

PITTSBURGH LEGAL JOURNAL

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PLJ

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

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

www.acba.org
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Circulation 6,395

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OPINIONS

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**Pennsylvania National Mutual Casualty Insurance Company v.
Rob-Bern Associates, Inc., Victim Outreach Intervention Center, Inc.,
Housing and Redevelopment Insurance Exchange
and American Plumbing Contractors, LLC**

Declaratory Judgment—Interpretation of Insurance Policy Provisions—Duty to Defend—Summary Judgment

1. Owner of building (Victim Outreach Intervention Center, Inc.) sued general contractor (Rob-Bern Associates, Inc.) and plumbing subcontractor (American Plumbing Contractors, LLC) for damages arising from subcontractor's faulty workmanship in installing plumbing in owner's new building. Building owner notified its Commercial General Liability Insurance Policy Carrier (Pennsylvania National Mutual Casualty Insurance Company) of damage claims to its building and invoked the policy demanding that the insurance carrier defend and indemnify damages to the building, including water damage to the structure and personal property, mold and loss of use of the premises. Insurance carrier refused to defend and filed Declaratory Judgment action asking Court to declare, that it had no duty to defend, since the faulty workmanship claims and consequent damages did not constitute an insurable claim under the insurance policy.

2. Summary Judgment in Declaratory Judgment action in favor of Plaintiff insurance carrier was warranted where trial court determined, as a matter of law, that the duty to defend arose under the terms of the insurance policy only for property damage caused by an "accident" or "occurrence" and that claims of faulty workmanship did not constitute an "accident" or "occurrence," relying on the Superior Court's decision in *Millers Capital Insurance Co. v. Gambone Brothers Development Co.*, 941 A.2d 706 (Pa. Superior Ct. 2007).

3. Building owner's argument that plumbing contractor's work in installing water lines done in violation of the Project Specifications was the equivalent of an "accident" or "occurrence" was rejected since the damages flowing from the work (water damage to the building and personal property, mold and loss of use of premises) were a reasonable and foreseeable result of the faulty workmanship and, thus, did not fit under any exceptions carved out *in dicta* in the Superior Court's *Millers Capital* opinion.

4. Under *Millers Capital*, court must ask whether underlying factual averments alleged an event that – from the perspective of the insurance carrier – is sufficiently fortuitous to constitute an "accident" and claims of faulty workmanship along with the natural and foreseeable results of the faulty workmanship did not satisfy this standard.

(Peter Clyde Papadakos)

Miles A. Kirshner and Kyle T. McGee for Plaintiff.

Paul S. Mazeski for Defendant Housing and Redevelopment Insurance Exchange.

Andrew M. Menchyk, Jr. for Victim Outreach Intervention Center, Inc.

Robert O. Lampl and John P. Lacher for Defendant Rob-Bern Associates, Inc.

Gary Davis for Defendant American Plumbing Contractors, LLC.

GD 08-002003. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM

Folino, J., May 14, 2010—In this declaratory judgment action, Penn National alleged that it did not have a duty to defend or indemnify its insured (Rob-Bern Associates, Inc.) in a lawsuit that had been filed against Rob-Bern in Butler County (the "Underlying Action"). This Court agreed with Penn National and granted its motion for summary judgment: Penn National did not have a duty to defend its insured since the underlying claim did not allege an "occurrence" and, thus, did not fall within the Commercial General Liability Insurance Policy's "general insuring clause." Now, both the Plaintiff in the Underlying Action and the Plaintiff's assignee have appealed this order to the Superior Court. The appeals are, however, meritless: my order granting summary judgment was required by our Superior Court's decision in *Millers Capital Insurance Co. v. Gambone Brothers Development Co., Inc.*, 941 A.2d 706 (Pa.Super. 2007). I therefore recommend affirmance.

I. Facts

In 2006, Victim Outreach Intervention Center, Inc. ("VOICE") filed, in the Court of Common Pleas of Butler County, the underlying action against Rob-Bern Associates, Inc. and American Plumbing Contractors, LLC.¹ This complaint contained two counts; both counts sounded solely in contract. Specifically, as against underlying defendant Rob-Bern Associates, VOICE explicitly claimed "breach of contract"; second, with respect to American Plumbing, VOICE alleged that American Plumbing had "fail[ed] to complete the plumbing in accordance with the Contract Documents, and in a good and workmanlike manner." "Second Amended Complaint – Civil," filed on behalf of "Plaintiff Victim Outreach Intervention Center, Inc. (VOICE)," filed in the Court of Common Pleas of Butler County at A.D. No. 06-10538 (hereinafter "Underlying Complaint"), at ¶¶ 50-54 & 55-57.

According to the Underlying Complaint, on November 7, 2003, VOICE and Rob-Bern entered into a construction contract. Under the terms of this contract, Rob-Bern agreed to be VOICE's General Contractor on a construction project: Rob-Bern was tasked with constructing VOICE's new "4800 square foot structure in Cranberry Township, Pennsylvania (the 'Project')." *Id.* at ¶ 10. The construction contract provided that "Rob-Bern was to fully execute the 'Project' described in the contract documents and was to be paid not in excess of \$535,000.00 for the work." *Id.* at ¶ 11.

The new structure, obviously, needed plumbing work. As such, Rob-Bern entered into a subcontract with American Plumbing Contractors, LLC; American Plumbing then "installed all the 'plumbing' required by the 'Contract Documents,' as a subcontractor for Rob-Bern." *Id.* at ¶ 38.

On March 1, 2004, the structure was "substantially completed" and VOICE began occupying the new building. Yet, and unfortunately, shortly after VOICE moved in, the building began to experience water-line problems. First, on July 9, 2004, "the domestic water supply to the residential portion of [the building] was interrupted." *Id.* at ¶ 18. As it was later determined, this interruption occurred because the "connection between the 2" main water service line and a 1" copper line for interior water distribution separated at the point of connection of the two...lines." *Id.* at ¶ 19.

In its attempt to discover why the two lines separated, VOICE conducted an investigation. And, according to the Underlying Complaint, this investigation revealed that the lines separated because of substandard plumbing. In particular, according to the

Underlying Complaint, the lines separated because “the connection of the water service [was made] in the middle of an ‘S’ curve, [thus] placing a lot of stress on the street adaptor and connector in general.” *Id.* at ¶ 23A. Moreover, the Underlying Complaint avers, the connection was prone to cause “further problems in the future,” since: 1) the connection was “unsupported” and 2) the “stresses induced by the ‘S’ curve install[ation]” would eventually cause the “plumbing filling [to]...fail.” *Id.* at ¶¶ 23B & C.

The investigation also revealed “additional deficiencies” in the plumbing, including: 1) “[i]nstalling water lines in an unheated crawl space in violation of the Project specifications”; 2) “[f]ailure to install water pipes sized in accordance with the ‘Project’s’ specifications”; and 3) “[f]ailure to locate and install various plumbing fixtures, parts and components in accordance with the ‘Project’ specifications.” *Id.* at ¶¶ 24A-C.

VOICE then contacted Rob-Bern and asked that Rob-Bern correct the “deficiencies” in the plumbing. Rob-Bern did not do so. *Id.* at ¶ 25. Instead, Rob-Bern apparently contacted a company named Professional Service Industries (“PSI”) and asked that PSI inspect the building for “fungal conditions.” *Id.* at ¶ 26. PSI did this and found “mold-like odors, visual mold growth, excess surface moisture in the crawlspace...along with []significantly elevated levels of Pen/ASP (an allergenic mold) detected.” *Id.* at ¶ 27. Although PSI recommended that Rob-Bern take action to eradicate the mold and moisture, Rob-Bern again did nothing. *Id.* at ¶ 28.

In the months that followed, what VOICE feared came to pass. According to the Underlying Complaint, on August 9, 2004, the same water lines that originally separated did so again; this caused “substantial amounts of water to enter” the building. *Id.* at ¶¶ 30-31. One month later, on September 8, 2004, the lines separated once more – and again “substantial amounts of water enter[ed]” the Project. *Id.* at ¶ 33.

