

PITTSBURGH LEGAL JOURNAL

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PLJ

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OPINIONS

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**Regis Insurance Company v.
Paul Kouknas Enterprises, Inc.,
a Pennsylvania corporation,
t/d/b/a Happy Days Saloon, Paul Kouknas,
individually and t/d/b/a Happy Days
Saloon, William Edward Tooks, and
Patricia Fields Tucker, Administratrix
of the Estate of John Ricky Tucker, Jr.,
deceased**

Summary Judgment—Insurance—Duty to Defend and Indemnify

1. Patron of a bar carrying a handgun shot and killed John Tucker. Mr. Tucker's estate sued the owners of the bar. The bar owners settled the case by assigning to the estate the bar owners' rights to their insurance.

2. The insurer of the bar sought a declaration that it had no duty to defend or indemnify the bar owners based on the Assault and Battery Exclusion of the insurance policy.

3. Where the alleged injury results from an assault and battery, the policy's exclusion applies and there is no coverage.

4. Cases that have not applied the Assault and Battery Exclusion involve situations where the injuries were allegedly caused by some acts of negligence of the bar owners or their employees, and not by an assault and battery.

5. In this case, because the injury to Mr. Tucker was caused by an assault and battery, there was no coverage under the bar owners' insurance policy.

(Kenneth M. Argentieri)

Steven J. Forry and Michael Dube for Plaintiff.
Alexander J. Jamiolkowski for Defendant, Patricia Fields Tucker, Administratrix of the Estate of John Ricky Tucker, Jr. William Edward Tooks, *pro se*.

No. GD 05-025988. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION AND ORDER OF COURT

Wettick, J., January 20, 2009—The Motion for Summary Judgment of Regis Insurance Company and the Motion for Partial Summary Judgment of Patricia Fields Tucker, Administratrix of the Estate of John Ricky Tucker, Jr., deceased, are the subject of this Opinion and Order of Court.

The Kouknas Defendants (Paul Kouknas Enterprises, Inc. and Paul Kouknas) operate a bar known as the *Happy Days Saloon*. William Edward Tooks shot and killed John Ricky Tucker, Jr. outside of the Happy Days Saloon. At the time of the incident, the Kouknas Defendants were insured under a policy issued by Regis Insurance Company.

Tucker's Estate sued the Kouknas Defendants in the Common Pleas Court of Allegheny County at GD05-011364. Regis refused to provide coverage on the ground that exclusions within the policy eliminated Regis' duty to defend and to indemnify the Kouknas Defendants. The underlying case was resolved through a settlement agreement between the Estate and the Kouknas Defendants under which the Kouknas Defendants relieved themselves of liability by assigning their right of payment against Regis in return for a release agreement.

In this lawsuit, plaintiff's complaint raises a claim for declaratory relief pursuant to the Declaratory Judgments Act, 42 Pa.C.S. §§7531-7541; plaintiff seeks a declaration that it was not obligated to defend or indemnify the Kouknas Defendants. The answer of the Kouknas Defendants includes

a two-count counterclaim raising a breach of contract and a bad faith cause of action pursuant to 42 Pa.C.S. §8371.

Regis relies on several provisions including an ASSAULT AND BATTERY EXCLUSION AND COVERAGE DELETION ENDORSEMENT¹ which provides that in consideration of the premium charged for this insurance, it is agreed that the policy to which this endorsement is attached is amended and modified as follows:

Actions and proceedings to recover damages for "bodily injury" or "property damage" or "personal injury" arising, *in whole or in part*, from the following are excluded from coverage and the Company is under no duty to investigate, defend or to indemnify an insured in any action or proceeding alleging such causes of action and damages:

1. *Assault and Battery or any act or omission in connection with the prevention, suppression or results of such acts;*

2. Harmful or offensive contact between or among two or more persons; or

3. Apprehension of harmful or offensive contact between or among two or more persons; or

4. Threats by words or deeds.

5. This exclusion applies to "bodily injury," "property damage," "personal injury" or any obligation to investigate, defend or indemnify, if such injury, damage or obligation is caused directly or indirectly by any other cause or event that contributes concurrently or in any other sequence to the injury or damage. If injury or damage from a covered occurrence, cause or event occurs, and that injury or damage would not have occurred but for the acts or omissions set forth in paragraphs 1 through 4 above, such injury or damage will be considered to be caused by the acts or omissions set forth in paragraphs 1 through 4 above, and would be excluded from coverage.

This exclusion applies regardless of the degree of culpability or intent and without regard to:

A. Whether the acts are alleged to be by or at the instruction or at the direction of the insured, his officers, employees, agents or servants; or by any other person lawfully or otherwise on, at or near the premises owned or occupied by the insured; or by any other person;

B. The alleged failure of the insured or his officers, employees, agents or servants in the hiring, supervision, retention or control of any person, whether or not an officer, employee, agent or servant of the insured;

C. *The alleged failure of the insured or his officers, employees, agents or servants to attempt to prevent, bar or halt any such conduct or to medically treat or obtain such treatment for any injuries or damages sustained.*

(Emphasis added.)

The complaint in the underlying lawsuit states that John Ricky Tucker died as a direct and proximate result of the conduct of the Kouknas Defendants. The complaint includes allegations that the Kouknas Defendants, through their agents, servants and/or employees, were negligent in per-

mitting the shooter, a 20 year old, to illegally enter the bar carrying a handgun and in serving intoxicating liquor to the shooter. The complaint also alleges that the shooter, who had a handgun visible in his waistband, began to argue with the deceased in the presence of the bouncer and/or security guard employed by defendants and that the security guard and/or bouncer failed to take any action whatsoever to protect the deceased who was unarmed and confronted by an armed patron.

However, it is not alleged that the shooting was accidental. See ¶21 of the Complaint which states that the shooter “pulled the gun from his pants and fired the weapon in the direction of John Ricky Tucker, Jr, who suffered a severe gunshot wound in his chest which caused his death approximately thirty minutes later.” Also, it is not alleged that after the shooting, there was action or inaction on the part of agents, servants, or employees of the Kouknas Defendants that contributed to the decedent’s death.

The shooting, as described in the Complaint of the Tucker Estate, constituted an assault and battery. Thus, the underlying lawsuit was an action to recover damages for “bodily injury” arising “in whole or in part” from an assault and battery. Consequently, the exclusion described in ¶1 of the Assault and Battery Exclusion applies.

Also, the explanation of the Assault and Battery Exclusion in ¶5 states that this Exclusion applies whenever acts constituting an assault and battery contribute to the injury. Paragraph 5 states that even if the injury is from a covered occurrence, the injury will be excluded from coverage if the injury “would not have occurred but for the acts or omissions set forth in paragraphs 1 through 4....”

The Tucker Estate relies on two Pennsylvania appellate court cases in support of its position that the Assault and Battery Exclusion does not apply: *Donegal Mutual Insurance Co. v. Baumhammers*, 938 A.2d 286 (Pa. 2007), and *QBE Insurance Corp. v. M&S Landis Corp.*, 915 A.2d 1222 (Pa.Super. 2007).

Baumhammers does not apply because in that case the Court was not considering the scope of an Assault and Battery Exclusion. The allegations in the complaint were that the negligence of the insureds enabled the intentional conduct of a third party (multiple shootings resulting in the death of five individuals and serious bodily injury to a sixth). The insureds contended that these negligence claims raised against the insureds were covered through its policy which provided coverage for claims against an insured for damages resulting from bodily injury caused by an occurrence. An *occurrence* was defined as an accident.² The Court held that the test of whether the injury is the result of an accident is to be determined from the viewpoint of the insured and that, in this case, the shooting spree cannot be said to be the natural and expected result of the insured’s alleged acts of negligence. 938 A.2d at 292-93.

In the present case, the Kouknas Defendants would prevail if the issue was whether the Regis policy provided coverage for claims against the Kouknas Defendants for damages resulting from bodily injury caused by an occurrence. However, the purpose of the Assault and Battery Exclusion is to exclude from coverage bodily injury that may be caused by an occurrence where the bodily injury arises in whole or in part from an assault and battery. In other words, the issue in this case is whether the Assault and Battery Exclusion excludes claims that would otherwise be covered under a policy providing occurrence coverage, as construed in *Baumhammers*. For the reasons that I have discussed, the Assault and Battery Exclusion reaches the claims of the Tucker Estate against the Kouknas Defendants that would otherwise be covered by a policy providing coverage for bod-

ily injury caused by an occurrence.

In *QBE Insurance, supra*, the plaintiffs’ complaint in the underlying action alleged that David Potter was smothered to death as the result of the negligent conduct of the insured’s owners and agents. The alleged negligent conduct arose out of the insured’s bouncers forcibly evicting Mr. Potter from a nightclub. The complaint alleged that the insured’s bouncers wrestled Mr. Potter down the stairs, at times in a choke hold, and then threw him face down on the ground. They then laid on top of him restricting his ability to breath, negligently causing his death. The complaint alleged that the death was the direct and proximate result of the carelessness of the owners and their agents in failing to properly train and supervise its staff, failing to adequately staff the nightclub, failing to recognize that Mr. Potter posed no risk and failing to render first aid.

QBE denied coverage on two grounds: the claims in the underlying complaint did not constitute an “occurrence” under the policy and that the alleged conduct was excluded from coverage based on the Assault and Battery Exclusion in the policy.

The Assault and Battery Exclusion upon which the insurance company relied reads as follows:

A. This insurance does not apply to actions and proceedings to recover damages for “bodily injury,” “property damage” or “personal and advertising injury” arising from the following and the Company is under no duty to defend or to indemnify an insured in any action or proceeding alleging such damages:

1. Assault and Battery or any act or omission in connection with the prevention or suppression of such acts;

B. This exclusion applies regardless of the degree of culpability or intent and without regard to:

1. Whether the acts are alleged to be by or at the instruction or at the direction of the insured, his officers, employees, agents or servants; or by any other person lawfully or otherwise on, at or near the premises owned or occupied by the insured; or by any other person;

2. The alleged failure of the insured or his officers, employees, agents or servants in the hiring, supervision retention or control of any person, whether or not an officer, employee, agent or servant of the insured;

3. The alleged failure of the insured or his officers, employees, agents or servants to attempt to prevent, bar or halt any such conduct.

915 A.2d at 1228.

The Court held that it could not determine as a matter of law that the bodily injury was the result of an assault and battery because the complaint did not allege that the cause of death was an assault and battery but rather that after eviction, these employees “negligently restrained [the decedent] or improperly restrained him, causing his death.” *Id.* at 1225-26.

The Court relied on an unpublished opinion in *Essex Ins. Co. v. Starlight Management Co.*, 198 Fed. Appx. 179 (3d Cir. 2006), which involved similar facts. A patron of a strip club was seriously injured when he was forcibly evicted from the club and in the process fell down stairs. He brought a negligence action alleging that he was injured as a result of the strip club’s failure to exercise due care in the selection and investigation of its employees, and its failure to provide adequate training to its security employees. The Court stated

that based on the allegations of the amended complaint, it could not be determined as a matter of law that the plaintiff's injuries arose out of an assault and/or battery.

The present case is not governed by *QBE Insurance Corp. v. Essex Ins. Co.* because in those cases the plaintiffs' complaints alleged that the injuries arose from the alleged negligence of the persons directly responsible for the death (*QBE Insurance*) and the serious injury (*Essex Insurance*). In both cases, the Court stated that the obligation to indemnify depended upon a finding that the injuries did not arise from an assault and battery.

In the present case, the injuries were caused by a shooting. There are no allegations in the complaint filed in the underlying suit that the shooting was not intended. Thus, in the present case, the injuries arose from an assault and battery.

Cases recognizing that an Assault and Battery Exclusion applies where the injury arises out of an assault and battery include *Acceptance Ins. Co. v. Seybert*, 757 A.2d 380 (Pa.Super.2000); *Britamco Underwriters, Inc. v. Grzeskiewicz*, 639 A.2d 1208 (Pa.Super. 1994), disapproved on other grounds, *Donegal, supra*, 893 A.2d at 808; and *Britamco Underwriters, Inc. v. Weiner*, 636 A.2d 649 (Pa.Super. 1994).

In *Britamco Underwriters, Inc. v. Weiner*, the plaintiff filed suit against the owners of a bar and an employee who struck the plaintiff in the neck. The bar sought coverage under its general liability policy; the insurance company filed a declaratory judgment action seeking a declaration that it had no duty to defend or to indemnify because the incident was covered by the policy's Assault and Battery Exclusion.

