. However, the LLC statute does provides that:

> Unless otherwise provided in writing in the operating agreement, if all of the other members of the company other than the member proposing to dispose of his interest do not approve of the proposed transfer or assignment by unanimous vote or written consent, which approval may be unreasonably withheld by any of the other members, the transferee of the interest of the member shall have no right to participate in the management of the business and affairs of the company or to become a member. The transferee shall only be entitled to receive the distributions and the return of contributions to which that member would otherwise be entitled.

15 Pa.C.S.A. §8924(a)

Further, the Comment to 15 Pa.C.S.A. §8924 goes on to state that "[s]ubject to a contrary agreement, a member can freely transfer only economic rights" and "[a] transfer of economic rights only, whether voluntary or involuntary, is not intended to be an 'event that terminates the continued membership of a member in the company.'"

It is clear from the language of 15 Pa.C.S.A. §8924 that a membership interest in a LLC includes both economic rights and also rights to participate in the management of the business. The language of §8924 further prescribes that if a transfer of an interest is not unanimously approved by the nontransferring members, the interest is then divided into its economic rights, which are transferred, and its governance rights, which are not transferred. It follows from this that where, as here, a judgment creditor attempts to obtain a debtor's interest in a limited liability company that the interest is split in two with the judgment creditor obtaining the economic rights and the governance rights remaining with the member-debtor.

In discussing a provision of the Indiana Limited Liability Company law substantively indistinguishable from 15 Pa.C.S.A. §8924, the Indiana Court of Appeals stated that: "[t]here is no reason why our courts should disregard the intent of the General Assembly to protect the close-knit structure of a LLC and violate the other members' interests and rights by declaring that they must accept a judgment creditor of a member into full membership with all the rights appurtenant thereto when the judgment debtor could not transfer those rights himself." *Brant v. Krilich,* 835 N.E.2d 582, 592 (Ind.App. 2005). We concur with the Indiana Court's reasoning and believe it would be contrary to the organizational nature of the LLC to permit a judgment creditor to assume a creditor's participation rights without the other members' approval.

Plaintiff cites the case of *Gulf Mortgage and Realty Investments v. Alten,* 282 Pa.Super. 230, 422 A.2d 1090 (1980) in support of his argument that a transfer of the membership interests of the LLCs is the appropriate remedy in this case. In *Gulf Mortgage,* the Pennsylvania Superior Court ruled that shares of a professional corporation constitute property subject to seizure notwithstanding the Pennsylvania Corporation Law's restriction on sales to licensed professionals.

The *Gulf Mortgage* case is distinguishable from the instant case in that it involved shares of a professional corporation, not the interest of a member in a limited liability company. The Pennsylvania Professional Corporation Law provided no language exempting shares of a professional corporation from levy and sale upon execution. Here, however, the language of §8924 of the Pennsylvania LLC Act dictates that judgment creditor is only entitled to economic rights and not the governance rights of a debtor member's interest in a limited liability company.

Thus, here a transfer of Defendant McWilliams' actual certificates and rights to participate in the management of the limited liability companies to Zokaites would be inappropriate. Zokaites' proper remedy is to seek an order from this Court for the distributions and the return of contributions to which Defendant McWilliams is entitled to from the LLCs.[5]

BY THE COURT:
/s/Ward, J.

Dated: April 28, 2008

[1] A Complaint in Confession of Judgment was filed by Zokaites against the Defendants in the amount of $121,980.50 plus continuing interest.

[2] The Order further provided that if the original member interests have not been issued or cannot be found or located within 5 days from the date of this order, the Defendant McWilliams is directed to execute an affidavit to that effect and directed to cause Pittsburgh Irish Pubs, LLC and Molly Brannigans, LLC to issue the original certificates or to issue replacement certificates and to transfer the certificates to the Sheriff for levy and sale. Further, it was ordered that Defendant McWilliams shall be held in contempt of Court upon his failure to perform the foregoing acts and that the Allegheny County Sheriff is directed to enforce this Order and to take Defendant McWilliams into custody and transport him to this Court for further contempt proceedings.

[3] On February 1, 2008 Plaintiff filed another Motion to Compel Defendant McWilliams' Member Interest Transfer in Erie Irish Pubs LLC and requested that the Court's consider the Motion in conjunction with the previously filed Motion to Compel Member Interests in Pittsburgh Irish Pubs, LLC and Molly Brannigans, LLC.

[4] This Order encompassed both the Motion to Compel Member Interests in Pittsburgh Irish Pubs, LLC and Molly Brannigans, LLC and the Motion to Compel Member Interest Transfer in Erie Irish Pubs LLC.

[5] This remedy is equitable to the charging order provided by Pennsylvania's Partnership and Limited Partnership statutes. 15 Pa.C.S.A. §8345; 15 Pa.C.S.A. §8563.

Pennsylvania National Mutual Casualty Insurance Company v. James Dean Guardino d/b/a James Dean Autoworks, Audrey J. D'Incau, Scott R. Birdseye, and Automobile Insurance Company of Hartford, Connecticut

Automobile Insurance Company of Hartford v. James Guardino, et al.

Declaratory Judgment Actions—Motion for Summary Judgment

1. Insurance Carrier A ("Penn National") filed suit seeking a determination as to whether it was required to provide insurance coverage for a lawsuit filed against Defendant Guardino.

2. Defendant Guardino filed a Motion for Summary Judgment on the applicability of the mobile equipment exclusion contained in the Penn National insurance policy.

3. The Court found that there was no issue of material fact as to whether the mobile equipment exclusion applied and granted Guardino's Motion for Summary Judgment.

4. Insurance Carrier B ("Hartford") filed suit seeking a determination as to whether it was required to provide insurance coverage for a lawsuit filed against Defendant Guardino.

5. Defendant Hartford filed a Motion for Summary Judgment contending that coverage was barred by the business exclusion provision contained in its policy.

6. The Court found that there was no issue of material fact that the incident arose from or was connected to any business and granted Hartford's Motion for Summary Judgment.

(Robert A. Crisanti)

Miles A. Kirshner for Pennsylvania National Mutual Casualty Insurance Company.
James Herb for James Guardino d/b/a James Dean Autoworks.
John M. Daley for Audrey J. D'Incau and Scott R. Birdseye.
Bridget M. Gillespie for Automobile Insurance Company of Hartford.

No. GD-06-030500 consolidated with GD-07-010828. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM

Ward, J., May 27, 2008—Plaintiff Pennsylvania National Mutual Casualty Insurance Company ("Penn National") has filed the instant action seeking a declaration of rights concerning a business owner's insurance policy and a business auto insurance policy issued to Defendant James Guardino ("Guardino"), doing business as James Dean Autoworks. Defendants Audrey D'Incau and Scott Birdseye (the "Birdseye Defendants") have filed a civil action against Guardino, individually, and doing business as James Dean Autoworks, for damages arising out of bodily injury sustained by D'Incau in an incident occurring on July 4, 2006 at Guardino's camp property[1] located in Armstrong County, PA.[2] On July 4, 2006 Defendants D'Incau and Birdseye were guests of Guardino at his camp property when Guardino offered to take D'Incau for a ride in his dune buggy. Guardino while operating the dune buggy up a hill, lost control of the buggy, flipping it, and causing bodily injury to D'Incau. In their Complaint, Penn National contends that no coverage is available for Guardino under the business owner's insurance policy for the underlying personal injury action due to the mobile equipment exclusion contained in the policy.[3] It is Penn National's contention that the dune buggy ride was a prearranged stunting activity which is specifically excluded under the mobile equipment exclusion to the policy.

Currently before the Court is a Motion for Summary Judgment filed by Guardino on the issue of the mobile equipment exclusion contained in the Penn National policy. Guardino contends that no genuine issue of material fact exists regarding whether the subject dune buggy ride was "prearranged" and/or a "stunting activity" and thus the mobile equipment exclusion is inapplicable.

Initially, we note that a motion for summary judgment may be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Flood v. Silfies*, 933 A.2d 1072, 1074 (Pa.Cmwlth. 2007). The right to judgment must be clear and free from doubt. *Id.* Thus, the Court must "view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact

must be resolved against the moving party." *Id.*

"Where an insurer relies on a policy exclusion as the basis for its denial of coverage and refusal to defend, the insurer has asserted an affirmative defense and, accordingly, bears the burden of proving such defense." *Madison Const. Co. v. Harleysville Mut. Ins. Co.*, 557 Pa. 595, 605, 735 A.2d 100, 106 (1999).

> The mobile equipment exclusion provides:
>
> h. Mobile Equipment
>
> "Bodily injury" or "property damage" arising out of:
>
> (2) The use of "mobile equipment" in, or while in practice for, any prearranged racing, speed, demolition or stunting activity.

For the purposes of this Motion it is uncontested that the dune buggy qualifies as a piece of "mobile equipment" under the Penn National policy. What is at issue is whether the dune buggy ride was "prearranged stunting activity." Setting aside the issue of prearrangement for a moment, we will first examine whether this dune buggy ride was "stunting activity."

"The task of interpreting an insurance contract is generally performed by a court rather than by a jury. The goal of that task is, of course, to ascertain the intent of the parties as manifested by the language of the written instrument. Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement. Where, however, the language of the contract is clear and unambiguous, a court is required to give effect to that language." *Id.* at 606, 735 A.2d at 106.

The term "stunting" is not defined by the Penn National policy. "Words of common usage in an insurance policy are to be construed in their natural, plain, and ordinary sense." *Id.* at 608, 735 A.2d at 108. Courts often consider dictionary definitions in construing these terms.

The Merriam-Webster online dictionary defines stunt as: "an unusual or difficult feat requiring great skill or daring; *especially*: one performed or undertaken chiefly to gain attention or publicity." In their brief in response to Guardino's Motion for Summary Judgment, Penn National cites Webster's New Twentieth Century Dictionary definition of stunt: "something done for thrill, to attract attention."[4]

The deposition testimony of Guardino and D'Incau reveals that the dune buggy ride was engaged in for excitement or thrill, however, absolutely no evidence has been offered by Penn National to suggest that the activity required great skill or daring and/or was engaged in to attract attention or for publicity. Without a scintilla of evidence to suggest that the dune buggy ride required great skill or daring or was engaged in to attract attention or for publicity, Penn National has failed to carry its burden. No issue of material fact exists as to whether this was a "stunting activity"; therefore, we must grant Guardino's Motion for Summary Judgment on the issue of the mobile equipment exclusion.[5]

BY THE COURT:
/s/Ward, J.

[1] The Armstrong County camp is actually owned by Guardino's wife.

[2] This underlying personal injury action was filed on August 2, 2006 at GD 06-018219.

[3] Penn National also contends that coverage is inapplicable because the subject injury did not arise as a result of business activity.

[4] This definition was also cited by the Court of Appeals of Ohio in the case of *Blankenship v. CRT Tree*, 2002 WL 31195215 (Ct. of Appeals of Ohio 2002).

[5] Having ruled that no issue of material fact exists as to whether the dune buggy ride was a "stunting activity" we need not make a ruling regarding whether the activity was "prearranged."

MEMORANDUM

Ward, J., May 27, 2008—Plaintiff Automobile Insurance Company of Hartford ("Hartford") has filed the instant action seeking a declaration of rights concerning a homeowner's insurance policy issued to Defendant James Dean Guardino ("Guardino"). Defendants Audrey D'Incau and Scott Birdseye (the "Birdseye Defendants") have filed a civil action against Guardino, individually and doing business as James Dean Autoworks, for damages arising out of bodily injury sustained by D'Incau in an incident occurring on July 4, 2006 at Guardino's camp property[1] located in Armstrong County, PA.[2] On July 4, 2006 Defendants D'Incau and Birdseye were guests of Guardino at his camp property when Guardino offered to take D'Incau for a ride in his dune buggy. Guardino while operating the dune buggy up a hill, lost control of the buggy, flipping it, and causing bodily injury to D'Incau. In their Complaint, Hartford contends that no coverage is available under the homeowner's policy to Guardino for the underlying personal injury action.

Currently before the Court is a Motion for Summary Judgment, filed by Hartford and a Motion for Partial Summary Judgment[3] filed by the Birdseye Defendants.

A motion for summary judgment may be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Flood v. Silfies*, 933 A.2d 1072, 1074 (Pa.Cmwlth. 2007). The right to judgment must be clear and free from doubt. *Id.* Thus, the Court must "view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." *Id.*

Initially, we will address the Motion for Summary Judgment filed by Hartford. In its Motion for Summary Judgment Hartford offers two arguments in support of its contention that it has no duty to defend or indemnify Guardino in the underlying personal injury action. First Hartford contends that coverage for the underlying action is barred by the business exclusion contained in the Policy because the alleged accident occurred at a customer appreciation event for Guardino's Autoworks business. Alternatively, Hartford argues that because the Armstrong Camp property does not qualify as an "insured location" under the Policy, coverage is barred by the owned premises exclusion and/or the motor vehicle exclusion.

Firstly, we will address the issue of whether coverage is barred by the business exclusion provision contained in the policy.

> The business exclusion provides:
>
> b. Arising out of or in connection with a "business" conducted from an "insured location" or engaged in by an "insured," whether or not the "business is owned or operated by an "insured" or employs an "insured." This exclusion applies but is not limited to an act or omission, regardless of its nature or circumstances involving a service or duty rendered,

> promised, owed or implied to be provided because of the nature of the "business";

Where an insurer relies on a policy exclusion as the basis for its denial of coverage and refusal to defend, the insurer has asserted an affirmative defense and, accordingly, bears the burden of proving such defense. *Madison Const. Co. v. Harleysville Mut. Ins. Co.*, 557 Pa. 595, 605, 735 A.2d 100, 106 (1999).

In support of its Motion for Summary Judgment on the issue of the business exception, Hartford relies in part on deposition testimony of Guardino. This testimony reveals that the accident occurred at an event sponsored by Guardino for his customers and employees and that he, himself, considered the gathering to be a business event.

> Q: Do you consider the July 4th event to be a business event?
>
> A: Sure.
>
> Q: How so?
>
> A: Because I invite all my customers and stuff, and any other time I don't invite my customers.

The deposition testimony further revealed that Guardino wrote off the July 4th event as a business expense on his income tax. Additionally, it must be noted that in the case consolidated with the instant matter,[4] Guardino made an admission that the D'Incau accident occurred during the course of a business event at which he was conducting business.

In response to Hartford's Motion for Summary Judgment, Guardino contends that he was not conducting business at the camp and it was a social gathering.[5] Although Guardino testified at his deposition that he invited friends as well as business associates to the July 4th gathering, it is clear from the totality of his deposition that the primary purpose for the event was business.

