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PLJ

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Opinions deemed appropriate for publication are not disqualified because of the identity, profession or community status of the litigant. The guide to publication is the helpfulness of the opinion to practitioners in the particular area of law. All opinions submitted to the PLJ are reviewed for publication and will only be disqualified or altered by Order of Court.

OPINIONS

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**Commonwealth of Pennsylvania v.
Jamar Lashawn Travillion**

Waiver of Counsel—Right to Testify—Warrantless Searches

1. Defendant was found guilty of second-degree murder, robbery, criminal attempt to commit criminal homicide, aggravated assault, two counts of violations of the Uniform Firearms Act, and one count of possession of a small amount of a controlled substance.

2. Defendant appealed the denial of his post-trial relief motions and suggested four errors: 1) He was denied his right to counsel; 2) He was denied his right to testify at the time of trial; 3) The court erred when it denied his motion to suppress the evidence seized by the police, the identification of him by one of the witnesses, and inculpatory statements made by him; and 4) The court intimidated one of his witnesses, thereby causing that witness to refuse to testify.

3. After defendant fired his prior counsel, the court granted defendant a continuance for over a year, but defendant still refused to retain new counsel. After a lengthy inquiry by the court, it was determined that defendant made a knowingly, voluntarily, and intelligent decision to represent himself.

4. The claim that defendant was denied his right to testify is patently specious.

5. Defendant was parked in a vehicle outside of a store in the rear of a shopping center, late at night. Police had probable cause to question defendant, and the behavior of the defendant gave probable cause for the police to search the vehicle, and obtain the evidence (the gun) that was in plain view. Defendant was advised of his Miranda rights before he gave any statements and as such statements were admitted as evidence.

6. The court did not intimidate defendant's witnesses, but rather sought independent counsel for the witness, who after speaking with counsel, invoked his Fifth Amendment rights and refused to testify.

(Daniel McIntyre)

Stephie-Anna Kapourales for the Commonwealth

Thomas N. Farrell for Defendant.

Nos. CC 200303767; 200307963; 200308353. In the Court of Common Pleas of Allegheny County, Pennsylvania Criminal Division.

OPINION

Cashman, J., July 6, 2009—On February 26, 2006, the appellant, Jamar Travillion, (hereinafter referred to as “Travillion”), was found guilty of the charges of second-degree murder, robbery, criminal attempt to commit criminal homicide, aggravated assault, two counts of violation of the Uniform Firearms Act, and one count of possession of a small amount of a controlled substance. A presentence report was ordered in aid of sentencing and Travillion was sentenced on May 15, 2006, to the mandatory life without parole for the conviction of second-degree murder and a consecutive sentence of one hundred eight to two hundred sixteen months for his conviction of the charge of robbery and a consecutive sentence of twelve to twenty-four months for his conviction of possessing a firearm without a license. Travillion did not file either post-sentencing motions or a direct appeal to the Superior Court.

On April 2, 2007, his current appellate counsel filed a petition for post-conviction relief requesting that his appellate rights be reinstated. On June 4, 2007, this Court prepared an order granting the reinstatement of his appellate rights and Travillion's appellate counsel filed post-sentencing motions on June 15, 2007. On August 29, 2007, a hearing was held on those motions and an Order was entered on January 31, 2008 denying those motions. Travillion filed an appeal from the denial of his post-sentencing motions and was directed to file a concise statement of matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). In that concise statement, Travillion has suggested that there are four claims of error. Initially, Travillion maintains that he was denied his right to counsel under the United States and Pennsylvania Constitutions. Travillion also maintained he was denied his right to testify at the time of his trial. Travillion has also suggested that this Court erred when it denied his motion to suppress the evidence seized by the Ross Township Police, the identification made of him by one of the victims and his inculpatory statements to the investigating homicide detectives. Finally, Travillion contends that this Court intimidated one of his witnesses thereby causing that witness to refuse to testify.

On February 21, 2002, James Kapinski, (hereinafter referred to as “Kapinski”), was a graduate student at Carnegie-Mellon University and lived in an apartment located at 408 Grant Street in the Garfield Section of the City of Pittsburgh. Kapinski had gone to school early that day and sometime between ten a.m. and seven p.m., an unknown individual entered into his apartment and stole some watches, a zip drive, some electronic equipment, an MP3 player, and a .357 caliber magnum Reuger revolver. Kapinski reported the burglary and theft to the police that day.

On September 27, 2002, at approximately five a.m., Leonard Feigel, age sixty-two, and his wife Doris Feigel, were delivering newspapers for the *Pittsburgh Post-Gazette* in the Bloomfield/Friendship area of the City of Pittsburgh. Leonard Feigel, who suffered from coronary disease and cirrhosis of the liver, was awaiting a liver transplant and this was the least strenuous type of employment in which he could engage. The Feigels were about to deliver the newspapers on Evangeline Street when Mrs. Feigel noticed an individual walking down that street toward them. This unknown individual came up to the driver's car door, opened it and then pulled Mr. Feigel out of the car. Mr. Feigel told him to take whatever he wanted, however, an altercation ensued as Mr. Feigel and his assailant moved up the street away from the Feigel's automobile toward an unoccupied parked car. Mrs. Feigel saw her husband's attacker pull out a gun and then she heard a shot and her husband cry out in pain. Her husband also yelled for her to get away from them.

When she heard her husband cry out in pain, Mrs. Feigel slid over to the driver's seat and put the car in gear and then drove toward her husband and his attacker in an attempt to hit this assailant. She barely touched Travillion when he then turned around and fired twice into her car and ran to the back of it and fired two more shots. He then ran down the street where one of the neighbors who had heard the shots saw him get into a dark colored foreign car which resembled a picture of a Mitsubishi Mirage shown during the course of the investigation of this crime. Mrs. Feigel, who was not hurt, got out of the vehicle and ran to several of the houses pounding on the doors, asking for someone to call the police for an ambulance.

The police and the paramedics arrived within minutes of the shooting and noted that Mr. Feigel had been shot in the leg and

that he had lost a significant amount of blood. The paramedics noted that he said he was cold and believed that he was going into shock. Mr. Feigel was transported by ambulance to Presbyterian University Hospital where he underwent emergency surgery and following the surgery he was listed as critical but stable; however, the trauma associated with this wound, his significant loss of blood, together with his severe coronary artery disease and his cirrhosis of the liver, ultimately resulted in his death. Dr. Bennett Omalu performed the autopsy on Feigel and noted that the downward, backward, and through and through gunshot wound had perforated the two major arteries of the leg causing a substantial loss of blood. Based upon that autopsy, Dr. Omalu offered the opinion that the cause of death of Feigel was atherosclerotic heart disease and cirrhosis of the liver which were exacerbated by the trauma of the gunshot wound and the significant loss of blood that he sustained. The triggering factor in Feigel's death was the gunshot wound to his leg and the loss of blood.

Mrs. Feigel was interviewed by the homicide detectives and she told them that her husband's attacker was an African American in his mid-twenties to early thirties and that he was approximately two hundred twenty pounds and that he was reasonably tall. Mrs. Feigel had indicated to the homicide detectives that she was able to get a good look at the individual who not only killed her husband but, also shot at her since he was a short distance from her and the street was well-lit. On October 10, 2002, she was shown a photo array of potential suspects; however, she was unable to identify anybody from that photo array.

During 2002 Samantha Smith owned a black Mitsubishi Mirage which was wrecked by her boyfriend, Travillion. Smith went to Enterprise Rental Company and rented a red Ford Focus automobile while awaiting payment from her insurance company so that she could purchase a new vehicle. In renting this automobile, she indicated on the rental form that she would be the only driver and that there were no other permitted drivers.

On November 24, 2002, Officer Joseph Shurina, of the Ross Township Police Department, was on routine patrol along McKnight Road checking buildings for any evidence of possible criminal activity. In the preceding weeks there had been numerous burglaries of commercial establishments along McKnight Road and it was Officer Shurina's job that night to check the buildings for evidence of any burglaries. At approximately 11:00 p.m., as Officer Shurina approached the Bed, Bath & Beyond store, he noticed a vehicle parked behind the building with its lights on and engine running. Officer Shurina suspected that something might be wrong since the building was closed and the area where the car was stopped was not a parking lot nor was it used to gain ingress or egress to the parking lot for the store. Officer Shurina pulled behind this automobile and put on his take down lights. Once he had put these lights on, Officer Shurina noticed that there was one individual in the car and that this individual started to move around in that vehicle. He also noted that the vehicle was a red Ford Focus automobile. The driver of this vehicle was subsequently identified as Travillion who got out of the vehicle and attempted to explain why he was in the alleyway behind the store. Officer Shurina told him to get back into the car and then he ran the plate to determine the ownership of the vehicle. When he received the information that the vehicle was owned by Enterprise Rental, he went back to the car and asked the driver for owner's and operator's information. Travillion supplied him with his driver's license and told him that the car was his girlfriend's car and provided him with the rental agreement which indicated that only his girlfriend, Samantha Smith, was a permitted driver for this vehicle. Travillion then told Officer Shurina that he had pulled into the alley because he needed to urinate. When asked why he had not stopped at a restaurant that had a restroom, Travillion had no answer and seemed befuddled and then became more nervous and agitated.

Officer Shurina then called for backup and waited for his backup to arrive. After the backup officer arrived, they both approached the vehicle and saw that Travillion had bent down and was moving around inside the car. Officer Shurina asked Travillion to get out of the car so that he could perform a pat-down of him and at this point when Travillion exited the vehicle Officer Shurina noticed a barrel of a gun sticking out from under the driver's seat. Officer Shurina took possession of this firearm, noted that it was loaded, and it was a 357 Magnum. Officer Shurina then checked to determine whether or not Travillion had a license to carry a firearm and when he was advised that he did not, Travillion was arrested and subsequently transported to the Ross Township Police Department. An inventory search was performed on the vehicle and during the search of that vehicle, a bag of marijuana was found in the console of the car. Travillion subsequently was charged with possession of a firearm without a license and possession of a small amount of a controlled substance. From the time that Officer Shurina initially encountered Travillion until the time that he was taken from the Ross Township Police Department to the Allegheny County Jail, Travillion did not request an opportunity to go to the bathroom.

The firearm found in Travillion's car was turned over to the Allegheny County Crime Lab so that it could be examined to see if it was in good operating condition and whether or not any of the bullets fired from it matched any of those contained in open case files. The gun was examined in May of 2003 by Robert Levine, Ph.D., who was the firearm's expert for the Crime Lab and it was determined that this weapon was used in the killing of Leonard Feigel. This information was given to the Pittsburgh Homicide Detectives and they, in turn, contacted the Ross Township Police Department so that they could gather information as to the facts surrounding how they came into possession of the firearm. After receiving the information that Travillion had been arrested and charged with the crime of possession of a firearm without a license, a new photo array was prepared which included his photograph and then that photo array was shown to Mrs. Feigel who immediately identified Travillion as the individual who killed her husband.

An arrest warrant was issued for Travillion for the homicide of Feigel and on May 16, 2003, Homicide Detectives Hal Bolin and George Satler went to Travillion's last known address to arrest him. The Detectives knocked on his door and Travillion came to the door and asked what they wanted. The Detectives identified themselves and told him that they had an arrest warrant for him for the charge of criminal homicide. Satler and Bolin knew that it was Travillion at the door since they had with them the a copy of the picture that Mrs. Feigel had identified in the photo array. Initially, Travillion denied that he was Jamar Travillion and, in fact, told the police that his name was Raymont Geeter. Travillion had on him a Pennsylvania driver's license with the name Raymont Geeter. Knowing that they had the right individual, they arrested Travillion and transported him to the homicide headquarters.

After being read his Miranda warnings, Travillion signed the form indicating that he had been fully advised of his rights and that he was willing to talk to the police with respect to the death of Feigel. Initially, Travillion maintained that he had nothing to do with that death and this continued for approximately forty-five minutes when Travillion asked if he could have a couple of minutes alone. After a ten minute break, Bolin continued with his interview of Travillion and Travillion said he was responsible for Feigel's death. He stated that he was high on marijuana that was laced with formaldehyde and on the morning of Feigel's death he had driven Smith's black Mitsubishi to the Bloomfield area looking for somebody to rob because he wanted to buy more marijuana.

na. Once he saw Feigel he approached him, drew his gun and demanded money. He held the gun at his side, pointing low, and pointing down. The victim grabbed at the gun and it went off and he took twenty to thirty dollars from the victim and possibly his wallet. After shooting Feigel, he ran from the scene and went home. Travillion never mentioned shooting into Feigel's car at Mrs. Feigel. During the course of this interview, Bolin was taking notes and once he finished the interview, he reviewed the notes with Travillion, had him read those notes and asked him if they were accurate. Travillion indicated that the notes were accurate and that he had no additions or corrections to those notes. However, when he was asked to sign those notes he refused and he also refused to put his statement on tape.

Travillion was taken to the Coroner's office so that he could be arraigned on the charge of criminal homicide. After being arraigned, he was leaving that office when he was confronted by numerous members of the media who asked him why he killed Feigel and he denied that he had done that. While he was being taken to the Allegheny County Jail, Bolin asked Travillion why he lied to the media and he said he was mad at the detectives because he believed they were the cause of the media being there and he was informed that the detectives did not call the media, but if anyone called the media, it was probably somebody from the Coroner's office.

In Travillion's statement of matters complained of on appeal he asserts four claims of error. Initially he maintains that he denied his Fifth Amendment right to counsel since he maintained that he was forced to represent himself. It is axiomatic that defendant has a constitutional right to represent himself in a criminal proceeding. *Commonwealth v. El*, 933 A.2d 657 (Pa.Super. 2007). When a defendant asserts that right to self-representation, the Court must make an inquiry as to whether or not this decision is knowingly, voluntarily and intelligently made. *Commonwealth v. Doyen*, 848 A.2d 1007 (Pa.Super. 2004). Pursuant to *Pennsylvania Rule of Criminal Procedure 121*, a Court must inquire into six separate areas in making the determination that the defendant's decision to represent himself was knowingly, intelligently and voluntarily made.