The Court ruled against the insurance company because the complaint contained allegations that the injuries were the result of an accident. The Court stated that the exclusion did not apply because the plaintiff's injuries were not necessarily caused by the intentional acts of any individual.

In *Britamco v. Grzeskiewicz*, a patron of a bar attacked the plaintiff with a broken beer bottle, striking her in the face. Her complaint included allegations that the injuries were caused by the negligence of the bar's agents, servants, or employees. The bar's insurance company sought a declaration that it had no duty to indemnify or defend. The Court ruled that the assault and battery endorsement to the policy excluded coverage because the injuries were inflicted through intentional, willful, and purposeful acts of the patron. The Court distinguished *Britamco Underwriters v. Weiner* on the ground that in that case the plaintiff's complaint could potentially come within the coverage of the policy because of the allegations that the injuries were not the result of intentional acts.

In *Acceptance Insurance*, the plaintiff in the underlying action sued five individuals who attacked him following a night of drinking at a bar. The plaintiff also sued the bar that sold and furnished alcoholic beverages to these individuals while they were visibly intoxicated, thereby rendering them incapable of safe and prudent conduct.

The insurance company sought a declaration that it had no duty to defend or indemnify the bar against the injured party's claims. The Court agreed with the insurance company that the claims were barred by the Assault and Battery Exclusion. The Court stated that *Britamco Underwriters v. Weiner* did not govern this situation because in that case the complaint asserted alternative theories of liability sounding in assault and battery and claims of general negligence, and "referred to the incident in question as an 'accident,' clearly suggesting the possibility of negligence as opposed to an intentional assault and battery." 757 at 383. In the present case, on the other hand, the complaint in the underlying action contained no allegations that the injuries were directly caused in any way other than by assault and battery.

"There is no suggestion that Seybert's injuries were an accident, as was suggested in *Weiner*, or were negligently caused directly by Belmont employees." *Id.* The Court stated that this case was governed by *Britamco Underwriters v. Grzeskiewicz* where the patron was injured by another patron who deliberately attacked her with a beer bottle.

Regis Ins. Co. v. Kenny's Bar & Restaurant, 4 D.&C. 5th 6 (C.P. Bucks 2008), involved a fact situation almost identical to the fact situation in this case. A patron of a bar sued both the bar and the patrons of the bar who had assaulted him. The complaint raised a negligence count against the bar for violating various duties including a duty to prevent harm to customers and a duty to provide sufficient crowd control and staff. The bar's insurance company denied coverage on the ground that the injuries described in the complaint fell within the Assault and Battery Exclusion. In this declaratory judgment action, the Court upheld the insurance company's contention that the claims raised against the bar in the underlying action were covered by the Assault and Battery Exclusions. The Court rejected the bar's contention that *QBE Insurance Corp.* governed this case because in *QBE* the complaint alleged that the patron's death was a direct and proximate result of the negligence and carelessness of the defendant's agents, while in the present case, the patron's injuries arose "in whole or in part" from an assault and battery.³

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

ORDER OF COURT

On this 20th day of January, 2009, it is hereby ORDERED that the Motion of the Tucker Estate for Partial Summary Judgment is denied, that plaintiff's Motion for Summary Judgment is granted, and that it is hereby declared that Regis Insurance Company was not obligated to defend or indemnify Paul Kouknas or Paul Kouknas Enterprises, Inc., with regard to the underlying action docketed in the Court of Common Pleas of Allegheny County at GD05-011364.

BY THE COURT:
/s/Wettick, J.

¹ See Regis Special Multi-Peril Policy, Plaintiff's Exhibits in Support of Motion for Summary Judgment, Ex. C at RAB 3(12-99).

² See Regis Policy, DEFINITIONS—SECTION II and DEFINITIONS APPLICABLE TO SECTION I: "[O]ccurrence" means an accident...which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Plaintiff's Exhibits, Ex. C.

³ The Court noted the difference in the policy language: in *Regis v. Kenny's Bar*, the policy included the "in whole or in part" language while in *QBE*, the policy did not include this language. In the present case, ¶5 of the Assault and Battery Exclusion (see *supra* at 2-3) results in the same conclusion.

Dawn Mapel and Michael Mapel, individually and as co-administrators of the Estate of Andrea Rose Mapel, deceased v. Deborah Ann Lenart, M.D., et al.

MCARE Fund—Posting of Bond—Motion to Exempt

1. Following a jury trial, a verdict was entered in favor of Plaintiffs and against Defendant in the amount of \$895,000.

2. The jury verdict of \$895,000 plus delay damages was in excess of Defendant's insurance coverage of \$500,000 there-

by requiring excess coverage by the Medical Care Availability and Reduction of Error Fund (MCARE).

3. Defendant appealed to Superior Court and filed a Motion to Exempt the MCARE portion of the verdict from the necessity of posting an appeal bond. A supersedeas bond was posted for 120% of the judgment not including the MCARE Fund portion of the judgment.

4. The trial court denied Defendant's Motion to Exempt but stayed the execution on the MCARE portion of the judgment to a date certain. Defendant appealed this Order to Superior Court.

5. Defendant then filed a Motion Pursuant to Pa.R.A.P. 1701(b), to preserve the status quo, *i.e.*, exempt the MCARE portion of the verdict from posting security. This was denied by the trial court and Defendant appealed.

6. Defendant argued that the MCARE portion of the security is exempt from bonding as a Commonwealth party pursuant to Pa.R.A.P. 1736(a)(1) as well as case law. Trial court found that the MCARE Fund is not to be considered protected under the umbrella of the Commonwealth as contemplated by the statute in that the MCARE Act expressly exempts the Commonwealth from liability or debts incurred by the MCARE Fund.

7. The trial court also concluded that Pa.R.A.P. 1731 "Automatic Supersedeas for Orders for the Payment of Money" is meant to ensure that Plaintiffs who have prevailed at trial are guaranteed that funds will be available after the successful exhaustion of any and all appeals.

(C. Kurt Mulzet)

Harry S. Cohen for Plaintiffs.

Naomi A. Plakins for Defendant.

No. GD 04-18288. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Della Vecchia, J., January 12, 2009

I. INTRODUCTION

This is a companion Opinion to the Opinion previously filed at docket numbers of 429 WDA 2008, 379 WDA 2008 and 449 WDA 2008. The Superior Court is respectfully directed to the previously filed Opinion for the Factual History of the underlying case.

II. PROCEDURAL HISTORY

A complaint was filed at the above-referenced general docket number on August 10, 2004. The complaint was answered on October 20, 2004. Numerous filings were made over the next three (3) years, including numerous Notices of Deposition, Preliminary Objections, Requests, Motions and Orders of Court until the case was listed for a jury trial before this Court on September 5, 2007.

The trial lasted six (6) days. At the conclusion, the jury found in favor of the Plaintiffs and against the Defendant, Dr. Deborah Ann Lenart in the amount of \$895,000.00.¹ The jury verdict of \$895,000.00 plus delay damages is in excess of the Defendant's primary insurance coverage, which totals \$500,000.00, thereby requiring excess coverage by the Medical Care Availability and Reduction of Error Fund (hereinafter "MCARE"). The Defendant, Deborah Ann Lenart, M.D., filed Post-Trial Motions and thereafter appealed to the Superior Court.

On February 15, 2008, the Defendant filed a Motion to Exempt the MCARE portion of the verdict from the necessity of posting an appeal bond. On February 22, 2008, the Defendant's primary insurance carrier, ProNational Insurance Company, posted a supersedeas bond in the amount of \$702,300.00, representing 120% of the judgment, not including the portion of the judgment payable by the

MCARE Fund.

On February 22, 2008, this Court denied the Defendant's Motion to Exempt and ordered the Defendant to maintain the bond in the amount of \$702,300.00. This Court did, however, stay the execution on the MCARE portion of the judgment until August 31, 2008. (See Order dated February 22, 2008).

The Defendants filed a Notice of Appeal on February 26, 2008. In an Order dated March 3, 2008, this Court instructed the Defendants to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.C.P. §1925. Defendant Lenart's Matters Complained of were timely filed on March 20, 2008, referenced as 379 WDA 2008. Plaintiffs filed a cross-appeal to this matter at 449 WDA 2008. This Court filed an Opinion as to said matters on June 24, 2008.

On August 8, 2008, the Defendant filed a Motion pursuant to Pa.R.A.P. §1701(b), to Preserve the Status Quo, *i.e.* exempt the MCARE portion of the verdict from posting security. Plaintiffs filed a response to said Motion on August 13, 2008. This Court ordered that argument on said Motion would be held on August 15, 2008. After argument and due consideration, this Court denied said Motion in an Order dated August 15, 2008.

On September 10, 2008, the Defendant filed a Petition to Reconsider and Motion to Decrease Supersedeas. Plaintiffs filed a Response on September 15, 2008. Also on September 15, 2008, the Defendant appealed this issue to the Superior Court of Pennsylvania. On September 18, 2008, this Court issued an Order denying Defendant's Petition to Reconsider.

In an Order dated October 20, 2008, this Court instructed the Defendant to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b). That statement was timely filed on November 10, 2008, placing this issue properly before the Superior Court of Pennsylvania.

III. ISSUES RAISED ON APPEAL

Defendant Lenart raises the following Matter Complained of on Appeal:

1. The Trial Court erred/abused its discretion in denying Dr. Lenart's Motion Pursuant to Pa.R.A.P. §1701(b) to Preserve Status Quo on August 15, 2008, where granting such motion was within its discretion pursuant to Pa.R.A.P. 1701(b), in the interest of judicial economy, and would not have prejudiced Plaintiffs.

IV. DISCUSSION

Pa.R.A.P. §1701(b), entitled Authority of a Trial Court or Agency after Appeal, states,

after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may:

- (1) Take such action as may be necessary to preserve the status quo, correct formal errors in papers relating to the matter, cause the record to be transcribed, approved, filed and transmitted, grant leave to appeal in forma pauperis, grant supersedeas, and take other action permitted or required by these rules or otherwise ancillary to the appeal or petition for review proceeding.

The Defendant was requesting that this Court Stay the Execution on the portion of the Judgment payable by the MCARE Fund for a period of six (6) months from the date of the proposed Order, August 15, 2008. (See Order on Motion Pursuant to Pa.R.A.P. §1701(b) to Preserve the Status Quo, Order Denied). As previously stated, this Court denied this request.

Pa.R.A.P. §1736(a) states, [n]o security shall be required of:

- (1) The Commonwealth or any officer thereof, acting in his official capacity.
- (2) Any political subdivision or any officer thereof, acting in his official capacity, except in any case in which a common pleas court has affirmed an arbitration award in a grievance or similar personnel matter.
- (3) A party acting in a representative capacity.
- (4) A taxpayer appealing from a judgment entered in favor of the Commonwealth upon an account duly settled when security has already been given as required by law.
- (5) An appellant who has already filed security in a lower court, conditioned as prescribed by these rules for the final outcome of the appeal.

Pa.R.A.P. §1737, entitled, Objections to Security further states,

The lower court or the appellate court may at any time upon application of any party and after notice and opportunity for hearing, upon cause shown:

- (1) Require security of a party otherwise exempt from the requirement of filing security, or increase, decrease or eliminate the amount of any security which has been or is to be filed.
- (2) Strike off security improperly filed.
- (3) Permit the substitution of surety and enter an exoneration of the former surety.

The Medical Care Availability and Reduction of Error Fund (hereinafter "MCARE"), a deputation of the Pennsylvania Insurance Department, was created by Act 13 of 2002, and signed into law on March 20, 2002. MCARE is the successor to the Medical Professional Liability Catastrophe Loss Fund, better known as the "CAT Fund" which originally was established by section 701(e) of the Health Care Services Malpractice Act, Act 111 of 1975 (40 P.S. §§ 1301.101-1301.1006), *et seq.* and began to accept coverage and accrue unreserved liabilities starting in the calendar year 1976.

(www.mcare.pa.us, About MCARE).

MCARE is a special fund within the State Treasury established, among other things, to ensure reasonable compensation for persons injured due to medical negligence. Money in the fund is used to pay claims against participating health care providers and eligible entities for losses or damages awarded in medical professional liability actions in excess of basic insurance coverage ("primary coverage") provided by primary professional liability insurance companies ("primary carriers") or self insurers. (www.mcare.pa.us, Purpose).