Thus, there exists no issue of material fact on this issue of whether the accident arose out of or in connection with a "business" conducted from an "insured location" or engaged in by an "insured."[6] Accordingly we must grant the Hartford's Motion for Summary Judgment on the issue of the business exclusion and find that Hartford has no duty to defend or indemnify James Guardino in the underlying action filed at GD 06-018219.

Having granted Hartford's Motion for Summary Judgment on the issue of the business exclusion, we do not reach the issue of whether the campsite was an "insured location" for the purposes of the owned premises and/or motor vehicles exclusion. Correspondingly, the Birdseye Defendants' Motion for Partial Summary Judgment on the "insured location" issue is rendered moot.

[1] We note that the Armstrong County camp is actually owned by Guardino's wife. She is also an insured under the Hartford Homeowner's Policy.

[2] This underlying personal injury action was filed on August 2, 2006 at GD 06-018219.

[3] The Birdseye Defendants' Motion for Summary Judgment addressed the issue of whether the Armstrong County camp property qualifies as an "insured location" under the policy.

[4] See GD 06-030500.

[5] The Birdseye Defendants all but concede that the 4th of July event was held for a business purpose.

[6] There is no dispute that Guardino is an "insured" under the policy.

Selective Software, Inc. v. Steve and Dona Worthington, et al.

Breach of Contract—Contracting with Former Employees of a Party—Motion for Preliminary Injunction

1. Provider of computer equipment and services ("Selective") sued former customers alleging breach of their agreement precluding the right to contract with former employees of Selective for two (2) years following termination of their agreement.

2. Selective filed a Motion for Preliminary Injunction requesting the Court enjoin the Defendants from transacting business with any current or former employees of Selective.

3. Preliminary objections filed by Worthington Defendants were granted by the Court because their agreement with Selective did not provide for a termination date and had expired more than seven (7) years before these defendants had contracted with any former employees of Selective.

4. The Motion for Preliminary Injunction filed by Selective was granted by the Court as to the remaining Defendants to prevent immediate and irreparable harm to Selective because it would restore the parties to the status as it existed immediately prior to the alleged wrongful conduct.

(Robert A. Crisanti)

Jeffrey A. Hulton for Plaintiff.
Joseph P. Murphy for Defendants.

No. GD 07-026642. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM

Ward, J., June 18, 2008—Plaintiff Selective Software, Inc., ("Selective") is a corporation in the business of selling computer hardware and software products and creating customer computer programs. Defendants Worthington Sales Associates, West Penn Financial Services, Pittsburgh Anesthesia Associates, and National Road Utility Supply ("Defendants")[1] are former customers of Selective. Non-parties Jack Ingraham, Karen DeZort and Chris Marvin are former employees of Selective.

Selective has brought this action pursuant to written agreements between Selective and the Defendants in which the Defendants agreed not to contract with Selective's employees and former employees for a period of two (2) years following the termination of the agreements.[2]

In July 2007, Jack Ingraham, Karen DeZort and Chris Marvin formed Iceburgh Solutions, LLC ("Iceburgh"). Thereafter, on or about August 7, 2007, Jack Ingraham, Karen DeZort and Chris Marvin resigned their employment with Selective. Subsequently, Iceburgh entered into agreements with each of the Defendants pursuant to which Iceburgh agreed to provide the type of computer related sales and services previously provided to the Defendants by Selective.

Currently before this Court is Plaintiff's Motion for Preliminary Injunction. Plaintiff is requesting that the Court enjoin the Defendants from transacting business with Iceburgh, Karen DeZort, Jack Ingraham, Chris Marvin or any current or former employees of Selective Software.

Initially we will discuss the Motion for Preliminary Injunction with respect to Steve Worthington and Dona Worthington, t/d/b/a Worthington Sales Associates (the

"Worthington Defendants").

On December 29, 1998 Selective and the Worthington Defendants entered into an agreement for computer goods and services (the "Agreement"). The Agreement between Selective and the Worthington Defendants contains a non-hire provision pursuant to which the Worthington Defendants agreed not to contract with Selective's employees for a period of two years beyond the termination date of the Agreement. A close examination of the Agreement reveals that the document contains no termination date. The Agreement does however, provide an expiration date of December 31, 1999.[3] Therefore, the non-hire prohibition concluded two years from December 31, 1999, i.e. December 31, 2001. The Worthington Defendants entered into an agreement with Iceburgh for computer products and service in November 2007. Thus, the Worthington Defendants hiring of Iceburgh was not violative of the non-hire agreement as it was beyond the time scope fixed by the Agreement.[4]

Having addressed the unique situation regarding the Worthington Defendants we will now address the Motion for Preliminary Injunction with respect to the other Defendants, collectively.

A preliminary issue raised by the Defendants in their briefs in opposition to the Plaintiff's Motion is that Iceburgh is not a former employee of Selective and thus the Defendants did not breach the non-hire agreement by hiring Iceburgh. We recognize that the contracts for computer software and services are between the Defendants and Iceburgh rather than Jack Ingraham, Karen DeZort and Chris Marvin. However, the evidence introduced revealed that the only members of Iceburgh are Jack Ingraham, Karen DeZort and Chris Marvin. Iceburgh has no employees and the three partners of Iceburgh perform all of the work of Iceburgh. Additionally, it must be noted that Iceburgh sent out solicitory emails and letters to potential customers noting the fact that Iceburgh was in essence Jack Ingraham, Karen DeZort and Chris Marvin.[5] The evidence also demonstrates that when the contracts were entered into, the Defendants were well aware that they were contracting with Jack Ingraham, Karen DeZort and/or Chris Marvin acting as Iceburgh.

> [W]here it is necessary in order to meet the ends of justice, a court of equity will not hesitate to treat the corporation and the individual or individuals owning its shares as identical. The fiction of a corporation as an entity distinct from the aggregate of individuals comprising it was designed to serve convenience and justice. There is consequently an exception recognized wherever the rule is known, namely, that the fiction will be disregarded and the individuals and corporation considered as identical whenever justice or public policy demand it and when the rights of innocent parties are not prejudiced thereby nor the theory of corporate entity made useless. We have said that 'a court of equity does not take a skin-deep view of a situation like that here presented. It looks to the substance of the transaction, not to its mere form or color and sees things as ordinary [persons] do. Again we said, equity, which penetrates through forms to realities, will regard plaintiff and the corporation as so far identical as to recognize him as the true party in interest.

Markovitz v. Markovitz, 336 Pa. 122, 126-127, 8 A.2d 36, 37-38 (1939).

We believe in this instance, it is proper to disregard the corporate form for the purposes of this non-hire agreement. Here, recognizing the LLC as a distinct entity from its members would violate the spirit of the non-hire agreement. To recognize the corporate form in situations such as this would allow parties to circumvent easily their contractual obligations through use of an LLC agreement. Thus, for purposes of this Motion for Preliminary Injunction we will treat Iceburgh and the former Selective employees (Jack Ingraham, Karen DeZort and Chris Marvin) as one in the same.

There are six "essential prerequisites" that a party must establish prior to obtaining preliminary injunctive relief. The party must show: 1) "that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages"; 2) "that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings"; 3) "that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct"; 4) "that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits"; 5) "that the injunction it seeks is reasonably suited to abate the offending activity"; and, 6) "that a preliminary injunction will not adversely affect the public interest." The burden is on the party who requested preliminary injunctive relief. *Warehime v. Warehime,* 580 Pa. 201, 209-210, 860 A.2d 41, 46-47 (2004).

Here, a preliminary injunction is necessary to prevent immediate and irreparable harm and greater injury would result from refusing an injunction than from granting it. Selective has suffered the loss of trained and valued employees as well as anticipated benefits from a continuing business relationships with the Defendants. Further, an entry of a preliminary injunction will not result in harm to the Defendants as they are free to pursue other services from companies operated by those other than Selective's former employees.

Relief in the form of a preliminary injunction restores the parties to the status as it existed immediately prior to the alleged wrongful conduct. That is, the contractual ties between the Defendants and Selective's former employees will no longer exist; dissolution of the contractual bonds between the Defendants and Iceburgh restores the parties to where they were before the breach.

Plaintiff is likely to prevail on the merits considering that he has conclusive proof that the Defendants entered into these non-hire agreements with Selective and subsequently entered into service/product agreements with Selective's former employees in violation of the non-hire provisions. Further, in order to halt the offending activity on the part of the Defendants a preliminary injunction is required. This is the only available remedy which restores the parties to the status quo before the breach and prevents further violation of the contractual terms.

The issuance of the preliminary injunction will not adversely affect the public interest. The Defendants are free to contract for computer software and services with other entities and Iceburgh is free to solicit potential customers other than those which have non-hire agreements with Selective.

For the above reasons, Plaintiff's request for Preliminary Injunction will be granted.

BY THE COURT:
/s/Ward, J.

[1] Plaintiff has entered into a settlement with West Penn Financial Services. Therefore, West Penn Financial Services

is excluded from all discussions regarding the "Defendants" in this Memorandum.

[2] The Agreements provide in pertinent part that: "Customer agrees not to hire, offer to hire, subcontract or otherwise contract with any of Selective's current or past employees for a period of two years beyond the termination date of this Agreement."

[3] Although Selective and the Worthington Defendants continued to do business beyond the December 31, 1999 date, no formal contract was entered into.

[4] We do not reach the question of which Worthington Defendant was the proper party to sue.

[5] A letter to a potential customer dated August 7, 2007 states "You may not recognize the company name on the letterhead [ICEBURGH], but we think that it will become familiar to you very quickly. You have known us as Jack Ingraham, Karen DeZort and Chris Marvin. However, as of August 20, 2007, we are launching a new company called Iceburgh Solutions, LLC."

M. Marlin Metz v. Manjit Khara, Rattan Deep Singh Virk, and Daljit S. Khara

Limited Liability Company Operating Agreement—Breach of Contract—Fiduciary Duties—Promissory Estoppel—Tortious Interference with Contractual Relationship

1. Limited liability company member ("Partner A") sued fellow member ("Partner B") pursuant to an operating agreement and sued others for interference with contractual relations.

2. Partner B filed preliminary objections demurring to Count I (Breach of Contract).

3. The Court denied the preliminary objections and found that a cause of action existed to the extent that the alleged breach was of a promise memorialized in a writing signed by the partners.

4. Partner B filed preliminary objections to Count II (Breach of Fiduciary Duty) and Count III (Promissory Estoppel) claiming these two (2) counts are barred by the "gist of the action" doctrine, because Partner B has no fiduciary duty to Partner A, and because expectation damages are not recoverable on a promissory estoppel claim.

5. The Court denied the preliminary objections to Count II finding a separate cognizable cause of action against Partner B, but granted the preliminary objections to Count III because Partner A lacked a written agreement establishing the requisite duty of Partner B.

6. The remaining defendants filed preliminary objections alleging that Partner A failed to state a cause of action for interference with contractual relations.

7. The Court denied these preliminary objections and found that Partner A had sufficiently pled this Count.

(Robert A. Crisanti)

Herbert A. Terrell for Plaintiff.
Bernard D. Marcus for Defendants.

No. GD-07-025073. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM

Ward, J., June 25, 2008—This case involves a claim for breach of a limited liability company operating agreement and alleged interference with one member's performance under the agreement. M. Marlin Metz (the "Plaintiff") and the Defendant Manjit Khara ("Manjit") formed MK Group, LLC ("MK Group") in August 2006. The parties created MK Group for the specific purpose of establishing a Subway sandwich shop.

It is Plaintiff's contention that Defendant Manjit breached the MK Group Operating Agreement by failing to follow through with assurances of complete capitalization or of additional funding for new business ventures. Plaintiff's Complaint also includes claims for "breach of fiduciary duty" and "promissory estoppel" against Defendant Manjit. Additionally, Plaintiff contends that Defendants Rattan Deep Singh Virk ("Virk") and Daljit S. Khara ("Daljit") tortiously interfered with Plaintiff's existing contractual relationship with Defendant Manjit by persuading or inducing him not to engage or invest in new or additional business with Plaintiff.

Currently before the Court are Preliminary Objections filed by the Defendants Manjit, Virk and Daljit.

Defendants' first preliminary objection is a demurrer to Count I of the Plaintiff's Complaint (Breach of Contract). "A preliminary objection in the nature of a demurrer is properly granted where the contested pleading is legally insufficient. Preliminary objections in the nature of a demurrer require the court to resolve the issues solely on the basis of the pleadings; no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer. All material facts set forth in the pleading and all inferences reasonably deducible therefrom must be admitted as true." *Hess v. Fox Rothschild, LLP,* 925 A.2d 798, 805 (Pa.Super. 2007).

Defendants contend that Defendant Manjit was not required to invest in any new or additional business or invest any additional capital into MK Group under the terms of the MK Group Operating Agreement. Thus, Plaintiff cannot recover damages for injuries allegedly incurred as a result of Defendant Manjit's decision not to engage or invest in new or additional business.

Pennsylvania's Limited Liability Company Law provides that "[a] promise by a member to contribute to a company is not enforceable unless set out in a writing signed by the member." 15 Pa.C.S.A. §8931(b). It is alleged in Count I of Plaintiff's Complaint that pursuant to the MK Group Operating Agreement, Defendant Manjit promised Plaintiff that he would fully contribute his share of capital to the entity. Because Plaintiff alleges that this promise is memorialized in a writing signed by the member, if proven, it may be enforceable.[1]

Plaintiff further contends in Count I of his Complaint that "[w]hen [Defendant] Manjit failed or refused to fully contribute his share of capital to MK he additionally promised or assured Plaintiff that any shortfall in his initial contribution would be 'made good' by investments in new or additional business of which Manjit and Plaintiff would enter into." Plaintiff is in essence contending that Defendant Manjit promised contributions to new investments or additional business as a substitute for the original capital he promised to provide under the Operating Agreement. However, Plaintiff has made no allegation nor has he attached any exhibits to the Complaint revealing that this promise of sub-

stitute capitalization is set forth in a writing.[2] Thus, Plaintiff's breach of contract claim based on Defendant Manjit failure to engage or invest in new or additional business will be dismissed pursuant to 15 Pa.C.S.A. §8931(b).

Defendants' second Preliminary Objection is a demurrer to Count II (Breach of Fiduciary Duty) and Count III (Promissory Estoppel) of Plaintiff's Complaint.