Rule 121. Waiver of Counsel

(A) Generally.

- (1) The defendant may waive the right to be represented by counsel.
- (2) To ensure that the defendant's waiver of the right to counsel is knowing, voluntary, and intelligent, the judge or issuing authority, at a minimum, shall elicit the following information from the defendant:
 - (a) that the defendant understands that he or she has the right to be represented by counsel, and the right to have free counsel appointed if the defendant is indigent;
 - (b) that the defendant understands the nature of the charges against the defendant and the elements of each of those charges;
 - (c) that the defendant is aware of the permissible range of sentences and/or fines for the offenses charged;
 - (d) that the defendant understands that if he or she waives the right to counsel, the defendant will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules;
 - (e) that the defendant understands that there are possible defenses to these charges that counsel might be aware of, and if these defenses are not raised at trial, they may be lost permanently; and
 - (f) that the defendant understands that, in addition to defenses, the defendant has many rights that, if not timely asserted, may be lost permanently; and that if errors occur and are not timely objected to, or otherwise timely raised by the defendant, these errors may be lost permanently.
- (3) The judge or issuing authority may permit the attorney for the Commonwealth or defendant's attorney to conduct the examination of the defendant pursuant to paragraph (A)(2). The judge or issuing authority shall be present during this examination.

(B) Proceedings Before an Issuing Authority. When the defendant seeks to waive the right to counsel in a summary case or for a preliminary hearing in a court case, the issuing authority shall ascertain from the defendant whether this is a knowing, voluntary, and intelligent waiver of counsel. In addition, the waiver shall be in writing,

- (1) signed by the defendant, with a representation that the defendant was told of the right to be represented and to have an attorney appointed if the defendant cannot afford one, and that the defendant chooses to act as his or her own attorney at the hearing or trial; and
- (2) signed by the issuing authority, with a certification that the defendant's waiver was made knowingly, voluntarily, and intelligently. The waiver shall be made a part of the record.

(C) Proceedings Before a Judge. When the defendant seeks to waive the right to counsel after the preliminary hearing, the judge shall ascertain from the defendant, on the record, whether this is a knowing, voluntary, and intelligent waiver of counsel.

(D) Standby Counsel. When the defendant's waiver of counsel is accepted, standby counsel may be appointed for the defendant. Standby counsel shall attend the proceedings and shall be available to the defendant for consultation and advice.

The purpose of the Court making such an inquiry of this rule is to insure that the Court is convinced that the defendant has made an informed and independent decision to waive his right to counsel. *Commonwealth v. Davido*, 582 Pa. 52, 868 A.2d 431 (2005). In making a determination as to whether or not the defendant has made an intelligent decision to represent himself, The Court must be satisfied that it has considered the six areas of inquiry and the Court must look to the totality of the circumstances giving rise to that decision.

Before a defendant is permitted to proceed *pro se*, however, the defendant must first demonstrate that he knowingly, voluntarily and intelligently waives his constitutional right to the assistance of counsel. *Faretta, supra*, at 835,

95 S.Ct. at 2541; *Szuchon, supra*, 506 Pa. at 250, 484 A.2d at 1377. If the trial court finds after a probing colloquy that the defendant's putative waiver was not knowingly, voluntarily or intelligently given, it may deny the defendant's right to proceed *pro se*. See, *Commonwealth v. Richman*, 458 Pa. 167, 175, 320 A.2d 351, 355 (1974) (right to counsel not waived because waiver not knowingly and intelligently given). The "probing colloquy" standard requires Pennsylvania trial courts to make a searching and formal inquiry into the questions of (1) whether the defendant is aware of his right to counsel or not and (2) whether the defendant is aware of the consequences of waiving that right or not. *Szuchon, supra*, 506 Pa. at 250, 484 A.2d at 1377 (trial judge must make searching inquiry into defendant's request to proceed without counsel). See also Pa.R.Crim.P. 318(c) (when the defendant seeks to waive the right to counsel after the preliminary hearing, the judge shall ascertain from the defendant, on the record, whether the waiver was made knowingly, voluntarily and intelligently). Specifically, the court must inquire whether or not: (1) the defendant understands that he has the right to be represented by counsel, and the right to have free counsel appointed if he is indigent; (2) the defendant understands the nature of the charges against him and the elements of each of those charges; (3) the defendant is aware of the permissible range of sentences and/or fines for the offenses charged; (4) the defendant understands that if he waives the right to counsel he will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules; (5) defendant understands that there are possible defenses to these charges which counsel might be aware of, and if these defenses are not raised at trial, they may be lost permanently; and (6) the defendant understands that, in addition to defenses, the defendant has many rights that, if not timely asserted, may be lost permanently; and that if errors occur and are not timely objected to, or otherwise timely raised by the defendant, the objection to these errors may be lost permanently. Comment to Pa.R.Crim.P. 318.

Commonwealth v. Star, 541 Pa. 564, 664 A.2d 1326, 1335 (1995).

In Travillion's case, although there was no single colloquy addressing these concerns, all of the areas that were required to be addressed pursuant to *Pennsylvania Rule of Criminal Procedure 121*, were discussed with Travillion which enabled this Court to be satisfied that his waiver of counsel was knowingly and intentionally made, thereby permitting him to represent himself. Travillion initially retained private counsel William Difenderfer, to represent him and had his case continued three times in order for Difenderfer to prepare for trial. The case was scheduled for trial in December of 2004 and another request for a continuance was made which was denied. A hearing was held on Travillion's motion to suppress and that motion was denied. Following the denial of that motion, the parties were directed to proceed to the jury room for the selection of the jury. At that point in time, Difenderfer indicated to the Court that Travillion wanted to address certain issues prior to jury selection. This Court informed Difenderfer and Travillion that it would not discuss the matters pertaining to a case with the defendant but, rather, it would discuss those matters with defendant's counsel. Difenderfer advised this Court that he had reviewed all of the concerns that Travillion had and believed that none of the issues that Travillion wanted to raise had any merit and he would not raise those issues. Travillion became insistent that he personally wanted to discuss those matters, however, he was instructed to proceed to the jury room for jury selection.

Once in the jury room, Travillion became animated and overbearing, frustrating the jury selection process. Travillion returned to the courtroom once again insisting that he be heard personally on the issues that he wished to raise. This Court advised Travillion that he was represented by counsel and that any issues that were to be raised regarding his case had to be raised by his counsel. His counsel once again indicated that the issues Travillion wished to raise were of no moment to his case. Again, Travillion was told to return to the jury room to select a jury; however, he advised his counsel that he would not participate in jury selection. Travillion was then sent to the bullpen to await the selection of a jury. While in his holding cell, Travillion created a disturbance in that facility and once again was returned to the Courtroom and he was advised that the only way that this Court would listen to his arguments on the issues that he wished to raise would be if he was representing himself but since he had counsel, he could either elect to proceed with jury selection or to be returned to the jail.

Travillion once again, went to the jury room to complete jury selection only to return to the Courtroom and this Court was advised by Difenderfer that he had been fired. After asking him over twenty times as to whether or not he had fired Difenderfer, and never receiving an intelligible answer from Travillion, this Court received an acknowledgement from Difenderfer that, in fact, he had been fired by Travillion. This Court then permitted Travillion to raise his issues, all of which had nothing to do with his case. The real reason for Travillion's unwillingness to participate in the jury selection process was the fact that he wanted another continuance and that request was denied. Travillion was then advised that since he was going to represent himself, he would be held responsible for his actions and that he would be bound by the same rules as a lawyer and he would be expected to understand the law that was applicable to his case, the Rules of Evidence, and the Rules of Criminal Procedure as they applied to the charges that had been filed against him.

Following his dismissal of Difenderfer, Travillion indicated that he was unprepared to pick a jury and he requested a continuance so that he could hire a new lawyer. Travillion's case was then continued until January, 2006, in hopes that Travillion would hire a new lawyer so that a prompt trial date could be scheduled. Despite giving Travillion more than a year to hire a new lawyer, he did not do so and this Court, on its own motion, appointed the Public Defender's Office to assist him and/or to represent him. Both Christopher Patarini and Sumner Parker of the Public Defender's Office of Allegheny County attempted to meet with Travillion but he refused to discuss his case with them. Their efforts to meet with Travillion were further complicated by the fact that Travillion spent more than six months in "the hole" as a result of his being a disciplinary problem at the Allegheny County Jail. Difenderfer, prior to being fired, put forth the issues that Travillion wanted to discuss and his difficulty in dealing with Travillion in deciding the strategy and evidence that should be presented in his case. Rule 3.1 of the Pennsylvania Rules of Professional Conduct mandate that a lawyer not pursue frivolous issues. That Rule provides as follows.

Rule 3.1. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case

be established.

Similarly, the American Bar Association Model Code of Professional Conduct provide that the stewardship of any case, especially a criminal case, rests in the hands of counsel after consultation with a client. Proposed Rule 122(a) provides:

A lawyer shall abide by a client's decisions and show any objectives of representation...and shall consult with the client as to the means by which they are to be pursued....

In a criminal case, the lawyer shall abide by the client's decision, ...as to a plea to be entered, whether to waive jury trial and whether the client will testify.

With the exception of these specified fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case after consulting with this client. In this regard, Difenderfer's decision not to raise the frivolous issues suggested by Travillion comported with the Pennsylvania Code of Professional Responsibility and the American Bar Association's model Rules of Professional Conduct.

The first issue that Travillion wanted to raise was that he did not have all of the discovery with respect to the reports that were involved concerning the arrest of Shawn Williams who was initially thought to be a suspect based upon information provided by a confidential informant. In discussing this matter with the assistant district attorney, Difenderfer was advised that when Shawn Williams became a suspect, a photo array was put together which contained his photograph and that photo array was shown to Mrs. Feigel who did not identify anyone in the photo array. As a result of her inability to identify Williams as a possible suspect, no further investigation of him was made.

Next Travillion wanted the aerial photographs that were taken by the City Homicide Detectives in conjunction with this case. This request, however, was broader than that in that he wanted all of the aerial photographs that were taken. As explained by the assistant district attorney, every three to six months homicide detectives and the state police taken aerial photographs of the crime scenes of numerous homicides. What Travillion wanted were the reports that were associated with unrelated criminal investigations. Travillion had been provided with the photographs and the investigative material that pertained to the homicide with which he had been charged. Travillion also maintains that he should have been entitled to the videotapes from the surveillance cameras mounted in the Ross Police cars which were used at the time of his arrest. The problem with this request is that the two vehicles that were used by Officer Scirina and his backup did not contain cameras and, accordingly, there were no videotapes.

Travillion next wanted all reports pertaining to the burglary investigation of Kapinski's apartment where the 357 Magnum was stolen. The initial report indicated that the police had fingerprinted that apartment during the course of its investigation. Travillion wanted the copies of all the fingerprints and reports that were associated with that investigation. Travillion was never charged with that burglary nor was it suggested that he was the burglar, but rather that he was the individual who was in possession of the weapon that killed Leonard Feigel when he was stopped by the Ross Township Police. The reports of the Kapinski Burglary do not indicate whether or not any latent or usable prints were ever obtained and there is no indication that Travillion's prints were associated with that burglary.

Travillion also wanted the photographs that were allegedly shown to Mrs. Feigel while she was at the hospital and the Commonwealth indicated that there were no such photographs. In speaking with each detective that was involved in the investigation of Feigel's death, they all indicated that they did not show any photographs to Mrs. Feigel while she was at the hospital. This was an issue for credibility and not an evidentiary issue.

Difenderfer also indicated that he had a tactical disagreement with Travillion since he wanted to hire an expert to look at the issue of causation with regard to Feigel's death; however, Travillion told him, in no uncertain terms, that he did not want an expert hired. Difenderfer also indicated that there were strategic and tactical disagreements between he and Travillion which included the evidence that should have been presented at the time of the hearing on Travillion's suppression motion and that Travillion disregarded his advice when he decided to testify at that hearing.

In looking at all of these claims that Travillion wished had been asserted, it is clear that Difenderfer's assessment was correct in that they were non-meritorious and frivolous. Difenderfer was Travillion's counsel of choice and he was discharging his duties toward Travillion in accordance with his obligations under the Code of Professional Responsibility. The problem that arose between Difenderfer and Travillion was that Travillion wanted to be not only the client but, also, the lawyer. He wanted to dictate the manner in which the strategic and tactical decisions of his case were to be made. A more fundamental problem occurred, however, and that is that Travillion also wanted to dictate how the system of justice was to operate with respect to his case.

In *Commonwealth v. Prysock*, A.2d, 2009 W.L. 1058652 (Pa.Super. 2009), the Court detailed the balancing test between the defendant's right to counsel and the administration of justice.

With respect to the right to counsel, The Supreme Court of Pennsylvania has stated:

[t]he right to counsel is guaranteed by both the Sixth Amendment to the United States Constitution and by Article I, Section 9 of the Pennsylvania Constitution. In addition to guaranteeing representation of the indigent, these constitutional rights entitle an accused "to choose at his own cost and expense any lawyer he may desire." *Commonwealth v. Novak*, 395 Pa. 199, 213, 150 A.2d 102, 109, cert. denied, 361 U.S. 882, 80 S.Ct. 152, 4 L.Ed.2d 118 (1959). The right to "counsel of one's own choosing is particularly significant because an individual facing criminal sanctions should have great confidence in his attorney." *Moore v. Jamieson*, 451 Pa. 299, 307-08, 306 A.2d 283, 288 (1973).