The Defendant argues that the MCARE portion of the security is exempt from bonding as a Commonwealth party, pursuant to PA.R.A.P. §1736(a)(1) as well as case law. This Court does not agree with same. Although the fund is considered, "a deputation of the Pennsylvania Insurance Department," it can hardly be considered protected under the umbrella of the Commonwealth as contemplated by the statute. In fact, Section 1303.712(1) of the MCARE Act expressly exempts the Commonwealth from liability or debts incurred by the MCARE Fund.

The case law on which the Defendant relies is captioned, *Hyrca v. West Penn Allegheny Health System Inc., et al.*, GD 03-10989. The exhibit that Defendant provides for support is merely an Order that does not speak to the reasoning of that decision. (See Exhibit C). In *Hyrca*, the Plaintiff obtained a verdict in excess of eight (8) million dollars. The Defendant petitioned the court for a reduction in security required by the MCARE Fund. The Honorable Eugene Strassburger granted said petition. Following the Plaintiff's application to restore the security, the Superior Court, by *per curiam* Order denied plaintiff's application. In the *Hyrca* case, neither the lower court nor the appellate court filed an opinion in support of said order.

This Court respectfully directs the Superior Court's attention to the case of *Cypher v. South Hills Health Systems* (Allegheny Co. GD 96-3496). The trial judge denied the health care provider's request for exemption from bonding requests for the predecessor of MCARE, i.e. the CAT fund. The Superior Court reversed the trial judge, but the Supreme Court reversed the Superior Court and reinstated the trial court's order. (See No. 9 W.D. Misc. Dkt. 1998—In the Supreme Court of Pennsylvania—Western District, April 22, 1998).

V. CONCLUSION

Pa.R.A.P. § 1731, entitled "Automatic Supersedeas for Orders for the Payment of Money," is meant to ensure that Plaintiffs who have suffered harm and met their burden at trial in proving such harm and recovered monetary damages are guaranteed that said funds will be available after the successful exhaustion of any and all appeals. The rulings made by this Court are in accord with said statute. For the above stated reasons, this Court respectfully requests the Superior Court of Pennsylvania to affirm this Court's Order dated August 15, 2008.

BY THE COURT:
/s/Della Vecchia, J.

Date: January 12, 2009

¹ As per this Court's Order of October 3, 2007, delay damages were added so as to inflate the jury verdict to \$1,047,592.17 and Patricia J. Bulseco, M.D., PC, was added to the verdict slip as a defendant. Please also see O'Brien, J. Order of November 14, 2006, which was not docketed until June 25, 2008, dismissing Patricia J. Bulseco, M.D. as a defendant.

**David H. Caiarelli, et al. v.
Sears, Roebuck & Co.
and
David Albertini, et al. v.
Sears, Roebuck & Co., Edward S. Lampert,
Aylwin Lewis and William C. Crowley**

Summary Judgment—PA Minimum Wage Act of 1968

1. Plaintiffs repair appliances for defendant company at the homes of customers. Under company's Home Dispatch Program, plaintiffs commute to and from work in company-owned vans, but are not compensated for the first 35 minutes of commuting time. Plaintiffs have the option to go to company's dispatch location by private means and then drive company's vans to their customers' locations.
2. Plaintiffs seek compensation under PA Minimum Wage Act of 1968 ("PMWA") for their commuting time.
3. This issue is not addressed by PMWA or regulations. It

is proper to look to the Fair Labor Standards Act (“FLSA”), the federal statute similar to the PMWA, to interpret the PMWA.

4. Under the FLSA, time spent traveling to and from work is excluded from compensable work even where the work place varies, such as customers’ homes.

5. Summary judgment was properly granted to the company on the PMWA claim. Because plaintiffs failed to allege a specific contract between the parties, it was also proper to grant preliminary objections to the Wage Payment and Collection Law claim and breach of contract claim.

(Kenneth M. Argentieri)

Michael Bruzzese and James Cirilano for Plaintiffs.

Michael Adams and Thomas G. Abram for Defendants.

Nos. GD 03-1375 and GD 07-19720. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Horgos, J., January 15, 2009—Plaintiffs, David H. Caiarelli, et al., filed a Complaint against Defendants, Sears, Roebuck & Co., Alan J. Lacy and Lyle G. Heidemann, seeking an accounting and to recover damages for Defendants’ alleged breach of contract and violations of the Wage Payment and Collection Law, 43 P.S. Section 260.1 *et seq.* Defendants filed Preliminary Objections to Plaintiffs’ Complaint which this Court sustained and granted Plaintiffs thirty (30) days to file an amended Complaint.

Plaintiffs timely filed an Amended Complaint which added a fourth Count alleging that Sears had violated the Pennsylvania Minimum Wage Act of 1968, 43 P.S. Section 333.101 *et seq.* Defendants filed Preliminary Objections to the Amended Complaint which were sustained in part and denied in part. By Order dated January 7, 2005, the Court dismissed Plaintiffs’ claims under the Wage Payment and Collection Law in Count I for failure to state a cause of action upon which relief may be granted. The Court also dismissed Count II which set forth a claim for breach of contract and the claim for an accounting in Count III which was based on Counts I and II. Defendants’ Preliminary Objections to Plaintiffs’ claim for relief under the Pennsylvania Minimum Wage Act of 1968 were denied. No claims against the individual Defendants proceeded.

Plaintiffs, David Albertini, et al., filed a similar Complaint against the same Defendants in the Court of Common Pleas of Beaver County, Pennsylvania which was transferred to Allegheny County and was coordinated and consolidated with the action by Caiarelli before this Court by the Honorable Eugene Strassburger. Following Preliminary Objections filed by Defendants to Albertini’s Amended Complaint, the Court entered an Order on January 22, 2008 which dismissed Plaintiffs’ claims under the Pennsylvania Wage Payment and Collection Law and the consolidated actions proceeded on Plaintiffs’ claims against Sears under the Pennsylvania Minimum Wage Act of 1968 (PMWA).

Plaintiffs are repair service technicians who service and repair Sears’ appliances in customers’ homes in Western Pennsylvania. Plaintiffs allege that Sears’ method of compensating these technicians under its Home Dispatch Program (HDP) fails to pay Plaintiffs for work performed for Sears and thus violates the PMWA.

Under the HDP, Sears provides vans to the technicians to make service calls. The technicians have the option of driving the Sears’ vans to commute from home to their first service call of the day and then home following the last service call. Sears pays the gas and operating expenses for the commute. Alternatively, the technician may choose to commute to and from a reporting location by private means and use the van during working hours only.

Plaintiffs herein have chosen to commute to and from their homes in a Sears’ van under the HDP. The HDP provisions are incorporated in a collective bargaining agreement covering most of the Plaintiffs.

The technicians who voluntarily participate in the HDP begin their working day when they arrive at the first customer call for the day and are compensated for the time spent repairing appliances, traveling between customer calls and performing other work-related activities during the workday. They are not compensated for the first thirty-five (35) minutes of their travel from home to the first customer in the morning and from the last customer to home at the end of the workday. Sears pays the expenses related to the use of the vehicle such as gas, maintenance and insurance.

The technicians who choose not to participate in the HDP also use the vans owned by Sears to drive to service calls. They commute to and from their homes to their reporting office by private means and pick up the Sears’ van to travel to their first customer in the van. Their compensation does not include their commute time to and from their reporting office.

Sears provides a laptop computer called an SST to the technicians on which they receive their daily assignments and record billing, timekeeping, and parts ordering. When the technicians return home from work, they connect the SST and plug the SST’s power cord into an electrical outlet for charging. Assignments are transmitted electronically overnight from Sears’ computer to the SST’s without assistance or participation by the technicians.

Sears instructs the technicians to arrive at the first customer at approximately 8:00 a.m. which is the scheduled start of the workday. Sears further instructs the technicians that they are not to call customers or managers during their commute. The technicians are provided with global positioning system software to provide directions to their calls.

The technicians enter their own records of hours worked on the SST. The first entry is made when the technician enters the van to make his first call. When he arrives at the first call, he enters that time and another when he is ready to start the first call. The technician is compensated for any amount of time in excess of thirty-five (35) minutes travel to the first call or from the last call to home.

The issue raised in both Plaintiffs’ Motion for Summary Judgment and Defendant’s Motion for Summary Judgment is whether the Sears technicians are entitled to compensation for the time spent in the Sears’ van commuting to and from their work locations. Plaintiffs argue that the Sears technicians are “on duty” during the morning and evening commutes under the terms of the PMWA. Plaintiffs maintain that under the definition of “hours worked” contained in the Pennsylvania Code, Chapter 231.1, which governs the interpretation of the PMWA, the commute time of the Sears technicians is included.

Section 231.1 of the Pennsylvania Code defines “hours worked” as:

The term includes time during which an employee is required by the employer to be on the premises of the employer, to be on duty or to be at the prescribed work place, time spent in traveling as part of the duties of the employee during normal working hours and time during which an employee is employed or permitted to work; provided, however, that time allowed for meals shall be excluded unless the employee is required or permitted to work during that time, and provided further, that time spent on the premises of the employer for the convenience of the employee shall be excluded.

34 PA. Code 231.1.

Plaintiffs point out that the Pennsylvania Code's definition of "hours worked" includes: "time spent traveling as part of the duties of the employee." (Plaintiffs' Brief in Support of Their Motion for Summary Judgment, p. 3.). Plaintiffs thus argue that the Sears technician is on duty during the commute and that the commute to and from the first and last work location is "time spent traveling as part of the duties of the employee." *Id.* Plaintiffs ignore the qualifying phrase in the definition which limits the time spent traveling by the employee as part of his duties to time spent traveling "during normal working hours." (34 PA. Code, 231.1(b)).

Plaintiffs and Defendant agree that neither the PMWA and its regulations nor Pennsylvania courts have specifically addressed the compensability of commute time in a company-owned vehicle. Defendant argues that this court should look to the Fair Labor Standards Act (FLSA), 29 U.S.C. 201-219, which is the analogous federal statute in properly interpreting an issue on which the state statute is silent.

Pennsylvania state courts have looked to federal statutes and, in particular, the FLSA where Pennsylvania courts have not had the occasion to interpret the state's statute. In *Commonwealth v. Stuber*, 822 A.2d 870 (Pa. Commw. Ct. 2003), the sole issue before Commonwealth Court was whether an individual was an employee or an independent contractor for purposes of the PMWA. Commonwealth Court first noted that there was no Pennsylvania authority that establishes the standard to be used to determine whether one is an employee or an independent contractor under the PMWA and indicated that it is proper in such circumstances to give deference to the federal interpretation of a federal statute where the state statute substantially parallels it. *Id.* at 873.

The Court explained that the PMWA "mirrors the federal Fair Labor Standards Act" and that deference to the federal law in its analysis of the PMWA was proper. *Id.* at 873. Commonwealth Court also deferred to the federal National Labor Relations Act in interpreting the Pennsylvania Public Employee Relations Act in *Commonwealth v. Pa. Labor Relations Board*, 527 A.2d 1097, 1099 (Pa. Commw. Ct. 1987). Similarly, the Federal District Court applied federal law in analyzing overtime claims under the FLSA and the PMWA. *Barvinchak v. Indiana Regional Medical Center*, 2007 WL 2903911, at 12 (W.D. Pa. Sept. 28, 2007).

Section 4 (a)(1) of the Portal-to-Portal Act of 1947, 29 U.S.C. 254 (a)(1) amended the FLSA to provide that time spent traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform is not time counted as compensable work time under the FLSA. Section 4(a)(2) of the Portal-to-Portal Act excludes from compensable time activity which occurs before or after the employee's principal activity. 29 U.S.C. 254(a)(2). Here, it is clear that the service technicians' principal activity is serving and repairing Sears' appliances and that the work place is located in the various customers' homes.

The implementing regulations to the Portal-to-Portal Act further provide that commuting to and from work, even when the work site varies from day to day, is not part of the workday.

An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. *This is true whether he works at a fixed location or at different job sites.* Normal travel from home to work is not work time.

29 C.F.R. Section 785.35 (emphasis added).

In *Reich v. N.Y. City Transit Auth.*, 45 F.3d 646 (2d Cir. 1995), the Court commented: "The Portal-to-Portal exemptions properly protect employers from responsibility for

commuting time and for relatively trivial, non-onerous aspects of preliminary preparation, maintenance and clean up." *Id.* at 651.