Afterwards, VOICE brought suit (the Underlying Action) against Rob-Bern and Rob-Bern’s plumbing subcontractor, American Plumbing. VOICE’s two-count complaint claimed: 1) that Rob-Bern breached its construction contract with VOICE and 2) that, as “an intended third party beneficiary to the written contract between Rob-Bern and American Plumbing,” American Plumbing breached the subcontract and was liable to VOICE. *Id.* at ¶¶ 50-54; 9 & 55-57. Moreover, as the Underlying Complaint makes clear, all of the claimed damages occurred as a result of contractual breaches. VOICE averred:

It is believed and averred that as a direct result of Rob-Bern’s and American’s failure to complete the interior and exterior plumbing work, in accordance with the plans, specifications, and Contract Documents, substantial quantities of water was discharged on multiple occasions into the interior of Voice’s building in a crawl space under the main floor of the structure. The water discharged as a result of the faulty/defective installation of the plumbing resulted in:

- A. Water damage to the interior structural components of the building, including, but not limited to, damages to floor joists, wall studs and other wooden and non-wooden structural components;
- B. damage to insulation, dry wall, carpet, light fixtures, electrical components, concrete flooring, hardware, and other fixtures and components;
- C. the formation of mold and other microbial contamination in the interior of the structure and on portions of the interior walls, ceilings, insulation and other areas;
- D. damages to various items of personal property;
- E. loss of use of the premises.

Id. at ¶ 40.

After being served with the Underlying Complaint, Rob-Bern contacted its Commercial General Liability Insurance Policy carrier, Pennsylvania National Mutual Casualty Insurance Company; Rob-Bern demanded that Penn National defend and, if necessary, indemnify, Rob-Bern with respect to the underlying claim. Penn National undertook this alleged obligation under a “reservation of rights.”

Following an investigation into the claim, Penn National filed the current “Complaint for Declaratory Judgment.” As Penn National claimed, it did not have any duty to defend Rob-Bern from the Underlying Action, since: 1) the Underlying Complaint did not allege an “occurrence”; 2) the allegations in the Underlying Complaint fell under the “Contractual Liability” Exclusion; 3) some of the damage claims fell under the “Damage to Your Work” Exclusion and 4) the claims for mold damage fell under the “Fungi or Bacteria” Exclusion. “Complaint for Declaratory Judgment,” filed on behalf of Plaintiff Pennsylvania National Mutual Casualty Insurance Company (hereinafter “Complaint for Declaratory Judgment”), at Counts I-IV.

The current Declaratory Judgment Action was decided at the summary judgment stage: I held that Penn National was entitled to summary judgment in its favor, as the Underlying Complaint did not plead an “occurrence.” Order of Court, dated December 15, 2009, Folino, J. VOICE and the Housing and Redevelopment Insurance Exchange have now appealed this decision to the Superior Court.

II. Standard of Review

This appeal arises from the grant of summary judgment. Therefore, it is important to remember that:

summary judgment is appropriate only where the record clearly shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The reviewing court must view the record in the light most favorable to the nonmoving party and resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Only when the facts are so clear that reasonable minds cannot differ can a trial court...enter summary judgment.

Mountain Vill. v. Bd. of Supervisors, 874 A.2d 1, 5-6 (Pa. 2005)(internal citations omitted).

Yet, as the Pennsylvania Supreme Court has held, the “interpretation of an insurance contract regarding the existence or non-existence of coverage is ‘generally performed by the court.’” *Prudential Prop. & Cas. Ins. Co. v. Sartno*, 903 A.2d 1170, 1175 (Pa. 2006). As such, these interpretive issues are, usually, “resolved by a court pursuant to a motion for summary judgment.” *Fisher v. Harleysville Ins. Co.*, 621 A.2d 158, 159 (Pa.Super. 1993).

The current appeal conforms to this “general” standard: it is concerned solely with the “legal interpretation” of an insurance policy. Accordingly, the Superior Court must employ a *de novo* standard of review and, while this Court’s legal analysis might be useful as a guide, the appellate court “need not defer” to my conclusions. *Donegal Mut. Ins. Co. v. Baumhammers*, 938 A.2d 286, 290 (Pa. 2007).

III. Analysis

III.A. Introduction

It is settled that “the obligation of a casualty insurance company to defend an action brought against the insured is to be determined solely by the allegations of the [underlying] complaint.” *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888, 898 (Pa. 2006) (emphasis in original). This “duty to defend” will then arise if the factual allegations of the underlying complaint, taken as true, “would support a recovery covered by the policy.” *Allen*, 692 A.2d at 1095. In other words, questions regarding the defense “duty” are wholly dependent upon the interplay between “the coverage afforded by the insured’s policy” and the factual allegations contained within the underlying complaint. *O’Brien Energy Sys., Inc. v. Am. Employers’ Ins. Co.*, 629 A.2d 957, 960 (Pa.Super. 1993).

In addition, and clearly, the duty to defend is broad: “an insurer must defend in any suit in which there exists actual or potential coverage.” *Hartford Mut. Ins. Co. v. Moorhead*, 578 A.2d 492, 494 (Pa.Super. 1990) (emphasis omitted). Yet, this duty is not unlimited: if the policy’s “general insuring clause” does not encompass the factual allegations contained within the underlying complaint, or, if the allegations all fall under an “exclusion” or an “exception” in the policy, the insurer does not have a duty to defend its insured – as a matter of law.

III.B. The Underlying Complaint Does Not Allege an “Occurrence”

In the case at bar, the underlying factual allegations are not covered by the general insuring clause. I will explain.

III.B.i. The “General Insuring Clause” and the Definition of “Occurrence”

As is normal, the general insuring clause in the current Commercial General Liability Insurance Policy explicitly declares:

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of...‘property damage’ to which this insurance applies. We will have the right and duty to defend the insured against any ‘suit’ seeking those damages. However, we will have no duty to defend the insured against any ‘suit’ seeking damages for...‘property damage’ to which this insurance does not apply...

b. This insurance applies to... ‘property damage’ *only if*:

(1) The...‘property damage’ is caused by an ‘*occurrence*’...

Form CG 00 01 1001 to the Commercial General Liability Insurance Policy between Pennsylvania National Mutual Casualty Company and Rob-Bern Associates Inc., for policy period September 15, 2003 through September 15, 2004, attached as “Exhibit ‘B’” to Plaintiff’s “Complaint for Declaratory Judgment” (hereinafter “CGL Policy: Coverage Form”), at § 1, ¶ 1 (emphasis added).

The policy then goes on to define the term “occurrence” as “an *accident*, including continuous or repeated exposure to substantially the same general harmful conditions.” *Id.* at § 5, ¶ 13 (emphasis added).

Therefore, pursuant to the terms of the agreement, Penn National need not defend Rob-Bern from every “suit” seeking “property damage”; rather, the insurer’s obligation to defend will only come into being if the underlying factual averments show that the “property damage” was caused by an “accident.”

Moreover, our Supreme Court has defined the term “accident” in accordance with its ordinary meaning. The word means: “an unexpected and undesirable event, or something that occurs unexpectedly or unintentionally.” *Kvaerner*, 908 A.2d at 897-98 (quoting Webster’s II New College Dictionary 6 (2001)) (internal quotations omitted) (internal corrections omitted). As our high Court has emphasized, the “key term in the ordinary definition of ‘accident’ is ‘unexpected’” – this requires “a degree of fortuity.” *Kvaerner*, 908 A.2d at 898.

With the term “occurrence” defined in this manner, our Supreme Court has thus held that claims based upon an insured’s “faulty workmanship” do not state an “occurrence”: “[s]uch claims simply do not present the degree of fortuity contemplated by the ordinary definition of ‘accident.’” *Id.* at 899. This was the holding of *Kvaerner*.

III.B.ii. *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888, 898 (Pa. 2006)

In the *Kvaerner* case, the Kvaerner corporation entered into a contract with Bethlehem Steel; under the terms of the contract, Kvaerner was to “design and construct a coke oven battery (the ‘Battery’) for Bethlehem.” *Kvaerner*, 908 A.2d at 891. Yet, after the Battery was installed, many separate parts of the Battery failed and the entire Battery became “damaged.” Bethlehem then sued Kvaerner for breach of contract. *Id.*

After it was sued, Kvaerner contacted its CGL insurer and demanded that the insurer defend Kvaerner in that action. The insurer refused to do so; as the insurer argued, Bethlehem Steel’s complaint did not allege an “occurrence” under the CGL Policy. *Id.* at 892.