Defendants claim that Counts II and III are barred by the "gist of the action" doctrine, since the relief sought by these two counts is precisely the same relief sought in the breach of contract claim. Further, it is argued that Count II should be dismissed for failing to state a claim because plaintiff has not identified any duty that would have required Defendant Manjit to participate and fund the proposed business ventures. Additionally, Defendants contend, that Count III should be dismissed in part because Plaintiff has not alleged that Defendant Manjit ever promised to pay him for his time and expenses related to the additional business ventures and because Plaintiff's claims for expectation damages are not recoverable on a promissory estoppel claim.

"The gist of the action doctrine acts to foreclose tort claims: (1) arising solely from the contractual relationship between the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates a breach of contract claim or where the success of the tort claim is dependent on the success of a breach of contract claim." *Reardon v. Allegheny College,* 926 A.2d 477, 486 (Pa.Super. 2007).

With respect to Count II (Breach of Fiduciary Duty), Plaintiff claims that Defendant Manjit breached his duty of loyalty and fair dealing to Plaintiff in the following ways in Paragraph 40 of his Complaint:

> a. By allowing the other named defendants here to persuade or influence his decisions in regard to the business and the other business investments of opportunities of MK.
>
> b. By failing to disclose to Plaintiff that his decisions or opinions, as related to MK were controlled, dependent upon, or influenced by the other named defendants herein.
>
> c. By allowing the other named defendants to tacitly act as members of MK.
>
> d. By allowing Defendant Virk to collect fees from MK which said fees were Manjit's personal expenses.

The conduct at issue in the breach of fiduciary claim is not the same conduct for which Defendant seeks recovery under the breach of contract claim. In Count II Plaintiff is not seeking liability resulting solely from contract entered into by the parties; nor does the breach of fiduciary duty claim duplicate the breach of contract claim.

With respect to the issue of fiduciary duties imposed on members of limited liability companies, the Pennsylvania LLC law provides that: "the member has no right to appropriate for personal use property belonging to the company. It is intended that the courts will fashion rules in appropriate circumstances by analogy to principles of corporate or partnership law to deal with situations such as oppression of minority members, actions taken in bad faith, etc. *See* 15 Pa.C.S. §110." 15 Pa.C.S.A. §8943

In many ways the relationship between two equal members in a limited liability company is akin to a partnership. And under Pennsylvania common law dealing with partnership: "One should not have to deal with his partner as though he were the opposite party in an arms-length transaction. One should be allowed to trust his partner, to expect that he is pursuing a common goal and not working at cross-purposes." *Clement v. Clement,* 436 Pa. 466, 468, 260 A.2d 728, 729 (1970). Instantly, Plaintiff alleges that Defendant Manjit was acting contrary to the interests of MK Group at the behest of Defendants Virt and Daljit. These factual allegations make a theory of breach of fiduciary duty cognizable. Therefore, the Preliminary Objections in the nature of a demurrer to Count II of the Plaintiff's Complaint will be overruled.

Regarding Plaintiff's claim for promissory estoppel: "Where there is no enforceable agreement between the parties because the agreement is not supported by consideration, the doctrine of promissory estoppel is invoked to avoid injustice by making enforceable a promise made by one party to the other when the promisee relies on the promise and therefore changes his position to his own detriment." *Crouse v. Cyclops Industries,* 560 Pa. 394, 402, 745 A.2d 606, 610 (2000). The doctrine of promissory estoppel dispenses with the requirement of consideration where justice requires; however, it does not dispense with the requirement of a writing. *See Borrello v. Lauletta,* 455 Pa. 350, 317 A.2d 254 (1974) (holding that the principles of estoppel may not be invoked against the operation of the statute of frauds). In other words, where the law demands that a particular agreement must be in writing to be enforceable, a plaintiff cannot circumvent this requirement by brining a claim for promissory estoppel.

As noted above, 15 Pa.C.S.A. §8931(b) requires that a promise by a member to contribute capital to a company must be in writing to be enforceable. It is this Court's ruling that the doctrine of promissory estoppel may not be invoked to circumvent 15 Pa.C.S.A. §8931(b). Thus, the Defendants' Preliminary Objection to Count III of Plaintiff's Complaint will be sustained.[3]

Defendants' third and final preliminary objection to Plaintiff's Complaint is that Plaintiff has failed to state a claim for interference with prospective advantage. Plaintiff alleges in his Complaint that Defendants Virk and Daljit interfered with prospective advantage by advising and encouraging Manjit to not enter into new or additional business opportunities with Plaintiff and inducing, persuading and/or causing Defendant Manjit to breach his agreement with Plaintiff. Defendants contend that because Defendant Manjit was not contractually obligated to engage or invest in new or additional business the alleged "interference" by Defendants Virk and Daljit did not cause Defendant Manjit to breach the contract. Moreover, because Defendants Virk and Daljit had a legitimate interest in the proposed business ventures, their alleged interference was not wrongful or improper.

For Appellant to prove the tort of interference with prospective business relations, it must establish the following: (1) a prospective contractual relation; (2) the purpose or intent to harm the plaintiff by preventing the relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual damages resulting from the defendant's conduct. *InfoSAGE, Inc. v. Mellon Ventures, L.P.,* 896 A.2d 616, 627 (Pa.Super. 2006).

Plaintiffs have sufficiently plead the elements required to establish a *prima facie* case of interference with contractual relations. Simply because Defendant Manjit was not contractually obligated to engage or invest in new or additional business does not foreclose Plaintiff's claims for interference with prospective contractual relations. An existing contractual right is not required to establish interference with prospective contractual relations, there must only exist reasonable likelihood or probability that transaction would occur. *Id.*

Furthermore, whether Defendants Virk and Daljit Khara had a legitimate interest in the proposed business ventures is an issue of fact that is inappropriately raised by preliminary objection, but which may constitute a defense to the claim. Thus, Defendants' Preliminary Objection to Count III of the Plaintiff's Complaint will be overruled.

ORDER

AND NOW, this 25th day of June 2008, after argument and consideration of the briefs filed, it is hereby ORDERED, ADJUDGED AND DECREED that Defendants' Preliminary Objections to Plaintiff's Complaint are SUSTAINED in part and OVERRULED in part:

1. Defendants' Preliminary Objection to Count I (Breach of Contract) is sustained in part. Plaintiff's claims for breach of contract based on Defendant Manjit Khara's failure to engage in new or additional business including damages for "lost business opportunity," "loss of income from Defendant's failure or refusal to go forward with investment in new or additional business," and "injury to his business and professional reputation," are stricken. Plaintiff's other claims for breach of contract are not dismissed, including his claim for expenses incurred in connection with his purported business development activities.

2. Defendants' Preliminary Objection to Count II (Breach of Fiduciary Duty) is overruled.

3. Defendants' Preliminary Objection to Count III (Promissory Estoppel) is sustained. Count III of the Plaintiff's Complaint is dismissed with prejudice.

4. Defendants' Preliminary Objection to Count IV (Interference with Prospective Advantage) is overruled.

BY THE COURT:
/s/Ward, J.

[1] We note that there is an outstanding issue regarding whether Plaintiff is the proper party to bring this claim. However, this issue is not raised by the Defendant's Preliminary Objections and thus it will not be discussed.

[2] Defendant alleges that pursuant to Schedule B of the MK Group Operating Agreement, it was envisioned by the parties that new or additional business investments would be pursued. However, this is not the same as an allegation which says that Schedule B states that Defendant Manjit promised to invest in new or additional business as substitute capital.

[3] Having disposed of Plaintiff's claim for promissory estoppel on other grounds, the Defendants' "gist of the action" doctrine argument will not be addressed.

Daniel J. Zangrilli and Dorothy M. Zangrilli, Appellants v. Zoning Hearing Board of the Borough of Dormont and the Borough of Dormont

Accessory Garage—Auto Repairs—Enforcement Notice

1. Appellants received Enforcement Notice for violating zoning ordinance restricting use of garage as "accessory building for the storage of motor vehicles where no repair of motor vehicles is done."

2. Neighbor complained that Appellants were working on a vehicle using paint, power tools, and car jacks. Appellants argued that the Commonwealth Court, in a prior case involving the same parties, *Zangrilli v. Zoning Hearing Board of Borough of Dormont*, 692 A.2d 656 (Pa.Cmwlth 1997) held that landowners have the right to repair their personal vehicles in their personal garages. The Court found that this was mere dicta and that the Commonwealth Court did not explain what constituted simple repairs or standard maintenance, and that the painting of one's car does not seem to fall under either of those categories.

(Lynn E. MacBeth)

Albert J. Zangrilli, Jr. for Appellants.
David Raves for Zoning Hearing Board of the Borough of Oakmont.
Thomas H. Ayoob, III for Borough of Oakmont.

No. SA 07-001491. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

James, J., October 7, 2008—Appellants, Daniel J. and Dorothy M. Zangrilli, are a married couple who own a home located in a R-2 District in the Borough of Dormont. Accessory to their home is a private residential garage. The use of the garage for auto repairs has been the subject of litigation since 1995. The Borough of Dormont Zoning Ordinance ("Ordinance") provides in Chapter 210, Section 7 that a private garage is an accessory building for the storage of motor vehicles "where no repair of motor vehicles is done."

On March 27, 2007, complaints were received from a neighbor that appellants were working on a vehicle in the garage. An officer who was dispatched smelled paint, heard the use of power tools, and witnessed a car on jacks being worked on by Mr. Zangrilli. A Civil Complaint at A.R. 07-8044 was initiated and by agreement of the parties, it was consolidated with the later violation.

On July 9, 2007, another complaint was received and an officer was dispatched again. Again the smell of paint was apparent and Mr. Zangrilli was working on a vehicle. An Enforcement Notice was issued to Mr. Zangrilli, which was appealed to the Zoning Hearing Board of the Borough of Dormont. The Board denied appellants request for relief and this timely appeal followed.

Where no additional testimony is taken, this court's scope of review is limited to a determination of whether the Board committed an error of law, abused its discretion, or made findings not supported by substantial evidence. *Mars Area Residents for Safe Community v. Zoning Hearing Bd.*, 529 A.2d 1198, 1199 (Pa.Cmwlth. 1987). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Hertzberg v. Zoning Bd. Of Adjustment,* 721 A.2d 43, 46 (Pa.Cmwlth. 1998).

In regard to the first violation appellants argue that it should be dismissed because no enforcement notice was issued as required by the MPC. *City of Erie v. Freitus,* 681 A.2d 840, 842 (Pa.Cmwlth. 1996); 53 P.S. §10616.1(c). However, on July 23, 2007, an enforcement notice for both the March 23, 2007 and July 9, 2007 violations was issued.

Next, appellants argue that the evidence pertaining to the July 9 incident should be suppressed because it was obtained illegally. However, the evidence presented to the the Board was conflicting, with Mr. Zangrilli arguing that the officer entered without permission and the officer claiming

that he was allowed to enter. Therefore, there was substantial evidence for the Board to find that there was no illegal search and seizure of appellants' garage. The Board, as finder of fact, is the sole judge of credibility of witnesses. *Abbey v. Zoning Hearing of the Borough of East Stroudsburg*, 559 A.2d 107, 111 (Pa.Cmwlth. 1989). Therefore, this court will not interfere with the credibility determinations of the Board. *McDonald v. Zoning Bd. Of Adjustment*, 577 A.2d 240, 241 (Pa.Cmwlth. 1990).

Additionally, appellants argue that in a prior case, *Zangrilli v. Zoning Hearing Bd. of Borough of Dormont*, the Commonwealth Court of Pennsylvania held that landowners have the right to repair their personal vehicles in their personal garages. The Court stated "for a landowner to do simple repairs or standard maintenance on his or her own vehicle is the common understanding and practice in most communities." *Zangrilli v. Zoning Hearing Bd. of Borough of Dormont*, 692 A.2d 656, 660 (Pa.Cmwlth. 1997). However, this was mere dicta and the Court did not go on to explain what constituted simple repairs or standard maintenance. The painting of one's car does not seem to fall under either of those categories.

The language in the Ordinance is straightforward and unambiguous. There is substantial evidence to support the ruling by the Board that the Appellants violated the ordinance on two occasions. The ruling of the Board is affirmed.

Evan Nauman, Douglas Graham, Timothy McVeagh, and Michael Ressler, Appellants v. City of Pittsburgh Zoning Board of Adjustment v. City of Pittsburgh v. Phillip Coblitz, Intervenor

Zoning—Variance—Setback Requirement—Occupancy Permit—Untimely Appeal

1. Property owner obtained occupancy permit and commenced construction on premises with a 50-foot setback requirement. The intended use, a vehicle/equipment repair business, had a 60-foot setback requirement. Permit was issued based on zoning administrator's advice that no variance was needed if setback line of new building was at least as far back as the building on the adjacent property.

2. Surrounding property owners filed an appeal more than thirty days after permit issued and construction commenced. Despite having had notice of the issuance of the permit, appellants filed appeal after several months had passed. The Board determined that the appeal was untimely, and the Court affirmed the Board's finding.

(Lynn E. MacBeth)

Arnold M. Horovitz for Appellants.
Joel P. Aaronson for Intervenor.
Lawrence H. Baumiller for City of Pittsburgh and City of Pittsburgh Zoning Board of Adjustment.

No. SA 08-000374. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

James, J., October 22, 2008—Phillip Coblitz ("Coblitz") was the owner of a piece of property located on the corner of Woodworth Street and Baum Boulevard in Bloomfield on which he operated an auto tune-up business. In 2004, a developer who wanted to purchase the property approached Coblitz. Coblitz agreed to sell the property on the condition that he could secure zoning approval to relocate the auto tune-up business to a piece of property that he owned located diagonally across the street ("Initial Relocation Property").

The Initial Relocation Property was located in a LNC, Local Neighborhood Commercial zoning district. In a LNC district a vehicle/equipment repair business is a special exception, which requires a 60-foot setback for the rear property line. However, since the Initial Relocation Property only had a 35-foot setback Coblitz applied to the City of Pittsburgh Zoning Board of Adjustment ("the Board") for a rear yard setback variance. The application for variance was granted on February 10, 2005. On March 18, 2005, appellants filed an appeal with the Court of Common Pleas of Allegheny County, which ultimately overturned the Board's decision to grant the variance.

In March of 2005, Coblitz purchased property ("Additional Property") adjacent to the Initial Relocation Property. The Additional Property had a 50-foot frontage and combined with the Initial Relocation Property, they form a new parcel ("the New Relocation Property").

On May 10, 2005, Coblitz's attorney met with the Zoning Administrator of the City of Pittsburgh. He advised the attorney that if the setback line of the building on the New Relocation Property was at least as far back as the building on the adjacent property, then no variance was needed. In reliance on this advice Coblitz submitted an Occupancy Permit Application for the New Relocation Property on June 13, 2005, which was approved the same day. Construction on the building commenced August 17, 2005, and was completed April 8, 2006. Appellants, who are surrounding property owners, filed this appeal May 31, 2006.