We have held, however, that the constitutional right to counsel of one's choice is not absolute. *Commonwealth v. Robinson*, 468 Pa. 575, 592-93 & n. 13, 364 A.2d 665, 674 & n. 13 (1976). Rather, "the right of the accused to choose his own counsel, as well as the lawyer's right to choose his clients, must be weighed against and may be reasonably restricted by the state's interest in the swift and efficient administration of criminal justice." *Id.* at 592, 364 A.2d at 674 (internal quotations omitted). Thus, this Court has explained that while defendants are entitled to choose their own counsel, they should not be permitted to unreasonably "clog the machinery of justice" or hamper and delay the state's efforts to effectively administer justice." *Commonwealth v. Baines*, 480 Pa. 26, 30, 389 A.2d 68, 70 (1978). At the same time, however, we have explained that "a myopic insistence upon expeditiousness in the face of a justifiable

request for delay can render the right to defend with counsel an empty formality.” *Robinson*, 468 Pa. at 593-94, 364 A.2d at 675 (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964)).

In Travillion’s case, he was given three prior continuances and on the day of trial scheduled in December of 2004, was requesting a fourth as his counsel had not adequately prepared and obtain the materials which Travillion believed to be necessary for his defense. As previously demonstrated, these requests were non-meritorious and frivolous and there was no need for that material in order for the defense of Travillion’s case to go forward. As noted by the assistant district attorney at the time of the hearing on Travillion’s suppression motion, the Ross Township Police arrested Travillion, who was in possession of the firearm that caused Feigel’s death, that he was positively identified in a photo array, and subsequently in a jury trial by Mrs. Feigel as being her husband’s killer and her assailant, and that Travillion had confessed to the commission of the crime of robbery which resulted in Feigel’s death. The request for an additional continuance was nothing more than another attempt to hinder the administration of justice by preventing his case from going forward.

It is obvious that Travillion knew that following the death of her husband, Mrs. Feigel had moved to Florida, and that she also had some health issues. While this Court denied his request for a continuance when he was represented by Difenderfer, his case was continued to provide him with sufficient time to obtain new private counsel in an attempt to insure his right to be represented by counsel. Despite being given more than a year to obtain counsel, Travillion never did. This Court, in an effort to protect his right to counsel, appointed the Public Defender’s Office to represent him; however, he refused to cooperate and/or to meet with two different experienced homicide trial counsel from that office. When the entire record is reviewed in connection with this proceeding, it is clear that Travillion made a knowing, intelligent and voluntary decision to waive his right to counsel and proceed as his own counsel. In concluding that Travillion had made this decision, this Court permitted him to act as his own counsel in this proceeding.

At the time of trial, this Court engaged in a colloquy with Travillion about his right to remain silent and his right to testify. During this Court’s colloquy with Travillion concerning his right to testify, he acknowledged that he had been previously advised of the penalties that could be imposed upon him should he be convicted of the charges that were filed against him. Travillion noted that this Court had advised him of those penalties at an earlier point in time, during the numerous hearings that were held prior to trial. When reviewing the entire record it is clear that Travillion’s decision to represent himself was knowingly, intelligently and voluntarily made and was part of his orchestrated plan to manipulate the system to obtain a continuance when he was informed that no continuance would be granted. Even Difenderfer, prior to being discharged, advised this Court of his difficulties with Travillion since Travillion attempted to orchestrate and to manipulate this case and to hinder Difenderfer’s ability to effectively represent him. It is clear from a review of the entire record that the dictates of Pennsylvania Rule of Criminal Procedure 121 were met and this Court had a full understanding of the knowing, voluntary and intelligent decision made by Travillion to represent himself.

Travillion’s second claim of error is that he was denied his absolute right to testify at the time of trial. This claim is patently specious. This Court went through an extensive colloquy with respect to Travillion’s right to remain silent and his right to testify. When asked whether or not he made a decision whether to testify, Travillion made the following statement:

MR. TRAVILLION: Well, I attempted to prepare to testify yesterday, but due to the fact that the testimony is going to conclude today and I don’t have an attorney to cross-examine me, I am certainly not going to get on the witness stand and ask myself questions. This is just something that is not going to happen.

THE COURT: Are you going to testify? Yes or no.

MR. TRAVILLION: I wish to, but it is impossible for me to do so.

THE COURT: It is your decision to make.

MR. TRAVILLION: Yes, I do wish to testify, but I can’t do it because I can’t ask myself questions.

THE COURT: You can get up and give a statement.

MR. TRAVILLION: Well...

THE COURT: You don’t have to ask yourself a question. You can give a narrative. I will let you do that.

MR. TRAVILLION: That is something I hadn’t thought of, Your Honor, quite frankly, at this point.

THE COURT: We will recess until 1:30. Think about it.

He did not take the witness stand but, rather, called defense witnesses and then rested. When given the opportunity to present his testimony in the form of a narrative statement, Travillion made a knowing, voluntary and intelligent decision not to exercise his right to testify.

Travillion’s next claim of error is that this Court erred in failing to grant his suppression motion. This Court conducted a hearing on Travillion’s suppression motion, at which hearing he was represented by Difenderfer. Travillion’s suppression motion was directed to what he perceived to be the illegal and unjustifiable stop and subsequent arrest of Travillion by the Ross Township Police. Since the predicate for this claim is the alleged illegal stop and subsequent search of Travillion’s vehicle, a determination must be made as to the level of interaction between the police and Travillion. In *Commonwealth v. Collins*, 950 A.2d 1041, 1046 (Pa.Super. 2008), the Court described the three types of interaction between the public and the police as follows:

There are three categories of police interactions which classify the level of intensity in which a police officer interacts with a citizen, and such are measured on a case by case basis.

Traditionally, this Court has recognized three categories of encounters between citizens and the police. These categories include (1) a mere encounter, (2) an investigative detention, and (3) custodial detentions. The first of these, a “mere encounter” (or request for information), which need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond. The second, an “investigative detention” must be supported by reasonable suspicion; it subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. Finally, an arrest or “custodial detention” must be supported by prob-

able cause.

Commonwealth v. Mendenhall, 552 Pa. 484, 488 715 A.2d 1117, 1119 (1998) (citing *Commonwealth v. Polo*, 563 Pa. 218, 759 A.2d 372, 375 (2000)).

It is clear that Officer Shurina's initial encounter with Travillion was an investigative detention and was supported by reasonable suspicion.¹

As previously noted, Travillion was parked behind a Bed, Bath & Beyond Store at approximately 11:00 when Officer Shurina was on routine patrol along McKnight Road checking business along that road since there had been numerous burglaries of those businesses in the preceding weeks. Officer Shurina noted Travillion's car behind the building where he would not have been permitted during normal business hours and decided to investigate. When Officer Shurina asked for owner's and operator's information, Travillion produced the rental agreement for the car which was rented by his girlfriend and which indicated that only she was an authorized driver of that vehicle and his identification. When asked why he was behind the building, Travillion advised Shurina that he had pulled in and was about to relieve himself despite the fact that he was living with his girlfriend less than one hundred yards from the Bed, Bath & Beyond Store. When Officer Shurina ran the plate for that car, he noticed Travillion moving around in the car and it appeared to him that he was attempting to hide something and when he asked Travillion to get out of the vehicle, he noticed a gun underneath the driver's seat.

It is clear that Officer Shurina had a reasonable suspicion to detain Travillion since he was not an authorized driver for the vehicle and that he was in an area where he would not have been permitted even during normal business hours. In addition, there had been numerous burglaries of commercial establishment along McKnight Road in the preceding several weeks and Travillion's presence there led Officer Shurina to suspect that another burglary might be in the process of being committed. These facts coupled with Travillion's furtive movements in the car and the gun being in plain view, provided for the lawful seizure of that weapon.

In the latter two cases, seizure was not from a person but from a vehicle. For Fourth Amendment purposes, the police may conduct a warrantless search of a vehicle where probable cause exists. *Carroll v. United States*, 267 U.S. 132, 147-56, 45 S.Ct. 280, 69 L.Ed. 543 (1925). Even where a vehicle is essentially seized and immobilized, the Fourth Amendment does not preclude a warrantless search of it if probable cause exists. *Chambers v. Maroney*, 399 U.S. 42, 51, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). A warrantless search of a vehicle is reasonable under the Fourth Amendment because of the mobility of a vehicle, *Carroll*, at 153, 45 S.Ct. 280 and the reduced expectation of privacy an individual has in a vehicle's contents. The United States Supreme Court explained:

One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects.... It travels public thoroughfares where both its occupants and its contents are in plain view. *Chadwick*, at 12, 97 S.Ct. 2476 (quotation omitted).

The Commonwealth argues we should adopt the federal automobile exception under Article I, § 8. Constitutional protections are applicable to one's vehicle under Article I, § 8. *Commonwealth v. Holzer*, 480 Pa. 93, 389 A.2d 101, 106 (1978). We have not adopted the full federal automobile exception under Article I, § 8, *Id.*, and decline to overrule that long-standing precedent today, especially because that issue is not specifically before us, but ancillary to the issue we are resolving.

Nevertheless, we have adopted a limited automobile exception under Article I, § 8. "While many in our society have a great fondness for their vehicles, it is too great a leap of logic to conclude that the automobile is entitled to the same sanctity as a person's body." *Commonwealth v. Rogers*, 578 Pa. 127, 849 A.2d 1185, 1191 (2004); *see also Holzer*, at 106 (expectation of privacy in one's vehicle significantly less than in one's home or office); *Commonwealth v. Mangini*, 478 Pa. 147, 386 A.2d 482, 487 (1978) (same). We have described two reasons why exigent circumstances allow a warrantless search or seizure of a vehicle under Article I, § 8:(1) a vehicle is mobile and its contents may not be found if the police could not immobilize it until a warrant is secure; and (2) one has a diminished expectation of privacy with respect to a vehicle. *Holzer*, at 106. Thus, even though privacy protections are implicated under Article I, § 8, the heightened privacy concerns involved in a seizure from an individual's person are not present where an object is seized from a vehicle.

Commonwealth v. McCree, 592 Pa. 238, 924 A.2d 621, 629-630 (2007).

Travillion also maintained that inculpatory statements should have been suppressed since he did not make them. The record in this case clearly reveals that Travillion was advised of his Miranda rights, executed a waiver of those rights, and spoke with Detective Bolin. Bolin took notes during this interview and gave them to Travillion to review. Travillion had no corrections or additions to those notes which contained Travillion's statement that he shot Feigel during the course of the robbery. As with his other claims of error, this contention also has no merit.

Travillion's final claim of error is that this Court intimidated a defense witness to the point that that witness refused to testify in support of Travillion. Travillion called Raymond Geeter to testify and elicited some basic information to him which included the fact that on the day prior to Travillion's arrest by the Ross Township Police that Geeter was in possession of Susan Smith's car and that he was using that vehicle as a jitney. When this information came forward, the assistant district attorney asked to approach sidebar and asked that Geeter be advised of his Fifth Amendment rights in light of the possibility of him admitting to several crimes, the least of which would be operating a jitney and the worst of which might be his involvement in the homicide of Feigel. Following a discussion in chambers with respect to the possibility of Geeter disclosing incriminating information, this Court appointed Giuseppe Rosselli to represent him and advise him of his rights in light of the purported testimony that he was to give. Geeter met in this Court's chambers with Rosselli and no one else was present. Following their meeting, Geeter indicated that he wanted to invoke his Fifth Amendment right since he had been advised by Rosselli that the testimony he might give could possibly implicate him in the death of Feigel since he was in the car which had the murder weapon in it at the time that he was using that vehicle.

At no time did this Court ever advise Geeter that it would charge him but, rather, advised him that any decision as to whether or not he would be subject to criminal charges would be made by the District Attorney's office. This Court, rather than trying to intimidate Geeter, was insuring that his rights were protected by appointing an attorney to advise him of what his rights and

options were with respect to testifying in this particular case. As with all of Travillion's claims of error, this one was also without merit.

Cashman, J.

Dated: July 6, 2009

¹ This is the same standard which permits a traffic stop pursuant to 75 Pa.C.S.A. §6308(b), which provides:

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

ADDENDUM TO OPINION

Previously this Court filed its Opinion in the above-captioned case on July 6, 2009. Subsequent to the filing of that Opinion, the Supreme Court issued its Opinion in the case of the *Commonwealth v. Lucarelli*, 971 A.2d 1173 (Pa. 2009). This case dealt with the same question raised in Travillion's appeal concerning his right to counsel. This Court adopts the reasoning, rationale and decision of the Pennsylvania Supreme Court in the *Commonwealth v. Lucarelli*, *supra*, in that when reviewing the entire record of Travillion's case it is clear that he forfeited his right to counsel by firing his original trial counsel, who was prepared to proceed to trial, refused to hire new counsel and, finally, refused to meet and to cooperate with two lawyers who were appointed for him by this Court.

Cashman, J.

Dated: July 20, 2009

Thomas Lang and Sharon Lang v. Frontier Van Lines Moving and Storage, Inc.

Federal Preemption—Exceptions to Preemption

1. Plaintiffs filed suit against the defendant claiming loss of personal property that was moved from their former home in Pennsylvania to their new home in Arizona.

2. The Carmack Amendment to the Interstate Commerce Act, 49 U.S.C., §14706 imposes absolute liability on the carrier for lost or damaged goods, but the amendment affords the carrier the opportunity to limit liability through a written agreement with the shipper.

3. Defendant asserts that plaintiffs' claims are preempted by the Carmack Amendment, and that plaintiffs' damages, if any, must be limited to the amount set forth in the bill of lading.

4. The Carmack Amendment does not preempt plaintiffs' state claim for conversion.

5. Defendant's actions in selling plaintiffs' property after entry of a state order of court staying any such sale was outrageous. Plaintiffs met their very difficult burden of proving a claim for conversion, and therefore, their damages are not limited by the bill of lading.

(Daniel McIntyre)

Thomas Lang and Sharon Lang, *pro-se*.

Ray F. Middleman for Defendant.