Our Supreme Court agreed with the insurer. As the Court held, the underlying complaint simply claimed “property damage from poor workmanship to the work product itself.” *Id.* at 900. Such claims, our Supreme Court held, were not covered by a CGL Policy: by their very nature, the claims did not contain the “degree of fortuity” necessary to constitute an “accident” or an “occurrence.” *Id.* at 899. Indeed, since the claimed “property damage” was to the work-product itself, coverage in *Kvaerner* would have improperly “convert[ed] a policy for insurance into a performance bond” – an outcome the Supreme Court refused to countenance. *Id.*

Left for another day was the issue of whether a CGL Policy would insure “the possibility [of] the goods, products or work, of the insured, once relinquished and completed,...caus[ing]...damage to property other than to the completed work itself.” *Id.* at 899n.10. And, although *Kvaerner dicta* suggested that such claims might be covered, our Superior Court has since been confronted with this very same issue and has held that a CGL Policy does *not* cover these claims. See *Millers Capital Insurance Co. v. Gambone Brothers Development Co., Inc.*, 941 A.2d 706 (Pa.Super. 2007).

III.B.iii. *Millers Capital Insurance Co. v. Gambone Brothers Development Co., Inc.*, 941 A.2d 706 (Pa.Super. 2007)

Specifically, in *Millers Capital Insurance Co. v. Gambone Brothers Development Co., Inc.*, our Superior Court interpreted *Kvaerner* and held: if the claimed “property damage” was a “*natural and foreseeable*” result of simple “faulty workmanship,” such a claim would *not* allege an “occurrence” and would *not* be covered by a CGL Policy – this would be so, the Superior Court held, *even if* the work-product caused “damage to property other than to the completed work product itself” and *even if* the insured’s subcontractor was the one who completed the faulty work.

The facts of *Millers Capital* are substantively identical to those at bar. In *Millers Capital*, the Gambone Brothers Development Company was a real estate firm that planned, developed and built homes; in the years 2001 and 2002, Gambone and its subcontractors built homes inside of two separate real estate developments. After the families moved into their new homes, however, they started noticing that water was infiltrating the structures. *Millers Capital*, 941 A.2d at 709. The families then sued Gambone, alleging: “Gambone and/or its subcontractors built homes with defective stucco exteriors, windows, and other artificial seals intended to protect the home interiors from the elements.” *Id.* at 713. In other words, all of the complaints sounded in contract and all alleged “faulty workmanship” on the part of Gambone and Gambone’s subcontractors.

Further, although the “faulty workmanship” – itself – solely concerned the home-exterior, the complaints averred that the defective *exterior* work caused massive damage to the home *interiors*. Thus, the complaints alleged “damage to property other than to the completed work product itself.” *Kvaerner*, 908 A.2d at 899n.10. For example, as the *Millers Capital* Court explained, one of the complaints declared:

Defective stucco known as “drivit” [was used] in building the exterior of the...home. The [homeowners] alleged the defective drivit resulted in “delamination, peeling, disfigurement, compromise of structural integrity, infiltration by the elements, mold, cracking of the exterior cladding, and moisture penetration and entrapment in and through said system.” The [homeowners] further averred that “the defects are the result of poor workmanship during the initial construction of the Home, including, without limitation, the improper or faulty design, implementation, workmanship, and supervision of the application of the exterior finish of the Home by the Builder.”

Millers Capital, 941 A.2d at 713.

Gambone then contacted its CGL Policy provider and demanded that the insurer defend and, if necessary, indemnify Gambone in the underlying actions. The insurer refused and brought a declaratory judgment action against the claimants: citing to our Supreme Court’s decision in *Kvaerner*, the insurer argued that the underlying claims did not constitute an “occurrence” under the CGL Policy. *Id.* at 710-11. The trial court agreed and granted summary judgment in favor of the insurer. *Id.* Claimants then appealed to the Superior Court.

In the Superior Court, the claimants attempted to distinguish their case from *Kvaerner*. As the *Millers Capital* Court stated:

Gambone argues the facts of this case are distinguishable from the facts of *Kvaerner*...Specifically, Gambone contends the nature of the damage at issue in this case varies from the nature of the damage at issue to the coke oven battery in *Kvaerner*. Gambone concedes *Kvaerner* stands for the broad principle that an insurance claim under an occurrence based CGL policy that defines the term “occurrence” as an accident cannot be premised on a claim of faulty workmanship. Gambone argues the [homeowners] actions do not merely involve claims for faulty workmanship that led to the failure of the stucco exteriors **but also involve claims for ancillary and accidental damage caused by the resulting water leaks to the non-defective work inside the home interiors**. Gambone argues the resulting water damage constitutes an “occurrence” even though the damage to the faulty stucco exteriors does not.

Millers Capital, 941 A.2d at 713 (internal footnote omitted)(internal citation omitted)(emphasis added).

Our Superior Court found no merit “in the distinction Gambone attempt[ed] to create.” *Id.*

In finding that *Kvaerner* controlled its decision, the *Millers Capital* Court recited one of *Kvaerner*’s basic holdings: that the term “occurrence” meant “accident” and that the word “accident” “contemplated a degree of fortuity that does not accompany faulty workmanship” claims. *Id.* The Superior Court then reasoned:

In reaching [its] holding, the [*Kvaerner*] Court suggested that natural and foreseeable acts, such as rainfall, which tend to exacerbate the damage, effect, or consequences caused *ab initio* by faulty workmanship also cannot be considered sufficiently fortuitous to constitute an “occurrence” or “accident” for the purposes of an occurrence based CGL policy. This suggestion is consistent with this Commonwealth’s longstanding notion of legal and proximate causation in tort law. *See generally, Powell v. Drumheller*, 653 A.2d 619, 623 (Pa. 1995) (“In determining whether an intervening force is a superseding cause, the test is whether the intervening conduct was so extraordinary as not to have been reasonably foreseeable.”).

Id. at 713-14.

Thus, in *Millers Capital*, the Superior Court held that the underlying “faulty workmanship” claims did not constitute an “occurrence.” There, the alleged “faulty workmanship” concerned defective exterior work that then exposed the homes to the elements. Yet, as the Superior Court recognized, all of the damage claims were a “**natural and foreseeable**” result of the “faulty workmanship”: a “natural and foreseeable” result of the claimed “faulty exterior work” would, obviously, be interior water infiltration, water damage to inside property and moisture and mold buildup in the home-interiors. Thus, the Superior Court held, since the claimed damages were a “natural and foreseeable” result of the “faulty workmanship,” the claims did not contain the necessary “degree of fortuity” required for an “accident” or an “occurrence.” *Id.* And, this was true even though the complaints alleged “damage to property other than to the completed work product itself.” *Kvaerner*, 908 A.2d at 899n.10

Moreover, and important to the case at bar, the *Millers Capital* analysis did not change even though the underlying complaints alleged that the *insured’s subcontractor* performed the “faulty workmanship.” If it were otherwise, the *Millers Capital* Court reasoned, courts “**would be forced to render the definition of ‘occurrence’ mere surplusage in every instance where a plaintiff sues a contractor for faulty work performed by the subcontractor on the contractor’s behalf.**” *Millers Capital*, 941 A.2d at 715 (emphasis added). Instead, the Superior Court implied, it was only where the subcontractor performed its work **in such an unexpected and deficient manner** – where the insured could rightfully claim something akin to a “fortuitous event” – would an “occurrence” arise. *Id.* at 716.

There can be no question that *Millers Capital* controls the case at bar; and, under the reasoning of *Millers Capital*, there can be no question that, here, the Underlying Complaint fails to allege an “occurrence.”

III.B.iv. Pursuant to *Millers Capital*, since the underlying claim is simply one for “faulty workmanship,” the claim does not allege an “occurrence”

As was true in *Millers Capital*, here the Underlying Complaint claimed “breach of contract” against the insured – and premised the contractual breach upon a simple claim of “faulty workmanship.” In particular, the Underlying Complaint avers, all of the

claimed water, mold and property damage occurred when either the insured or insured's subcontractor: improperly connected "the water service in the middle of an 'S' curve." "Underlying Complaint," at ¶ 23A. The Underlying Complaint then claims "additional deficiencies" in the plumbing work, such as: 1) "[i]ninstalling water lines in an unheated crawl space in violation of the Project specifications"; 2) "[f]ailure to install water pipes sized in accordance with the 'Project's' specifications" and 3) "[f]ailure to locate and install various plumbing fixtures, parts and components in accordance with the 'Project' specifications." *Id.* at ¶¶ 24A-C.

Yet, if the insured or the insured's subcontractor performed the faulty work, there was no "occurrence." See *Millers Capital*, 941 A.2d at 713. Such claims of faulty work do not constitute an "occurrence": they do not allege a "fortuitous" event. The claims simply allege that the subcontractor *improperly completed* the work that it was *contractually obligated to perform*. According to *Millers Capital*, this does not allege a "fortuitous" event. Rather, the above-stated allegations merely claim that the subcontractor performed its contractual obligations in a careless manner. As *Millers Capital* holds, the world must *expect* that, sometimes, a subcontractor will perform its contractual duties carelessly: otherwise, "we would be forced to render the definition of 'occurrence' mere surplusage in every instance where a plaintiff sues a contractor for faulty work performed by a subcontractor on the contractor's behalf." *Id.* at 715. Hence, following the reasoning of the *Millers Capital* Court, the current "faulty workmanship" allegations are not sufficiently "fortuitous" as to constitute an "occurrence." *Id.* at 713-14 & 716.