Where no additional testimony is taken, this court's scope of review is limited to a determination of whether the Board committed an error of law, abused its discretion, or made findings not supported by substantial evidence. *Mars Area Residents for Safe Community v. Zoning Hearing Bd.*, 529 A.2d 1198, 1199 (Pa.Cmwlth. 1987). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Hertzberg v. Zoning Bd. Of Adjustment*, 721 A.2d 43, 46 (Pa. 1998).

Section 923.02.D of the Pittsburgh Zoning Code requires an appeal within 30 days of the Board's determination, action or decision. "Since there is no requirement that a zoning officer give notice of the approval of most zoning applications, the practical effect of the Code is to permit an appeal by a protestant filed within 30 days of the issuance of a permit, or promptly after the protestant learns of its issuance." Ryan, Pennsylvania Zoning Law and Practice, §9.4.3; *Mars*, at 1200. Therefore, actual notice is not required. *Berryman v. Wyoming Borough Zoning Hearing Bd.*, 884 A.2d 386, 389 (Pa.Cmwlth. 2005). "Rather than formal notice, the event which begins the appeal period is either actual notice of permit issuance or a circumstance which would give a person reason to believe that approval had been given." *Id.* at 390. In *Berryman* the beginning of construction was held to be enough to put the aggrieved parties on notice not the date they received actual notice. *Id.* 9

In the current case appellants had numerous signs to alert them to the fact that a new building permit had been issued. Appellee's attorney advised appellants' attorney that

appellee had received a new zoning approval on June 22, 2005, during a status conference. Construction of the building commenced on August 17, 2005, and within months it was apparent that the building was located in a different location than allowed in the original permit. Appellants' attorney even admitted he was advised that a new building permit had been issued.

Additionally, appellants' attended a Planning Commission hearing on October 25, 2005, at which a detailed design plan for the new building permit was shown to and approved by the Planning Commission. In response to the objection of one of the appellants' at that meeting, appellee agreed to reduce one of the setback lines. In fact, the building was completed more than 30 days prior to the appeal being made.

Based on these factors it can be determined the Board's decision was based on substantial evidence. Therefore, the decision of the Board that appellants' appeal was untimely is upheld.

ORDER OF COURT

AND NOW, this 21st day of November, 2008, it is ORDERED that the appeal is denied and decision of the City of Pittsburgh Zoning Board of Adjustment is hereby affirmed.

BY THE COURT:
/s/James, J.

Ross Mendicino, Annunziato Reilsono and Jessica Reilsono, Appellants v. Aleppo Township, Appellee

Amendment to Subdivision Plan—Minor v. Major Subdivision—Timeliness

1. Appellants filed an application in accordance with the Township's Subdivision and Land Development Ordinance seeking a minor amendment to a subdivision plan. Although Appellants first approached the Planning Commission in November of 2006, they claimed they were discouraged from filing the application at that time because there was no quorum for the November meeting.

2. In the meantime the Township enacted a new ordinance effective November 20, 2006 which effectively acted to prevent Appellants from obtaining a minor subdivision.

3. Appellants then submitted their application in December, and it was rejected because it did not comply with the new ordinance. Because the new ordinance was properly enacted and not challenged within 30 days, the Court affirmed the Board's denial and found that it properly applied the new ordinance, and did not apply it retroactively since the application was received after the new ordinance was adopted.

(Lynn E. MacBeth)

Chrystal C. Tinstman for Appellants.
Harlan S. Stone for Aleppo Township.

No. SA 07-001377. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

James, J., October 27, 2008—This Appeal arises from the decision of the Aleppo Township Board of Commissioners ("Board") dealing with vacant land in Aleppo Township, Allegheny County, Pennsylvania, owned by Ross Mendicino. Mr. Mendicino has entered into an agreement with Annunziato and Jessica Reilsono because the Reilsonos want to purchase two lots on his vacant land to construct a single family home. Mr. Mendicino and the Reilsonos ("the Appellants") first approached the Aleppo Township Planning Commission in November of 2006, seeking to amend an old subdivision plan from the 1970's to allow the subdivision. They were informed that they could not rely on amending the old subdivision, but would have to submit a new Application and a new plan. They also claim that they were discouraged from filing the Application at that time because there was no quorum for the November meeting. In the meantime, the Township enacted an amended Ordinance 2006-05, effective November 20, 2006, which effectively acts to prevent the Appellants from obtaining a minor subdivision.

On December 6, 2006, the Appellants filed an Application in accordance with the Township's Subdivision and Land Development Ordinance ("SALDO"). The Township informed them that their Application was defective because the land had been subdivided before and, therefore, it must be designated as a major and not a minor subdivision. Article III, Section 3.3.3 of the SALDO (effective November 20, 2006) provides:

> Where a lot or tract has been previously subdivided to create two or more lots, and such subdivision or subdivisions have been recorded, all subsequent subdivisions of the residual remaining tract of land shall be reviewed as a major subdivision and be subject to all applicable provisions of the Subdivision and Land Development Ordinance.

The Appellants claim that under Article III, Section 3.3 of the Township's old SALDO, their plan would have been characterized as a minor subdivision and subject to final approval. The Appellants filed an amended Application on February 8, 2007 seeking preliminary approval for a full subdivision plan. The Planning Commission approved it subject to several conditions. However, the Board voted not to accept the Planning Commission's recommendation and referred the matter back to them. The Township Solicitor advised the Appellants that their plan needed to comply with the requirements of Section 3.10.2 of the SALDO. On June 6, 2007, the Planning Commission voted to deny the Application. At a Township meeting on June 11, 2007, the Board accepted the Planning Commission's recommendation and denied the Appellants' Application. It is from that decision that the Appellants appeal.

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

The Township properly complied with procedures when they enacted Ordinance 2006-05. They followed the Municipalities Planning Code ("MPC") in creating and adopting Ordinance 2006-05. As early as June 12, 2006, the Township discussed amending the Ordinance (R.R. 89). The Chairman of the Planning Commission presented the proposed amendments at a public meeting in accordance with Section 505 of the MPC. The Ordinance was advertised on November 2 and November 9 in accordance with Section 506. The Ordinance was finally adopted following an adver-

tised public meeting on November 20, 2006, where the Board voted unanimously to adopt it. However, even assuming that there were some procedural defect in the enactment of Ordinance 2006-05, the Appellants' challenge is time-barred pursuant to the Judicial Code, 42 Pa. C.S. §5571 (c)(5). They failed to challenge the Ordinance within 30 days of November 20, 2006 and are now barred from doing so.

Ordinance 2006-05 governs the Appellants' Application. The Appellants claim that the Township erred in applying amended Ordinance 2006-05, to their Application because it was not in effect when Mr. Mendicino previously subdivided his Property. They assert that their Application should be treated as a "minor subdivision" because it is the first subdivision on that tract of land with Ordinance 2006-05 in effect. They claim that the Township incorrectly retroactively applied Ordinance 2006-05. However, the Township did not receive Appellants' first Application until December 6, 2006, which is after Ordinance 2006-05 was adopted. The MPC states that the Township must apply the ordinance which is in effect when the application was filed. 53 P.S. §10508(4). Ordinance 2006-05 was in effect on December 6, 2006.

The Township was reasonable in denying the Appellants' Application because it failed to meet the requirements of Ordinance 2006-05. Section 105 of the MPC describes the broad scope of the Code as:

> to protect and promote citizen safety, health and morals, accomplish coordinated development, promote energy conservation, provide for the general welfare by guiding and protecting development and growth and permit municipalities to minimize such problems as may presently exist or which may be foreseen.

Ordinance 2006-05 "promotes the public health, safety or general welfare and the means used to achieve that goal or the ordinance are substantially related to the end sought. *Hopewell Twp. Board of Supervisors v. Golla,* 428 A.2d 701, 702-703 (Pa. 1981).

Based upon the foregoing, the decision of the Aleppo Township Board of Commissioners is affirmed.

Township of Marshall v. Marshall Township Zoning Hearing Board

Zoning—Interpretation of Zoning Ordinance—Storage vs. Display for Sale

1. Duro-Shed sought approval for use and occupancy permits to "utilize the premises as a retail sale location with the outdoor display of product," and planned to display eight or nine outdoor sheds on the property. The sheds would be models and not for sale or for storage.

2. The Township denied the Application, finding that it violated the zoning ordinance prohibiting outdoor storage, defined as "the keeping, in an unroofed area, of any goods, junk, material, merchandise or vehicles in the same place for more than twenty-four (24) hours." The Board, however, determined that the proposed use did not constitute outdoor storage, and Township appealed.

3. The Court agreed with the Board that, although the ultimate purpose of outdoor sheds is storage, Duro-Shed's stated purpose was to display them for sale, which is permitted by the ordinance. Applicant was unable to display the sheds indoors and they were not using them for storage. The Board had the authority to interpret the zoning ordinance, and, according to the Municipalities Planning code, the ordinance is to be construed in favor of property owners and against any implied extension of the restriction.

(Lynn E. MacBeth)

Blaine Lucas for Township of Marshall.
Patricia L. Dodge for Marshall Township Zoning Hearing Board.

No. SA 08-000459. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

James, J., November 20, 2008—This appeal arises from the decision of the Marshall Township Zoning Hearing Board ("Board") dealing with Property owned by Duro-Shed, Inc. located at 16085 Perry Highway in Marshall Township. The Property is located in the Route 19 Boulevard Zoning District ("RB District").

Duro-Shed sought approval for use and occupancy permits to "utilize the premises as a retail sale location with the outdoor display of product." (RR. 42) Duro-Shed planned to display eight or nine outdoor sheds on the Property. The sheds would be models and not for sale or for storage. The Township denied the Application finding that the plan was in violation of Section 208-2902 of the Marshall Township Zoning Ordinance ("Ordinance"). Section 208-2902 defines "outdoor storage" as "the keeping, in an unroofed area, of any goods, junk, material, merchandise or vehicles in the same place for more than twenty-four (24) hours." "Outdoor storage" areas are not permitted in the RB District. The Board determined that Duro-Shed's proposed use does not constitute "outdoor storage" as defined by the Ordinance. The Township has filed the instant Appeal.

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

The Township claims that the Board misinterpreted the meaning of "outdoor storage" in their decision. The Board found that Duro-Shed's display sheds do not represent "outdoor storage" as defined by Section 208-2902 of the Ordinance. The Zoning Officer determined that the display sheds represent either "goods," "merchandise" or "material." The Board found that although the ultimate purpose of outdoor sheds is storage, Duro-Shed's stated purpose is to display them for sale, which Section 208-301 permits in the RB District. Duro-Shed is unable to display the sheds indoors and they are not using them for storage. The Court agrees. The Municipalities Planning Code ("MPC") permits the Board to interpret the language in zoning ordinances and states that ordinances shall be construed in favor of property owners and against any implied extension of the restriction. 53 P.S. §10603.1. Therefore, the Board correctly, and within their authority, interpreted the Ordinance and the meaning of "outdoor storage."

For the reasons set forth in this Opinion, the decision of the Marshall Township Zoning Hearing Board is affirmed and the Appeal is dismissed.

ORDER OF COURT

AND NOW, this 25th day of November, 2008, the decision

of the Marshall Township Zoning Hearing Board is affirmed and the appeal is dismissed.

BY THE COURT:
/s/James, J.

Daniel J. Selepec, et al. v. Johnson and Johnson, Inc., et al.

Products Liability—Defective Design—Judgment Notwithstanding the Verdict–Expert Testimony

1. Plaintiff, administrator of the estate of his wife, brought a products liability action against a company, its subsidiary, and its products distributor. The action was based upon his wife's death following bariatric surgery, during which an endocutter, designed and manufactured by one of the defendants, was used. Plaintiff asserted either a product malfunction or defective design. Following a six-day trial, the jury awarded Plaintiff five million dollars on a defective design theory.

2. The bariatric surgery entailed dividing the stomach into two parts, for which the endocutter would cut and staple the sections. The decedent experienced difficulty several hours after surgery, requiring surgeons to reopen the abdominal cavity. The surgeons found that the stomach contents had leaked into her abdomen due to a leak in the staple line. The decedent suffered sepsis from the leak, despite repair surgery.

3. Plaintiff asserted that the endocutter was defective as it did not warn the surgeon when too much tissue was used to safely form the staple. Although the staple may temporarily hold, it may later come apart and result in leakage of stomach contents. As surgeons cannot see the tiny staples used by the endocutter, they cannot determine whether the staples form properly.

4. Defendant requested a new trial or judgment notwithstanding the verdict asserting that the endocutter was not defective as a matter of law, that evidence was not admitted regarding the alleged design defect and that no evidence was admitted showing proximate cause of the decedent's injuries. Further, Defendant requested a new trial stating that the jury's findings were against the weight of the evidence and comments made by Plaintiff's counsel during opening and closing were improper.

5. The Court found that "social policy supports a finding of Defendant's liability," as the "endocutter's defect exposed patients to a high risk of serious or fatal injury," which is "unavoidable" regardless of surgical skill. Although Defendants sent a letter to doctors advising of the appropriate tissue thickness for use of the endocutter, testimony revealed that doctors are unable to make an accurate measurement. The Court was persuaded by testimony that showed the "likelihood of the occurrence of danger, even when the surgeon exercised care and proper training."

6. Two surgeons testified as experts, stating that the product was defective and that the leakage occurring in the staple line was not caused by anything other than stapler failure. Defendant asserted that the opinions of the experts were inadmissible due to lack of qualifications, no generally accepted methodology, untimely-filed reports and supplemental reports exceeding scope of initial reports. The first doctor had a thirty-year career in the industry of research, development and consultation, as well as forensic failure analysis of medical devices. This surgeon had specific significant experience with surgical staples and stapling devices, including consultation for a device manufactured by the defendant. The Court found this doctor qualified to testify on the issue of the endocutter's defective design. The second surgeon also found to be qualified testified regarding medical issues, as he had significant experience with the specific bariatric procedure performed on the decedent as well as the endocutter used. The surgeon was trained on the endocutter's use by Defendant and used Defendant's facility for training other surgeons. This expert testified that a surgeon is unable to see the staples or evaluate safely.

7. The Court found the expert testimony was admissible as generally accepted in the scientific community and based upon the extensive experience of both surgeons who testified. Further, the Court found Defendant's arguments regarding the timeliness of the Plaintiff's expert reports meritless, as they were submitted as rebuttal to Defendant's experts, and the issue was addressed in pre-trial motions. Defendants deposed the doctors prior to trial.