Nos. GD 07-020428. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM OPINION AND NON-JURY VERDICT

Olson, J., July 6, 2009—Plaintiffs, Thomas Lang and Susan Lang, filed suit against Defendant, Frontier Van Lines Moving and Storage, Inc. ("Frontier") claiming the loss of personal property and household goods that were to be moved from the Langs' home in Pennsylvania to their new residence in Arizona. A non-jury trial was held before this Court at which time Frontier argued that all of the Plaintiffs' claims are preempted by the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. §14706 and, therefore, to the extent a verdict is rendered in favor of the Plaintiffs, their damages must be limited to the amount set forth in the bill of lading. Without waiving this defense, the non-jury trial proceeded and the parties were then afforded an opportunity to brief the issues surrounding the Carmack Amendment and whether it preempts the Plaintiffs' claims. After careful consideration of the evidence presented, the pleadings in this case, and the legal memoranda submitted, the Court shall enter a verdict in favor of the Plaintiffs and against the Defendant in the amount of \$79,750.

Facts and Procedural History

In June 2007, Mr. and Mrs. Lang arranged with Frontier to have all of their personal belongings and household goods moved from Pennsylvania to Arizona.¹ On June 8, 2007, the parties executed several shipping documents, including a Uniform Household Goods Bill of Lading and Freight Bill (Defendant's Exhibit 1(a)) ("Bill of Lading"). The Bill of Lading contained the following provision:

Unless the shipper expressly releases the shipment to a value of .60 cents per pound per article, the carrier's maximum liability for loss and damage shall be either the lump sum value declared by the shipper or an amount equal to \$1.25 for each pound of weight in the shipment, whichever is greater.

The shipment will move subject to the rules and conditions of the carrier's tariff. Shipper thereby releases the entire shipment to a value not exceeding 60¢ per pound.

Notice: The shipper signing this contract must insert in the space above, in his own handwriting, either his declaration of the actual value of the shipment, or the words "60 cents per pound per article." Otherwise the shipment will be deemed released to maximum value equal to \$1.25 times the weight of the shipment in pounds.

Mr. Lang signed and dated the Bill of Lading, and wrote the words "60¢ per pound" in the blank provided in the second paragraph.

Frontier packed and loaded the Langs' goods onto two (2) trucks. The Langs provided Frontier with a cashier's check for a deposit in the amount of \$1,800. The goods were then moved from the Langs' home to a warehouse facility for storage prior to being moved to Arizona.

Following the transportation of the Langs' property from their Pennsylvania house to the storage facility, a dispute arose as to the charges and the amount of money due and owing to Frontier for the various services rendered. Numerous phone calls and e-mails were exchanged between the parties from June 2007 to August 2007; however, the parties were not able to resolve their dispute. Throughout this time period, the Langs' goods remained in the storage facility. Finally, on or about August 27, 2007, Frontier issued a Sale Notice which was sent to Mr. Lang in Scottsdale, Arizona. Frontier had sub-contracted with an auctioneer to sell the goods in a public auction and the Notice apprised Mr. Lang of the upcoming auction.

On or about September 17, 2007, Mr. Lang contacted Frontier to get the exact amount that Frontier claimed was due and owing. Based on the information provided, Mr. Lang sent a personal check to Frontier in overnight mail; however, Frontier refused to accept it on the basis that, under the General Agreement signed by the parties (Defendant's Exhibit 2), the Langs were obligated to pay with cash or a certified check.

On September 25, 2007, the Langs filed a Complaint against Frontier asserting claims for replevin and breach of contract. Additionally, the Langs filed an Emergency Petition to Stay Sale of Personalty which was presented to the Civil Division Motions Judge on September 26, 2007. The Honorable Christine A. Ward, who was sitting as the Motions Judge, entered an Order on the Petition which, *inter alia*, stayed all attempts at execution on the Langs' property until further Order of Court. (September 26, 2007 Order of Court.) Notwithstanding the Court Order staying the sale of the Langs' property, the auction proceeded on two (2) separate occasions—September 28, 2007 and October 12, 2007. According to Mike Biton—the owner of Frontier—Frontier netted approximately \$3,618 from the two (2) sales of the Langs' property.

In mid-October, 2007, Plaintiffs learned of the sale of their property. Thus, on November 8, 2007, the Plaintiffs presented to Judge Ward a Petition for Rule to Show Cause Why Defendant Should Not be Held in Contempt of Court for Violation of Court Order Dated September 26, 2007. Judge Ward thereafter entered an Order issuing a rule to show cause why Frontier should not be held in contempt and scheduled argument on the Petition. (November 8, 2007 Order of Court.)

On December 12, 2007, Judge Ward entered an Order in which she granted the Plaintiffs' Petition for Rule to Show Cause Why Defendant Should Not be Held in Contempt of Court and ordered Frontier to turn over to the Langs any funds generated by the sale of their personal possessions and any items belonging to the Langs which still remained in Frontier's possession.² (December 12, 2007 Order of Court.) In addition, Judge Ward scheduled a hearing on damages and/or further sanctions.

Following the damages hearing at which time testimony was provided, Judge Ward entered a Memorandum Opinion in which she expressly found that Mike Biton was not credible when he testified that he did not receive her September 26, 2007 Order staying the sale prior to the two (2) auctions. She went on to find that,

even if Mr. Biton were telling the truth, it would not excuse his failure to prevent the sale of October 12, 2007 from going forward. Further, and even more troubling there was no indication that Mr. Biton made *any* effort to retrieve the Langs [sic] wedding albums and other sentimental items, which would not have been sold and would have had no value to a third-party buyer.

(Emphasis in original.) (March 19, 2008 Memorandum Opinion.) Judge Ward concluded "the Defendants' choice to sell the property in defiance of this Court's Order was outrageous." (*Id.*) Hence, due to "the outrageous conduct on the part of the Defendants" Judge Ward sanctioned Frontier by assigning values to the property at issue based on the evidence submitted by the Plaintiffs and precluding Frontier from refuting those values or introducing evidence or testimony regarding those values at the final hearing. (*Id.*) Judge Ward found the value of the Plaintiffs' goods to be \$69,750 and held that "[t]hese values are to be treated by the trial judge at the final hearing to be conclusive." (*Id.*) She went on to find that Frontier "callously disposed of several items of the Plaintiffs which hold great sentimental and/or emotional value" and that Frontier's action in disposing of these personal items was "wanton and malicious." (*Id.*) Judge Ward further held that the Plaintiffs may seek an award for additional damages from the court trying the case for the sentimental or emotional value of these items. (*Id.*) In accordance with the Memorandum Opinion, Judge Ward entered an Order on March 25, 2008 which provided, *inter alia*, that "[t]he values listed in the schedule contained in this Court's Opinion of March 19, 2008 regarding the property at issue are to be treated by the trial judge at the final hearing on the merits as conclusive." (March 25, 2008 Order, ¶11.)

On November 27, 2007, Plaintiffs filed an Amended Complaint which contained claims for replevin (Count 1), breach of contract (Count 2), violation of 13 Pa. C.S.A. §7210 (Count 3), conversion (Count 4), violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. §201-1, *et seq.* (Count 5) and fraud and intentional misrepresentation (Count 6). Counts 1, 2, 3, 5 and 6 of Plaintiffs' Amended Complaint seek damages arising out of Frontier's failure to deliver the Plaintiffs' goods as contracted by the parties and for alleged misrepresentations made to Plaintiffs regarding Frontier's services. The facts that give rise to these claims all deal with the agreement between the parties and Frontier's failure to abide by the terms of the agreement. Count 4, however, is based on different facts. Specifically, the Langs' claim for conversion is based entirely upon Frontier's violation of Judge Ward's September 26, 2007 Order staying the sale of the Plaintiffs' belongings. In Count 4, the Langs allege that Frontier willfully interfered with the Plaintiffs' possession of their goods by auctioning off the goods without legal justification. (Amended Complaint, ¶s 60-69.)

Frontier filed an Amended Answer and New Matter to Amended Complaint in Civil Action and Counterclaim in which Frontier alleged that Plaintiffs' damages, if any, are limited by the Bill of Lading to an amount not exceeding 60¢ per pound. (Amended Answer and New Matter to Amended Complaint in Civil Action and Counterclaim, ¶89.) Frontier's counterclaim seeks \$7,818.50—the amount that Frontier claims is still due and owing for services rendered to the Langs.

The case proceeded to trial before this Court. At trial, Frontier argued (apparently for the first time) that, notwithstanding Judge Ward's Order of March 25, 2008, the Carmack Amendment preempts all of the Plaintiffs' claims set forth in the Amended Complaint and, hence, any damages to which the Plaintiffs may be entitled are limited by the terms of the Bill of

Lading which is 60¢ per pound or \$9,168.³ Additionally, Frontier argued that it was entitled to the balance due for the shipping services rendered.

Legal Analysis

In 1906, Congress enacted the Carmack Amendment as an amendment to the Interstate Commerce Act so as to create a national policy and a single uniform federal rule regarding an interstate carrier's liability for damages arising from the interstate transportation of goods. See 49 U.S.C. §14706. *New York, New Haven & Hartford Railroad Co. v. Nothnagle*, 346 U.S. 128 (1953). The Amendment imposes "absolute liability upon carriers for the 'actual loss or injury to property caused by' a carrier." *Carmana Designs Ltd. v. North American Van Lines*, 943 F.2d 316, 319 (3d Cir. 1991), quoting 49 U.S.C. §11707(a)(1). To establish a prima facie case against a common carrier under the Carmack Amendment, a plaintiff must prove "(1) delivery of the goods to the initial carrier in good condition, (2) damage to the goods before delivery to their final destination, and (3) the amount of damages." *Beta Spawn, Inc. v. FFE Transp. Serv., Inc.*, 250 F.3d 218, 223 (3d Cir. 2001), quoting *Conair Corp. v. Old Dominion Freight Line, Inc.*, 22 F.3d 529, 531 (3d Cir. 1994). Thus, a carrier is liable, "without proof of negligence, for all damages to the goods transported by it, unless it affirmatively shows that the damage was occasioned by the shipper, acts of God, the public enemy, public authority, or the inherent vice or nature of the commodity." *Secretary of Agriculture v. U.S.*, 350 U.S. 162, 166 n. 9 (1956).

Although the Carmack Amendment imposes absolute liability on a carrier for lost or damaged goods, the Amendment affords the carrier the opportunity to limit its liability through a written agreement with the shipper. *Carmana*, 943 F.2d at 319. Thus, the Carmack Amendment "expressly recognizes the right of a shipper and carrier to establish an agreed value of the goods to be shipped which limits the carrier's liability and permits a shipper thereby to benefit from a lower rate." *Rocky Ford Moving Vans, Inc. v. U.S.*, 501 F.2d 1369, 1372 (8th Cir. 1974).

The United States Supreme Court has held that the Carmack Amendment is "comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination." *New York, P. & N. R. Co. v. Peninsula Produce Exchange*, 240 U.S. 34, 38 (1916). In fact, "[a]lmost every detail of the subject [of a carrier's liability under a bill of lading] is covered so completely that there can be no rational doubt that Congress intended to take possession of the subject, and supersede all state regulation with reference to it." *Adams Express Co. v. E.H. Croninger*, 226 U.S. 491, 505-506 (1913). Thus, "the Carmack Amendment preempts a state law cause of action if it involves loss of goods or damage to goods caused by the interstate shipment of those goods by an interstate common carrier." *Mallory v. Allied Van Lines, Inc.*, 2003 WL 22391296, *2 (E.D. Pa. 2003). See e.g., *Schoenmann Produce Co., v. BNSF Railway Co.*, 2008 U.S. Dist. LEXIS 8278 (S.D. Tex. 2008) (state law claims for misrepresentation are preempted by the Carmack Amendment); *Sorokin v. National Van Lines*, 2002 U.S. Dist. LEXIS 15093 (E.D. Pa. 2002) (Carmack Amendment "completely preempts state law as to the liability of interstate common carriers"); *Faust v. Clark and Reid Co.*, 1994 WL 675132 (E.D. Pa. 1994) (Carmack Amendment preempts claims asserted under state deceptive trade practices statute).

Although state and common law claims are generally preempted by the Carmack Amendment thereby rendering the Amendment a shipper's sole remedy for loss of property shipped in interstate commerce by a common carrier, Courts have found an exception if "the shipper alleges injuries separate and apart from those resulting directly from the loss of shipped property." *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 382 (5th Cir. 1998). See *Smith v. United Parcel Serv.*, 296 F.3d 1244, 1248-49 (11th Cir. 002) (Situations can exist where the Carmack Amendment does not preempt all state and common law claims "including ones for outrage."); *Jones v. USA Express Moving*, 2008 U.S. Dist. LEXIS 54385, *8 (E.D. Pa. 2008) ("[T]hose intentional torts that are separate and distinct from the underlying property loss escape Carmack preemption." (Emphasis in original.)).

One of the state law claims that may escape preemption is conversion. Conversion, like other state and common law claims, is preempted unless there is "a true conversion, i.e., where the carrier has appropriated the property for its own use or gain." *Glickfeld v. Howard Van Lines, Inc.*, 213 F.2d 723, 727 (9th Cir. 1954). See e.g. *Deiro v. American Airlines, Inc.*, 816 F.2d 1360, 1366 (9th Cir. 1987) ("[O]nly an appropriation of property by the carrier for its own use will vitiate the limits on liability."); *Schultz v. Auld*, 848 F. Supp. 1407, 1506 (D. Idaho 1993) ("With respect to conversion, [p]laintiff must show a true conversion has taken place in order to avoid Carmack Amendment preemption; the mere nondelivery of good is insufficient.") A "true conversion" has been defined as "a defendant's willful or intentional misconduct occasioning the nondelivery." *Art Masters Assoc., Ltd. v. United Parcel Serv.*, 77 N.Y. 2d 200, 566 N.Y.S.2d 184, 186 567 N.E. 2d 226, 228 (Ct. App. 1990). The burden of establishing that the carrier was responsible for the loss due to some willful or intentional conduct on its part rests upon the party asserting the conversion claim. *Lerakoli, Inc. v. Pan American World Airlines, Inc.*, 783 F.2d 33, 37 (2d Cir. 1986). See *Nippon Fire & Marine Ins. Co. v. Holmes Transp.*, 616 F. Supp. 610 (S.D.N.Y. 1985) ("Absent affirmative proof of [an actual] conversion, the rule of law is that plaintiff's recovery is limited to the agreed release value of [the missing or damaged goods].") Hence, "nothing short of intentional destruction or conduct in the nature of theft of the property will permit a shipper to circumvent the liability limitations" set forth in a bill of lading. *American Cyanamid Co. v. New Penn Motor Express, Inc.*, 979 F.2d 310, 315-16 (3d Cir. 1992).