In addition, and importantly, this is not a case where the plumbing subcontractor did something *completely unexpected* – such as might be the case if the subcontractor used materials that the contractor *could never have contemplated* would be used for the job or if the subcontractor installed the pipes in a completely *"reckless"* manner. Pursuant to *dicta* found within *Millers Capital*, such a claim might indeed allege an "occurrence": the claim would be based upon an event that – from the perspective of the insured – was so *"unexpected"* as to be *"fortuitous."* See *Millers Capital*, 941 A.2d at 716. Yet, no such claim has been made here. Rather (and again), here we have a claim that the plumbing subcontractor – who was contractually obligated to install the *plumbing* – performed its *plumbing obligations* in a *substandard manner*. From the perspective of the insured, such a claim does not allege a "fortuitous" event – it alleges *"faulty workmanship"*; and, under *Millers Capital*, a "faulty workmanship" claim cannot constitute an "occurrence." *Id.* at 713.

The Appellants (VOICe and the Housing and Redevelopment Insurance Exchange) have, however, taken issue with this Court's conclusion. According to Appellants, since the Underlying Complaint avers that the plumbing was done "in violation of the Project specifications," there was an "occurrence" under the subject CGL Policy. Specifically, Appellants argue that the following "additional [plumbing] deficiencies" state an "occurrence": 1) "[i]ninstalling water lines in an unheated crawl space in violation of the Project specifications"; 2) "[f]ailure to install water pipes sized in accordance with the 'Project's' specifications" and 3) "[f]ailure to locate and install various plumbing fixtures, parts and components in accordance with the 'Project' specifications." "Underlying Complaint," at ¶¶ 24A-C.

Appellants argue that these averments constitute an "occurrence" since they are: "claims for repair of damage caused by [the subcontractor's] work in areas in which [it] was not contracted to work and installation of materials not contemplated under the contract." "Brief in Opposition to Motion for Summary Judgment," filed on behalf of Declaratory Judgment Defendant VOICe, at docket number GD-08-002003 (hereinafter "VOICe's Brief in Opposition"), at 6. It is a meritless argument.

To understand why the argument is meritless, it is important to note that the argument is dependent upon a court latching upon certain *dictum* that is found within *Millers Capital*, interpreting that *dictum* as if it were statutory law and then forgetting the central focus of *Millers Capital*: that the term "occurrence" must always be given its proper meaning. The *dictum* to which claimants cling is found within *Millers Capital* and, in the context of the opinion, was written to show that the term "occurrence" could be read *in pari materia* with the "your work" exclusion. It reads as follows:

For example, a scenario could arise where a subcontractor confuses job orders and works on a part of a project on which it was not contracted to work; such a scenario would, in all likelihood, be considered an "occurrence" which would not be defined as faulty workmanship and would fit within the exception to the "your work" exclusion. *We can also conjure up additional examples.* A subcontractor could use materials on a job not contemplated by the contractual arrangement between the contractor and subcontractor. An error such as this could also be considered an "occurrence" and could fit within the exception to the "your work" exclusion.

Millers Capital, 941 A.2d at 716 (emphasis added); *see also*, "VOICe's Brief in Opposition," at 9-10.

Seizing upon this *dictum*, Appellants now declare that these examples "conjured up" by the *Millers Capital* Court created two broad "categories" of "occurrences." And, as applied to the instant case, Appellants argue that the Underlying Complaint alleges an "occurrence" since it avers: 1) that the subcontractor "[i]nsta[ll]ed water lines in an unheated crawl space in violation of the Project specifications" – and therefore "work[ed] on a part of the project on which it was not contracted to work" – and 2) that the subcontractor "[f]ail[ed] to install water pipes sized in accordance with the 'Project's' specifications" – and therefore used "materials...not contemplated by the contractual arrangement between the contractor and subcontractor." "VOICe's Brief in Opposition," at 6 & 10.

Yet, the language to which claimants cite is *all dicta*: the *Millers Capital* Court was *never* confronted with any allegation that the subcontractor "confuse[d] job orders and work[ed] on a part of the project on which it was not contracted to work" or that the subcontractor "use[d] materials on a job not contemplated by the contractual arrangement between the contractor and subcontractor." The Court was merely attempting to conceive of possible scenarios where the term "occurrence" could be read *in pari materia* with the "your work" exclusion. *Millers Capital*, 941 A.2d at 715-16. Therefore, the above language does not create two broad "categories" of "occurrences" – where an "occurrence" is alleged just because a *broad, categorical reading* of the above *dictum* could possibly encompass the underlying factual averments. That is the first reason why claimants' argument fails.

Second, by attempting to show that their claims fall within two broad, imaginary categories, Appellants have, in effect, forgotten what *Millers Capital* was attempting to explain: that, for a claim to allege an "occurrence," the underlying factual averments must allege an "unexpected" or "fortuitous" event. *Millers Capital*, 941 A.2d at 715. Thus, in every case, we must ask whether the underlying factual averments allege an event that – from the perspective of the insured – is sufficiently "fortuitous" to constitute and "accident." According to *Millers Capital*, simple claims of "faulty workmanship" do not satisfy this standard. *Id.*

And, here, the underlying plaintiff does simply allege "faulty workmanship"; the Underlying Complaint alleges nothing more than that *the plumbing subcontractor improperly performed its contractual duties*. From the perspective of the insured (Rob-Bern), this is no more "unexpected" or "fortuitous" than an allegation that one of its subcontractors improperly used "defective stucco" on the building or failed to seal window-exterior, thereby allowing the elements to harm the building-interior – as was

alleged in *Millers Capital*. Neither is this more “fortuitous” than if it were alleged that the finished building was “damaged” or “did not meet the contract specifications” – as was alleged in *Kvaerner*. Rather, all of these allegations concern the improper or care-less performance of a contractual obligation – which is, by definition, “faulty workmanship.”

In the case at bar, the Underlying Complaint alleges “faulty workmanship” on the part of the plumbing subcontractor. Yet, under *Millers Capital*, this is simply not enough to satisfy the definition of “occurrence.” Appellants’ claim must therefore fail.

III.B.v. Pursuant to *Millers Capital*, since the damage claims were a “natural and foreseeable result” of the “faulty workmanship,” they cannot state an “occurrence”

This Court has just explained why the claimed “faulty workmanship” does not create an “occurrence”; now, I explain why the “damage claims” also fail to state an “occurrence.”

As was true in *Millers Capital*, in the case at bar the claimed damages were a “natural and foreseeable result” of the faulty workmanship. As stated above, the Underlying Complaint avers that on July 9, 2004, the “2” main water service line and a 1” copper line for interior water distribution” became separated. “Underlying Complaint,” at ¶ 19. Following an investigation, the underlying plaintiff learned that this separation occurred because “the connection of the water service [was made] in the middle of an ‘S’ curve, [thus] placing a lot of stress on the street adaptor and connector in general.” *Id.* at ¶ 23A. The investigation also revealed that the faulty connection would cause “further problems in the future” since: 1) the connection was “unsupported” and 2) the “stresses induced by the ‘S’ curve install[ation]” would cause the “plumbing filling [to] eventually fail.” *Id.* at ¶¶ 23B & C.

Then, the Underlying Complaint avers, on both August 9, 2004 and September 8, 2004, *the same water lines that originally separated* did so again – thus causing “substantial amounts of water to enter” the building. *Id.* at ¶¶ 30-31 & 33. And, in specifying the “damages” that it incurred, the underlying plaintiff declares:

It is believed and averred that as a direct result of Rob-Bern’s and American’s failure to complete the interior and exterior plumbing work, in accordance with the plans, specifications, and Contract Documents, substantial quantities of water was discharged on multiple occasions into the interior of Voice’s building in a crawl space under the main floor of the structure. The water discharged as a result of the faulty/ defective installation of the plumbing resulted in:

- A. Water damage to the interior structural components of the building, including, but not limited to, damages to floor joists, wall studs and other wooden and non-wooden structural components;
- B. damage to insulation, dry wall, carpet, light fixtures, electrical components, concrete flooring, hardware, and other fixtures and components;
- C. the formation of mold and other microbial contamination in the interior of the structure and on portions of the interior walls, ceilings, insulation and other areas;
- D. damages to various items of personal property;
- E. loss of use of the premises.