8. Although Defendant contended that the product was misused by the surgeon who performed the bariatric surgery, the Court found no misuse of the product because no evidence was submitted that it was used for other than the intended purpose. Although "a defendant may not assert comparative negligence in a products liability action," it is permissible to present evidence of misuse, or unforeseeable, highly reckless or extraordinary use.

9. Finally, the Court found that statements made by counsel regarding Plaintiff's development of cancer in support of his loss of consortium claim were proper and not prejudicial or improper. The comments by Plaintiff's counsel relating to not adding the doctor as a defendant and summary of the law were found to be appropriate and not erroneous or misleading.

(Angel L. Revelant)

Brian DelVecchio for Plaintiff.
John Richardson, Bryan Sgrignoli and *C. James Zeszutek* for Defendants.

No. GD 04-17685. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Horgos, J., October 29, 2008—Plaintiff, Daniel J. Selepec, individually and as Administrator of the Estate of Sandra L. Selepec, deceased, filed a products liability action against Defendants, Ethicon Endo-Surgery, Inc. (Ethicon), a subsidiary company of Defendant Johnson and Johnson, Inc., seeking damages arising from fatal injuries suffered by Plaintiff's decedent, Sandra Selepec. Defendants Cardinal Health, Inc., t/d/b/a Cardinal Health, and Cardinal Health 414, Inc., t/d/b/a Cardinal Health, are the distributors of products for Defendants Johnson and Johnson, Inc. and Ethicon. The cause of action arose from Mrs. Selepec's death following bariatric surgery performed on Mrs. Selepec on August 5, 2002. Plaintiff alleged that the endocutter, a device used in Mrs. Selepec's bariatric surgery, was defectively designed and manufactured by Defendant Ethicon.

Mrs. Selepec underwent the bariatric surgical procedure

which involved dividing the stomach into two parts: a gastric pouch and a gastric remnant attached to the small intestine. (Trial Transcript, pp. 215-17, hereinafter Tr.). The endocutter was used to cut and staple the stomach into the two constituent parts.

Following the surgery, Mrs. Selepec experienced difficulties after a few hours and surgeons reopened the surgical site and found that stomach contents had leaked into the abdominal cavity due to a leak in the staple line. (Tr. pp. 274-75). The repair surgery did not alleviate the sepsis suffered by Mrs. Selepec and she died on August 26, 2002.

Plaintiff maintained that the endocutter was defective because it did not warn the operating surgeon when there was too much tissue in the endocutter's jaws for staples to safely form, even if the surgeon was careful and thoroughly tested the line. (Tr. p. 350). The staples could hold the tissue together temporarily but come apart later, resulting in the leakage of stomach contents and other fluids. (Tr. pp. 355, 427-29). The surgeon cannot see the tiny staples and, therefore, cannot determine whether they have properly formed in a particular case. (Tr. p. 186).

The case was heard by a jury from May 16, 2007 through May 23, 2007. Plaintiff presented two alternative theories of product defect: product malfunction and defective design. The jury returned a Verdict in favor of Defendant on the product malfunction theory and in favor of Plaintiff in the amount of $5 million on the defective design theory.

Defendant filed a Motion for Post-Trial Relief which was denied by Order of Court dated May 1, 2008. Defendant's timely appeal to the Pennsylvania Superior Court followed.

In its Statement of Matters Complained of on Appeal, Defendant argues that the Court erred in refusing to enter judgment notwithstanding the verdict and failing to order a new trial because: 1) the endocutter is not defectively designed as a matter of law; 2) Plaintiff failed to introduce admissible evidence regarding the endocutter's alleged design defect; and 3) Plaintiff introduced no admissible evidence showing that the endocutter's alleged design defect was the "cause of, let alone the proximate cause of, their injuries." (Statement of Matters Complained of on Appeal, number 3).

Defendant further argues that the Court erred by refusing to order a new trial because: 1) the jury's findings that the endocutter is defectively designed and that the design defect was a proximate cause of Plaintiff's injuries were against the weight of the evidence; and 2) the comments made by Plaintiff's counsel during his opening and closing arguments were improper and inflammatory.

The Court may enter judgment notwithstanding the jury's verdict only when the moving party is entitled to judgment as a matter of law, or the evidence is such that no two reasonable minds could disagree that the outcome should have been for the movant. *Davis v. Berwind Corp.*, 690 A.2d 186, 189 (Pa. 1997). This standard is satisfied when the record, read in the light most favorable to the verdict winner and affording the verdict winner the benefit of all doubts, contains no competent evidence to support the verdict. *Pennsylvania Dept. of Gen. Servs. v. U.S. Mineral Prods. Co.*, 898 A.2d 590, 604 (Pa. 2006). A new trial is proper when the jury's verdict is so contrary to the evidence as to shock one's sense of justice. *Armbruster v. Horowitz*, 744 A.2d 285, 287 (Pa.Super. 1999).

Defendant first argues that judgment notwithstanding the verdict was appropriate because, as a matter of law, the endocutter is not defectively designed. The Restatement (Second) of Torts Section 402A regarding products liability has been adopted as the law in Pennsylvania. *Webb v. Zern*, 220 A.2d 853 (Pa. 1966). Section 402A provides as follows:

> 1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> a) the seller is engaged in the business of selling such a product, and
>
> b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> 2) The rule stated in Subsection (1) applies although
>
> a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Restatement (Second) of Torts Section 402A (1965).

Under Section 402A, a plaintiff must prove the following: 1) that the product was defective; 2) that the defect existed when it left the hands of the defendant; and 3) that the defect caused the harm. *Riley v. Warren Mfg., Inc.*, 688 A.2d 221, 224 (Pa.Super. 1997). The question of whether a product is unreasonably dangerous is a question of law. *Id.*

In making this determination, Pennsylvania courts conduct a balancing test, considering such factors as "the gravity of the danger posed by the challenged design; the likelihood that such danger would occur; the mechanical feasibility of a safer design; and the adverse consequences to the product and to the consumer that would result from the safer design." *Id.*, 688 A.2d at 225 (quoting *Dambacher by Dambacher v. Mallis*, 485 A.2d 408, 423 n.5 (Pa.Super. 1984).

> Other factors that may also be considered by the court are:
>
> 1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
>
> 2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
>
> 3) The availability of a substitute product which would meet the same need and not be as unsafe.
>
> 4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
>
> 5) The user's ability to avoid danger by the exercise of care in the use of the product.
>
> 6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
>
> 7) The feasibility on the part of the manufacturer, of spreading the loss of setting the price of the product or carrying liability insurance.

Riley, 688 A.2d at 225 (citing *Dambacher, supra.*)

If a judicial determination has been made that recovery might be justified, then it is necessary for a jury to determine whether "the product left the supplier's control lacking any element necessary to make it safe for its intended use or

possessing any feature that renders it unsafe for the intended use." *Schindler v. Sofamor, Inc.*, 774 A.2d 765, 772 (Pa.Super. 2001).

Here, social policy supports a finding of Defendant's liability. The endocutter's defect exposed patients to a high risk of serious or fatal injury. (Tr. pp. 352, 702-03). The defect and its risks are unavoidable, despite the best care or training of the surgeon. (Tr. pp. 188-89, 725-28).

The seriousness of the danger posed by the challenged design is clear; trial testimony included the likelihood of the occurrence of the danger even when the surgeon exercised care and had proper training. (Tr. pp. 188-89, 291-92, 350, 725-28). Further, the stapler could have been designed so that it would not fire if tissue was too thick or the defect could have been eliminated if the endocutter was equipped with a measuring device as used in other staplers. (Tr. pp. 190-91).

Defendant did send a letter to doctors advising them to select tissue of a specific miniscule thickness but surgeons were unable to make this measurement accurately. (Plaintiff's Exhibit 48). The doctor's inability to avoid danger in the use of the product by the exercise of due care was shown through the testimony of Plaintiff's experts.

While there are certainly benefits to society by the use of the endocutter, the foregoing analysis shows that the utility and benefit of this endocutter are outweighed by the danger it poses. The Court properly denied Defendant's motion for a new trial on the grounds that the endocutter was not defectively designed.

Defendant also argues that the Court erred by failing to enter judgment notwithstanding the verdict because the Plaintiff offered no admissible evidence regarding the design defect and that the Court should have granted a new trial because the jury's conclusion that the endocutter was defectively designed and that the defective design was the proximate cause of the injury were against the weight of the evidence.

Thomas Birdas, M.D., one of the two surgeons who performed the repair surgery, stated in his operative report: "What we found was a defect on the staple line both on the left side of the gastric pouch as well as the gastric remnant. These findings were consistent with mechanical stapler failure." (Tr. pp. 274-75).

The second surgeon, Peter Naman, M.D., testified at trial:

> This is the area that was—where the gastric stapler was applied, and it was the continuation of the staple line, and towards the end of that staple line that there were two defects, and basically indicating that this—the defects were the result of the application of the stapler apparatus.
>
> (Tr. pp. 274-75).

Dr. Naman further testified that staple failure was the sole cause of Mrs. Selepec's condition:

> Q. (Perer): Were you able to rule out any other cause for the holes that you had found on either side of the staple line other than the defective staple, mechanical stapler failure, as you put it?
>
> A. (Naman): There was no other cause except a technical problem, a mechanical problem, yes. (Tr. p. 277).

Defendant argues that the opinions of Drs. Hetzel and Leitman were inadmissible because: 1) they were not qualified to offer them; 2) Drs. Hetzel and Leitman did not use a generally accepted methodology to form their opinions; 3) the reports in which they offered their opinions were not timely filed; and 4) the supplemental reports exceeded the fair scope of the reports that Drs. Hetzel and Leitman did timely file.

The standard for qualification of an expert witness is a liberal one and within the sound discretion of the trial judge. *Rauch v. Mike-Mayer*, 783 A.2d 815 (Pa.Super. 2001). A witness may be qualified as an expert by knowledge, skill, experience, training or education. Pa. R.E. 702. The test for the qualification of a witness as an expert is whether the witness has any reasonable pretension to a specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine. *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525 (Pa. 1995).

Dr. Hetzel was called by Plaintiff as an expert on the issue of the endocutter's defective design. Dr. Hetzel has a Bachelor of Science degree, a Master's degree and a Ph.D. in chemistry. (Tr. p. 303). His thirty (30) year career in industry has focused on research, development and consulting for developing new products and he currently operates a consulting practice in forensic failure analysis of medical devices including the development of medical devices and the demonstration that said medical devices are effective. (Tr. pp. 304-05). He has significant experience developing and evaluating medical devices including surgical staples. (Tr. pp. 310-11). He worked as a consultant for Defendant Ethicon on a stapling device for colon surgery and in identifying polymers for stapling applications. (Tr. p. 307). His *voir dire* testimony demonstrates that he is clearly qualified to testify as an expert on the issue of the endocutter's defective design.

Similarly, Dr. Leitman's *voir dire* testimony showed his qualifications to testify as an expert regarding the medical issues in the case. Dr. Leitman is a board certified surgeon with significant experience performing the surgical procedure that Mrs. Selepec underwent as well as extensive experience using the subject endocutter. (Tr. pp. 174-91). Dr. Leitman was trained by Defendant in the use of the endocutter, and he trained other surgeons in the endocutter's use at Defendant's training center. (Tr. pp. 163-64). Dr. Leitman testified that the Defendant taught its surgeons that the endocutter "clicked" when it was ready to safely deploy, and that the surgeon is unable to see the tiny staples and evaluate whether they are safe and is unable to palpate the tissue within a fraction of a millimeter, the measurement critical to safe staple formation. (Tr. pp. 174, 177-79, 186-91). Dr. Leitman's testimony concerned the issues regarding the medical and surgical factors surrounding Mrs. Selepec's death. He did not testify regarding medical device development, product testing or alternative design. Both Dr. Leitman and Dr. Hetzel were well qualified to testify as experts for Plaintiff.

Defendant further maintains that Drs. Hetzel and Leitman's testimony was inadmissible because of the methodology or lack of methodology used to form their opinions. Plaintiff relies on *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923). In *Frye*, the court concluded that if a theory or practice was reliable enough to have attained "general acceptance" by the relevant scientific community, then it was reliable enough to be presented before the trier of fact. *Id.* at 1014.

The Pennsylvania Superior Court has concluded that the *Frye* "general acceptance" test:

> Assures that those most qualified to assess the general validity of a scientific method will have the determinative voice by requiring that the principle or discovery forming the basis for evidence presented at trial must have gained general acceptance in the particular field to which it belongs.

Commonwealth v. Rodgers, 605 A.2d 1228, 1234 (Pa.Super. 1992).

Dr. Hetzel testified that his conclusion that the endocutter was defective was based upon his experience in medical device testing and development during his career and that he has been qualified in other cases involving the subject endocutter. He further testified that he is familiar with the literature on these devices and the surgical procedure at issue as well as having been involved in the design of many medical devices; for thirty (30) years he has not only worked on medical devices but also analyzed device failures in conjunction with engineers, doctors and other scientists. (Tr. pp. 304, 308, 325-26).

He testified to the specific documents, drawings and materials he reviewed, relied on the testimony of the surgeons in this case and Dr. Leitman's opinions concerning the cause of Mrs. Selepec's staple line failure. He also reviewed the medical literature regarding stomach wall thickness for obese patients. (Tr. pp. 350-62, 427-29). He visited the Defendant's headquarters and reviewed numerous documents concerning the design, development, marketing, customer feedback and government reports concerning the endocutter. (Tr. pp. 352-54, 374-77, 419-29).

This recitation does not include all of the steps Dr. Hetzel took in analyzing the endocutter as described in his lengthy testimony. He testified to his own professional experience in this field and reviewed numerous Ethicon documents concerning this stapler, the reports and testimony of all the surgeons in this case, as well as other expert reports. He did not employ novel methodology to his analysis. The Court properly admitted his testimony and expert opinions based on methodology used generally in this field.

Similarly, Dr. Leitman used well-accepted methodology in reaching his expert conclusions and did not employ novel scientific methodology. His opinion concerned the medical and surgical issues involved in this case. He reviewed the pertinent medical records and deposition testimony, interpreting them using his knowledge and experience. (Tr. pp. 173, 189, 191, 195). He drew upon his extensive experience as a general surgeon and his fifteen (15) years of performing bariatric surgery including his experience using the endocutter in his practice. (Tr. pp. 162-64). Defendant's objection that Dr. Leitman never test fired the endocutter is without merit because he did not render an opinion regarding the endocutter's design from an engineering perspective. His opinion concerned only medical and surgical issues. (Tr. pp. 165, 183-91). The Court properly admitted his expert testimony before the jury.