There is no question that Courts are very reluctant to find that a shipper's state law claim survives Carmack preemption and, therefore, they have imposed a very difficult burden on a plaintiff to establish outrageous, intentional, or willful misconduct on the part of the carrier in order to avoid liability limitation provisions. In this case, however, the Plaintiffs have met this difficult burden as Frontier "purposefully converted the entrusted property for its own use or gain." *Rocky Ford Moving Vans, Inc. v. U.S.*, 501 F.2d at 1372. As found by Judge Ward in her Memorandum Opinion of March 19, 2008, Frontier's actions in selling the Langs' property at auction in direct contravention of the Court Order staying the sale was outrageous, wanton, callous and malicious. The act of proceeding with the auction in violation of a Court Order is separate and distinct from the underlying property loss. The Plaintiffs' property was not lost or damaged as a result of negligence or even gross negligence on the part of Frontier or its employees, agents or representatives (as was the situation in the various cases cited by Frontier in its legal memoranda.). Instead, as alleged in Count 4 of the Amended Complaint and as proven in Court, Frontier took actions in direct contravention of Judge Ward's Order which amounted to an intentional, willful conversion done strictly to benefit Frontier. Judge Ward found that Frontier proceeded with two (2) separate sales of the Langs' property (on September 28 and October 12, 2007) even though her September 26, 2007 Order was faxed and e-mailed to Frontier's office on that date. The evidence establishes that the Plaintiffs met all of the elements of a claim for conversion

under Pennsylvania common law.⁴ Frontier intentionally deprived the Langs of their goods, sold the goods, and then pocketed the net proceeds. More egregiously, Judge Ward found that, notwithstanding her Order and after being fully aware of the Plaintiffs' legal efforts to regain possession of their property, Frontier intentionally disposed of and did nothing to retrieve the Langs' sentimental items—such as their wedding albums, the birth video of their son and their son's trophies. The facts of this case are uniquely disquieting and, if the Defendant's actions in this case do not survive Carmack Amendment preemption, then this Court cannot envision a situation where a shipper could meet the burden of proving a state law claim for conversion. Under the facts of this case, the Carmack Amendment does not preempt the Plaintiffs' claim for conversion and the Plaintiffs have met their burden of establishing that Frontier committed conversion.⁵ Hence, Frontier is liable to the Plaintiffs for conversion of their property.⁶

In awarding damages, this Court is bound to follow Judge Ward's Memorandum Opinion of March 11, 2008 and Order of Court of March 25, 2008. Accordingly, the Plaintiffs shall be awarded \$69,750 for their property that was wrongly converted. In addition, the Plaintiffs are entitled to damages in the amount of \$10,000 for the personal and sentimental goods that were lost.

As for Frontier's counterclaim, the evidence establishes that Frontier failed to perform the services for which the Plaintiffs' contracted and took steps to deprive the Plaintiffs of all of their personal goods. Thus, Frontier is not entitled to recover for its counterclaim.

An appropriate verdict follows.

Judith F. Olson
Court of Common Pleas of Allegheny County, Pennsylvania

Date: July 6, 2009

NON-JURY VERDICT

AND NOW, to-wit, this 6th day of July, 2009, in accordance with the foregoing Memorandum Opinion, the Court hereby enters judgment in favor of the Plaintiffs, Thomas Lang and Sharon Lang, and against the Defendant, Frontier Van Lines Moving and Storage, Inc., in the amount of \$79,750. As to the Defendant's Counterclaim, judgment is hereby entered in favor of the Plaintiffs, Thomas Lang and Sharon Lang, and against the Defendant, Frontier Van Lines Moving and Storage, Inc.

Judith F. Olson
Court of Common Pleas of Allegheny County, Pennsylvania

¹ Frontier is a duly certified interstate mover of household goods licensed by the Department of Transportation to operate in interstate commerce within the United States. (Defendant's Exhibit 1.)

² As of the date of the non-jury trial, Frontier had not turned over the auction proceeds as directed by Judge Ward nor were any of the Langs' items returned.

³ The total weight of the Plaintiffs' shipment was 15,280 pounds which, when multiplied by 60¢, equals \$9,168.

⁴ As found by Judge Ward and as established during the trial, Frontier 1) acquired possession of the Langs' property and asserted a right to the property which was adverse to the Langs; 2) sold the goods thereby depriving the Langs of control; 3) unreasonably withheld possession of the goods from the Langs; and 4) seriously misused the chattel in defiance of the Langs' rights. *See Norriton East Realty Corp. vs. Central-Penn National Bank*, 435 Pa. 57, 60, 254 A.2d 637, 638 (1969).

⁵ It is not inconsistent with the policy underlying the Carmack Amendment for this Court to uphold the Plaintiffs' conversion claim in the face of Frontier's preemption challenge. Carmack's overarching goal was the adoption of a single, nationwide policy on common carrier liability as a replacement for varying state law regulation. A uniform law permits carriers to better control and predict potential damages claims that could be asserted against them by shippers. Under the Carmack Amendment, carriers are able to conform their conduct to a single standard. Nothing in this decision erodes the uniform standards established under the Carmack Amendment nor does it diminish a carrier's ability to conform its conduct to prevailing federal law as it has developed since the adoption of the Carmack Amendment. The Court emphasizes that it is the uniquely intentional and egregious nature of Frontier's conduct in this action that takes this case outside the scope of the Amendment.

⁶ Even if the Plaintiffs' claim for conversion did not survive preemption, Frontier cannot hide behind the Carmack Amendment in order to minimize its liability. Judge ward expressly found Frontier to be in contempt of her Order of September 26, 2007 and sanctioned Frontier for its callous conduct by setting the value of the Plaintiffs' property at \$69,750 and ordering that Frontier be precluded from refuting those values. Pursuant to her Order of March 25, 2008, Judge Ward intended to punish Frontier for its bad faith conduct. Frontier cannot avoid the sanctions imposed by now arguing that the Plaintiffs' damages must be limited to the terms of the bill of lading. Congress did not intend for the Carmack Amendment to be used as a shield to protect parties that are in defiance of a Court Order and have been sanctioned accordingly.

Charles E. Younkin and Toni Younkin v. Pittsburgh Sea Foods, Inc., Pittsburgh Sea Food Service and Hiawatha Hudson

Evidence—Judgment Notwithstanding the Verdict

1. At trial, Mr. Hudson testified that he did not see Mr. Younkin's approaching vehicle before Mr. Hudson made a left turn and collided with Mr. Younkin's vehicle.

2. The jury was given instructions to find Mr. Hudson negligent and to proceed to consider the issues of causation and damages, if the jury concluded that Mr. Hudson violated a motor vehicle code.

3. After deliberations, the jury returned a verdict finding neither Mr. Hudson, nor his employers, negligent. Plaintiffs filed a Motion for Post-Trial Relief and contended that the verdict in this case was against the weight of the evidence and that they are

entitled to a judgment notwithstanding the verdict.

4. Plaintiffs filed a Motion for Post-Trial Relief and contended that the verdict in this case was against the weight of the evidence and that they are entitled to a judgment notwithstanding the verdict. Plaintiffs assert that the evidence was such that no two reasonable minds could disagree and the verdict should have been rendered in favor of the Plaintiffs.

5. Contrary to Plaintiffs' assertions, there was evidence presented at trial that Defendant did not see Plaintiff's vehicle when he began his turn from which the jury could have inferred that Mr. Hudson was not negligent.

(Daniel McIntyre)

R. Sean O'Connell for Plaintiffs.

Robert A. Weinheimer for Defendants.

No. GD 06-010720. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM OPINION AND ORDER

Olson, J., July 6, 2009—This case is before the Court on a Motion for Post-Trial Relief filed on behalf of the Plaintiffs, Charles E. Younkin and Toni Younkin, his wife. Following trial in this motor vehicle accident case, the jury returned a verdict which found that the Defendant driver, Hiawatha Hudson, was not negligent. In their Motion, the Plaintiffs ask this Court to enter an Order granting judgment notwithstanding the verdict in their favor and against Mr. Hudson and his employers, Defendants Pittsburgh Sea Foods, Inc. and Pittsburgh Sea Foods Service, on the issue of negligence. The Plaintiffs' Motion also requests that the Court enter a directed verdict on the issue of causation and grant the Plaintiffs a new trial to consider only the extent of their injuries and the total amount of damages to which they are entitled.

This Court heard oral argument on the Plaintiffs' Motion on June 8, 2009. Based upon the oral arguments presented to the Court, as well as the Court's careful consideration of Plaintiffs' Brief in Support of the Motion, Defendants' Brief in Opposition and Plaintiffs' Reply Brief, as well as the exhibits to these submissions, the Plaintiffs' Motion will be denied for the reasons set forth more fully below. An appropriate order follows.

Factual and Procedural History

The four-day trial in this matter produced the following testimony and evidence which the Court finds relevant to the disposition of the Plaintiffs' Motion. On May 6, 2004, Mr. Hudson was driving a white box truck along State Route 711 near Ligonier, PA to deliver seafood to customers of Defendants Pittsburgh Sea Foods, Inc. and Pittsburgh Sea Foods Services, Inc. While proceeding along Route 711, Mr. Hudson brought his vehicle to a stop and prepared to execute a left turn. Before he began the turn, Mr. Hudson looked for oncoming traffic but did not see Charles Younkin's red pick-up truck. As he made the left-hand turn, Mr. Hudson's delivery truck collided with Mr. Younkin's truck which was traveling in the opposite direction on Route 711. Mr. Hudson testified that he had nearly completed his turn when the vehicles collided on or near the white line that separated the oncoming lane in which Mr. Younkin was driving from the shoulder of the road opposite of the lane from which Mr. Hudson originated his turn. The Court precluded Mr. Hudson from testifying that any excessive speed of Mr. Younkin's vehicle caused or contributed to the collision.

Plaintiffs offered both oral testimony and demonstrative evidence to counter Mr. Hudson's version of the facts, to demonstrate that the collision occurred in the center of Mr. Younkin's lane shortly after Mr. Hudson began his left turn, and to establish that Mr. Hudson failed to properly yield the right-of-way. Michelle Addison, the operator of a vehicle that was behind Mr. Hudson's delivery truck on Route 711, testified that she witnessed the collision of the vehicles; operated by Mr. Hudson and Mr. Younkin. Ms. Addison stated that the accident occurred just after Mr. Hudson began his left turn. On a photograph of the accident scene, Ms. Addison identified the center of the lane in which Mr. Younkin's vehicle traveled as the location of the collision. Although she did not see Mr. Younkin's red pick-up truck until after it had collided with Mr. Hudson's vehicle, Ms. Addison stated that nothing obstructed the view of oncoming traffic on Route 711 where the accident occurred and that Mr. Hudson should have been able to see at least 10-12 car lengths in the direction from which Mr. Younkin's vehicle approached. Neither side offered testimony or evidence from an accident reconstruction expert to establish the relative positions or speeds of the vehicles leading up to the collision or to explain the manner in which this unfortunate accident occurred.

At Plaintiffs' request during the charge conference, the Court agreed to instruct the jury with respect to negligence as a matter of law in view of the evidence that the accident occurred while Mr. Hudson executed a left turn. The Court's charge instructed the jury to find Mr. Hudson negligent, and proceed to consider the issues of causation and damages, if the jury concluded that he violated 75 Pa.C.S.A. §3322 of the Motor Vehicle Code. Section 3322 imposes on a driver who intends to make a left turn a duty to yield the right-of-way to an oncoming vehicle which is so close as to pose a collision hazard when the turn is executed. Following its deliberations, the jury returned the verdict that found that Mr. Hudson was not negligent.

Legal Analysis

Plaintiffs' motion for post-trial relief initially argues that, in finding that Mr. Hudson was not negligent, the jury's verdict was so contrary to the weight of the evidence presented at trial that it should shock the conscience of the Court and, therefore, must be overturned and judgment entered in favor of Plaintiffs as a matter of law. Building upon their opening position that the evidence compelled a finding that the Defendants were negligent Plaintiffs further argue that they are entitled to a new trial because the Court erred in refusing to grant their motion for a directed verdict on causation and in failing to instruct the jury to award at least some damages for injuries that were not contested at trial.

This Court concludes that Plaintiffs are not entitled to judgment notwithstanding the verdict on the issue of the Defendants' alleged negligence. Because the Court will not disturb the jury's verdict finding an absence of negligence on the part of the Defendants, the Court does not reach Plaintiffs' claims that they are entitled to a directed verdict on causation as well as a new trial to determine the amount of any damages they allegedly sustained. Thus, the Court turns now to address Plaintiffs' contention that the verdict in this case was against the weight of the evidence and that they are entitled to a judgment notwithstanding the verdict.

In reviewing a motion for judgment notwithstanding the verdict, the Court considers the evidence in the light most favorable to the verdict winner, as he must be given the benefit of every reasonable inference. *Moure v. Raeuchle*, 604 A.2d 1003, 1007 (Pa. 1992). All conflicts in the evidence must be resolved in his favor. *Id.* Judgment notwithstanding the verdict should only be entered in a clear case, with any doubt resolved in favor of the verdict winner. *Id.*

There are two bases upon which the Court may enter judgment notwithstanding the verdict: (1) the movant is entitled to judgment as a matter of law, or (2) the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered in favor of the movant. *Id.* With the first, the Court must review the record and conclude that even with all factual inferences decided against the movant, the law nonetheless requires a verdict in his favor. *Id.* With the second, the Court must review the evidentiary record and conclude that the evidence was such that a verdict for the movant was beyond all doubt. *Id.*

Plaintiffs assert in their motion only the second ground for relief, *i.e.* that no two reasonable minds could disagree that the verdict in this case should have been rendered in their favor. Plaintiffs point out that Mr. Hudson admitted at trial that he never saw Mr. Younkin's vehicle before the accident. They also assert that the record demonstrated conclusively that the accident occurred in Mr. Younkin's lane of travel when Mr. Hudson was only half-way into his turn. In view of these factual contentions, Plaintiffs argue that the evidence established beyond all doubt that Mr. Hudson breached the duty of care under §3322 because he failed to yield the right-of-way to Mr. Younkin.