Id. at ¶ 40.

As is self-evident, all of the claimed damages are a “natural and foreseeable result” of the faulty workmanship. In sum: according to the Underlying Complaint, the plumbing was deficient in that “the connection of the water service [was made] in the middle of an ‘S’ curve”; this faulty plumbing caused the water-service lines to separate; the separation caused “substantial amounts of water to enter” the building and, then, the water-entry caused structural damage, damage to fixtures, mold, etc. No further explanation is needed – all of the “damages” naturally and foreseeably flowed from the “faulty workmanship.” And, simply put, the CGL Policy does not cover these claims: according to *Millers Capital*, damage claims that are the “natural and foreseeable result” of “faulty workmanship” fail to state an “occurrence.”

Thus, even though the “faulty workmanship” caused “damage to property other than to the completed work itself,” *Millers Capital* holds that the above averments do not allege an “occurrence”: the damages were the “natural and foreseeable result” of the faulty workmanship.

IV. Conclusion

Any remaining issues are discussed within the following footnotes.^{2,3} In conclusion, the CGL Policy’s general insuring clause does not encompass the underlying factual averments: under the precedent set by *Millers Capital*, there has been no “occurrence.” Certainly, and echoing our Superior Court in *Millers Capital*, any other result would force courts to “render the definition of ‘occurrence’ mere surplusage in every instance where a plaintiff sues a contractor for faulty work performed by the subcontractor on the contractor’s behalf.” *Millers Capital*, 941 A.2d at 715.

For the foregoing reasons, this Court’s Order dated December 15, 2009 granting Plaintiff’s Motion for Summary Judgment should be affirmed.

Date Filed: May 13, 2010

¹ According to the Underlying Complaint, Current-Appellants “The Housing Authority of the County of Butler and The Housing and Redevelopment Insurance Exchange are the assignees of VOICE’s claims and causes of action set forth [within the Underlying Complaint] in accordance with a written assignment dated December 15, 2004.” “Second Amended Complaint – Civil,” filed on behalf of “Plaintiff Victim Outreach Intervention Center, Inc. (VOICE),” filed in the Court of Common Pleas of Butler County at A.D. No. 06-10538 (hereinafter “Underlying Complaint”), at ¶ 1. As Penn National explains, The Housing and Redevelopment Insurance Exchange was the “insurer which has compensated VOICE in whole or in part for the damages allegedly caused by Rob-Bern (among others).” “Motion for Summary Judgment,” filed on behalf of Plaintiff Pennsylvania National Mutual Casualty Insurance Company, at docket number GD08-002003 (hereinafter “Penn National’s Motion for Summary Judgment”), at ¶ 3c.

² Penn National also based its summary judgment motion upon the “Contractual Liability” Exclusion: according to Penn National, even if there was an “occurrence,” the “Contractual Liability” Exclusion mandated that judgment be entered in its favor. When I granted Penn National’s summary judgment motion, however, I did so because I believed *Millers Capital* controlled – thus resulting in no “occurrence” being pleaded. This is still my belief. Thus, this Memorandum does not address whether the “Contractual Liability” Exclusion would require summary judgment in Penn National’s favor.

³ Appellants have also declared that “the doctrines of estoppel and laches bar[] Penn National’s claims.” “VOICE’s Brief in Opposition,” at 12. Yet, appellants have supported this declaration with absolutely no evidence and, indeed, no argument – there is not even an assertion *as to why* estoppel or laches *would* apply. The argument is therefore waived. Moreover, any such argument would be meritless: attached to Penn National’s summary judgment motion are authenticated “reservation of rights” letters, sent by certified mail and addressed to the Insured. Within every one of these letters, Penn National tells the Insured that the claim investigation is continuing and that Penn National is “reserving its right” to deny coverage. *See, e.g.*, “Penn National’s Motion for Summary Judgment,” at “Exhibit ‘D.’”

Commonwealth of Pennsylvania v. Sully George Jackson

Police Stops and Searches—Motion To Suppress—Expert Testimony—Mandatory Sentences—Notice Requirements

1. Motion to Suppress evidence seized during stop will not be granted where evidence adduced at trial supported findings that (1) police legally stopped Defendant for speeding and (2) Defendant’s furtive movements, extreme nervousness, evasive answers and refusal to make eye contact justified police search and patt-down.

2. Large object felt in Defendant’s pocket during patt-down was properly removed where evidence established that object could have been weapon and contents of bottle in plain view (cocaine baggies) were properly admitted as evidence at trial.

3. Expert testimony can establish that amount of cocaine found in Defendant’s possession is consistent with possession of controlled substance with intent to deliver rather than possession for personal use.

4. Mandatory three year sentence was not given in this case where Commonwealth never gave reasonable notice to Court, pursuant to 18 Pa. C.S. Section 7508, advising Court that it would seek imposition of mandatory three year sentence.

5. Where amount of drugs was minimally above the three year mandatory sentencing provisions and where evidence established that drugs in possession of Defendant were for personal use and delivery, Court fashioned appropriate one year mandatory sentence given the facts presented to the Court, the contents of the presentence report and Defendant’s criminal history.

(Peter Clyde Papadakos)

Michael Streily for the Commonwealth.

Jessica L. Herndon for Defendant.

No. CC No. 200803805. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Cashman, J., May 10, 2010—Both the Defendant, Sully George Jackson, (hereinafter referred to as “Jackson”), and the Commonwealth of Pennsylvania have appealed following a non-jury trial in which Jackson was convicted of possession with intent to deliver a controlled substance, possession of a controlled substance, driving while operating privilege is suspended, and exceeding the maximum speed limits. Jackson has contended that this Court erred in denying his motion to suppress, arguing that no probable cause existed for the warrantless search of Jackson. Jackson further argues that the search in question exceeded the legitimate scope of a *Terry* frisk. Finally, Jackson contends that the evidence was insufficient to prove beyond a reasonable doubt that he possessed the cocaine found on him with the intent to deliver.

The Commonwealth has appealed from the sentence imposed in this matter, arguing that the Court failed to impose the mandatory minimum sentence it believed to be applicable in this case. The Commonwealth further seeks to argue whether a particular form of notice is required under 18 Pa. C.S. §7508 and, if so, whether such notice must be made to the Court as well as to Jackson. Finally, the Commonwealth seeks to argue that where the record demonstrates that both Jackson and his counsel had actual notice of the Commonwealth’s intention to seek the mandatory sentence and did not dispute its applicability, a Court may find the form of notice inadequate and refuse to impose the mandatory sentence on that basis alone.

The evidence presented at the suppression hearing, which was incorporated for purposes of the non-jury trial, established that Officer Vince DiCenzo, (hereinafter referred to as “DiCenzo”), of the East Pittsburgh Police Department, was working on September 9, 2007, at approximately 2:30 in the morning. DiCenzo clocked Jackson’s vehicle traveling at a rate of forty-six miles per hour in a posted twenty-five mile per hour zone. A traffic stop was made, and Jackson was identified as the driver. As DiCenzo approached Jackson’s vehicle, he observed Jackson making furtive movements to his right. DiCenzo saw Jackson’s shoulder dipping down on two separate occasions toward the floorboard area. DiCenzo was unable to see Jackson’s hands at this time. Based on these observations, DiCenzo radioed for another police officer to assist him. DiCenzo approached Jackson’s vehicle and asked for Jackson’s license, registration and insurance information. Jackson admitted that he was speeding and advised DiCenzo that he did not have a driver’s license. Jackson further clarified his statement to admit that he was suspended. DiCenzo took no further actions with respect to Jackson until his backup arrived.

DiCenzo testified that Jackson avoided eye contact with him while he spoke to him. He characterized Jackson as appearing very nervous. Jackson refused to make eye contact with DiCenzo and kept staring straight ahead. The vehicle Jackson was driving was not registered to him, but rather, to Halbleib Automotive in Pittsburgh.

Once backup arrived DiCenzo ordered Jackson to step from his vehicle DiCenzo’s intention was to pat down Jackson for his safety. During the pat down, DiCenzo felt a large bulge in Jackson’s right leg pocket. When asked what this bulge was, Jackson stated that it was “Stacy’s.” Believing that it was a weapon, DiCenzo removed it from Jackson’s pocket. He described the bulge as very solid, very large. Upon removing the object, DiCenzo discovered that the item was, in fact, a large pill bottle. This bottle was not the size of a typical prescription bottle, but was rather described by DiCenzo as a very large prescription bottle with estimated dimensions of two and one-half to three inches by five inches. The officer was able to immediately observe several corner baggies of suspected crack cocaine in this pill bottle. This was visible to the officer without opening the bottle.