Defendant further objects to the admission of the supplemental reports of both experts on the basis that they were untimely filed. The reports to which Defendant objects were submitted as rebuttal to the opinions of Defendant's experts. Moreover, Defendant filed two Pre-Trial Motions seeking to limit or preclude the testimony of Drs. Leitman and Hetzel or, in the alternative, to permit further discovery as to the basis of those opinions on the grounds that the reports were untimely filed. At pre-trial argument, Defendant's counsel stated: "We ask that either the reports be stricken or we have the opportunity to take Hetzel's deposition. And Dr. Leitman, the same thing." (Tr. p. 31). The Court granted the request and Defendant took the depositions of both Dr. Leitman and Dr. Hetzel. Defendant now has no reason to complain. The supplemental reports of Drs. Leitman and Hetzel were properly admitted.

Defendant next argues that the Court erred by refusing to enter judgment notwithstanding the verdict or failing to order a new trial because Plaintiff failed to introduce admissible evidence showing that the design defect was the proximate cause of Plaintiff's injury. Specifically, Defendant contends that the endocutter was misused by Dr. Athan Georgiades, the surgeon who performed the operation, and that Dr. Georgiades' misuse must be considered a superseding cause of Plaintiff's injury.

In a products liability case, plaintiff must not only prove that the product was defective, but also that the plaintiff's injuries were proximately caused by the defect. *Davis v. Berwind Corp., supra* at 191. While a defendant may not assert comparative negligence in a products liability action, Pennsylvania courts allow a defendant to introduce evidence of misuse of a product when it relates to the element of causation. *Charlton v. Toyota Industrial Equip.,* 714 A.2d 1043, 1047 (Pa.Super. 1998). "Misuse" of a product in this context refers to use in a manner that differs from its intended purpose which is unforeseeable, highly reckless or extraordinary. *Madonna v. Harley Davidson, Inc.,* 708 A.2d 507, 509 (Pa.Super. 1998).

There was no evidence in this case that Dr. Georgiades used the endocutter other than for its intended purpose. There was no evidence that his manner of use of the device was unforeseeable, highly reckless or extraordinary. Instead, the testimony of the experts, as well as the testimony of Dr. Georgiades, amply demonstrated that the endocutter's defect caused the harm suffered by Mrs. Selepec.

Finally, Defendant argues that Plaintiff's counsel made improper and inflammatory comments in his opening and closing arguments to the jury. Defendant objects to counsel's statements regarding the development of Daniel J. Selepec's cancer after Sandra Selepec's death. Plaintiff's mention of Mr. Selepec's cancer in the year following his wife's death related to Mr. Selepec's claim for loss of consortium against Defendant due to his wife's death. The fact that Mr. Selepec was deprived of his wife's companionship, society and comfort during this period of time was testified to at trial. This was not prejudicial or inflammatory evidence.

Defendant also argues that it was prejudiced by Plaintiff's mention of Defendant's decision not to add Dr. Georgiades as a Defendant to this case. Comment by counsel in such a matter is appropriate. *See*: *Rothermel v. Owen Illinois, Inc.,* 16 Pa. D & C 4th 20 (Phila. Com. Pl. 1992). Defendant also objects to Plaintiff's summary of the law of products liability. Counsel is permitted to explain the law to the jury so long as counsel does not misstate it in an effort to cause confusion or prejudice. *Fernandez v. City of Pittsburgh,* 643 A.2d 1176 (Pa. Commw. Ct. 1994). Counsel's statements regarding the law of products liability were not erroneous or misleading. Moreover, Plaintiff's counsel's statements were followed by the Court's instructions to the jury. Defendant raises no objections to the Court's charges to the jury.

For all of the foregoing reasons, the Court properly denied Defendant's Post-Trial Motions.

BY THE COURT:
/s/Horgos, J.

Commonwealth of Pennsylvania v. Anthony Tusweet Smith

Jurisdiction—Presence in the Commonwealth

1. The U.S. Marshall was holding the Defendant at the Allegheny County jail awaiting sentencing following conviction on federal charges. While in jail, the Defendant assault-

ed two county correctional officers, and he was convicted of two counts of aggravated assault.

2. Prior to trial, the Defendant moved to dismiss the prosecution on the basis that he was in "federal custody" at the time of the assault and that, therefore, the court lacked jurisdiction over him. The trial court denied that motion. On appeal, Defendant again raised that argument.

3. 42 Pa.C.S. §5301(a)(1) provides that the Commonwealth has jurisdiction over an individual who is served with process when he is present in the Commonwealth. The Defendant was in the Commonwealth when he committed the assaults and when he was served with the process related to those offenses.

5. Accordingly, because the assaults occurred while the Defendant was in Allegheny County, the Court of Common Pleas of Allegheny County had both venue and jurisdiction.

(Carol L. Rosen)

Stanley Booker for the Commonwealth.
William Bickerton for Defendant.

CC No. 200703194. In the Court of Common Pleas of Allegheny County, Criminal Division.

OPINION

Todd, J., September 29, 2008—This is an appeal by Defendant, Anthony Tusweet Smith, from his conviction after a non-jury trial on February 6, 2008 of two counts of aggravated assault in violation of 18 Pa.C.S.A. §2702 (a)(3). On April 11, 2008, Defendant's public defender was permitted to withdraw and substitute counsel was appointed to represent Defendant. On April 17, 2008 Defendant was sentenced to 35 to 70 months incarceration at each count to be served consecutively. At the time of Defendant's sentencing, Defendant also made a motion for leave to represent himself during further proceedings and on April 21, 2008 an order was entered granting Defendant's motion for leave to represent himself and the order of April 11, 2008 appointing counsel was rescinded, however, counsel was ordered to act as stand-by counsel to assist Defendant during any further proceedings. An order was entered on May 7, 2008 granting Defendant leave to proceed in forma pauperis. On May 18, 2008 Defendant filed a Notice of Appeal and a Concise Statement of Matters Complained of on Appeal which stated as follows:

> "Does denial of _____ violate Due Process of Pennsylvania and United States Constitution? The verdict on review occurred on the date of time period in which the defendant was in federal custody"[1]

BACKGROUND

This matter arises out of Defendant's assaults on two correctional officers at the Allegheny County Jail on January 31, 2007 while Defendant was present at the jail as an inmate. Defendant was being held at the Allegheny County Jail awaiting sentencing after his conviction on December 13, 2006 on charges filed against him in the United States District Court for the Western District of Pennsylvania at case number 205-cr-00119-TFM-1. Defendant was being held by the United States Marshall pending his sentencing which was scheduled for March 14, 2007.

Prior to the commencement of trial in this case, Defendant made a motion to dismiss the prosecution against him on the basis that he was in "federal custody" at the time of his assault on the officers in the Allegheny County Jail and, therefore, there was no jurisdiction over him. (T. p. 4). Defendant relied solely on 42 Pa.C.S.A. §5301(a)(3) and 42 Pa.C.S.A. §931 to support his position that he was not subject to prosecution in Allegheny County for the crimes committed while in the Allegheny County Jail. As it was clear that Defendant was subject to the jurisdiction of the court, his motion to dismiss was denied. (T. p. 10). After an appropriate colloquy regarding his waiver of the right to a jury trial, the matter proceeded as a non-jury trial.

The evidence at trial established that on January 31, 2007 Defendant was housed on Pod 7E of the jail when Defendant assaulted a corrections officer when Defendant was instructed to return to his cell during one of the daily inmate counts. When Defendant was informed that his failure to promptly return to his cell as required would result in Defendant being locked down for the remainder of the day, Defendant assaulted the officer by pushing, slapping striking and kicking the officer. (T. pp. 18-23) This assault was captured on video which was admitted into evidence.[2] (T. p. 13) As a result of this first assault, the officer sustained bruises on his face, some soreness of his face and back. He was examined at the hospital but received no other treatment and missed one day of work. (T. pp. 25-27)

During the first assault, other correctional officers responded and Defendant was subdued, handcuffed and transported to a disciplinary housing unit as a result of his misconduct. As Defendant was placed in a cell in the disciplinary housing unit, his handcuffs were removed at which time Defendant struck a second officer. (T. p. 40) This officer sustained a scratch under his eye and a bruise on his shin, but did not require any medical treatment. (T. p. 41)

At trial, Defendant admitted striking both officers, asserting that he struck the first officer as a result of being upset that he was being unjustly disciplined and the second officer in response to being punched by the officer. (T. pp. 63, 69). After considering all of the evidence, including the testimony of the officers regarding the nature of their injuries, Defendant was found guilty of causing bodily injury to the officers in violation of 18 Pa.C.S.A. 2702 (a)(3), but not of causing serious bodily injury in violation of 2702 (A)(2). Defendant was also found not guilty of Recklessly Endangering Another Person in violation of 18 Pa.C.S.A. 2705.[3] (T. pp. 89-90).

DISCUSSION

Defendant's pro se concise statement, although incomplete, clearly is a reiteration of his pretrial motion that the charges against him should have been dismissed on the basis that he was in federal custody at the time of the assaults and, therefore, the court lacked jurisdiction to prosecute him. It is also clear, however, that 42 Pa.C.S.A. §5301 enunciates the various bases for jurisdiction over an individual by the courts of the Commonwealth, which includes the individual's presence in the Commonwealth when the individual is served with process. 42 Pa.C.S.A. §5301(a)(1). There is no question that Defendant was present in the Commonwealth when he committed the assaults and served with the process related to those offenses. Further, 42 Pa.C.S.A. §931 provides for the unlimited jurisdiction, except when otherwise provided by statute or rule, of the courts of common pleas of all actions and proceedings cognizable by law or usage in the courts of common plea. Indeed, both 42 Pa.C.S.A. 5301(a)(1) and 931 have been recognized as providing a basis for jurisdiction over an individual when a defendant was arrested in the Commonwealth for a murder when his presence in the Commonwealth was based on the Interstate Agreement on Detainers., 42 Pa.C.S.A. §9101 *et. seq. McCandles v. Vaughn*, 172 F.3d. 255, 264 C.A.3 (Pa.) 1999. Defendant did not rely on any other authority to support his position that this court

lacked jurisdiction to conduct the trial of these charges based solely on his status as a federal prisoner.

The general grant of jurisdiction over cases against individuals accused of crimes in Pennsylvania is found in 18 Pa.C.S.A. §102 which provides in pertinent part that;

> "…a person may be convicted under the laws of this Commonwealth of an offense committed by his conduct or the conduct of another for which he is legally accountable if either:
>
> (1) the conduct which is an element of the offense or the result which is such an element occurs within this Commonwealth." 18 Pa. §102 (a)(1).

There is no dispute that the offense with which Defendant was charged occurred within the Commonwealth and his status as a prisoner being held pending sentencing in federal custody in the county jail does not divest this Court of jurisdiction. Defendant was ultimately sentenced for his conviction on the federal charges on March 14, 2007 to 327 months of incarceration and, therefore, at the time of the incident a final disposition of those charges had not occurred. At the time of the assaults in the instant case, he had not been transferred to the Allegheny County Jail pursuant to the terms of the Interstate Agreement on Detainers and, therefore, there is no basis to assert, nor did Defendant argue, that there was any violation of the terms of that act. The purpose of the act is to prevent the disruption of an inmate's treatment and rehabilitation by the transfer of an inmate for successive prosecutions in different jurisdictions and it is clear that this was not the circumstance in the present case. *Commonwealth v. Booze*, 953 A.2d 1263, 1266 (Pa.Super. 2008). Based on the occurrence of the assaults in Allegheny County in violation of 18 Pa.C.S.A. §2702 (a)(3) jurisdiction and venue in the Court of Common Pleas of Allegheny County were appropriate and Defendants motion to dismiss based on a lack of jurisdiction was appropriately denied.

BY THE COURT:
/s/Todd, J.

[1] Defendant's Concise Statement is quoted as written with what appears to be a blank space in the body of the statement. The Concise Statement is accepted as setting forth Defendant's argument that this Court lacked jurisdiction to hear the case based on his status as inmate in federal custody at the time of the occurrence.

[2] The order permitting the release of a copy of this video is the subject of an appeal by the Commonwealth to the Superior Court at No. 291 WDA 2008.

[3] The Commonwealth withdrew three counts of Recklessly Endangering Another Person, Counts 4, 5, and 6, prior to the commencement of trial. (T. p. 3)

Commonwealth of Pennsylvania v. Hamin Azeez Gray

Warrantless Search by Probation Officers—Reasonable Suspicion Standard

1. While Defendant was serving house arrest for a previous conviction of possession with intent to deliver, a confidential informant reported to an adult probation manager that the Defendant was in possession of a gun and was suspected of dealing drugs. The informant stated that Defendant kept a gun in the basement of his apartment building in a room with two deadbolts on the door. The owner of the building confirmed that the Defendant lived in the building and that there was a room with two deadbolts on the door in the basement. The Defendant's supervising probation officer had visited the Defendant's residence earlier and became suspicious because, when someone repeatedly banged on the door, the Defendant would not let the person in, but rather continually responded that his probation officer was present. The Defendant's supervising probation officer also received a telephone call the same day from a police officer who stated that she had received a report that the Defendant threatened someone with a gun days earlier.

2. Probation officers and police officers went to the Defendant's apartment. They entered the apartment, confined the Defendant, and began to search the apartment. Although the officers did not secure a warrant, as a condition of the house arrest, the Defendant previously had agreed to permit random visits, 24 hours per day. The officers found 259 bags of cocaine, a large amount of marijuana, drug paraphernalia, and a 9-mm handgun. Shortly after the initial search, police obtained a warrant for the deadbolted basement room, where they discovered numerous additional firearms. The Defendant was arrested and convicted of possession of a firearm and possession with intent to deliver.

3. Prior to the bench trial, a suppression hearing was held and the Defendant's suppression motion was denied. On appeal, Defendant argued that the initial evidence should have been suppressed because it was the result of a warrantless search, and that the evidence from the subsequent search should be suppressed due to the fruit of the poisonous tree doctrine.

4. Pursuant to 61 Pa.C.S. §331.27(d)(1)(A), a probation or parole officer can conduct a personal search of an offender if there is a reasonable suspicion to believe that the offender possesses contraband or other evidence of violations of the conditions of supervision. Although the probation office received a tip from a confidential informant who was not yet known to be reliable, the tip was combined with other observations, such that the totality of the evidence demonstrated that the probation officers had reasonable suspicion that the Defendant had committed a probation violation.

(Carol L. Rosen)

Russell Broman for the Commonwealth.
Steven R. Greenberg for Defendant.

CC No. 200611686. In the Court of Common Pleas of Allegheny County, Criminal Division.