In 1996, Congress enacted the Employee Commuting Flexibility Act which added the following language to Section 4 (a) of the Portal-to-Portal Act, 29 U.S.C. 254(a):

For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

29 U.S.C. 254(a).

Thus, commuting to and from work in a company-provided vehicle is not a compensable "principal activity" under the Act so long as: (1) the use of the vehicle was within the normal commuting area for the employer's business or establishment and (2) the use was subject to an agreement or understanding on the part of the employer and employee. Here, Sears' HDP meets both of these requirements.

The Court notes that the HDP provisions are part of the technicians' collective bargaining agreement. Further, these technicians can choose to drive their own vehicles or take public transportation or other private means to a reporting location, in which case the commute is not compensable even if it exceeds thirty-five (35) minutes. It would appear that the HDP benefits the technicians who choose it or they would simply choose to use other means of transportation and pay the attendant travel expenses. This in no way appears to be a situation where an employer has imposed burdensome conditions to the detriment of a worker in an unequal bargaining position.

For all of the foregoing reasons, the Court properly granted Defendant's Motion for Summary Judgment and denied Plaintiffs' Motion for Summary Judgment.

In the Statement of Matters Complained of on Appeal, Plaintiffs also argue that the trial court erred when it sustained Defendants' Preliminary Objections and dismissed Counts I, II and III of Plaintiffs' Amended Complaint in *Caiarelli, et al. v. Sears, Roebuck & Co., et al.* at GD03-001735 by Order of January 7, 2005 and by sustaining Defendants' Preliminary Objections and dismissing Counts I, II and III of Plaintiffs' Amended Complaint in *Albertini, et al. v. Sears, Roebuck and Co., et al.* at GD07-019720 by Order dated January 22, 2008. The Court has already set forth its rationale for sustaining those Preliminary Objections and dismissing the individual Defendants in its Opinion dated January 7, 2005 at GD03-1735 a copy of which is attached hereto.

BY THE COURT:

/s/Horgos, J.

OPINION

Horgos, J., January 7, 2005—Plaintiffs are repair service associates for Defendant, Sears, Roebuck & Co. (Sears). Plaintiffs filed a Complaint in civil action as a class action seeking damages for wages that Sears has allegedly failed to pay Plaintiffs for work performed for Sears. The individual Defendants, Alan J. Lacy and Lyle G. Heidemann, are corporate officers of Sears and are named only in Count I of the Complaint. Plaintiffs' three count Complaint sets forth claims for violation of the Wage Payment and Collection Law (WPCL), 43 P.S. Section 260.1 *et seq.*, Breach of Contract and Accounting.

Defendant filed Preliminary Objections to Plaintiffs' Complaint arguing, *inter alia*, that Plaintiffs failed to state a claim under the WPCL because Plaintiffs did not allege the existence of an employment agreement between Plaintiffs and Sears which is necessary to prove a violation of the WPCL. This Court agreed and sustained Defendants' Preliminary Objections to Count I, Violation of Wage Payment and Collection Law based on legal insufficiency and Plaintiffs were granted 30 days to file an Amended Complaint.

Plaintiffs timely filed an Amended Complaint to which they added a fourth count alleging that Sears has also violated Pennsylvania's Minimum Wage Act. Count I was also amended to include the following paragraph:

At all times relevant to this complaint, the plaintiffs worked for the defendants under a contract of employment wherein the defendants agreed to pay the plaintiffs for their work at a particular hourly rate for each hour that the plaintiffs worked. (Amended Complaint, paragraph 56.)

In all other respects, the Amended Complaint is a verbatim recitation of the corresponding sections of the original Complaint.

Defendants again filed Preliminary Objections arguing, *inter alia*, that Counts I, II and III of the Amended Complaint are legally insufficient on their face to state a cause of action and must be dismissed. This Court agrees and will enter an Order sustaining Defendants' Preliminary Objections to Counts I, II and III for the reasons set forth herein.

Pennsylvania courts have consistently held that the WPCL provides a statutory remedy when the employer breaches a contractual obligation to pay earned wages. The act does not create a substantive right to compensation. "The contract between the parties governs in determining whether specific wages are earned." *Weldon v. Kraft, Inc.*, 896 F.2d 793, 801 (3d Cir. 1990). In order to recover under the WPCL, it is first necessary to show the employee's contractual right to compensation. *Antol v. Esposito*, 100 F.3d 1111, 1117 (3d Cir. 1996).

In the context of the application of the WPCL, the question is not whether the employee may be entitled to compensation for services rendered. The question is whether the employee has a contractual right to compensation. The WPCL is not the exclusive remedy provided for the collection of wages in Pennsylvania. *Todora v. Jones & Laughlin Steel Corp.*, 304 Pa.Super. 213, 450 A.2d 647 (1982). The WPCL did not change or supplant common law rights of action or other statutory remedies. *Id.* 450 A.2d at 650. To deny a remedy under the WPCL is not to deny a remedy under other statutory or common law remedies. In fact, in Count IV Plaintiffs have set forth an allegation of a violation of the Pennsylvania Minimum Wage Act of 1968, 43 P.S. 333.01 *et seq.*, which will proceed.

Because Plaintiffs have failed to state a cause of action on which relief may be granted under the WPCL, the claims against Sears and the two individual Defendants in Count I must be dismissed.

Defendants have also preliminarily objected to Count II, Breach of Contract, on the basis of legal insufficiency. Again, Plaintiffs have failed to allege the existence of a particular contract or contracts by setting forth the elements or terms of the contract or circumstances of the contract. It is still not known if the alleged contract or contracts were express, implied, oral or written.

Pa. R.C.P. 1019(a) requires that:

(a) The material facts on which a cause of action or defense is based shall be stated in a concise and

summary form.

Rule 1019(h) further provides:

(h) When any claim or defense is based upon an agreement, the pleading shall state specifically if the agreement is oral or written.

Rule 1019(i) provides that when the claim is based upon a writing, a copy of the writing or a material part thereof, must be attached to the Complaint.

Plaintiffs were given an opportunity to amend the Complaint and correct the deficiency in pleading an agreement if such correction could be made. Plaintiffs have failed to remedy this defect, however, and the breach of contract claim must be dismissed.

Count III of Plaintiffs' Amended Complaint sets forth a claim for an Accounting which is based on Counts I and II which have been dismissed. Accordingly, Defendants' Preliminary Objection to Count III of Plaintiffs' Complaint is sustained and Count III is dismissed.

Defendants have also filed a Preliminary Objection to Plaintiffs' request in Count IV for an accounting under the Minimum Wage Act on the grounds of legal insufficiency. Count IV, however, asks only for a "full accounting of all wages that are and were due...that the defendant wrongfully and unlawfully failed to record." (Amended Complaint, paragraph 77). There is no compelling reason to dismiss this request within the Count under the Minimum Wage Act and the Court will not do so.

In conclusion, the Court will enter an Order sustaining Defendants' Preliminary Objections to Counts I, II and III of Plaintiffs' Amended Complaint. The individual Defendants named in Count I only are therefore dismissed from this case. Defendants' Preliminary Objection to Count IV of Plaintiffs' Amended Complaint will be denied.

ORDER OF COURT

AND NOW, this 7th day of January, 2005, upon consideration of the Preliminary Objections to Plaintiffs' Amended Complaint, oral argument thereon and the submission of briefs by the parties, it is hereby ORDERED, ADJUDGED and DECREED that Defendants' Preliminary Objections to Counts I, II and III of Plaintiffs' Amended Complaint on the grounds of legal insufficiency are sustained and Counts I, II and III are dismissed with prejudice. The individual Defendants named in Count I only are dismissed from the case. Defendants' Preliminary Objection to Count IV of Plaintiffs' Amended Complaint is denied.

BY THE COURT:
/s/Horgos, J.

Lynda R. Smith v. Con-Way, Inc., and jointly, severally or separately, Consolidated Freightways Corporation of Delaware

Demurrer—Worker's Compensation Exclusivity Provision

1. Plaintiff sued her husband's employers for fraudulent misrepresentation, misuse of courts and other claims relating to the employers' denial of Worker's Compensation Act claims and subsequent defense of legal proceedings relating to the claims.

2. Employers' preliminary objections, filed before answering the complaint, were timely. Plaintiff's improper

filing of a summary judgment motion prior to the filing of the preliminary objections did not prohibit the filing of the preliminary objections.

3. The exclusivity provision of the Worker's Compensation Act bars all claims of an employee's spouse concerning work-related injuries, including claims relating to the employers' defense of a Worker's Compensation Act claim.

(Kenneth M. Argentieri)

Mary Ellen Chajkowski for Plaintiff.
David McQuiston for Defendant.

No. GD 07-027516. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Scanlon, J., May 19, 2008—Plaintiff, Lynda R. Smith, (hereinafter "Appellant"), appeals this Court's Order of March 3, 2008, which sustained the Preliminary Objections in the nature of a Demurrer filed by Defendants, Con-Way, Inc., and jointly, severally or separately, Consolidated Freightways Corporation of Delaware, (hereinafter "Appellees") thereby dismissing all Counts contained in Appellant's Complaint.

At the same time I denied the Preliminary Objections of Appellant to the Appellees' Preliminary Objections. Appellant contended that because there was a pending Motion for Summary Judgment that there was no jurisdiction to hear the underlying Preliminary Objections. This appeal followed.

In her Statement of Matters Complained of on Appeal, Appellant raises the following five issues:

1. Whether trial court lacked jurisdiction to sustain demurrer defenses filed by Appellee's untimely preliminary objection, where a Rule 1035.3 Motion for Summary Judgment filed by Appellant was pending argument?
2. Whether trial court committed an error of law by dismissing all counts?
3. Whether trial court was arbitrary and capricious in light of Appellant's undisputed allegation of Appellee record perjury and obstruction?
4. Whether trial court abused its discretion by failing to construe allegations of Appellee's record perjury and obstruction in favor of Appellant?
5. Whether Appellee's untimely preliminary objections failed to conform to law or rule of court?

Appellant, the wife of a thirty year employee of the Appellees, brought this action seeking relief under separate counts for "Fraudulent Misrepresentation," "Misuse of the Courts," "Unjust Enrichment," and "Infliction of Emotional Distress." As set forth in the Complaint, the genesis of her claims was Appellees denial, and then subsequent defense of her husband's claims under the Pennsylvania Worker's Compensation Act (The Act), or an injury he allegedly sustained in the course and scope of his employment. The standards for sustaining preliminary objections in the nature of a demurrer were enunciated by our Pennsylvania Supreme Court in *Gekas v. Shapp*, 469 Pa. 1, 364 A.2d 691 (1976). The standards are strict and essentially require "that the Plaintiff's complaint indicate on its face that the claim cannot be sustained, and the law will not permit recovery...if there is any doubt, this should be resolved in favor of overruling the demurrer."

Because all of Appellants claims in the Complaint arise originally from her husband's alleged work injury, the claims are subject to the exclusivity clause of "The Act." 77 P.S. §303(a) expressly precludes injured employees and their spouses and families from filing civil actions against employers for work-related injuries. For this reason alone, the demurrer would be sustainable.

As to the specifics of the first and fourth matters complained of by Appellant, the Preliminary Objections were appropriately and timely filed. No Answer to the Complaint had been filed by Appellees by the twentieth day after service, nor had Appellee filed for a default judgment under Pa. R.C.P. 237.1 with the appropriate ten-day notice. Appellant chose instead to file a Summary Judgment Motion seeking some relief. There is no provision in our Rules of Court prohibiting the filing by Appellee of Preliminary Objections, whereas it is clear there was no basis for the Summary Judgment Motion.

The second and third issues raised deal with the merits of the decision to sustain the demurrer. An analysis of the allegations of the four counts of the Complaint is thus required.

With regard to the allegations in support of each Count, they are frivolous at best. Appellant takes issue with the manner in which her husband's worker's compensation claim was defended by Appellees. Specifically, she charges among other things that the Appellees did not arrange for an independent medical exam; did not perform a vocational rehabilitation assessment; did not arrange for alternative employment for her allegedly disabled husband; chose to litigate for years because there are caps on their liability under the provisions of the Act; and did not respond to all briefs or other filings of Appellee. That the defense presented to the compensation claim is thus based upon false representations, or that Appellees might be unjustly enriched, or that she might be entitled to some form of relief as a result thereof, are not claims recognized by our courts even if the allegations are true.