It is readily apparent, and not challenged, that the officer had the right to stop Jackson’s vehicle, based upon the speed in which

he was traveling. His movements, extreme nervousness, evasive answers, and refusal to make any eye contact whatsoever, warranted the officers patting him down for their safety. See, *Commonwealth v. Mack*, 308 Pa.Super. 153, 953 A.2d 587 (2008). DiCenzo, believing that Jackson possessed a weapon, removed the bottle and was able to immediately observe that this bottle contained cocaine. Thus, Jackson's contentions that this Court erred in denying his motion to suppress are without merit. Likewise, the officer could properly pat down Jackson for his safety. His belief that the object he felt in Jackson's pocket might have been a weapon, was found to be credible by this Court. Thus, Jackson's challenge to the search and frisk must fail.

Likewise, Jackson's challenge to the sufficiency of the evidence to support his conviction must also fail with respect to the possession with intent to deliver charge. The Commonwealth presented expert testimony to opine that the quantity found on Jackson was consistent with the intent to deliver. This member of the Court credited that testimony. While Jackson's testimony that he was a drug user was somewhat persuasive, the Court did not conclude that the totality of the items found on Jackson were for personal use. Rather, the credible testimony was that Jackson possessed most, if not all of the crack cocaine found on him with the intent to deliver. Accepting the evidence in the light most favorable to the Commonwealth, as verdict-winner, it is clear that the evidence is more than sufficient to support Jackson's conviction. See, *Commonwealth v. Watson*, 945 A.2d 174 (Pa.Super. 2008); *Commonwealth v. Heater*, 899 A.2d 1126 (Pa.Super. 2006).

The Commonwealth's appeal focuses on the notice given for the imposition of a mandatory minimum sentence. While the record reflects that the defense and Court were placed on notice of Jackson's conviction that the Commonwealth was seeking a mandatory minimum sentence of three years incarceration, no notice was filed. The defense acknowledged at the time of sentencing that they were aware that the Commonwealth sought a three-year mandatory minimum. It is clear that the Commonwealth never filed a written notice with the Court advising the Court that the Commonwealth was seeking a mandatory minimum sentence here. 18 Pa. C.S. §7508 does not require any particular form of notice, but requires that notice to be reasonable. *Commonwealth v. Daniels*, 440 Pa.Super. 615, 656 A.2d 539 (1995).

The difficulty raised by the Commonwealth's failure to file a written notice of record of its intention to seek a mandatory is apparent in a case such as the one presently at issue. The Court received a written presentence report detailing Jackson's background. The Court also has the benefit of its notes, which reflected a case where the amount of drugs was minimally above the three-year mandatory quantity under circumstances in which it appeared that the quantity found was both for intent to deliver and for personal use. While the defense obviously did not argue this fact at the time of sentencing, the defense position at trial was that Jackson was a user of drugs. As the Court was not formally apprised of the Commonwealth's position that a three-year mandatory was being sought, a determination was made that Jackson fell within a one-year mandatory minimum sentence and in a guideline range as was imposed here. Thus, while it appears that the Commonwealth is not required to file a written notice of its intention to seek the imposition of a mandatory sentence, this would certainly be a prudent practice, especially in borderline cases such as the instant one. Unfortunately, the Commonwealth failed to take what should be a rather easy step to advise the Court of its position. Even worse, however, is the defense's failure to argue that the quantity here should be considered in a hybrid fashion where some of the substance could be considered consistent with intent to deliver, while part would be consistent with personal use, a claim that could have found credence, given Jackson's testimony. See, *Commonwealth v. Perez*, 2007 Pa.Super. 235, 931 A.2d 703 (2007): "The initial determination of whether the Commonwealth proves that the mandatory minimum applies under Section 7508 is reserved by statute for the Sentencing Court." The Court is thus left in a position of fashioning an appropriate sentence, given the facts presented to the Court, the contents of the presentence report and Jackson's criminal history. The sentence imposed reflected such a consideration.

Cashman, J.

Dated: May 6, 2010

Commonwealth of Pennsylvania v. Scott Kecman

Harassment—Sufficiency of Evidence—Prejudicial Statement by Court—Excessive Sentence—Admissibility of Statement of Defendant

1. Evidence to support harassment conviction under Pa.C.S. Section 2709(a)(4) was sufficient where Commonwealth submitted evidence to establish that Defendant engaged in a pattern of behavior to alarm and seriously annoy the victim by establishing that Defendant appeared on the victim's property carrying a firearm in the middle of the night and repeatedly using foul and inappropriate language to the victim and his minor son and motion to set aside verdict as being against the weight of the evidence would fail.

2. Defendant's claim that the Court prejudiced the Defendant by calling his counsel's attempt to impeach a witness on cross-examination by comparing his testimony at trial against his testimony at the preliminary hearing as an "ambush" did not warrant a new trial where the Court gave a cautionary instruction to the jury to ignore any comment it might have made during the trial which the jury could have construed as showing annoyance or displeasure of any witness or lawyer.

3. Where Court could have sentenced Defendant to 4-8 months incarceration using his prior record score and the sentencing guidelines, sentence of 1 year probation and \$1,000 fine was not excessive, especially where no evidence could be pointed to in the record to show that the sentence was enhanced because the Defendant elected to be tried by a jury.

4. Admission of surprise inculpatory statement by witness that Defendant called victim's son a "faggot" was not grounds for mistrial, where Court offered Defendant's Counsel additional time to prepare for cross-examination which was declined; where inculpatory statement was similar to other allegations and where Defendant was given opportunity to cross-examine witness as to recency of recollection and disclosure of the statement.

(Peter Clyde Papadakos)

Michael Streily for the Commonwealth.

Paul Gettleman for Defendant.

No. CC 200910616. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Rangos, J., May 17, 2010—On January 13, 2010, Defendant, Scott Kecman, was convicted by a jury of his peers on a harassment charge. Defendant was sentenced to one year of probation, the first two months of which to be served on house arrest, and a fine of \$1000.00. Defendant filed a timely Notice of Appeal on January 15, 2010 and a Statement of Errors Complained of on Appeal on February 11, 2010.

MATTERS COMPLAINED OF ON APPEAL

Defendant raises six issues on Appeal however, Defendant's claims can essentially be reduced to four issues. First, Defendant asserts that the verdict was against the weight of the evidence. (Concise Statement of Matters Complained of on Appeal, p. 2) Second, Defendant asserts that the Court prejudiced Defendant by referring to defense counsel's techniques as ambushing. *Ibid.* Next, Defendant asserts that this Court sentenced him excessively because he chose to exercise his right to a trial by jury *Ibid.* Defendant lastly asserts that this Court erred regarding the admissibility and consequences of a statement made by Defendant. *Ibid.*

HISTORY OF THE CASE

The circumstances of this case revolve around an ongoing dispute between two neighbors, Scott Kecman (Defendant) and David Leitzell. Leitzell testified that on April 28, 2009, at approximately 2:00 a.m., he was returning home from work when he noticed Defendant was standing on Leitzell's property, in front of his house. (Transcript of Jury Trial of January 12-13, 2010, hereinafter Tr. 25) Leitzell noticed that Defendant was carrying a rifle. (Tr. 27) Leitzell had previously told Defendant not to be on his property and had posted "No Trespassing" signs on the property. (Tr. 25-26)

Leitzell conducted a preliminary survey of his property and did not discover any damage. (Tr. 28) However, later that morning, at approximately 10:00 a.m., a more thorough review revealed damage to the windshields of two of Leitzell's vehicles. *Ibid.* Leitzell described the damage as similar to a bull's eye, partially penetrating the windshield of two vehicles. *Ibid.* The vehicles were on the left side of the property, the same side from which Defendant appeared. (Tr. 29) In addition, another car owned by Leitzell was damaged and described by Leitzell as having "a BB mark in the paint." (Tr. 30)

At approximately 4:00 p.m., Defendant drove past Leitzell's house. *Ibid.* According to Leitzell, Defendant called Leitzell's son a "retard." (Tr. 31) Defendant left and returned on his dirt bike, and said to Leitzell that he was not the one who shot out Leitzell's windows. *Ibid.* During this later encounter, Defendant also called Leitzell a "faggot" and "asshole." (Tr. 34)

DISCUSSION

Defendant alleges that the evidence was insufficient to support the conviction. The test for reviewing a sufficiency of the evidence claim is well settled:

[W]hether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences favorable to the Commonwealth, the jury could reasonably have determined all elements of the crime to have been established beyond a reasonable doubt... This standard is equally applicable to cases where the evidence is circumstantial rather than direct so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt.