OPINION

Zottola, J., October 2, 2008—On October 17th, 2007, following a stipulated non-jury trial, the Defendant, Hamin Gray, was convicted of Person not to Possess a Firearm and Possession with Intent to Deliver. Prior to the bench trial, on January 24th, 2007, a suppression hearing was held and the suppression motion was denied on August 29th, 2007. On January 15th, 2008, the Defendant was sentenced to a period of incarceration of not less than five (5) years nor more than ten (10) years and a consecutive probation term of five (5) years. A notice of appeal to the Superior Court was filed on the Defendant's behalf on February 12th, 2008. A timely appeal was then taken.

Pursuant to Rule Pa.R.A.P. 1925(b), the Defendant filed a Motion of Matters Complained of on Appeal on August 30th,

2008, from which the following is taken verbatim:

1. The court erred in denying the Motion to Suppress evidence found during the initial warrantless search of Mr. Gray's residence, and during the subsequent search, based on the fruit of the poisonous tree doctrine, insofar as at the time of the first search, the probation officers lacked reasonable suspicion that Mr. Gray possessed illegal drugs or firearms, or was in violation of the conditions of his supervision, while he was on electronic monitoring through the adult probation.

OPINION ON SUPPRESSION HEARING

On January 24th, 2007, a suppression hearing was held before this Court. James Trozzi, adult probation manager, testified that on June 23rd, 2006, he received a telephone call from a confidential informant that the Defendant, Hamin Gray, was in possession of a gun and was suspected of dealing drugs. (S.H., pp. 9)[1] At the time, Mr. Gray was on house arrested serving an intermediate punishment sentence for Possession with Intent to Deliver. (S.H., pp. 28) The informant told him that Mr. Gray kept a gun in the basement of his apartment building locked in a room with two deadbolts on the door. (S.H., pp. 33) The owner of the apartment building confirmed that Mr. Gray resided there and that there was a room with two deadbolts on the door in the basement. (S.H., pp. 33) Mr. Trozzi contacted Ray McGill, the Defendant's supervising officer, and relayed the information. (S.H., pp. 9) Mr. McGill had visited the Defendant's residence earlier in the day and became suspicious when someone repeatedly banged on the door. Mr. McGill testified that the Defendant would not let them in but continually responded that his probation officer was present. (S.H., pp. 51) Mr. McGill also received a telephone call that day from a City of Pittsburgh police officer who stated that she had received a report that the Defendant threatened someone with a gun days earlier. (S.H., pp. 71)

Mr. Trozzi and Mr. McGill contacted the city for assistance and proceeded to the Defendant's apartment. (S.H., pp. 10) Mr. Trozzi observed that the apartment was barricaded with a two-by-four that would lock in place to keep the front door from opening. (S.H., pp. 26) They entered the apartment, confined the Defendant, and began to search the residence. (S.H., pp. 11) Although the probation officers did not secure a warrant, the Defendant had previously voluntarily signed the Allegheny County adult probation intermediate punishment program rules for electronic monitoring. The rules included a provision that stated, "I will provide the probation officers access to my residence at any time for supervision. (Random visits, 24 hours a day). I understand that, by law, my person, vehicle and residence (or the portion of another's under my control) is subject to search." (S.H., pp. 8) Two hundred and fifty nine (259) bags of cocaine were found in the apartment, as well as a large amount of marijuana, drug paraphernalia, and a 9-mm handgun. (N.J., pp. 8)[2] Shortly after the initial search, the Allegheny County firearms task force obtained a warrant for the deadbolted basement room where they discovered numerous additional firearms. (S.H., pp. 75) The Defendant did not have a valid license to carry firearms at the time. (N.J., pp. 9) The Defendant was arrested and convicted of Person not to Possess a Firearm and Possession with Intent to Deliver.

The Defendant argues that this Court erred in denying the motion to suppress the evidence. Specifically, the Defendant asserts that all the initial evidence should be suppressed since it was the result of a warrantless search, as well as the evidence from the subsequent search due to the fruit of the poisonous tree doctrine. (S.H., pp. 13-16)

Under 61 Pa. C.S. §331.27b, county probation and parole officers are authorized to search the person and property of county offenders. According to Pa. C.S. § 331.27(d)(1)(A), "a personal search of an offender may be conducted by any officer: if there is a reasonable suspicion to believe that the offender possesses contraband or other evidence of violations of the conditions of supervision." (61 Pa. C.S. §331.27(d)(1)(A)) "A search will be deemed reasonable if the totality of the evidence demonstrates: (1) that the parole officer had a reasonable suspicion that the parolee had committed a parole violation, and (2) that the search was reasonably related to the parole officer's duty" *Commonwealth v. Williams,* 547 Pa. 577, 588 (1997). (Tip from a confidential informant about drug dealing, corroborated by local police, constitutes reasonable suspicion for a warrantless search by a parole officer).

As in *Williams*, the probation officers in this case received a confidential tip from an informant that the Defendant was in possession of a gun, a violation of his probation requirements. While the informant in this case was not yet known to be reliable, informant information combined with additional probation officer observations is sufficient to establish reasonable suspicion. *Shaw v. Board of Probation and Parole,* 744 A.2d 382 (Pa.Cmwlth. 2000). (An anonymous letter combined with parole agent's observations of his unemployed parolee's expensive car and clothes constitutes reasonable suspicion). In addition to the informant information, the Defendant's landlord confirmed that there was a room in the basement of the apartment with two deadbolt locks. The Pittsburgh police also provided the officers with information that the Defendant may have threatened someone with a gun. Furthermore, Mr. McGill's suspicious interaction with the Defendant earlier in the day suggested that the Defendant may have been involved in selling drugs. Therefore, the totality of the evidence demonstrates that the probation officers had reasonable suspicion that the Defendant had committed a probation violation and the subsequent search was reasonably related to the probation officers' duties.

Therefore, the Defendant's claim must fail.

Based on the foregoing, the Defendant's issue raised as matters complained of on appeal are deemed to be without merit.

BY THE COURT:
/s/Zottola, J.

[1] S.H. refers to the Suppression Hearing dated January 24th, 2007.

[2] N.J. refers to the transcript from the Non-Jury trial dated October 17th, 2007.

Commonwealth of Pennsylvania v. Jeffrey Todd

Probation Violation—Credit for Time Served—Exculpatory Evidence

1. Defendant pled guilty to two counts of Simple Assault, Burglary, Concealing the Whereabouts of a Child, and Interference with the Custody of a Child. He was sentence to an aggregate sentence of not less than sixteen and one-half (16 ½) months nor more than forty-four (44) months' incarceration followed by a sixty (60) month period of probation. The Defendant was given credit for time served and was

then paroled at the conclusion of the hearing to begin serving the sixty (60) months' probation.

2. Several months later a warrant was issued for his failing to report to the parole office. He was placed in custody pursuant to a fugitive arrest in Miami, Florida. A probation violation hearing was held. Defendant's probation was revoked and he was sentenced to five (5) months to forty-eight (48) months of incarceration for the burglary count.

3. Defendant alleged that it was error to impose separate sentences for Burglary and Interference with Custody. Defendant further contended that trial counsel was ineffective by failing to object to the imposition of separate sentences. However, Defendant did not file a PCRA petition within one year from the date that his judgment became final and, therefore, the claim is time-barred.

4. As to the probation violation hearing, Defendant alleged that his counsel was ineffective by failing to request that the Court grant him credit for time he previously spent in incarceration awaiting trial. Because Defendant received credit toward his original sentence, he is not entitled to receive the same credit towards his probation violation.

5. Defendant also asserted that his counsel was ineffective for failing to present exculpatory evidence, *ie,* that he did not know he was not allowed to move. During the original sentencing, the trial court stated that his probation could be transferred to Maryland. However, the Defendant never traveled to Maryland, but rather absconded to Florida. Also, he never reported to probation nor did he notify anyone in the probation office that he was leaving the state. Even if the Defendant's counsel presented evidence that Defendant thought he could move to Maryland, that doesn't explain why Defendant never reported to anyone in the probation office, nor does it explain why he believed he was allowed to move to Florida. Therefore, Defendant's failure to introduce the alleged exculpatory evidence would not have led to a different outcome and Defendant's ineffective assistance of counsel claim must fail.

(Carol L. Rosen)

Nicole Wetherton for the Commonwealth.
Donna McCelland for Defendant.

CC No. 200212049. In the Court of Common Pleas of Allegheny County, Criminal Division.

OPINION

Zottola, J., October 2, 2008—On March 16th, 2008, following a probation violation hearing, the Defendant, Jeffrey Todd, was sentenced to a period of not less than five (5) months nor more than forty-eight (48) months incarceration. Post-Trial Motions were filed on Defendant's behalf and dismissed on May 6th, 2008. A Notice of Appeal to the Superior Court was filed on the Defendant's behalf on June 6th, 2008. A timely appeal was then taken.

Pursuant to Rule Pa. R.A.P. 1925(b), the Defendant filed a Statement of Matters Complained of on Appeal on July 9th, 2008 from which the following is taken verbatim:

> 1. It was an error as a matter of law and/or patent error to impose separate sentences for Burglary and Interference with Custody.
>
> 2. Trial counsel was ineffective for failure to object to the imposition of separate sentences for Burglary and Interference with Custody.
>
> 3. Trial counsel was ineffective for failure to request that the Court order credit for time previously spent in incarceration waiting trial.
>
> 4. Trial counsel was ineffective for failing to present exculpatory evidence at the violation hearing.

STATEMENT OF THE CASE

On June 21st, 2002, the Defendant entered, without license or privilege, the residence of his estranged wife, Kimberly Todd. (G.P.H. pp. 10)[1] Ms. Todd had active PFAs against the Defendant and had custody orders for her 10-month-old biological child with the Defendant, Jessica Todd. (G.P.H. pp. 10) The Defendant was allowed to have supervised visitation with his daughter. (G.P.H. pp. 10) At approximately 3:00 a.m., the Defendant broke a front window in the house and went into Ms. Todd's bedroom. (G.P.H. pp. 10) Ms. Todd was in bed breastfeeding Jessica when the Defendant punched her in the face, breaking her nose. (G.P.H. pp. 10) The Defendant then overpowered Ms. Todd and took the baby. (G.P.H. pp. 11) Ms. Todd's mother, Marilyn Hackaday, hearing the commotion tried to prevent the Defendant from taking Jessica. The Defendant then bit Mrs. Hackaday in the face. (G.P.H. pp. 11) The Defendant left with the child and drove to the Canadian border where he was apprehended by Canadian customs agents. (G.P.H. pp. 11) The Defendant was then brought back to Pittsburgh along with Jessica. (G.P.H. pp. 12)

On March 28th, 2005, at a guilty plea hearing, the Defendant pled guilty to two counts of Simple Assault, Burglary, Concealing the Whereabouts of a Child, and Interference with the Custody of a Child. (G.P.H. pp. 12) The Defendant was sentenced to a total aggregate sentence of not less than sixteen and one-half (16 ½) months nor more than forty-four (44) months incarceration followed by a sixty (60) month period of probation. (G.P.H. pp. 18) The Defendant was given credit for time served and was then paroled at the conclusion of the hearing to begin serving sixty (60) months probation. (G.P.H. pp. 18) Several months later a warrant was issued for the Defendant for failing to report to the parole office. (P.V.H. pp. 4)[2] On October 6th, 2005, he was placed in custody pursuant to a fugitive arrest in Miami, Florida. On March 16th, 2006, a probation violation hearing was held where the Defendant's probation was revoked and he was sentenced to five (5) months to forty-eight (48) months of incarceration for the burglary count. (P.V.H. pp. 4)

ERROR OF LAW

The Defendant alleges that it was an error as a matter of law to impose separate sentences for Burglary and Interference with Custody. The Defendant further contends that its trial counsel was ineffective by failing to object to the imposition of separate sentences. However, the Defendant did not file a PCRA petition within one-year from the date that his judgment became final and therefore his claim is time-barred. The Post-Conviction Relief Act provides that "any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final...." 42 Pa.C.S.A. §9545(b). Furthermore, PCRA review is limited to validity of the revocation proceeding if the original judgment of sentence is imposed outside of the one-year filing period. *Commonwealth v. Cappello,* 823 A.2d 936, 940 (Pa.Super. 2003). Since this Court sentenced the Defendant to the separate sentences during the original trial on March 25th, 2005, and the probation violation sentencing did not occur until March 16th, 2008, the one-year time limit to challenge validity clearly expired. Any PCRA petitions the Defendant files

must therefore be limited to the probation violation proceeding.

Thus, the Defendant's claims must fail.

INEFFECTIVE ASSISTANCE OF COUNSEL

In claims for ineffective assistance of counsel, there is a presumption of effectiveness so that the burden of establishing ineffectiveness rests solely on the defendant. *Commonwealth v. Soto,* 693 A.2d 226, 228 (Pa.Super. 1997). In order to overcome the presumption of effectiveness, the defendant must prove three things: "(1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceeding would have been different." *Commonwealth v. Watson,* 835 A.2d 786 (Pa.Super. 2003). A failure to satisfy any prong of the ineffectiveness of counsel test is fatal to the entire ineffectiveness claim. *Commonwealth v. Sneed,* 899 A.2d 1067 (2006).

First, the Defendant alleges that its counsel was ineffective by failing to request that the Court order that credit be given for time previously spent in incarceration awaiting trial. A defendant whose probation is revoked is not entitled to have time previously spent in jail, which has been credited towards his original sentence, to then be again credited toward the sentence received upon revocation of his probation. *Commonwealth v. Bowser,* 783 A.2d 348 (Pa.Super. 2001). Similar to *Bowser*, the Defendant received credit for time served against his original sentence which allowed him to be released from jail at an earlier date. Since the Defendant received credit during the first component of his sentence, he cannot again receive the same credit towards his probation violation. Therefore, the Defendant failed to prove that his underlying claim is of arguable merit and the entire claim must fail.

Second, the Defendant asserts that his counsel was ineffective for failing to present exculpatory evidence of his ignorance as to his probation requirements to report. The Defendant claims that although he did not receive confirmation from anyone at Allegheny County Office of Probations, he believed he was allowed to move to Maryland based on this Court's statement that his probation could be transferred to Maryland. However, the Defendant never even traveled to Maryland but rather absconded to Florida. The Defendant never reported to probation nor did he notify anyone in the probation office that he was leaving the state. Even if the Defendant's counsel presented evidence of the Defendant's ignorance regarding moving to Maryland, it does not explain why the Defendant never reported to anyone, or why he believed he was allowed to move to Florida. Therefore, the Defendant's counsel's failure to introduce exculpatory evidence would not have led to a different outcome and the entire ineffectiveness claim must fail.