Contrary to Plaintiffs' assertions, however, Mr. Hudson's observations with respect to oncoming traffic and the precise location of the collision were hotly contested issues at trial. Mr. Hudson testified that he looked for, but did not see, Mr. Younkin's vehicle before he executed his left turn. He also testified that he had nearly completed his turn when the collision took place. This was competent evidence from which the jury could reasonably infer that Mr. Younkin's vehicle did not pose a collision hazard when Mr. Hudson executed his turn. From this, the jury could properly conclude that Mr. Hudson did not violate §3322 of the Motor Vehicle Code and thus was not negligent as a matter of law.

It was squarely within the province of the jury to consider the evidence presented at trial on these matters, to weigh the credibility of the witnesses for both sides, and to accord each piece of evidence the weight that the jury deemed appropriate. *Verdin v. Hosler*, 127 A.2d 110, 116 (Pa. 1956) (defendant's ability to make observations before turn within the province of the jury); *Hoover v. Sackett*, 292 A.2d 461 (Pa.Super. 1972) (jury to consider negligence of defendant, including defendant's failure to observe vehicles in intersection); *Fowler v. Smith*, 269 A.2d 340, 342 (Pa.Super. 1970) (findings on matters dependent upon varying estimates of distances and speeds within the province of the jury). Viewing the evidence in the light most favorable to the Defendants, there is no reason to set aside the jury's verdict based on the Plaintiffs' characterization of the conflicting testimony and evidence introduced at trial.

The case law cited in Plaintiffs' brief is factually distinguishable and does not lead to a different conclusion. In *Leasure v. Heller*, 258 A.2d 855 (Pa. 1969) and *Stifies v. American Stores Co.*, 53 A.2d 610 (Pa. 1947), the motorists were found to be negligent because they executed left turns notwithstanding their awareness of oncoming traffic. By contrast, in the present case, Mr. Hudson never testified that he saw Mr. Younkin's vehicle but nonetheless proceeded to execute a left turn because he believed that it could be completed without incident. Instead, Mr. Hudson testified that he did *not* see Mr. Younkin's vehicle when he began his turn. Thus, the cases cited by the Plaintiffs do not compel judgment in their favor as a matter of law.

Conclusion

The jury's verdict in favor of Defendants and against the Plaintiffs on the issue of negligence was not contrary to the weight of the evidence introduced at trial. For this reason, Plaintiffs are not entitled to judgment notwithstanding the verdict. The Plaintiffs' Motion for Post-Trial Relief is therefore denied. An appropriate order follows.

BY THE COURT:
Judith F. Olson
Court of Common Pleas of Allegheny County, Pennsylvania

Date: July 6, 2009

ORDER OF COURT

AND NOW, to wit this 6th day of July, 2009, upon consideration of the Plaintiffs' Motion for Post-Trial Relief, the parties' briefs, and oral argument, and in accordance with the foregoing Memorandum Opinion, it is hereby ORDERED, ADJUDGED and DECREED that Plaintiffs' Motion for Post-Trial Relief be and hereby is DENIED.

BY THE COURT:
Judith F. Olson
Court of Common Pleas of Allegheny County, Pennsylvania

Nationwide Mutual Fire Insurance Company v. Clarence M. Rollason, et al.

Insurance Coverage—Criminal Acts Exclusion

1. Defendant injured a police officer in an altercation in front of his home. Two tort actions were filed, one by the police officer and one by the officer's workers' compensation carrier. Defendant filed the claims with his homeowner's insurance.

2. Defendant's homeowner's insurance carrier asserted that it had no duty to indemnify the defendant for criminal acts, as his Nationwide policy bars coverage from such acts. The Court held for the insurance carrier and Defendant appealed.

3. The Court specifically held that the plaintiff provided sufficient evidence that the police officer was "effecting a lawful arrest" at the time Defendant caused his injuries, despite the fact that the officer dropped all charges against the defendant. All evidence presented by Nationwide was relevant to show that Defendant's conduct fell within the policy exclusion.

4. The Court also disagreed with the defendant's assertion that the criminal acts exclusion in the policy did not bar coverage because exclusion requires the intent to cause bodily injury. Coverage E of Defendant's homeowner's insurance policy explains the duty to defend and to indemnify in the event of a claim arising out of the insured's "negligent personal acts."

5. The Defendant's conduct was intentional and not negligent.

(Danielle D. Rawls)

George Gobel for Plaintiffs
Peter B. Skeel for Defendants.

No. GD 07-017402. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION AND ORDER OF COURT
DENYING CLARENCE M. ROLLASON'S MOTION FOR POST-TRIAL RELIEF

Introduction

O'Brien, J., October 8, 2009—An altercation occurred between Brian Pappal and defendant, Clarence Rollason, on Portsmouth Drive in Port Vue Borough on January 7, 2007. Mr. Rollason, who lives across the street from a Methodist church, apparently was angry about where Mr. Pappal, the church organist, had parked his car. Port Vue Police Lieutenant Bryan Myers responded to the scene and was injured when he attempted to intervene, causing him to lose work. Two tort actions were filed against Mr. Rollason in this court as a result of this incident, one by Lt. Myers¹ and one by his workers' compensation carrier.² Mr. Rollason's homeowner's carrier (instant plaintiff, Nationwide Mutual Fire Insurance Company) filed an action seeking a declaratory judgment that it has no duty to defend or indemnify Mr. Rollason or his wife.³ In a Memorandum and Non-jury Decision, I granted the relief sought by Nationwide because, based on the factual averments of the underlying complaints, the criminal acts exclusion in Mr. Rollason's Nationwide policy bars coverage. Pending is Mr. Rollason's Motion for Post-Trial Relief.

I

Paragraphs 1-5 of Mr. Rollason's motion argue that 1) I erred in allowing Nationwide to introduce eyewitness testimony relating to Mr. Rollason's conduct on January 7, 2007, as well as events leading up thereto and following; and 2) the non-jury trial testimony did not support my decision. As I noted in footnote 3 of my memorandum in support of my non-jury decision, however, it was necessary only for me to consider the factual averments of the underlying complaints, not the instant trial testimony. Our Supreme Court reaffirmed this principle very clearly in *Mutual Beneficial Ins. Co. v. Haver*, 725 A.2d 743 (Pa. 1999). There a pharmacist, without a doctor's prescription, distributed narcotics and other controlled substances to plaintiff-customer in the underlying case, ignoring requests from relatives and customer's physician and psychologist that the pharmacist cease. The Supreme Court granted allocatur

to address the issue of whether an insurance carrier has a duty to defend and possibly indemnify an insured pharmacist against a claim that is based upon his distribution of controlled substance when the insurance policy explicitly excludes coverage for bodily injuries which are a consequence of "knowing endangerment" by the pharmacist.

Id. at 744 (original quotes). The court held that the carrier had "neither a duty to defend nor a duty to indemnify." *Id.* The Court addressed pharmacist's final argument as follows:

[Pharmacist] argues that there is no evidence of record in this case to support Mutual Benefit's allegation that [pharmacist] willfully harmed or knowingly endangered [customer]. As stated above, in determining whether a carrier has a duty to defend or indemnify an insured we look to the complaint filed against the insured. Thus, our determination that the factual allegations in [customer's] complaint against [pharmacist] constitute knowing endangerment as a matter of law, makes this argument moot, *since there need not be evidence on the record for us to make this decision.*

Id. at 747 (emphasis added). In footnote 5 the court further explained that

We likewise need not address the parties' arguments whether [pharmacist's] guilty plea to federal drug charges has any bearing on this litigation, *since we have based our decision solely upon the factual allegations in [customer's] complaint against [pharmacist].*

Id. (emphasis added).⁴

In the event, however, that an appellate court deems the trial testimony relevant, I will discuss it briefly. Although I cannot cite any specific testimony because the non-jury trial transcript has not been ordered, the testimony clearly showed by the preponderance of the evidence that Lt. Myers' injuries complained of at GD 08-6576 and GD 09-000171 resulted from Mr. Rollason's commission of the crimes of Disorderly Conduct (18 Pa. C.S.A. § 5502) (summary offense and misdemeanor); Harassment (18 Pa. C.S.A. § 2709) (summary offense); and Resisting Arrest (18 Pa. C.S.A. § 5104). I find that Lt. Myers was "effecting a lawful arrest" of Mr. Rollason at the time he caused the lieutenant's injuries, despite the lieutenant's testimony to the contrary and despite the dropping of all charges against Mr. Rollason. *Id.* All evidence presented by Nationwide was relevant to show that Mr. Rollason's conduct fell within the relevant policy exclusion.

II

Paragraph 6 of Mr. Rollason's post-trial motion, which incorporates his briefs, argues the criminal acts exclusion in the instant policy does not bar coverage because the exclusion requires an intent to cause bodily injury. I disagree.

Section I of the instant policy pertains to property coverages and exclusions, and lists Coverages A through D. Section II pertains to liability coverages, exclusions and conditions. The "Coverage Agreements" subsection of Section II provides as follows:

COVERAGE E — PERSONAL LIABILITY

We will pay damages an **insured** is legally obligated to pay due to an **occurrence** resulting from negligent personal acts or negligence arising out of the ownership, maintenance or use of real or personal property. **We** will provide a defense at **our** expense by counsel of **our** choice. **We** may investigate and settle any claim or suit. **Our** duty to defend a claim or suit ends when the amount **we** pay for damages equals **our** limit of liability.

This coverage is excess over other valid and collectible insurance. It does not apply to insurance written as excess over

the applicable limits of liability.

COVERAGE F — MEDICAL PAYMENTS TO OTHERS

We will pay the necessary medical and funeral expenses incurred within three years after an accident causing **bodily injury**. This coverage does not apply to **you**. It does not apply to regular residents of **your** household. It does apply to **residence employees**. Payment under this coverage is not an admission of **our** or an **insured's** liability. This coverage applies as follows:

1. to a person on the **insured location** with consent of an **insured**.
2. to a person off the **insured location**, if the **bodily injury**:
 - a) arises out of a condition in the **insured location**.
 - b) is caused by the activities of an **insured**.
 - c) is caused by a **residence employee** of an **insured**.
 - d) is caused by an animal owned by or in the care of an **insured**.

Trial Exhibit 1, p. G1-2 (original emphasis).

Paragraph 1 of the “Liability Exclusions” subsection of Section II provides, in relevant part, as follows:

1. Coverage E — Personal Liability and Coverage F — Medical Payments to Others do not apply to **bodily injury** or **property damage**:

- a) by an act intending to cause harm done by or at the direction of any **insured**. This exclusion does not apply to corporal punishment of pupils.
- b) caused by or resulting from an act or omission which is criminal in nature and committed by an **insured**. This exclusion 1.b) applies regardless of whether the **insured** is actually charged with, or convicted of a crime.

Id. at H-1 (original emphasis). Subparagraphs a) and b) of ¶ 1 are obviously expressed in the disjunctive. If, as Mr. Rollason argues, ¶ 1.b) requires intent to injure, ¶ 1.a) would be superfluous. Mr. Rollason cites several cases in support of this argument, but only three involved a policy with a criminal acts exclusion. None of these cases, however, supports his position.

In *Donegal Mutual Insurance Company v. Baumhammers*, 893 A.2d 797 (Pa.Super. 2006), a man was convicted of murdering five people and wounding another during a shooting rampage. The jury rejected his insanity defense. The surviving victim and the families of the dead victims sued the parents of the shooter, alleging negligence on the part of the parents for failing to take steps to prevent the shootings. Two insurance companies filed declaratory judgment actions seeking a determination that they had no duty to defend or indemnify their insureds (parents). Only one of the policies contained a criminal acts exclusion. The Superior Court held that this policy did “not apply to bodily or personal injury arising out of a...criminal act of any insured...” and denied coverage to parents even though they were accused only of negligent conduct. *Id.* at 819. That son was convicted of capital crimes in *Baumhammers* does not distinguish it from our case because the criminality of the alleged conduct triggers the exclusion, regardless of seriousness.

In *Nationwide Mutual Insurance Co. v. Alston*, 2008 U.S. Dist. Lexis 13659, the insured was convicted of voluntary manslaughter in Virginia, a crime which requires an intentional killing. The insured’s homeowner’s policy contained an intentional acts exclusion as well as a criminal acts exclusion. When the insured sought coverage after being sued by the victim’s estate, plaintiff-homeowner’s carrier filed a declaratory judgment action seeking the same relief as instant plaintiff. In granting summary judgment to plaintiff, the court held that the factual allegations of the underlying complaint alleged purely intentional conduct.

In *Continental Insurance Co. v. Kovach*, 2007 U.S. Dist. Lexis. 59472, the insured furnished alcohol to a minor, who then became intoxicated and injured plaintiff in the underlying case in a car accident. Plaintiff-homeowner’s carrier sought declaratory relief identical to that sought by instant plaintiff after the insured sought coverage under the policy. The court granted summary judgment to the carrier based on the criminal acts exclusion in the policy because it is illegal under Pennsylvania Law to furnish alcohol to a minor. The court expressly declined to discuss the intentional acts exclusion in the policy, deeming it unnecessary to its decision.

On page 4 of his final brief, Mr. Rollason argues that

both of the...purported exclusions pled by [Nationwide]..., if applicable, only apply to payments for bodily injury or property damage and are, in effect, only indemnification exclusions.... There is no liability exclusion set forth relating to the insurer’s separate and distinct “duty to defend.”