She also asserts that the claims for counsel fees advanced by the Appellees in defense of the repetitive claims and appeals, following the denial of benefits by the first Workers Compensation Judge, were in some way a "misuse" of the courts. The record of the claims and appeals can be found on dockets of the Pennsylvania Commonwealth Court, the Pennsylvania Supreme Court and the Supreme Court of the United States. More to the point though, is that the claims made by Appellees were against her husband for counsel fees for the defense of frivolous appeals and re-filings and not against this Appellant.

Lastly, she claims entitlement to relief for infliction of emotional distress because she witnessed her husband's struggle with his physical injury and his frustration in the pursuit of justice on his worker's compensation claim; her husband was forced to secure payment of medical bills through the Veteran's Administration instead of having them paid under worker's compensation; and that the lifestyle of the family was altered by the injury to husband. These claims are specifically subject to the aforementioned exclusivity clause. See *Urban v. Dollar Bank*, 725 A.2d 815 (Pa.Super. 1999).

Accepting as true all the allegations of the four counts of the Complaint, together with all inferences reasonably deducible therefrom, the claims of Appellant cannot be sustained. Our law does not recognize a claim based upon these assertions.

For all the foregoing reasons, the Order of March 3, 2008, should be AFFIRMED.

BY THE COURT:
/s/Scanlon, J.

Dated: May 19, 2008

**The Huntington National Bank, Successor
by Merger to Sky Bank, Successor by
Merger to Pennsylvania Capital Bank v.
James R. Apple**

Sheriff's Sale—Motion to Set Aside Writ of Execution

1. Bank obtained judgment on a mortgage debt. Bank then assigned the judgment prior to obtaining a writ of execution on the judgment. Defendant sought to stay the sheriff's sale due to a defective writ.

2. Rule 2004 allows an original plaintiff to continue an action even if plaintiff transfers interest in the matter while an action is pending. Rule 2004 does not apply after the entry of a judgment.

3. Rule 2002 requires that all actions be prosecuted by and in the name of the real party in interest. After a judgment has been entered, only the real party in interest can execute on the judgment.

4. In this case, the court postponed the sheriff's sale rather than striking the defective writ because the defect in the writ could be cured by obtaining a writ under the proper party's name.

(Kenneth M. Argentieri)

Brian B. Dutton and Joseph A. Fiddler for Plaintiffs.
Joel E. Hausman for Defendant.

GD No. 07-24839. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM IN SUPPORT OF ORDER

Friedman, J., January 29, 2009—Defendant has filed a “Motion to Set Aside Execution and Writ.” As the Court understands the Motion, Defendant says that Plaintiff, The Huntington National Bank (“the Bank”), which praeciped for the issuance of the Writ and seeks to execute upon it, is and was without authority to do so.

The basis for Defendant's argument is that the Bank assigned all its interest in the underlying judgment on a mortgage debt to a third party *prior* to the issuance of the Writ. As a result, Defendant contends, the Writ is defective and execution may not proceed. Defendant argued also that Pa. R.C.P. 2002 is applicable, not Pa. R.C.P. 2004, which the Bank relies on.

The Bank argues that the Rules of Court override the case upon which Defendant relies, *Butler Fair and Agricultural Association v. Butler School District*, 389 Pa. 169, 132 A.2d 214 (1957), and that Pa. R.C.P. 2004 and the Supreme Court's decision in *Cole v. Price*, 566 Pa. 79, 778 A.2d 621 (2001) govern.¹

Butler Fair is quite interesting and the Opinion of Justice Jones is extremely clear. The *facts* are not on all fours with the instant case, but the *legal* principles discussed do pertain here. All parties in *Butler Fair* had appealed. We will refer to them as the Association, its Assignee, and the School District. The factual background involved a judgment “on award of viewers in condemnation of real estate” assigned by the Association to the Assignee. The Assignee then sought to enforce the judgment. (The School District had condemned the Association's real property via an action in eminent domain.) Three orders were entered in Common Pleas and the cases were consolidated for appeal. The Association and the Assignee appealed from orders in two of the cases denying them payment and the School District appealed from an order denying its interpleader petition.

The Supreme Court had a variety of issues to review. One was virtually the same as here, whether an assignee of a judgment is the “real party in interest” who is entitled to *payment* of the judgment. The Supreme Court held:

When this judgment was assigned it divested the assignor of all its interest of the assignor in the judgments and its incidents. Chambers, as assignee, became the real party in interest and in him was vested the power to control the action or discharge the cause of action which was being enforced by his suit. The assignment of this judgment gave to Chambers, as assignee, the right to employ every remedy available as a means of enforcing the judgment. The “plaintiff” in a judgment under the statutory provisions is the “real party of interest.” Chambers as the “real party in interest” had the right under this statute to enforce payment of his judgment against the school district.

As we indicated earlier, Plaintiff relies on *Cole*, which involved a motion to dismiss an *action* and has nothing to do with post-judgment matters. In *Cole*, the action was commenced in Magistrate's Court. The debtor sought to dismiss the action when it reached the Court of Common Pleas, based on the debtor's contention that an assignment deprived the original plaintiff of the right to continue to prosecute the action when it was appealed to Common Pleas. The assignment had been made after the Magistrate Court proceeding began but before the case reached Common Pleas. The Supreme Court in *Cole* held that, under Pa. R.C.P. 2004, “an *action* [emphasis added] can proceed in the name of the original plaintiff” if an assignment to a third party was made while the action was pending. (566 Pa. at 80, 778 A.2d at 621.) As a result, the Court ruled that the action should not have been dismissed.

We conclude that neither Rule 2004 nor *Cole* addresses the effect of the *completion* of the action, by the entry of a *judgment*. Rather, Rule 2002 and *Butler Fair* apply. It seems to us that logic requires that, once the action is no longer pending, *only* the *real* party in interest (the *Assignee*) may seek to execute on the judgment. Rules 2004 and 2002 are fully quoted below:

Rule 2004. Transfer of Interest in Pending Action

If a plaintiff has commenced an action in his or her own name and thereafter transfers the interest therein, in whole or in part, the action may continue in the name of the original plaintiff, or upon petition of the original plaintiff or of the transferee or of any other party in interest in the action, the court may direct the transferee to be substituted as plaintiff or joined with the original plaintiff.

Rule 2002. Prosecution of Actions by Real Parties in Interest. Exceptions

(a) Except as otherwise provided in clauses (b), (c) and (d) of this rule, *all actions shall be prosecuted by and in the name of the real party in interest*, without distinction between contracts under seal and parol contracts.

(b) A plaintiff may sue in his or her own name without joining as plaintiff or use-plaintiff any person beneficially interested when such plaintiff

(1) is acting in a fiduciary or representative capacity, which capacity is disclosed in the caption and in the plaintiff's initial pleading; or

(2) is a person with whom or in whose name a contract has been made for the benefit of another.

(c) Clause (a) of this rule shall not apply to actions where a statute or ordinance provides otherwise.

(d) Clause (a) of this rule shall not be mandatory where a subrogee is a real party in interest.

(Emphasis added.)

The Bank does not fall within the exceptions described in Rule 2002. Furthermore, *Cole* does not apply to the facts here. Had there been an assignment prior to the entry of judgment, the instant action *could* properly have proceeded “in the name of the Assignor,” i.e. the caption need not have been corrected where the assignment occurred while the case was pending. However, Defendant points out, and we agree, that after *judgment* has been entered, only the real party in interest, i.e. the Assignee, may execute upon it or take any other action relative to the judgment.

There is nothing in *Cole* that overrules the holding in *Butler Fair*, nor does Rule 2004 have anything to do with that holding. *Cole* and Rule 2004 apply to *pending actions*. *Butler Fair* applies to the judgment stage and after. The instant case is controlled by *Butler Fair* and Rule 2002. Defendant’s Motion must be granted.

However, we will first merely postpone the Sheriff’s Sale rather than entering a final order striking the defective writ. The defect asserted and found can be cured. It is also possible, if unlikely, that *Butler Fair* has been overruled. The postponement will allow counsel to research that point. We also note that the Assignor and the Assignee, related entities, might prefer to take whatever action Defendant says should have been done prior to obtaining the Writ of Execution in dispute. We have provided in the attached Order that such action shall *not* be affected by the stay and may proceed at the option of the Plaintiff’s Assignee.

If any other issues arise in the mind of either party related to the actual setting aside of the execution and striking of the writ, they may be brought to the Court’s attention by motion or supplemental motion, with supporting briefs, no later than February 10, 2009. Counsel may self-schedule this to suit their mutual convenience, but the Court must have copies of *all* motions and briefs by 4:00 p.m. on February 10, 2009. We will then make a final ruling on the Motion or will ask for additional argument. If nothing further is submitted, we will enter a final order granting the relief Defendant requested.

BY THE COURT:
/s/Friedman, J.

Dated: January 29, 2009

ORDER OF COURT

AND NOW, to-wit, this 29th day of January 2009, after consideration of Defendant’s Motion to Set Aside Execution and Writ and the arguments of counsel, the Court being willing to receive additional information and, possibly, additional argument by counsel, it is therefore hereby ORDERED as follows:

1. The Sheriff’s Sale set for February 2, 2009 is hereby postponed to Monday, April 6, 2009, without the need for further notice or advertising so long as the Sheriff announces this postponement at the February 2, 2009 sale.
2. All proceedings shall be stayed *except* that Plaintiff’s Assignee may seek to obtain a judgment in its own name if that has not yet been accomplished, and, further, the stay herein shall not bar the Assignee from seeking a writ of execution in its own name and proceeding thereunder. We note that the purpose of *this* stay is to bar the Plaintiff from having the property sold at Sheriff’s Sale pending the Court’s final ruling on Defendant’s Motion.

BY THE COURT:
/s/Friedman, J.

¹ We note that *Butler Fair* precedes *Cole* by 44 years. However, we have observed on other occasions that older cases are not necessarily weakened by the passage of time. Rather, the memory of their valid holdings sometimes dims.

Commonwealth of Pennsylvania v. T. Colm McWilliams

Private Criminal Complaint—Standard of Review

1. When a district attorney disapproves of a private criminal complaint based on policy considerations, the standard of review to be applied by a trial court is abuse of discretion.

2. An abuse of discretion applied when reviewing the district attorney’s disapproval of a private criminal complaint recognizes the limitations on judicial power to interfere with the district attorney’s discretion in these kinds of decisions.

3. In order to prove the district attorney abused his discretion in disapproving a private criminal complaint, the complainant must establish the district attorney acted in bad faith.

4. Complainant failed to demonstrate that the District Attorney’s decision to disapprove of the private criminal complaint was in fact rendered in bad faith, and therefore fails to establish that the District Attorney abused its discretion. The Complainant’s petition is dismissed as it is without merit.

(Laura A. Meaden)

Cathy Misko for the Commonwealth.
Jeffrey Hulton for the Complainant.

No. MD 1723-2008. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Zottola, J., December 31, 2008—On April 16, 2008, a Petition for the Review of Allegheny County District Attorney’s Disapproval of a Private Criminal Complaint pursuant to PA. R. Crim. P. 506 was filed on behalf of Complainant/Victim, Frank R. Zokaites, against Mr. McWilliams. A hearing was held before this Court on April 30, 2008. On May 5, 2008, this Court affirmed the Allegheny County District Attorney’s Disapproval of a Private Criminal Complaint. On June 4, 2008, a Notice of Appeal was filed on behalf of Mr. Zokaites.

Pursuant to Rule Pa.R.A.P. 1925(b), the Defendant filed a Concise Statement of Matters Complained of on Appeal on October 2, 2008, from which the following is taken verbatim:

- 1) This Honorable Court erred and abused its discretion in denying Mr. Zokaites’ Petition for Review of the Allegheny County District Attorney’s Disapproval of a Private Criminal Complaint.
- 2) The Petition averred, in pertinent part, that:

(a) On April 2, 2007, Zokaites filed a writ of execution on real property located at 660 Washington Boulevard, Pittsburgh PA 15228 and personalty contained therein to collect his judgment;

(b) Subsequently, McWilliams, on behalf of Molly Branigans, Pittsburgh, LLC, (“Molly Branigans”) filed a goods claim indicating that all of the personalty within the aforesaid premises is the property of Molly Branigans. The goods claim was sustained by the Allegheny

County Sheriff. Molly Branigans is another entity in which McWilliams is a principle;

(c) On September 6, 2007, Pittsburgh Irish Pubs filed for Chapter 11 bankruptcy relief in the Western District of Pennsylvania. McWilliams, who has not filed for bankruptcy, owns 20.05% of the outstanding member interests in Pittsburgh Irish Pubs, LLC and 20.05% of the outstanding member interests in Molly Branigans, LLC. Both of these entities are limited liability companies that were incorporated in the Commonwealth of Pennsylvania;

(d) During a deposition that was taken in the aforesaid bankruptcy matter, McWilliams testified that most of the personalty located within the aforesaid premises was the property of Pittsburgh Irish Pubs;

(e) The undersigned counsel appeared at the Office of The District Justice and met with the Assistant District Attorney Office for the Purpose of filing private criminal complaint against McWilliams for his perjury at the deposition pursuant to Pa. R. Crim. P. 506. The Assistant District Attorney would not approve the complaint.