Thus, the Defendant's claims of ineffective assistance of counsel must fail.

Based on the foregoing, the Defendant's issue raised as matters complained of on appeal are deemed to be without merit.

BY THE COURT
/s/Zottola, J.

[1] G.P.H. refers to notes of the Guilty Plea Hearing dated March 28, 2005.

[2] P.V.H. refers to the notes of the Probation Violation Hearing dated March 16, 2008.

Commonwealth of Pennsylvania v. Cecil Earl Grow

Counsel's Obligation in Post-Sentence Motions or Appeal—Restitution Limited to Amount Stolen

1. The Defendant pled guilty to theft of services. He was accused of using his employer's cellular phone to place over five thousand dollars worth of personal phone calls. He admitted his guilt in a letter to his employer. Although the guidelines called for incarceration in each of the ranges, pursuant to the Defendant's plea agreement, the Court sentenced him to serve seven years of probation and pay restitution in the amount of $5,603.00. After the District Attorney summarized the facts of the case during the plea colloquy, neither Defendant nor his counsel indicated any additions or corrections to the summary. Following the imposition of sentence, the Court advised the Defendant of his post-sentencing rights. Defendant did not file a post-sentencing motion or an appeal, but he did timely file a petition for post-conviction relief.

2. Defendant alleged that his trial counsel was ineffective for failing to consult with him about a post-sentencing motion or appeal. Counsel has a constitutionally-imposed duty to consult with defendant about an appeal when there is reason to think that a rational defendant would want to appeal or the particular defendant has reasonably demonstrated that he was interested in appealing.

3. At the hearing on the petition for post-conviction relief, trial counsel testified that Defendant never contacted her nor indicated he wished to file either post-sentencing motions or an appeal. She also testified that it would be highly unusual for anyone to seek to modify a sentence of probation when the guidelines called for incarceration in each of the ranges.

4. Because Defendant was advised of his rights to file post-sentence motions and/or an appeal, and because no rational individual would have expected an appeal to be taken for a sentence which fell substantially below the mitigated range, and because the Defendant had admitted his guilt in open court and in a letter to his employer, trial counsel was not ineffective for failing to pursue post-trial motions and/or an appeal.

5. Defendant also alleged that his sentence was illegal in that the restitution that was ordered exceeded the amount he stole, and that his trial counsel was ineffective for failing to raise the illegality or excessiveness of the restitution sentence. Although the original restitution order was for the gross amount of the telephone bill, the evidence introduced at the hearing on the Defendant's petition for post-conviction relief revealed that the bill included an outstanding previous balance of $1,417.13 for which Defendant should not have been held responsible.

6. The Court granted a portion of Defendant's motion for post-conviction relief and reduced restitution to exclude the preexisting debt. Although trial counsel did not file a motion seeking to modify the restitution order, Defendant never asked her to do so. Furthermore, Defendant was not prejudiced by trial counsel's failure to do so, because the Court has modified the order. The Court properly denied the petition for post-conviction relief because Defendant was not entitled to any further relief.

(Carol L. Rosen)

Louise McGuire for the Commonwealth.
David A. Hoffman for Defendant.

CC No. 200601213. In the Court of Common Pleas of Allegheny County, Criminal Division.

AMENDED OPINION

Cashman, J., October 27, 2008—The appellant, Cecil Earl Grow, (hereinafter referred to as "Grow"), has filed the instant appeal as the result of the denial of his petition for post-conviction relief following a hearing. In his concise statement of matters complained of on appeal, Grow has asserted three claims of the ineffectiveness of his trial counsel, which should have entitled him to post-conviction relief. Initially, Grow maintains that his trial counsel was ineffective in failing to consult with him as to whether or not he wished to file a post-sentencing motion or an appeal. Grow next maintains that the amount of the restitution order was excessive and illegal since it was not supported by the record. As a corollary to this argument, Grow has suggested that his trial counsel was ineffective for failing to raise the excessiveness of his ordered restitution.

The record in this case reveals that on November 14, 2006, Grow entered a plea of guilty to the charge of theft of services, a felony in the third degree, in exchange for a sentence of probation, which was to be set by this Court. The Guidelines in Grow's case were six months in the mitigated range; nine to sixteen months in the standard range; and, nineteen months in the aggravated range. Grow was employed by Lisle Zehner, III, as a salesman, and as a part of his employment he was given a cellular phone to use in furtherance of his employment. Despite the fact that this was to be used only for business purposes, in the months of November and December of 2005, it is alleged that Grow made over five thousand dollars in personal phone calls without the victim's permission to use this phone for his personal business and Grow refused to pay the victim for the charges that he incurred. Despite his refusal to reimburse the victim for these charges, Grow did write the victim a letter acknowledging that he was responsible for these charges.

In accepting Grow's plea of guilty and the plea agreement offered by the Commonwealth, this Court sentenced him to a period of probation of seven years, during which he was to pay restitution in the amount of five thousand, six hundred three dollars.[1] After the Assistant District Attorney had recited the facts to support Grow's plea of guilty to this charge, neither he nor his counsel indicated that they had any additions or corrections to that summary of the facts. In addition, when Grow was asked whether or not he would like to exercise his right of allocution, he did not, nor at any time did he suggest that the restitution figure that was provided to this Court was in error. Following the imposition of his sentence, Grow was advised of his post-sentencing rights, and, in particular, his right to file a motion seeking to challenge the validity of his plea of guilty, a motion seeking to modify his sentence or a motion in arrest of judgment or, in the alternative, his right to file an appeal to the Superior Court. No post-sentencing motions were ever filed nor was an appeal to the Superior Court filed; however, Grow did file a timely petition for post-conviction relief.

In order to be entitled to post-conviction relief a petitioner must establish his eligibility pursuant to Section 9543(a) of that Act,[2] which provides as follows:

> **(a) General rule.—**To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:
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> (1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:
>
> (i) currently serving a sentence of imprisonment, probation or parole for the crime;
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> (ii) awaiting execution of a sentence of death for the crime; or
>
> (iii) serving a sentence which must expire before the person may commence serving the disputed sentence.
>
> (2) That the conviction or sentence resulted from one or more of the following:
>
> (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
>
> (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
>
> (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.
>
> (iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
>
> (v) Deleted.
>
> (vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.
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> (vii) The imposition of a sentence greater than the lawful maximum.
>
> (viii) A proceeding in a tribunal without jurisdiction.
>
> (3) That the allegation of error has not been previously litigated or waived.
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> <Subsec. (a)(4) is permanently suspended insofar as it references "unitary review" by Pennsylvania Supreme Court Order of Aug. 11, 1997, imd. effective.>
>
> (4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

In reviewing Grow's claims in light of these eligibility requirements, it is clear that his petition has been timely filed and that the allegations of the ineffectiveness of his trial counsel would establish a basis upon which, if proven, he would be entitled to relief. In addition to meeting these requirements, Grow must also establish that his claims have not been previously litigated. In *Commonwealth v. Peterkin*, 538 Pa. 455, 649 A.2d 121 (1994), the Pennsylvania Supreme Court decided that a petitioner could not relitigate claims previously decided under the guise of the claim of the inef-

fectiveness of his counsel. See also, *Commonwealth v. Abu-Jamal,* 574 Pa. 724, 833 A.2d 719 (2003). However, in *Commonwealth v. Collins,* 585 Pa. 45, 888 A.2d 564 (2005), the Pennsylvania Supreme Court recognized that there is a separate and distinct claim that is being asserted when the claim of the ineffectiveness is being made even as it pertains to an issue that has been previously litigated since the claim that is being raised is the stewardship of the petitioner's counsel which affects his rights under the Sixth Amendment of the United States Constitution and under Article I, Section 9 of the Pennsylvania Constitution.

In reviewing a claim of ineffectiveness it is well-settled that the law presumes that counsel was effective and that the petitioner asserting that claim of ineffectiveness bears the burden of proving it. *Commonwealth v. Khalil,* 806 A.2d 415 (Pa.Super. 2002). In *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court set forth the standards for the performance and prejudice for evaluating the conduct of counsel. These standards were adopted by the Pennsylvania Supreme Court in *Commonwealth v. Pierce,* 515 Pa. 153, 527 A.2d 973 (1987), and require that a defendant prove a three-prong test, the first being that the claim currently being asserted has arguable merit; second, that counsel had no reasonable basis for his action or omission; and, third, that the defendant was prejudiced by his counsel's conduct. In *Commonwealth v. Kimball,* 555 Pa. 299, 724 A.2d 326, 333 (1999), the Supreme Court set forth the burden of proof imposed upon a petitioner in establishing the claim of ineffectiveness.

> To show ineffective assistance of counsel which so undermined truth-determining process that no reliable adjudication of guilt or innocence could have taken place, post-conviction petitioner must show: (1) that 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 reasonable probability that outcome of proceeding would have been different.

The standard for review of an order denying post-conviction relief is to determine whether or not the record supports the PCRA Court's decision and whether the PCRA Court's decision is free from legal error. *Commonwealth v. Allen,* 557 Pa. 135, 732 A.2d 582 (1999). A PCRA Court's findings will not be disturbed unless there was no support for those findings in the certified record. *Commonwealth v. Carr,* 768 A.2d 1167 (Pa.Super. 2001).

Grow's first claim of error is that his trial counsel was ineffective for failing to consult with the defendant to determine whether or not he wished to file a post-sentencing motion or an appeal. In *Roe v. Flores-Ortega,* 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed. 985 (2000), the United States Supreme Court decided the question of whether or not trial counsel was ineffective for not filing a notice of appeal when the defendant had not clearly stated that he wished either to file an appeal or to forego his appellate rights.

> If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal. See *supra*, at 1034 and this page. If counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel's failure to consult with the defendant itself constitutes deficient performance. *Roe v. Flores-Ortega, supra,* 528 U.S. at 478.

In rejecting the premise that the failure to consult with his client automatically establishes a claim of the ineffectiveness of counsel the Court established a standard for making that determination.

> We instead hold that counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known. See *Id.*, at 690, 104 S.Ct. 2052 (focusing on the totality of the circumstances). *Roe v. Flores-Ortega, supra,* 528 U.S. at 480.

At the time of the hearing on Grow's petition for post-conviction relief, both he and his trial counsel testified. His trial counsel, Leslie Perlow, (hereinafter referred to as "Perlow"), indicated that at no time following the entry of his plea did Grow ever contact her and indicate that he wished to file either post-sentencing motions or an appeal. Perlow testified that at no time following the entry of Grow's plea did he ever contact her by phone or in writing to ask her to pursue the appeal or modification of sentence. She also testified that this Court advised Grow of his post-sentencing rights, which included the right to file a petition seeking to modify his sentence or direct appeal to the Superior Court and Grow, had indicated that he had no questions with respect to those rights. *PCRA Transcript, page 5.* In addition, Perlow indicated, based upon her then twenty-one years of experience in representing criminal defendants that it would be highly unusual for anyone to seek to modify their sentence of probation when the guidelines called for incarceration in each of the ranges. *PCRA Transcript, page 7.*

Grow also testified at the time of the sentencing that he indicated that at no time after he entered his plea did he and Perlow ever discuss the filing of any post-sentencing motions or an appeal. Although he suggested that he was never advised of these rights, the sentencing transcript clearly refutes that contention as this Court advised him of his rights and asked him whether or not he had any questions with respect to his post-sentencing rights and/or his sentence to which he answered no on both occasions.

In reviewing the case in the totality of the circumstances, it is clear that no rational individual would have expected an appeal to be taken from a sentence which fell substantially below the mitigated range for this particular crime. Grow acknowledged his responsibility for the commission of this theft in open Court and also acknowledged his responsibility in a letter that was written to the victim apologizing for his conduct. When viewed in this context, it is clear that trial counsel was not ineffective for failing to pursue post-sentencing motions and/or an appeal, which were never requested by Grow.

Grow's next two claims of error are intertwined since he alleges that his sentence was illegal in that the restitution that was ordered exceeded the amount to which he would have been responsible and that his trial counsel was ineffective for failing to raise the illegality or excessiveness of his restitution sentence. A defendant cannot be ordered to make restitution for an amount that exceeds the amount that he stole and the record must support the order of restitution. *Commonwealth v. Reed,* 543 A.2d 587 (Pa.Super. 1988). At

the time of the entry of this plea, Grow acknowledged that he had received the cellular phone from his employer and that it was to be used for business purposes only. At the hearing on his petition for post-conviction relief, Grow acknowledged that he had received the phone in October of 2005 and had it until the December 12, 2005 bill had been received by the victim. That bill indicated a total amount due of five thousand one hundred twenty-one and eleven cents, which included an outstanding previous balance of one thousand four hundred seventeen and thirteen cents. The billing period was from November 12, 2005 through December 11, 2005. This bill also included a summary of the calls made and received by this particular phone. The original restitution order was for the gross amount of the December 12, 2005 bill. Grow indicated at the time of the entry of this plea that he had made all of the unauthorized calls during November and December and that he was responsible for those charges. In addition, he wrote a letter to the victim indicating that he was sorry for his actions.

When the question of the amount of restitution was raised in his post-conviction petition, this Court reviewed the exhibits that were a part of the Commonwealth's case and ordered a change in the restitution to reflect the charges incurred for the period in which Grow had that phone and made those unauthorized calls. The amount of three thousand seven hundred three dollars and ninety-eight cents was reflected by the bill that was submitted in connection with the use of that cellular phone. Based upon Grow's acknowledgement of his responsibility for the unlawful use of this phone beginning in October of 2005, and the statement showing a number of calls and the cost of those calls, it is clear that the record supports the order of restitution in the amount of four thousand nine hundred fifty-three dollars and eleven cents. Accordingly, it is clear that this Court properly corrected the restitution order when it granted a portion of Grow's petition for post-conviction relief with respect to the amount of the restitution. While Grow's counsel did not file a motion seeking to modify the amount of restitution, she was never asked to and her failure to file that motion does not result in any prejudice to Grow since he has had the restitution order modified to reflect that which the Commonwealth proved. Since there was no basis upon which Grow was entitled to any further relief, it is clear that his petition for post-conviction relief was properly denied.

Cashman, J.

Dated: October 27, 2008

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[1] This amount was reflected on the December, 2005 cellular phone bill submitted to Mr. Zehner. The restitution amount was later amended to $3,703.98, which actually reflected the charges that were made in the November and December billing period. The original amount reflected not only those charges but also a previous outstanding balance of $1,417.13. As a result of Grow's petition for post-conviction relief, he was granted that relief in that a new restitution order was entered reflecting the true amount that was owed.

[2] 42 Pa.C.S.A. §9543(a).