(Original quotes). I disagree. In ¶¶ 19, 21 and 22 of its Complaint in Declaratory Judgment, Nationwide pleads the applicability of all of the above-quoted sections of Mr. Rollason’s policy, setting them forth verbatim. As shown above, a subsection of Section II of the instant policy is entitled “Coverage Agreements,” which subsection is further broken down into “Coverage E – Personal Liability” and “Coverage F – Medical Payments to others.” Coverage E explains the *duty to defend* and to indemnify in the event of a claim arising out of the insured’s “negligent personal acts.” Trial Exhibit 1, p. G1. (Coverage F provides for payment of medical expenses incurred by third parties without regard to the insured’s liability). Paragraph 1 of the “Liability Exclusions” subsection of Section II clearly provides that “*Coverage E – Personal Liability* and *Coverage F – Medical Payments to Others* do not apply to **bodily injury**...caused by or resulting from an act or omission which is criminal in nature and committed by an **insured**.” (Original bold; italics added).

III

Paragraph 7 of Mr. Rollason’s post-trial motion also argues that I erred in finding that the underlying complaints allege criminal, but not negligent acts. I disagree.

Applicable Criminal Statutes

18 Pa.C.S.A. § 2709, “Harassment,” provides, in relevant part, as follows:

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

(1) strikes, shoves, kicks or otherwise subjects the other person to physical contact, or attempts or threatens to do the same.

18 Pa.C.S.A. § 5543, “Disorderly Conduct,” provides, in relevant part, as follows:

(a) Offense defined – A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

(1) engages in fighting or threatening, or in violent or tumultuous behavior; [or]

(4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

(b) Grading – An offense under this section is a misdemeanor of the third degree if the intent of the actor is to cause substantial harm or serious inconvenience, or if he persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a summary offense.

(c) Definition – As used in this section the word “public” means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, any neighborhood, or any premises which are open to the public.

18 Pa.C.S.A. § 5104, “Resisting Arrest or Other Law Enforcement,” provides as follows:

A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance.

18 Pa.C.S.A. § 2701, “Simple Assault,” provides, in relevant part, as follows:

(a) Offense defined – A person is guilty of assault if he:

(1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another[.]

The Underlying Complaint at GD 08-006576

Paragraphs 6-10 and 19 of this underlying complaint read as follows:

6. On January 7, 2007, Officer Myers along with the Port Vue Police Department Chief Gary Cartia (hereinafter “Chief Cartia”) were dispatched to a 911 call for a **fight in the street in front of the Port Vue United Methodist Church.**

7. After arriving at the scene of the fight, **Defendant Clarence Rollason became physically combative and grabbed Chief Cartia by the coat and began pushing Chief Cartia.**

8. **Officer Myers attempted to arrest Defendant Clarence Rollason and place him in handcuffs but Defendant Clarence Rollason continued to fight, push and otherwise harmfully and offensively contact both Chief Cartia and Officer Myers.**

9. While attempting to restrain Defendant Clarence Rollason, and as a result of Clarence Rollason’s fighting, pushing and otherwise harmful and offensive bodily contact with Officer Myers, Officer Myers was caused to fall to the ground on his right knee and side.

10. **As a result of the fall, Officer Myers suffered injury to his right knee and hip.**

19. Defendant Clarence Rollason’s conduct was without excuse, justification, or privilege.

Emphasis added.

Although ¶ 22 of this complaint states the legal conclusion that Mr. Rollason was “negligent” “in struggling with the officers,” this is no more relevant to my analysis than the alternative conclusion in ¶ 20 that Mr. Rollason’s “actions...were undertaken intentionally.” There is no suggestion in the complaint’s *factual allegations* that Mr. Rollason was acting carelessly or that Lt. Myers’ injuries resulted from an accident. The complaint essentially alleges Mr. Rollason was brawling in the public street in front of a church and injured Lt. Myers as the latter was attempting to subdue and arrest him. This appears to be exactly the kind of conduct the legislature had in mind when it enacted the Disorderly Conduct and Resisting Arrest statutes.

Further, these paragraphs clearly allege that Mr. Rollason “str[uck], shove[d] or otherwise subject[ed] [Chief Cartia and Lt. Myers] to physical contact.”⁵ It is necessarily inferable from the language used in these paragraphs that Mr. Rollason’s intent was either to “harass, annoy or alarm”⁶ (at least) Lt. Myers, or to cause him “bodily injury.”⁷ Thus, either Harrassment or Simple Assault (or both) are alleged.

The Underlying Complaint at GD 09-171

Paragraphs 8-13, 18(b) and 18(c) of this underlying complaint read as follows:

8. [On January 7, 2007], Plaintiff responded to a disturbance at 1102 Portsmouth Drive, Port Vue, Allegheny County, Pennsylvania 15133.

9. **At that date, time and place, Defendant Clarence M. Rollason, was involved in a confrontation with one, Brian Pappal.**

10. At that date, time and place when Lieutenant Myers arrived on the scene, Defendant Clarence M. Rollason, was on his property making comments to the other individual, Brian Pappal, who was in the street.

11. **At that date, time and place, Defendant Clarence M. Rollason, while arguing with Brian Pappal, started towards him to confront him.**

12. At that date, time and place, the Plaintiff walked towards the Defendant Clarence M. Rollason, to keep the two individuals separated.

13. At that date, time and place, this officer was legally and lawfully on Defendants' property and **Defendant Clarence M. Rollason, attempted to pass by [Lt. Myers] to confront the other individual again and, in doing so, knocked [Lt. Myers] to the ground.**

18. **The losses, injuries and damages sustained by [Lt. Myers] as set forth above, were caused by the negligence of Defendant Clarence M. Rollason, in some or all of the following particulars:**

(b) In failing to heed the words of the Officers on duty and, in particular, Plaintiff, Bryan R. Myers, to cease the confrontation;

(c) **In attempting to attack the other individual, Brian Pappal, and in the process, knocking [Lt. Myers] to the ground;**

Emphasis added.

Paragraphs 8-13 and part of ¶ 18 set forth the factual allegations which form the basis of the cause of action at this underlying complaint. Paragraphs 8-13, when read alone, do not necessarily allege criminal conduct. When read in conjunction with ¶ 18(c), however, it is clear the complaint is saying that Mr. Rollason caused Lt. Myers' injuries by knocking him to the ground as Mr. Rollason "*attempt[ed] to attack Brian Pappal.*" The complaint thus clearly alleges that Lt. Myers' injuries resulted from Mr. Rollason's attempt to harass or assault Mr. Pappal. Again, it is irrelevant that the word "negligence" is thrown in as part of paragraph 18. One cannot "negligently" attempt to attack another. Nor is it significant that this complaint does not allege that *Lt. Myers* was Mr. Rollason's intended assault victim. What is crucial is the allegation that Mr. Rollason's criminal conduct caused the Lieutenant's injuries.

Mr. Rollason cites *Britamco Underwriters, Inc. v. Weiner*, 636 A.2d 649 (Pa.Super. 1994), in support of this argument. There a tavern customer filed a complaint against the tavern owners, alleging one of them and a tavern employee "struck [him] in the neck." *Id.* at 650. When the tavern owners sought coverage, their liability carrier filed an action seeking a declaratory judgment that it had no duty to defend or indemnify. When the trial court denied the carrier's motion for summary judgment, the Superior Court allowed an interlocutory appeal and affirmed. *Weiner*, however, is inapposite because there the customer's underlying complaint referred to the incident as an "accident." *Id.* at 652.

IV

Thus, I have found that 1) both underlying complaints allege criminal, but not negligent, conduct by Mr. Rollason as the cause of Lt. Myers' injuries; and 2) Nationwide's evidence in the non-jury trial proved Lt. Myers' injuries were, in fact, caused by Mr. Rollason's criminal conduct. Nationwide therefore has no duty to defend Mr. Rollason. An insurer's "duty to defend is broader than the duty to negligence" is thrown in as part of paragraph 18. One cannot "negligently" attempt to indemnify... [B]ecause the duty to defend is broader, a finding that it is not present will also preclude a duty to indemnify." *Kvaerner Metals v. Commercial Union Ins.*, 908 A.2d 888, fn. 7 (Pa. 2008).

V

Paragraph 8 of Mr. Rollason's post-trial motion argues that I erred in not finding that Nationwide is estopped from denying coverage. At the conclusion of testimony, I ordered briefs from the parties on all pending issues. Neither of Mr. Rollason's pre-verdict briefs addressed this issue, causing me to assume, when I issued my Non-jury Decision, that the estoppel argument had been abandoned. The trial transcript, which would set forth Mr. Rollason's estoppel argument, has not been ordered. Although the last paragraph of Mr. Rollason's second post-decision brief refers to Nationwide's promising a defense to Mr. Rollason, such reference falls far short of a legal argument on the estoppel issue. I now deem this issue waived. Even if not waived, however, it is clear from the testimony that 1) Nationwide was proceeding under a reservation of rights in temporarily providing a defense and 2) Mr. Rollason has shown no prejudice resulting from any alleged Nationwide misconduct.

I therefore enter the following:

ORDER OF COURT

AND NOW, this 8th day of October, 2009, it is hereby ordered that the Motion for Post-Trial Relief filed by Clarence M. Rollason is denied.

BY THE COURT
/s/O'Brien

¹ GD 09-171

² GD 08-6576

³ Although Mrs. Rollason was sued in one of the underlying actions, her demurrer to the complaint was sustained in that case.

⁴ In any event, Mr. Rollason does not argue in his post-trial motion that I erred in concluding that consideration of the non-jury trial testimony was unnecessary to my decision that Nationwide has no duty to defend or indemnify.

⁵ 18 Pa. C.S.A. § 2709(a)(1).

⁶ 18 Pa. C.S.A. § 2709(a).

⁷ 18 Pa. C.S.A. § 2701(a)(1).

**Babcock & Wilcox Co., et al. v.
American Nuclear Insurers, et al.**

Indemnification Claim of Defendant/Insured Settling with Plaintiff Against Insurer's Objections—Insurer Providing Coverage and Defense—Settlement Amount Within Policy Limits—Reasonableness Standard—Enforceability of Consent to Settlement Clause in Insurance Policy—Good Faith/Bad Faith

Nuclear facilities insurer which rejects insured's settlement with underlying claimant will be held to standard announced in *Cowden v. Aetna* not *Alfiero v. Berks Mutual* to determine whether insurer unreasonably withheld consent to settle.

(Norma M. Caquatto)

Neal R. Brendel and Roberta D. Anderson for Babcock & Wilcox and B&W Nuclear Environmental Services, Inc.
Andrew S. Amer, Timothy J. Cornell, Samuel J. Rubin, and Jon Hogue for American Nuclear Insurers and Mutual Atomic Energy Liability Underwriters.

James A. Datillo for Atlantic Richfield Company.

Nos. GD 99-011498 and GD 99-016227 (Consolidated). In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION AND ORDER OF COURT

BACKGROUND

Wettick, J., December 1, 2009—In litigation commenced in the Federal District Court for the Western District of Pennsylvania, more than 300 persons raised claims against Babcock & Wilcox and Atlantic Richfield (“Babcock/Atlantic”) seeking damages arising from exposure to radiation emitted from two nuclear facilities owned and operated by Babcock/Atlantic (“Hall” action).

Babcock/Atlantic were insured by defendants (“ANI”). While the *Hall* litigation was pending, both Babcock/Atlantic and ANI sought declaratory relief in this court as to, *inter alia*, issues of coverage.

In an April 25, 2001 Opinion and Order of Court, 149 P.L.J. 163, 51 D.&C.4th 353 (2001), I ruled in favor of Babcock/Atlantic, holding that with respect to the applicable ANI policies, the date of manifestation was an applicable trigger of coverage. This ruling effectively meant that \$320 million of insurance coverage might be available for the *Hall* claims.

Subsequently, through negotiations with counsel retained by Babcock/Atlantic, the *Hall* plaintiffs settled their claims with Babcock/Atlantic for less than the policy limits. The settlement funds were provided by Babcock/Atlantic. ANI disagreed with the decision to settle.

At the request of the parties, I held a status conference following the settlement of the *Hall* litigation. At the conference, there were no surprises. Babcock/Atlantic is seeking reimbursement for the full amount paid to settle the *Hall* litigation, together with counsel fees. ANI is defending on the ground that it has no obligation to make any payment because of the consent to settlement clauses in the ANI policies issued to Babcock/Atlantic.

At the status conference, the parties requested that I address their disagreement over the legal standard to be applied in determining ANI's insurance coverage obligations:

The standard proposed by Babcock/Atlantic is as follows:

If an insurer breaches its duty to consent to a reasonable settlement within insurance limits, the insured may settle without the insurer's consent, without forfeiting its insurance coverage, provided the settlement is reasonable and entered into in good faith. Plaintiffs' Motion for Ruling on the Legal Standard, Proposed Court Order.

The standard proposed by the ANI is as follows:

This articulation of the bad faith standard which follows from *Cowden* and its progeny should apply here. Accordingly, the Court should enforce ANI's Consent-To-Settlement Clauses and bar coverage for the insureds' settlements unless B&W and ARCO can show by clear and convincing evidence that: (a) there was no real chance of a defense verdict in the *Hall* Action; (b) there was little possibility of a verdict or settlement within policy limits; (c) ANI's decision to proceed to trial rather than settle was not based on its bona fide belief, predicated upon all of the circumstances of the case, that there was a good possibility of winning; and (d) ANI's decision to litigate rather than settle was made dishonestly. ANI's Memorandum of Law Regarding the Legal Standard at 15-16.

My July 20, 2009 court order, agreed upon by the parties, states:

...The parties shall submit cross motions to determine the legal standard to be applied in determining the coverage obligations of the insurer in the circumstance where an insured settles an underlying covered claim without the consent of the insurer. The motions shall be limited to the legal standard and the policy language applicable to such standard and shall not address the specific facts to be applied to the standard....