Commonwealth v. Hardcastle, 546 A.2d 1101, 1105 (Pa. 1988) (citations omitted)

Defendant was convicted of harassment, which is defined, in relevant part, as follows:

§ 2709. Harassment

(a) Offense defined.—A person commits the crime of harassment when, with intent to harass, annoy or alarm another, the person:

* * *

(4) communicates to or about such other person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures;

18 Pa.C.S. §2709 This statute seeks to balance the right to free speech against the right to be free from intrusions of personal privacy.

With the enactment of 18 Pa.C.S. §2709, our legislature has sought to prohibit such conduct, including speech, which is not Constitutionally protected and which is intended to alarm or seriously annoy another person. The purpose of the legislature, undoubtedly, was to extend to the individual the protections which have long been afforded the general public under disorderly conduct and breach of the peace statutes. The legislature has sought to prevent, not the initial impact of unwelcome intrusions upon privacy, but rather repeated assaults on individual privacy interests.

Commonwealth v. Duncan, 363 A.2d 803, 809 (Pa.Super. 1976) Defendant repeatedly intruded upon the privacy of Leitzell. When viewed individually, his conduct may simply be irresponsible or immature, but when viewed as part of an ongoing pattern, it rises to the level of "alarming or seriously annoying." After having been previously warned, he appeared on Leitzell's property, late at night, brandishing a weapon. He returned hours later and hurled insults at Defendant's minor child. He returned a third time that day and made a direct reference to the damage on Leitzell's vehicles, which damage appeared to have been caused by a BB gun. Then he used inappropriate and insulting language toward Leitzell. The only conceivable purpose of this pattern of behavior is to alarm or seriously annoy Leitzell. Defendant's general denial of wrongdoing was apparently not found to be credible by the jury. Rather, the jury found his course of conduct squarely within the proscriptions of §2709. Based on all of the facts, and drawing all proper inferences in favor of the Commonwealth, the jury verdict must be affirmed.

Turning to Defendant's other claims of error, Defendant claims that this Court prejudiced Defendant by referring to his counsel's tactics on cross-examination as "ambushing" the witness. Defense counsel sought to impeach a witness on cross-examination by comparing his testimony at trial against the witness' testimony at the preliminary hearing. After numerous questions by defense

counsel, the Court intervened as follows:

COURT: Let's take a brief recess. It's not fair to ambush the witness with a transcript.

Counsel: Excuse me, I don't mean to interrupt, but I object to the characterization he's being ambushed.

COURT: I would like to give him the opportunity to step down and read the transcript if you're going to ask him to point out anywhere in the transcript where he might have said something.

(Tr. 46-47)

This Court first notes that, even if its characterization of counsel's cross-examination was unnecessary, not every unnecessary comment in a trial is prejudicial. *Commonwealth v. Goosby*, 301 A.2d 673, 674 (Pa. 1975) In order to be prejudicial, it must be "of such a nature or substance or delivered in such a manner that it may reasonably be said to have deprived defendant of a fair trial." *Ibid.* A trial court may legitimately exercise its discretion to expedite the trial and perform its duty to focus the proceeding on the issues presented. *Commonwealth v. Ryder*, 359 A.2d 379, 381 (Pa. 1976)

Ryder is particularly instructive in that the judge made comments on five separate occasions regarding the dilatory tactics of counsel. On appeal, the Court held that no error was made by the judge, as the court has the ability to restrain the unwarranted practices of defense counsel. *Ibid.* A judicial comment that goes further than necessary to rule on an objection does not warrant a new trial unless the court lectures counsel or threaten counsel in the presence of the jury. *Id.* at 383 citing *Commonwealth v. Horvath*, 285 A.2d 185 (Pa. 1971) and *Commonwealth v. Stallone*, 126 A. 56 (Pa. 1924)

In the case *sub judice*, this Court intervened only after counsel had been given considerable latitude with respect to his cross-examination. Counsel asked the witness question after question regarding details of the transcript of the preliminary hearing, with which the witness had not previously been provided. Counsel repeatedly asked the witness to point out where in the transcript the witness made certain statements. Naturally, this tactic resulted in repeated delays as the witness attempted to scan pages of transcript to respond. To expedite the testimony, the Court intervened and permitted the witness the opportunity to read the relevant portion of the transcript. This one instance of this Court moving the trial along falls far short of the five instances of judicial commentary in *Ryder* which were found to be acceptable. Moreover, the applicable standard is fairness of the trial, and this Court's intervention accomplished that goal by giving the witness an opportunity to better answer counsel's questions.

Furthermore, this Court issued the following jury instruction to cure any prejudice, real or perceived:

If during the trial I exhibited what you felt to be annoyance or displeasure toward any witness or lawyer, or if I made any comment or facial expression, you're not to assume that I have attempted to persuade you to render a particular verdict, because I have not.

(Tr. 121) This precautionary instruction is sufficient for statements such as the one to which Defendant cites.

Next Defendant alleges he was sentenced excessively for electing to have a trial by jury. Before addressing the reasonableness of the Court's sentence, this Court notes that Defendant must first establish that a substantial question exists that his sentence is inappropriate under the Sentencing Code. 42 Pa.C.S.A. §9781(b); *Commonwealth v. Urrutia*, 653 A.2d 706, 710 (Pa.Super. 1995) Defendant alleges that the sentence was enhanced because of his election to be tried by a jury.

This allegation is not only without merit, it is completely without support in the record. This Court sentenced Defendant to one year of probation, the first two months of which to be served on house arrest, and a fine of \$1000.00. (Tr. 148) Defense counsel requested a probationary sentence. Given Defendant's prior record score of four (4) and the sentencing guidelines, which this Court reviewed, this Court could have sentenced Defendant to a four to eight month period of incarceration in the standard range. Defendant has fallen far short of demonstrating that his sentence of one year probation, two months of which to be served on house arrest, was excessive, and his bald assertion of unfairness merits no further discussion. A bald claim of excessiveness does not raise a substantial question. *Commonwealth v. Wright*, 832 A.2d 1104, 1107 (Pa.Super. 2003). As such, Defendant is not entitled to appellate review on this issue.

Even if a substantial question had been raised, Defendant would not be entitled to relief. The standard of review with respect to sentencing is whether the sentencing court abused its discretion. *Commonwealth v. Smith*, 673 A.2d 893, 895 (Pa. 1996) A court will not have abused its discretion unless "the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will." *Ibid.* It is not an abuse of discretion if the appellate court may have reached a different conclusion. *Grady v. Frito-Lay, Inc.*, 613 A.2d 1038, 1046 (Pa. 2003).

The sentencing court is given such broad discretion because it alone can observe the defendant's conduct and behavior. "Simply stated, the sentencing court sentences flesh-and-blood defendants and the nuances of sentencing decisions are difficult to gauge from the cold transcript used upon appellate review." *Commonwealth v. Walls*, 926 A.2d 957, 963 (Pa. 2007).

"Unreasonable" is not defined by statute and is apparently intentionally vague in its meaning. "[T]he General Assembly has intended the concept of unreasonableness to be a fluid one...a circumstance-dependent concept that is flexible in understanding and lacking precise definition." *Walls*, 926 A.2d at 963. Despite the lack of concrete definition in statute or case law, this Court is not without guidance as to the meaning of unreasonableness. 42 Pa.C.S.A. § 9721, specifically the factors listed in §9721 (b) (the protection of the public, the gravity of the offense in relation to the impact on the victim and the community, and the rehabilitative needs of the defendant), inform appellate review for unreasonableness. *Id.*

In this case, this Court considered the fact that, having been warned previously, Defendant appeared on the property of the victim toting a firearm in the middle of the night. He repeatedly used foul and inappropriate language to the victim and his son. In order to put a stop to the ongoing, and apparently escalating, feud, this Court sentenced Defendant to a period of probation, consistent with the recommendation of his counsel. This Court is perplexed as to how Defendant can argue that a nonjury trial would have resulted in any lesser sentence.

Finally, Defendant alleges this Court erred in admitting a statement that the Defendant allegedly called the victim's son a "faggot." According to Defendant, the utterance of the statement on the witness stand was grounds for mistrial, as this statement had not been made available to defense counsel in advance.