3) Perjury and the defrauding of creditors are serious matters that undermine the entire judicial process and thus cannot be tolerated.

4) The evidence is clear of McWilliams's multiple perjurious statements that were falsely made under oath.

5) The District Attorney's Office, in the case of *Commonwealth v. Jeffery Robinson*, CC. 200311246, accepted for prosecution, a privately filed criminal complaint, with far less egregious conduct alleged on the part of the defendant and with far less harm suffered by the alleged victim.

6) This Honorable Court erred and abused its discretion in permitting the District Attorney's Office to randomly decide which victims are entitled to protection, especially as in this case, the District Attorney provided the Court with no valid reason for its refusal to prosecute this case.

REVIEW OF THE DISTRICT ATTORNEY'S DISAPPROVAL OF A PRIVATE CRIMINAL COMPLAINT

The complainant alleges that this Court abused its discretion in denying his Petition for Review of the Allegheny County District Attorney's Disapproval of a Private Criminal Complaint. The Commonwealth contends that the private complaint was denied due to policy concerns and a lack of public interest in the matter. When a district attorney disapproves of a private criminal complaint based on policy considerations, the standard of review to be applied by a trial court is abuse of discretion. *In re Wilson*, 879 A.2d 199, 215 (Pa.Super. 2005). "This deferential standard recognizes the limitations on judicial power to interfere with the district attorney's discretion in these kinds of decisions." *Id.* "In the Rule 506 petition for review, the private criminal complainant must demonstrate the district attorney's decision amounted to bad faith, fraud or unconstitutionality." *Id.*

Therefore, great deference is given to the district attorney when reviewing a Disapproval of a Private Criminal Complaint based on policy considerations. In order to prove abuse of discretion, the complainant must establish that the

District Attorney acted in bad faith when denying the private complaint. In this case, the complainant failed to demonstrate that the District Attorney's decision to disapprove of the private criminal complaint was in fact rendered in bad faith and therefore fails to establish that the District Attorney abused its discretion. Thus, the complainant's claim that this Court abused its discretion in denying the complainant's petition is without merit.

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

BY THE COURT:

/s/Zottola, J.

Commonwealth of Pennsylvania v. Jomar Laniel Mosby

Sufficiency of Evidence

1. Unlike a claim that a verdict is against the weight of the evidence, a claim that the evidence is insufficient to support the verdict may be raised for the first time on appeal. Pa. R. Crim. P. 606(a)(7)

2. When reviewing the sufficiency of the evidence, the court is not required to ask itself if it believes the evidence at the trial established guilt beyond a reasonable doubt. Instead, it must determine simply whether the evidence believed by a fact-finder was sufficient to support the verdict.

3. In viewing the evidence in the light most favorable to the Commonwealth and using all reasonable inferences drawn therefrom, it is clear the Commonwealth met its burden of proving the elements of the offenses charged beyond a reasonable doubt with both direct and indirect circumstantial evidence.

(Laura A. Meaden)

Michael Streily for the Commonwealth.

Suzanne M. Swan for Defendant.

No. CC200611126. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Cashman, J., January 26, 2009—On July 25, 2008, following a jury trial, the appellant, Jomar Laniel Mosby, (hereinafter referred to as "Mosby"), was found guilty of one count of aggravated assault of his victim, Shaitisha Campbell, (hereinafter referred to as "Shaitisha"). Mosby was found not guilty of the charge of aggravated assault as it applied to the other alleged victim, Nancy Campbell, mother of Shaitisha Campbell, and not guilty of the charge of unlawful restraint of Shaitisha. A presentence report was ordered and after receipt and review of that report, Mosby was sentenced to a period of incarceration of not less than four nor more than eight years, to be followed by a period of probation of five years, during which he is to have no contact with the victim, he is to enroll and complete anger management classes, to have a drug and alcohol evaluations performed, and also to undergo random drug screening.

Mosby did not file any post-sentencing motions but, rather, filed a timely appeal to the Superior Court and he was directed pursuant to Pennsylvania Rule of Appellate Procedure 1925(b) to file a concise statement of matters complained of on appeal. In that statement Mosby has raised one issue, that being his contention that the evidence was insufficient to support the verdict.

On June 23, 2006, the victim, Shaitisha and her mother,

Nancy Campbell had planned to go to a birthday celebration for Shaitisha's uncle, which was being held at Lee Tuck's Bar in the West End of the City of Pittsburgh. June 24 was Mosby's birthday and he wanted to go to Art's Tavern to celebrate. Shaitisha drove Mosby to Art's Tavern and dropped him off and she and her mother went to her uncle's birthday celebration.

Around midnight Shaitisha called Mosby and told him that the party was over and that she would pick him up so that they could go to the Flamingo Bar, which was located in the Hill District Section of the City of Pittsburgh. She, her mother and Mosby stayed at that bar until closing time. Shaitisha and her mother left the bar and were waiting outside for Mosby to leave the bar so that they could go home. While they were waiting for Mosby, Shaitisha and her mother were talking to a group of men who invited them to attend a cookout later that day. While Shaitisha was talking with several of these young men, Mosby walked around the corner of the bar, over to the group of men, and then punched one of them. A fight then broke out which was only broken up by the security guards who were employed by the Flamingo Bar. Shaitisha, her mother and Mosby then got in her car and she drove them back to her mother's house.

During the ride back to her mother's house, Shaitisha was yelling at Mosby for getting involved in that fight and potentially putting all of them at risk of getting hurt. Shaitisha recalled that her mother wanted to go back into the West End to visit another after hours bar and she refused to take her to that bar. At that point her mother decided that she would walk to the bar. The last thing that Shaitisha recalled was that she and Mosby were sitting in the car still arguing about the fact that he had gotten into the fight at the Flamingo Bar. The next thing that she recalls is waking up in a hospital several days later.

Nancy Campbell, when her daughter refused to drive her to the West End, decided that she would walk to her ultimate destination. After she had gone approximately three blocks, she decided to turn around and go back to her house. As she approached Shaitisha's car, she noticed that both the driver and front seat passenger doors were open and that nobody was in the car or anywhere near the car. She began to call out Shaitisha's name but she got no response. While she was calling out her daughter's name, she was grabbed from behind by Mosby who told her that Shaitisha had fallen and hit her head. Nancy Campbell went into her house and was about to call the police when Mosby took the phone away from her. Mosby then left her residence, got into Shaitisha's car and drove it around the block to the rear alleyway. Mosby got out of the car, pulled some weeds aside and Nancy Campbell, who had run after the car, saw her half-naked daughter lying on the ground. Nancy Campbell then went to the car, grabbed the keys, and was attempting to throw them away so that Mosby could not get the car, when he choked her until she passed out. When she regained consciousness, there was no one there.

Mosby testified that after they had returned to Nancy Campbell's house, he and Shaitisha were still arguing about the fact that he had gotten involved in the fight at the Flamingo Bar. He confirmed the fact that Nancy Campbell had decided to walk to the West End and after she had left, Shaitisha got out of the car, went to her mother's house and began pounding on her door, yelling her mother's name. Mosby stated that he attempted to calm Shaitisha down and get her to stop yelling when he tugged at her shirt from behind and she then fell forward on her face. He went to pick her up and then he fell on top of her, causing her to strike her head a second time. He then picked her up, put her in the car and then told Nancy Campbell when she returned to her residence, that he was going to take her to the hospital to get treatment. Rather than going to the hospital, which was less than a five minute drive, he drove to his mother's apartment located in Crawford Village

in McKeesport, approximately one-half hour away.

Although the incident which caused Shaitisha's injuries occurred at approximately 3:00 a.m., the paramedics were not called until approximately 5:45 a.m. When the paramedics arrived at Apartment 6A in Crawford Village, they observed Shaitisha curled up on her right side in a fetal position. She was in obvious distress and Robert Turpak, a paramedic with the McKeesport Ambulance Rescue Service, noticed a large abrasion that extended from her forehead past her ear, and also noticed that both of her eyes were bulging as a result of the swelling around her eyes. Turpak made the assessment that she was in need of immediate attention and wanted to life flight her to a trauma center but was unable to do so because the weather conditions did not permit it.

Shaitisha was taken by the paramedics initially to Presbyterian-University Hospital and then transferred to Allegheny General Hospital where Dr. Vincente Cortes, a trauma surgeon, saw her. Dr. Cortes examined her and determined that she had a severe concussion and blunt force spine trauma. In addition she had numerous fractures of the nasal passages, right orbit, and she had bilateral periorbital contusions and subcondral hemorrhaging of both eyes. She also had significant skin abrasions of her torso and extremities. He also made note of the fact that she had diffuse swelling of her entire scalp, which could only have been caused by multiple blows to the head. Dr. Cortes also noted that she was comatose and did not regain consciousness until several days into her stay in the hospital, which lasted five days.

The only issue asserted by Mosby in his current appeal is that the evidence was insufficient to support the verdict that was rendered in this case. Unlike a claim that the verdict is against the weight of the evidence, a claim that the evidence is insufficient to support the verdict may be raised for the first time on appeal. Pennsylvania Rule of Criminal Procedure 606(a)(7).¹ See also, *Commonwealth v. McCurdy*, 943 A.2d 299 (Pa.Super. 2008). In *Commonwealth v. Ratsamy*, 594 Pa. 176, 934 A.2d 1233, 1235-1236 (2007), the Pennsylvania Supreme Court set forth the standard for reviewing a claim that the evidence is insufficient to support a verdict.

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction...does not require a court to ‘ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.’” *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (citation omitted) (emphasis supplied). Instead, it must determine simply whether the evidence believed by the fact-finder was sufficient to support the verdict. The Superior Court properly articulated the correct substantive standard enunciated by this Court for review of a sufficiency of the evidence claim: all of the evidence and any inferences drawn therefrom must be viewed in the light most favorable to the Commonwealth as the verdict winner. *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745, 751 (2000). Indeed, the Superior Court quoted at length from its own opinion in *Commonwealth v. Lambert*, 795 A.2d 1010, 1014-1015 (Pa.Super. 2002), which set forth the proper substantive standard.^{FN2}

FN2. The standard we apply in reviewing the sufficiency of evidence is whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not

weigh the evidence and substitute our judgment for that of the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Ratsamy, 885 A.2d 1005, 1007 (Pa.Super. 2005) (quoting *Lambert*, internal citations and quotation marks omitted).

In viewing the evidence in the light most favorable to the Commonwealth and using all reasonable inferences drawn therefrom, it is abundantly clear that the Commonwealth met its burden of proving the elements of the offenses charged beyond a reasonable doubt with both direct and circumstantial evidence.

The uncontradicted evidence offered by both the Commonwealth and the defense was that Shaitisha, her mother and Mosby had been to a number of bars during the evening of June 23, 2006, and that Mosby started a fight with some of the individuals outside of the Flamingo Bar at approximately 2:30 a.m. In addition, both the Commonwealth and the defense agreed that when Shaitisha drove her mother and Mosby back to her mother's house that she and Mosby were arguing about the fact that he had started the fight and potentially placed all of them in jeopardy of being hurt by these other individuals. It was also uncontradicted that Nancy Campbell wanted to go to another bar and that her daughter would not drive her there so she decided to walk. It is at this point that there is a divergence in the testimony as to how Shaitisha was injured. Shaitisha had no memory of that event since the next thing that she remembered after arguing with Mosby was waking up in the hospital several days after she was assaulted. The Commonwealth, in addition to presenting the testimony of Nancy Campbell who observed the after effects of the assault on her daughter, also presented the testimony of Roobik Begian, who lives in the same building as Nancy Campbell, who testified that at approximately 2:30 a.m. on June 24, 2006, he was awakened when he heard a loud noise. When he went to the window, he saw two African Americans, one a female and the other a male, and he saw the male pick up the female and then drop her to the ground three different times, and each time she hit her face on the asphalt. In addition to this witness, the Commonwealth also presented testimony from investigating officer, Craig Kress, who testified that when he interviewed Mr. Begian, he was told that Begian observed the male throwing the female to the ground on three different occasions.

Mosby's explanation as to how Shaitisha sustained her horrific injuries was incredible. Initially, he only told the police that he attempted to get her to stop yelling for her mother when he pulled on her shirt and she fell to the ground, never mentioning that he had picked her up and then fell on top of her, causing her to hit the ground again. The most incredible part of his testimony is that he had no

explanation for the fact that Shaitisha's torn blouse and black bra were found in the area where she was assaulted. Nancy Campbell, her sister-in-law Vicky Campbell and the paramedic who examined her at Mosby's mother's apartment all testified that she was naked from the waist up. The testimony offered by Mosby's mother and sister was also equally incredible since they depicted Shaitisha as being coherent at the time that they were making an assessment as to what to do with her. Both the paramedic and examining physician found her unresponsive and unconscious. Dr. Cortes further testified that the injuries that she sustained were as a result of multiple blows to the head.

When examining the evidence in the light most favorable to the Commonwealth and using any reasonable inferences drawn therefrom, it is abundantly clear that the Commonwealth met its burden of proving the elements of the offenses charged beyond a reasonable doubt.

Cashman, J.

Dated: January 26, 2009

¹ Rule 606. Challenges to Sufficiency of Evidence

(A) A defendant may challenge the sufficiency of the evidence to sustain a conviction of one or more of the offenses charged in one or more of the following ways: (1) a motion for judgment of acquittal at the close of the Commonwealth's case-in-chief; (2) a motion for judgment of acquittal at the close of all the evidence; (3) a motion for judgment of acquittal filed within 10 days after the jury has been discharged without agreeing upon a verdict; (4) a motion for judgment of acquittal made orally immediately after verdict; (5) a motion for judgment of acquittal made orally before sentencing pursuant to Rule 704(B); (6) a motion for judgment of acquittal made after sentence is imposed pursuant to Rule 720 (B); or (7) a challenge to the sufficiency of the evidence made on appeal.

(B) A motion for judgment of acquittal shall not constitute an admission of any facts or inferences except for the purpose of deciding the motion. If the motion is made at the close of the Commonwealth's evidence and is not granted, the defendant may present evidence without having reserved the right to do so, and the case shall otherwise proceed as if the motion had not been made. (C) If a defendant moves for judgment of acquittal at the close of all the evidence, the court may reserve decision until after the jury returns a guilty verdict or after the jury is discharged without agreeing upon a verdict.

Commonwealth of Pennsylvania v. Robert Morris Anthony

Brady Violation—Ineffective Assistance of Counsel—PCRA

1. Following a jury trial, Defendant was convicted of Second Degree Murder, Robbery of a Motor Vehicle, Receiving Stolen Property, and violations of the Uniform Firearms Act. He subsequently pled guilty to Kidnapping, Aggravated Assault, Unlawful Restraint, False Imprisonment, Criminal Conspiracy and Escape.

2. Defendant shot and killed his robbery victim during a struggle in the robbery victim's motor vehicle.

3. Defendant was sentenced to a term of life imprisonment for Second Degree Murder, and 3 concurrent terms of imprisonment of 5 to 10 years each at the Kidnapping, Robbery and Aggravated Assault charges.

4. After exhausting his appeals, Defendant filed a Pro Se Post-Conviction Relief Act Petition, raising 2 claims: a *Brady* violation and trial Counsel's related ineffectiveness, which the court found meritless.

5. The alleged *Brady* violation was the failure to disclose a prosecution witness's pending criminal cases and the assumption that he received leniency in sentencing in exchange for testimony against the Defendant. The witness had pled guilty and was sentenced prior to the killing of the victim and over a year prior to the trial of the Defendant. The Defendant's mere speculation that the witness was given leniency is not supported by the record and does not form a basis for a *Brady* claim.

6. Defendant's claim of ineffectiveness of trial counsel is based on the alleged failure of trial counsel to investigate the witness's criminal record and possible favorable treatment in exchange for testimony. Given the futility of the underlying claim of a *Brady* violation, trial counsel could not be ineffective for failing to investigate and/or raise it at time of trial.

(C. Kurt Mulzet)

Edward H. Scheid for the Commonwealth.
Scott Coffey for Defendant.

No. CC 200216461, 200216531, 200217169, 200217489, 200312158. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

McDaniel, P.J., January 23, 2009—The Defendant has appealed from this Court's Order of June 17, 2008, which dismissed his Amended Post-Conviction Relief Act Petition without a hearing. A review of the record reveals that the Defendant has failed to raise any meritorious issues, and, therefore, this Court's Order must be affirmed.

The evidence presented at trial established that in the evening hours of October 21, 2003, the Defendant and Clinton Peterson were at the home of Deriah Baker. At some point during the evening, the Defendant told Baker that he needed money and Ms. Baker replied that she had someone for him. Baker called her friend, Paul Pusic, and asked him to come to her home to bring her some milk for her baby, though the call was a pretense to lure Pusic to her house so the Defendant could rob him. When Pusic arrived, he went into Baker's residence, while the Defendant and Peterson waited outside for him. When Pusic returned to his car, the Defendant approached him. The two began to struggle and Pusic honked the car's horn. The Defendant fired his gun twice, killing Pusic. He then threw Pusic's body out of the car, got in and drove away. He was eventually apprehended at the home of his girlfriend and the gun used in the shooting was found in another bedroom in her residence.

The Defendant was charged with Criminal Homicide,¹ Robbery of a Motor Vehicle,² Receiving Stolen Property,³ Violations of the Uniform Firearms Act: Firearms Not to be Carried Without a License,⁴ Robbery,⁵ Kidnapping,⁶ Aggravated Assault,⁷ Unlawful Restraint,⁸ False Imprisonment,⁹ Criminal Conspiracy¹⁰ and Escape.¹¹

The Defendant proceeded to trial on the Homicide charge as well as those charges contained in CC 200217169 and CC 2003 12158. Following a jury trial before this Court in June, 2004, he was convicted of Second Degree Murder and all remaining charges. He subsequently appeared before this Court on August 31, 2004 and pled guilty to the remaining charges contained in CC 200216461 and CC 200217489.

At a sentencing hearing held immediately following the Defendant's August 31, 2004 plea hearing, he was sentenced to a term of life imprisonment at the Second Degree Murder count, and three (3) concurrent terms of imprisonment of

five (5) to ten (10) years each at the Kidnapping, Robbery and Aggravated Assault charges at CC 200217489.

The judgment of sentence was affirmed by the Superior Court on December 1, 2006 and the Defendant's Petition for Allowance of Appeal was denied by the Pennsylvania Supreme Court on June 14, 2007.

On December 4, 2007, the Defendant filed a pro se Post-Conviction Relief Act Petition. Counsel was appointed to represent the Defendant and an Amended Petition was filed on May 8, 2008. After reviewing the merits of the Petition and the Commonwealth's answer thereto and giving notice of its intent to do so, this Court dismissed the Defendant's Amended PCRA Petition without a hearing on June 17, 2008. This appeal followed.

On appeal, the Defendant raises two claims: a *Brady* violation and trial counsel's related ineffectiveness. Both are meritless.

In order to establish a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), a defendant "must demonstrate that the prosecution suppressed material exculpatory evidence and, in so doing, prejudiced appellant.... The prejudice inquiry requires a showing that the evidence in question was material to guilty or punishment and that there is a reasonable probability that the result of the proceeding would have been different but for the alleged suppression of the evidence." *Commonwealth v. Dennis*, 950 A.2d 945, 966 (Pa. 2008).

The Defendant now alleges that the Commonwealth committed a *Brady* violation by failing to disclose Clinton Peterson's pending criminal cases and the fact that he received leniency in sentencing in exchange for his testimony against the Defendant.¹² Promises of leniency towards a witness in exchange for their testimony must be disclosed, as they are "relevant to the witness's credibility," *Commonwealth v. Strong*, 761 A.2d 1167, 1171 (Pa. 2000), but a defendant's "mere assumption that such a promise...must have been made is not sufficient to establish that such an agreement in fact existed." *Commonwealth v. Champney*, 832 A.2d 403, 412 (Pa. 2003). Close examination of the record reveals that the Defendant's claim that Peterson received favorable treatment is simply a "mere assumption" and requires no relief.

On November, 12, 2002, Peterson was arrested and charged with two (2) Violations of the Controlled Substance, Drug, Device and Cosmetic Act: one (1) Possession with Intent count and one (1) misdemeanor Possession of a Controlled Substance count. On April 28, 2003 – *before the killing of Mr. Pusic even occurred* – Peterson appeared before this Court, plead guilty to the Possession count, and was sentenced to a one (1) year term of probation. On January 24, 2004, Peterson appeared before this Court on a probation violation, at which time this Court sentenced him to time served and closed interest.

The Defendant was not brought to trial until June, 2004, over a year after Peterson pled and was sentenced, and almost six (6) months after this Court closed interest. Under these circumstances, there does not exist any reasonable argument that the Commonwealth offered Peterson leniency in exchange for his testimony against the Defendant – had they done so, Peterson's case would have been continued until after the Defendant's trial so his cooperation could be assured. The Defendant's mere speculation that Peterson was given leniency in exchange for his testimony is not supported by the record and does not form a basis for a *Brady* claim.

The Defendant also raises a claim of the ineffectiveness of trial counsel for failing to investigate Peterson's criminal record and possible favorable treatment he received in exchange for his testimony at trial. Again, this claim is meritless.

It is well-established that "to prevail on a claim that counsel was constitutionally ineffective, the [defendant] must

overcome the presumption of competence by showing that: (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 proceedings would have been different." *Commonwealth v. Hammond*, 953 A.2d 544, 556 (Pa.Super. 2008). Counsel will never be deemed ineffective for failing to raise a meritless claim. *Commonwealth v. Travaglia*, 661 A.2d 352, 358 (Pa. 1995).

As noted above, the Defendant has failed to establish a *Brady* violation with regard to Peterson's 2002 drug charges. Given the futility of the underlying claim of a *Brady* violation, trial counsel cannot be ineffective for failing to investigate and/or raise it at the time of trial. This claim must also fail.

Accordingly, for the above reasons of fact and law, this Court's Order of June 17, 2008 must be affirmed.

BY THE COURT:
/s/McDaniel, P.J.

¹ 18 Pa.C.S.A. §2501 – CC 200216531

² 18 Pa.C.S.A. §3702 – CC 200217169

³ 18 Pa.C.S.A. §3925 – CC 200217169

⁴ 18 Pa.C.S.A. §6106 – CC 200217169

⁵ 18 Pa.C.S.A. §3701 – CC 200217489 (1 count) and CC 200312158 (1 count)

⁶ 18 Pa.C.S.A. §2901 – CC 200217489

⁷ 18 Pa.C.S.A. §2702(a)(4) – CC 200217489

⁸ 18 Pa.C.S.A. §2902 – CC 200217489

⁹ 18 Pa.C.S.A. §2903 – CC 200217489

¹⁰ 18 Pa.C.S.A. §903 – CC 200217489 (1 count) and CC 200312158 (1 count)

¹¹ 18 Pa.C.S.A. §5121 – CC 200216461

¹² The Defendant has not layered his *Brady* claim in terms of the ineffectiveness of prior counsel to raise it at an earlier stage in the proceedings. However, our Supreme Court has held that *Brady* claims do not need to be layered to be cognizable at the post-conviction stage. *Commonwealth v. Puskar*, 951 A.2d 267, 283 (Pa. 2008).

Commonwealth of Pennsylvania v. James Robert Slater

Prosecutorial Misconduct—Motion for Mistrial—Jury Question

1. Following a jury trial, Defendant was convicted of Rape of a Child, Statutory Sexual Assault, Indecent Assault of a Child Under 13, Indecent Exposure and Corruption of Minors.

2. Defendant was sentenced to a term of imprisonment of 10 to 20 years at the Rape count, with consecutive terms of imprisonment of 3 to 6 years at the Statutory Sexual Assault count and 2 ½ to 5 years at the Corruption of Minors count. Defendant has appealed.