This argument also lacks merit. Counsel for the Commonwealth acknowledged that he was made aware of the statement only moments ahead of the testimony. (Tr. 56) It did not appear in the police report or any other written statement. *Ibid.* The prosecution does have a duty to disclose all inculpatory statements in his possession or control under Pa.R.C.P. Rule 573(B). The Assistant District Attorney in this case indicated that he had just himself learned of the statement in question. Pa.R.C.P. Rule 573(E) pro-

vides that a court may enter such order as justice requires under the circumstances for failure to comply with this Rule. In this case, counsel was offered additional time to prepare for cross-examination, which he declined. (Tr. 67) Since counsel did not find so much as a recess necessary to prepare cross-examination on this issue, it stands to reason that either counsel had previously prepared for this type of statement given the other similar allegations or the statement was so insignificant as to not require additional preparation. In any event, counsel for Defendant was given the opportunity to cross-examine the witness as to the recency of the recollection and disclosure of the statement. If a recess was not needed, it is clear that granting a mistrial was also not necessary.

CONCLUSION

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

BY THE COURT:

/s/Rangos, J.

Commonwealth of Pennsylvania v. Jeylon Davis

Unavailable Witness—Pa. Rules of Evidence 804(a)(5), (b)(1)

1. Commonwealth met its burden of showing it used reasonable means to procure the attendance of victim, living in Canada, in robbery prosecution under Pa. Rules of Evidence 804(a)(5) by demonstrating witness refused to attend trial even after Commonwealth communicated several times with unavailable witness and assured her that she would be able to return to Canada following her appearance at trial and by speaking with Canadian and American Immigration authorities concerning witness's immigration status and the reason for her travel to the United States.

2. Where witness refuses to appear at trial despite Commonwealth's good faith efforts to procure her attendance at trial she will be deemed unavailable for appearance and her preliminary hearing testimony, which was subject to cross-examination by defendant, can be admitted into evidence pursuant to Pa. Rules of Evidence 804(b)(1).

(Peter Clyde Papadakos)

*District Attorney's Office Appellate Division for Commonwealth.
Scott Coffey for Defendant.*

No. CC 200601962. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Machen, J., May 19, 2010—Defendant was charged at CC 200601962, with one count of Robbery – Serious Bodily Injury, 18 Pa. C.S.A. §3701(a)(1)(i); one count of Simple Assault, 18 Pa. C.S.A. §2701(a)(3); and one count of Recklessly Endangering Another Person (REAP), 18 Pa. C.S.A. §2705.

On May 13, 2008, this court held a hearing at which time the defendant moved to dismiss, asserting that the Commonwealth was unable to proceed because of an unwilling victim. Also at that hearing, the Commonwealth made an oral motion for the court to find the victim, June Yu, unavailable under Pa. Rules of Evidence § 804. The court ordered the parties to submit briefs. Briefs were submitted on May 20, 2008, and on May 21, 2008, the court granted the Commonwealth's motion for the victim to be declared unavailable.

Prior to the start of a two-day jury trial, the court held a hearing on defendant's Suppression Motion, which was denied and the matter proceeded to trial. On May 23, 2008, the jury found defendant guilty of all charges. Sentencing was postponed pending the preparation of a presentence report. On August 7, 2008, defendant was sentenced at Count 1 – to 7 1/2 to 15 years incarceration, effective May 4, 2008, with time credit from January 24, 2006, through August 11, 2006, and 5 years probation, to be served consecutive to the period of incarceration imposed at this count; at Count 3 to 1 year probation, to be served consecutive to the period of probation imposed at Count 1 of this Information. There was no further penalty at Count 2 as the simple assault merged with Count 1 for sentencing.

On August 13, 2008, defendant filed a Motion to Modify/Reduce Sentence with this court. A hearing was held on September 25, 2008, at which petitioner requested that counsel be appointed to file an appeal on his behalf. That request was granted, but it appears that counsel was not appointed. On March 26, 2009, petitioner filed a *pro se* Motion for Post Conviction Collateral Relief. On April 3, 2009, Scott Coffey, Esquire, was appointed to represent petitioner in his Post Conviction Collateral Appeal. On December 1, 2009, Petitioner, through Attorney Coffey, filed an Amended Petition for Relief pursuant to the Post Conviction Relief Act (PCRA). After the filing of an Answer by the Commonwealth, this court reviewed the pleading and the record and in accordance with, reinstated defendant's appellate rights *nunc pro tunc* on February 19, 2010. This timely appeal followed.

IN HIS STATEMENT OF MATTERS COMPLAINED OF ON APPEAL, DEFENDANT CLAIMS THAT THE TRIAL COURT ERRED IN PERMITTING THE COMMONWEALTH'S USE OF VICTIM JUNE YU'S PRELIMINARY HEARING TESTIMONY (PURSUANT TO PA.R.E. 804) AT APPELLANT'S JURY TRIAL, OVER THE OBJECTION OF TRIAL COUNSEL AT THE 5/13/08 PRE-TRIAL HEARING (AT PP. 5-6, 8, 9) & IN HER 5/20/08 BRIEF, SINCE THE WITNESS WAS NOT UNAVAILABLE AND THE COMMONWEALTH DID NOT MAKE A GOOD FAITH EFFORT TO SECURE HER PRESENCE AT TRIAL.

The question is whether June Yu was properly deemed to be unavailable for the purposes of Pennsylvania Rule of Evidence §804 which permits certain out-of-court statements, which would otherwise be excluded as hearsay, to be admitted into evidence, provided that the declarant is unavailable for trial. Pa. R.E. §804(a) provides a definition of unavailability of a witness for exceptions under this section. That definition provides, in pertinent part:

Rule 804. Hearsay exceptions; declarant unavailable

(a) **Definition of unavailability.** “Unavailability as a witness” includes situations in which the declarant:

...

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.

Pa.R.E. §804(a).

One exception under §804 allows former testimony where the witness testified at a prior proceeding in the same case, and was subject to cross-examination by this defendant. Pa.R.E. § 804(b)(1). Under this exception, Ms. Yu’s preliminary hearing testimony would be properly permitted under this rule, as long as Ms. Yu was determined to be unavailable by the court prior to the entrance of the testimony at trial.

A witness may be deemed to be unavailable if the Commonwealth demonstrates good faith effort to locate him. 42 Pa.C.S.A. §5917. The determination of whether a witness is unavailable is for the trial judge, whose decision will not be reversed absent a showing of an abuse of discretion. *Commonwealth v. Walloe*, 472 Pa. 473, 372 A.2d.788 (1977); *Commonwealth v. Lebo*, 795 A.2d 987 (Pa.Super. 2002).

This court conducted a hearing and ordered the parties to submit briefs prior to trial. After consideration of all of the arguments, this court determined that the Commonwealth had sufficiently demonstrated that a good faith effort had been made to secure Ms. Yu’s presence at trial.

At the pre-trial hearing, Assistant District Attorney Wholey represented to the court that he had exchanged several communications with Ms. Yu over an extended period of time and that she was unwilling to re-enter the United States for fear that she would not be able to return to Canada where her husband and her newborn baby reside. (Motion Hearing, pp. 3-4, 8). Attorney Broadus argued that the Commonwealth was attempting to circumvent an unwilling victim. (Motion Hearing, pp. 5-6). This court ordered that both parties submit briefs on the issue for further consideration.

In the Commonwealth’s Brief in Support of Motion to Declare Witness Unavailable, the Commonwealth reiterated its many attempts to procure Ms. Yu’s presence at trial. The exhibits attached to the Commonwealth’s Brief showed a willing witness who wanted to come to Pittsburgh to testify at Petitioner’s trial. This court found that Ms. Yu fully intended to appear at petitioner’s trial, and that the only reason for Ms. Yu’s unavailability was the Immigration Officer scaring Ms. Yu into believing that, due to her tenuous immigration status, she may not be permitted to re-enter Canada if she were to leave. Based upon the information presented to the court, it was apparent to the court that Mr. Wholey did everything in his power to assure Ms. Yu that she would be permitted to return to Canada, including speaking to both the Canadian and American Consulates and providing them with documentation of the reason for Ms. Yu’s travel to the United States. Despite these efforts, ADA Wholey was unable to provide to Ms. Yu the documentation that she believed was necessary to prove that she would be able to re-enter Canada. This was a reasonable concern for Ms. Yu. This court found that the Commonwealth’s efforts went beyond a mere good faith effort to secure Ms. Yu’s presence at trial and thus, properly allowed the use of her preliminary hearing testimony.

As such, this claim has no merit.

Date: May 19, 2010