3. Defendant claimed that the Assistant District Attorney engaged in prosecutorial misconduct. The Assistant District Attorney, in response to defense counsel's argument regarding a lack of forensic evidence, stated in closing that the Assistant District Attorney himself used to be a defense lawyer, and that he "learned how to use smoke and mirrors to cover up for what happened." The trial court held that the

Assistant District Attorney's comments were only oratorical flair and neither outrageous nor excessively argumentative, nor did they result in any prejudice to the Defendant.

4. Defendant also claims that the court erred in denying Defendant's Motion for Mistrial after the court allowed substitute counsel to sit in for defense counsel for a jury question. The jury had asked for a read-back of a charge and what they should do if they agreed on some counts but not others. Defense counsel could not be located and the court was faced with defense counsel's unexplained absence of unknown duration. The court proceeded by securing the presence of an experienced criminal defense attorney to sit in for the jury's questions.

(C. Kurt Mulzet)

Paul Christopher Hoffman for the Commonwealth.
Lea Terlonge for Defendant.

No. CC200708089. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

McDaniel, P.J., January 23, 2009—The Defendant has appealed from the judgment of sentence entered on August 18, 2008. A review of the record reveals that the Defendant has failed to raise any meritorious issues and, therefore, the judgment of sentence must be affirmed.

The evidence presented at trial established that the victim, five (5) year old Jade Edwards, was being baby-sat by the Defendant's mother, Lydia Finch, at her home in Penn Hills. At some point during the evening, Jade asked to go to the Defendant's room to play video games. Shortly thereafter, Mrs. Finch heard Jade screaming from the Defendant's room. She ran up the stairs, broke down the locked door and found both Jade and the Defendant naked. Mrs. Finch called the police and Jade was taken to Children's Hospital. Jade testified that the Defendant touched and licked her vagina and anus and penetrated her with his penis. A physical examination done at Children's Hospital was inconclusive, but forensic testing revealed the presence of the Defendant's DNA on the rape kit's genital swabs and saliva in her underpants.

The Defendant was charged with Rape of a Child,¹ Involuntary Deviate Sexual Intercourse with a Child,² Statutory Sexual Assault,³ Unlawful Contact with a Minor,⁴ Indecent Assault of a Child under 13,⁵ Indecent Exposure⁶ and Corruption of Minors.⁷ A jury trial was held before this Court in May, 2008 and at the close of the Commonwealth's case, the Defendant's Motion for Judgment of Acquittal was granted as to the Unlawful Contact with a Minor charge. The jury returned a verdict of Not Guilty at the IDSI charge, but convicted the Defendant of all remaining charges.

The Defendant appeared before this Court on August 18, 2008 and was sentenced to a term of imprisonment of 10 to 20 years at the Rape count, with consecutive terms of imprisonment of three (3) to six (6) years at the Statutory Sexual Assault count and two and one half (2 ½) to five (5) years at the Corruption of Minors count. His Motion for Reconsideration was denied on August 26, 2008 and this appeal followed.

Initially, the Defendant argues that Assistant District Attorney Christopher Hoffman, Esquire, engaged in improper closing argument. This claim is meritless.

In response to defense counsel's closing argument regarding a lack of forensic evidence, Mr. Hoffman stated:

Defense counsel during her closing said there was no other forensic findings, no physical findings, and for these reasons we should find him not guilty. Not so. That's not what Doctor Squires said. She said it is not

unusual to not find physical findings in a case such as this. It is not unusual not to find damage to the anal area on a girl's vagina. It is not that unusual.

You would only find, as the DNA expert told you, you can only find seminal fluid if he ejaculated. If he penetrated, and when he penetrated her and raped her, and didn't ejaculate, he doesn't leave any evidence behind. There is nothing else to suggest that. These things that defense counsel talks about as being somehow being a reason to let him go. Don't let her trick you with smoke and mirrors. I know these things. I used to sit in her seat. I used to be a defense attorney for five years.

In fact, in 2000, I did my first jury here, a different judge. And I stood up as a defense attorney to do an opening from the other side. You know what I learned from my years of doing that, I learned how to use smoke and mirrors to cover up for what happened.

(Closing Arguments Transcript, p. 12-13).

"It is well-settled that statements made by the prosecutor to the jury during closing argument will not form the basis for granting a new trial 'unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so they could not weigh the evidence objectively and render a true verdict'.... Like the defense, the prosecution is accorded reasonable latitude and may employ oratorical flair in arguing its version of the case to the jury." *Commonwealth v. Williams*, 896 A.2d 523, 542 (Pa. 2006).

It is clear from a review of the context of Mr. Hoffman's comments that he was only employing oratorical flair in an attempt to counter defense counsel's arguments regarding the physical evidence. His statements were neither outrageous nor excessively argumentative, nor did they result in any prejudice to the Defendant. Mr. Hoffman's statements were proper and did not rise to the level of prosecutorial misconduct, and therefore this Court did not err in denying defense counsel's objection thereto. This claim is meritless.

The Defendant also argues that this Court erred in denying his motion for a mistrial when it allowed substitute counsel to sit in for Ms. Phillips for a jury question. Again, this claim is meritless.

"The denial of a motion for a mistrial is assessed on appellate review according to an abuse of discretion standard.... The central tasks confronting the trial court upon the making of the motion were to determine whether the misconduct or prejudicial error actually occurred and, if so, to assess the degree of any resulting prejudice." *Commonwealth v. Sanchez*, 907 A.2d 477, 491 (Pa. 2006). "A mistrial is an extreme remedy and is required only when the incident is of such nature that the unavoidable effect is to deprive the defendant of a fair trial." *Commonwealth v. Montalvo*, 641 A.2d 1176, 1188 (Pa.Super. 1984).

During their deliberations, the jury asked a number of questions. On their second set of questions – those at issue here – the jury asked for a read-back of the Statutory Sexual Assault charge and asked what they should do if they agreed on some counts but not the others. Defense counsel was not present in the Courtroom or adjacent hallway, and this Court was unable to locate her even after telephoning her office. Given Ms. Phillips' unexplained absence, her inability to be contacted and this Court's uncertainty as to when, if ever, she would appear, this Court asked J. Richard Narvin, Esquire, head of the Office of Conflict Counsel, to sit in as defense counsel when this Court responded to the question. This was *not* a situation where the Court knew that Ms.

Phillips would be arriving momentarily and deliberately chose to proceed without her as the Defendant now alleges. Rather, this Court was faced with counsel's unexplained absence of unknown duration, which it was forced to balance against a waiting jury with questions regarding their deliberations. Under the circumstances, this Court proceeded appropriately by securing the presence of Mr. Narvin, an experienced criminal defense attorney, to sit in for this Court's response to the jury's questions.

Neither is this Court persuaded by the Defendant's argument that proceeding without Ms. Phillips, even with Mr. Narvin in her stead, is tantamount to a complete denial of the right to counsel. To the contrary, given that the questions did not require input from either the prosecution or defense counsel, there is no possible way the Defendant could have been deprived of his counsel. Although the Defendant seems very concerned with the non-"fungibility" of attorneys, he himself did not object to the brief substitution at the time, and this Court suspects he would have preferred Mr. Narvin to no attorney at all, since his counsel of record, Ms. Phillips, was nowhere to be found.

Rather, reference to the record suggests that the true complaint here comes from defense counsel rather than the Defendant himself. Ms. Phillips was clearly in a snit after this Court reprimanded her for her disappearance and subsequent Motion, ordered her to remain in the courtroom for the remainder of the jury's deliberations and spoke with her supervising attorney regarding her conduct. It seems clear that appellate counsel – who has, on a number of prior occasions, lobbed offensive personal accusations at this Court in her appellate pleadings – saw Ms. Phillips' conduct as another opportunity to wield her pen in enmity.

Under the circumstances, it is clear that this Court acted appropriately given Ms. Phillips' Houdini-esque disappearance and unknown return by securing the presence of an experienced criminal defense attorney (and head of the Office of Conflict Counsel) to stand in her stead while this Court re-read a portion of the charge and answered a question about the completion of the verdict slip. As no input from defense counsel was needed, Ms. Phillips' absence – or Mr. Narvin's presence – did not amount to the denial of counsel. This Court's actions were proper and, therefore, the Defendant's claims must fail.

Accordingly, for the above reasons of fact and law, the judgment of sentence must be affirmed.

BY THE COURT:
/s/McDaniel, P.J.

¹ 18 Pa.C.S.A. §3121(c)

² 18 Pa.C.S.A. §3123(b)

³ 18 Pa.C.S.A. §3122.1

⁴ 18 Pa.C.S.A. §6318(2)

⁵ 18 Pa.C.S.A. §3126(a)(7)

⁶ 18 Pa.C.S.A. §3127(a)

⁷ 18 Pa.C.S.A. §301(a)(1)

CAPSULE SUMMARIES

Janice Huwe v. Joseph Huwe

Child Support—Modification Requires Full Evidentiary Hearing

1. On Mother's petition to increase child support, parties completed a complex hearing, and no modification was granted. Ten days later Father's custodial time increased (by consent of the parties) to 49%, 179 nights annually.

2. Father presented a Petition to modify his support obligation of \$1,400.00 per month, requesting that the matter be remanded to the Hearing Officer for a new support order based upon the change in his custody, using the testimony from the just completed hearing. The court denied this request and Father appealed.

3. The court recognized that while Pa. R.C.P. 1910-16-4(c) provides that a custodial arrangement in excess of 40% of the time creates a rebuttable presumption that an obligor is entitled to a reduction to the basic support obligation and Rule 1910.19 entitles the payor to a hearing when there is a change in circumstance, the rule provides only that a trier of fact "may modify...the existing support order in any appropriate manner based on the evidence presented."

4. The court held that Father bears the burden to show that a permanent change of circumstance exists warranting a support reduction and a modification must be based only upon facts in the record. The rule does not entitle Father to a remand for a recalculation. Once a modification petition is filed, the door is open to admission of any and all relevant evidence and Father's request for a modification could result in a support increase.

5. The court noted that "relevant evidence" is especially important in this case where Father failed to provide credible testimony at the initial hearing regarding his income. Father's testimony was that he earned \$60,000.00 annually as a self-employed pediatrician, while his current wife—his administrative assistant—earned \$48,000.00 annually. Father's income had been static over the preceding 6 years, while his wife's almost doubled. Mother was not working at the time of the hearing and presented no evidence that she had any impediment to working and was therefore assigned a full time minimum wage earning capacity. Father was assigned a "range" of monthly net incomes. Neither party presented evidence to support a determination of actual income.

(Hilary A. Spatz)

Christine Gale for Plaintiff.

Barbara J. Shah for Defendant.

No. FD 02-009048-008. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.
Bubash, J., November 21, 2008.

Joann C. Rodkey v. Joseph F. Rodkey, Jr.

Child Support—Guideline Deviation—Return of Overpayment—Attorneys' Fees

1. The Hearing Officer established Father's child support obligation including a 20% upward deviation from the guidelines, relying on Pa. R.C.P. 1910.16-5(b), factors 4, 5, 7, and 9. Father's overpayment of \$1,232.00 was ordered to be repaid by Mother by reducing the child support over a period of 12 months.

2. Father filed exceptions to the Hearing Officer's recommendation, and, subsequently, both parties appealed from the court's order which (1) eliminated the deviation and established Father's child support at the guideline amount, and (2) extended the repayment period to 24 months.

3. The Court held that the Hearing Officer erred in granting the upward deviation where there was no record evidence of any "extraordinary need or unusual circumstances justifying a deviation." The Hearing Officer's recitation of general factors, including the children's ages, the parties' assets, and standard of living was insufficient. The court stated that Mother failed to show that application of the support guidelines would "work an injustice."

4. The court extended to 24 months the period in which Father's overpayment would be recouped. The court denied Father's claim that a two-year repayment period mandates an award of interest on the balance.

5. The court held that Father's child support obligation is not an ordinary debt, but a court-imposed parental duty, and no interest is warranted. Father is more capable of bearing the "modest" financial burden than the children.

6. The court compared recapture of an overpayment to the repayment of arrears. With its broad discretionary power to remit support arrears and in light of the specific factors of this case, the court held that Mother had no ability to repay by way of lump sum and the extension of the repayment would benefit the children.

7. Father's exceptions, which were granted in part, were not frivolous, and, therefore, Mother's claim for counsel fees on that ground was appropriately denied.

(Hilary A. Spatz)

Pauline M. Calabrese for Plaintiff.

Todd M. Begg for Defendant.

No. FD 01-008742-004. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.
Hens-Greco, J., November 5, 2008.