Babcock/Atlantic states that ANI's policies contain standard consent to settlement clauses and, in support thereof, sets forth this chart (Plaintiffs' Motion at 31):

ANI correctly states that the clear and unambiguous language of the policies provides that ANI has no obligation to reimburse Babcock/Atlantic for any funds that Babcock/Atlantic paid to settle the case. See ANI Liability Policy Language described above. Babcock/Atlantic contends that the courts will not enforce standard consent to settlement clauses where the insured, acting in good faith, enters into a reasonable settlement at or below the policy limits.

ENFORCEABILITY OF CONSENT TO SETTLEMENT CLAUSES

The enforceability of a consent to settlement clause may be raised in three scenarios.

FIRST SCENARIO

The defendant's insurance company refuses to provide coverage or to provide a defense. The policy limits are \$1 million. The

defendant settles the case for \$1 million and looks to the insurance company for reimbursement.

SECOND SCENARIO

The policy limits are \$1 million. The plaintiff in the underlying action will settle for \$1 million. The defendant's insurance company—which is providing a defense and is not disputing coverage—rejects the offer.

The jury returns a verdict of \$2 million.

Following the verdict, the insurance company pays the policy limits of \$1 million. The insured contends that the insurance company is obligated to pay the full amount of the verdict because of its failure to settle the case within the policy limits.

THIRD SCENARIO

The policy limits are \$2 million. The plaintiff in the underlying action will settle for \$1 million. The insurance company—which is providing a defense and is not disputing coverage—turns down the offer to settle for \$1 million over the objections of the insured. The insured settles the case for a payment of \$1 million and proceeds against the insurance company for reimbursement.

STANDARDS GOVERNING SCENARIO ONE

Most jurisdictions, including Pennsylvania, require an insurance company that refuses to provide coverage and a defense, to reimburse the insured for any reasonable settlement even though the insurance company did not consent to the settlement. See 14 *Couch on Insurance* 3d §202:8 (2005).

In *Alfiero v. Berks Mutual Leasing Co.*, 500 A.2d 169 (Pa.Super. 1985), the primary carrier paid its policy limits and the excess carrier denied coverage and refused to provide a defense. Ultimately, the claim was settled within the policy limits of the excess carrier. Garnishment proceedings were commenced by the assignee of the insured against the excess carrier.

The trial court permitted recovery against the excess carrier for the unsatisfied portion of the settlement. The Superior Court affirmed, stating that the excess carrier breached its duty to act in good faith and repudiated its contract of insurance by repeatedly denying any and all obligations to defend or to indemnify. “Under these circumstances, Berks could properly negotiate a settlement directly with Alfiero so long as it was done in good faith and the settlement was fair and reasonable. The settlement was not unreasonable merely because Berks sought to protect the assets which it used in conducting business.” *Id.* at 172 (citations omitted).

Also see *Barr v. General Accident Group Ins. Co. of North America*, 520 A.2d 485, 489 (Pa.Super. 1987) (“We think the insured should be allowed, as soon as the insurer denies coverage, to protect its interests by negotiating a settlement.”).

STANDARDS GOVERNING SCENARIO TWO

This Scenario is governed by *Cowden v. Aetna Casualty and Surety Co.*, 134 A.2d 223 (Pa. 1957), and its progeny. In *Cowden*, the underlying lawsuit would have settled if the insurance company had been willing to pay the policy limits. The verdict exceeded the policy limits. In this lawsuit, the insured sought to recover the amount by which the verdict exceeded the policy limits.

The Court described the question raised by the appeal as follows:

The basic question of law raised by this appeal relates to the nature and extent of the duty owed to an insured by his insurer against liability for personal injury to others where the insured, by the terms of the policy, cedes to the insurer the right to control litigation (falling within the insurance coverage) including possible settlement of the claim against the insured when it is apparent that a recovery, if adversarially obtained, will exceed the maximum limit of the insurer's liability under the policy. *Id.* at 227.

The Court ruled that the insurer's right to control the litigation is not absolute. While it is the insurer's right under the policy to make a decision as to whether a claim should be litigated or settled, “it is not a right of the insurer to hazard the insured's financial well-being.” *Id.* at 228. There is an obligation of good faith which “requires that the chance of a finding of nonliability be real and substantial and that the decision to litigate be made honestly.” *Id.* The Court stated that there is a requirement that the insurer also consider the interests of the insured which requires a balancing of the interests of the insurer and insured in a manner such that the insurer “treat the claim as if it were alone liable for the entire amount. But, that does not mean that the insurer is bound to submerge its own interest in order that the insured's interests may be made paramount. It means that when there is little possibility of a verdict or settlement within the limits of the policy, the decision to expose the insured to personal pecuniary loss must be based on a bona fide belief by the insurer, predicated upon all the circumstances of the case, that it has a good possibility of winning the suit.” *Id.* Finally, the Court stated that “bad faith, and bad faith alone” is the requisite to render the insurer liable and that “bad faith must be proven by clear and convincing evidence.” *Id.* at 229.

In *Birth Center v. St. Paul Companies, Inc.*, 787 A.2d 376 (Pa. 2001), the Pennsylvania Supreme Court looked to *Cowden* in considering when an insurance company is obligated to satisfy a verdict in excess of the policy limits where the claims could have settled within the policy limits. In the second paragraph of the Opinion, the Court stated, “Where an insurer refuses to settle a claim that could have been resolved within policy limits without ‘a bona fide belief...that it has a good possibility of winning,’ it breaches its contractual duty to act in good faith and its fiduciary duty to its insured. *Cowden v. Aetna Casualty and Surety Co.*, 389 Pa. 459, 134 A.2d 223, 229 (1957).” 787 A.2d at 379.

Also see footnote 16 of the *Birth Center* Opinion:

FN16. An insurer, who acts in bad faith by unreasonably refusing to settle a case, may be liable for the full amount of a verdict notwithstanding that the verdict exceeds the insured's policy limits. *Cowden*, 389 Pa. 459, 134 A.2d 223. In *Cowden*, we stated that an insurer:

may be liable for the entire amount of a judgment secured by a third party against the insured, regardless of any limitation in the policy, if the insurer's handling of the claim, including a failure to accept a proffered settlement, was done in such a manner as to evidence bad faith on the part of the insurer in the discharge of its contractual duty.

Id. at 224. See also *Gray v. Nationwide Insurance Co.*, 422 Pa. 500, 223 A.2d 8 (1966). 787 A.2d at 388 n.16.

In 2007, in *Toy v. Metropolitan Life Ins. Co.*, 928 A.2d 186 (Pa. 2007), the Pennsylvania Supreme Court concluded that the purpose of the bad faith statute (42 Pa.C.S. §8371) was to extend the case law governing an insurer's failure to accept a settlement demand within policy limits to also cover an insurer's failure to make payments allegedly due to the insured under the insurance policy between the insured and insurer. In this Opinion, the Court summarized the case law governing an insurer's failure to set-

tle as follows:

In *Cowden v. Aetna Casualty and Surety Company*, 389 Pa. 459, 134 A.2d 223 (1951), this Court considered whether the evidence presented in the action between insured and insurer was sufficient to justify the jury's finding that in deciding to proceed with the trial to verdict, the insurer was guilty of bad faith in arriving at its decision. Even though we upheld the judgment n.o.v. entered for the insurer on the grounds that the evidence was insufficient to impose liability upon the insurer, we acknowledged that "the contractual relationship under an indemnity policy was one requiring 'a high degree of good faith in the conduct of the indemnity company's counsel generally'"; that the insurer "must act with the utmost good faith" toward the insured in disposing of claims in third-party actions where there is little or no likelihood of a verdict or settlement within policy limits; and that the manner by which an insurer handles the defense of an third-party action can give rise to a claim by the insured that the insurer acted in bad faith. *Id.* at 229 (quotations omitted). We also noted that Pennsylvania was joining the jurisdictions throughout the country that had held that an insurer may be liable for the entire amount of a judgment secured by a third party against the insured, regardless of any limitation in the policy, if the insurer's handling of the claim, including a failure to accept a proffered settlement, was done in such a manner as to evidence bad faith on the part of the insurer in the discharge of its contractual duty. *Id.* at 227-28. See also *Gray v. Nationwide Mutual Insurance Co.*, 422 Pa. 500, 223 A.2d 8 (1966) (confirming *Cowden's* holding). 928 A.2d at 198.

COWDEN CONTINUES TO GOVERN SCENARIO TWO

Babcock/Atlantic states that the *Cowden* requirement of a showing of bad faith is no longer good law. Instead, it is now the law of Pennsylvania that a consent to settlement clause will not be enforced unless the insurer can establish substantial prejudice resulting from the breach.

Babcock/Atlantic's argument is based on its contention that the *Cowden* line of cases has been superseded by *Brakeman v. Potomac Ins. Co.*, 371 A.2d 193 (Pa. 1977). In *Brakeman*, the Pennsylvania Supreme Court held that an insurance company cannot deny coverage based on the breach of a notice clause without establishing prejudice. Babcock/Atlantic contends that *Brakeman* established a general principle that the courts will not enforce provisions within an insurance contract which deprive the insured of coverage without a showing of prejudice.

There are several serious difficulties with this argument. First, nothing in the *Brakeman* Opinion suggests that it is intended to apply to other policy provisions. To the contrary, the Opinion of the Court, the Concurring and Dissenting Opinion, and the Dissenting Opinion were concerned with the purpose of policy provisions requiring that notice be given within a certain time.

Second, Pennsylvania case law continues to look to *Cowden* where the insured seeks recovery beyond the policy limits because of the insurance company's unwillingness to settle within the policy limits. The *Toy* and *Birth Center* Opinions of the Pennsylvania Supreme Court would not have been referring to *Cowden* and *Gray* in discussing a claim by the insured against an insurance company that failed to settle within the policy limits if *Brakeman* had superseded the *Cowden* line of cases.

Finally, *Brakeman* does not easily extend to consent to settlement clauses. Where there is late notice, the insurance company is in a position to show that it was actually prejudiced. However, where a settlement offer is accepted by the insured while the case is pending, what might have happened if the settlement had not been reached at that time is highly speculative. Because the interests of the insurance company differ from the interests of the insured, I have no doubt that settlements reached where the insurance company retains control will generally be more favorable to the insurance company than settlements reached by the insurer. However, it is difficult to establish that this is true in an individual case.

Where timely notice was not provided, either the insurance company has been or has not been prejudiced. However, as I discuss in greater detail at pages 15-16 of this Opinion, there is a wide range of decisions to accept or to reject settlement demands that may meet a reasonableness standard. Consequently, a finding that the insured's decision to accept a settlement over the objections of the insurer was reasonable, does not mean that the insurer's decision not to settle at this time was unreasonable.

At oral argument, I asked counsel for Babcock/Atlantic to identify the cases (excluding UIM cases) which best support its position that *Brakeman* has been extended to consent to settlement clauses. Babcock/Atlantic cited two federal court opinions and a common pleas court opinion, none of which is either persuasive or controlling.

The earliest case upon which Babcock/Atlantic relies is *Trustees of the University of Pennsylvania v. Lexington Ins. Co.*, 815 F.2d 890 (3d Cir. 1987). In that case, the insurance company refused to provide a defense on the ground of late notice. The insured then settled within the policy limits and in this lawsuit sought to recover from the insurance company.

The Court applied the *Brakeman* rule solely for the purpose of upholding a jury determination that late notice did not forfeit the protection of the excess policy.

The Court then considered whether to require the insurance company to honor the settlement, which was within the policy limits, between the injured party and the insured. It followed the ruling in *Alfiero v. Berks Mutual Leasing Co.* that once the insurer has repudiated the contract of insurance, its insured must be allowed to negotiate a settlement that protects the interests for which it purchased the insurance, subject to the requirements of reasonableness and good faith. *Id.* at 901-02. Thus, the only remaining issue was whether the settlement was reasonable and in good faith.

In summary, this is a Scenario One case in which the insured was permitted to enter into a reasonable settlement in good faith because the insurance company had denied coverage and refused to provide a defense.

Babcock/Atlantic next cites *Granary Associates, Inc. v. Evanston Ins. Co.*, 2000 WL 1782544 (E.D. Pa. 2000) (unreported Memorandum and Order of Court). In this case, after the insurance company denied coverage, the insured settled the claim and sought reimbursement from its insurance company. The Court rejected the insurance company's contention that it was relieved of its obligation to cover the claim because the insured had breached the consent to settle clause.

This is also a Scenario One fact situation that is governed by *Alfiero*. However, the Court, instead of citing *Alfiero*, concluded that the *Brakeman* rule extends to consent to settle clauses. It stated that while the *Brakeman* decision and its progeny deal exclusively with the failure to provide notice and not the absence of consent to the settlement, this is a distinction without a difference.

The third case upon which Babcock/Atlantic relies is *Resource America, Inc. v. Certain Underwriting Members of Lloyd's*, 2004 WL 2580554 (C.P. Phila. 2004). The Court (without any persuasive citations in support of the ruling) supports Babcock/Atlantic's position that *Brakeman* should be applied to a consent to settle clause.¹ Furthermore, in this case, the Court was considering a provision in the insurance policy stating that the insurer's consent to a settlement "shall not be unreasonably withheld...." *Resource*

America, supra at 4 n.3.

Babcock/Atlantic also relies on case law considering insurance policies which provide UIM coverage including *Nationwide Mutual Ins. Co. v. Lehman*, 743 A.2d 933 (Pa.Super. 1999), and *Daley-Sand v. West American Ins. Co.*, 564 A.2d 965 (Pa.Super. 1989). Policies providing UIM coverage include a provision that the insurance company will not provide UIM coverage for bodily injury sustained by the insured if the insured settles the underlying personal injury claim without the insurance company's consent.

In *Daley-Sand*, the Court stated that the appeal presents the question of whether underinsured motorist coverage required by the Motor Vehicle Financial Responsibility Law is sufficiently nullified by the operation of a consent to settle clause so that the public policy of the Commonwealth, as expressed in the Motor Vehicle Responsibility Law, is contravened. *Id.* at 961. The Court concluded that the withholding of consent because of a concern that future subrogation interests will be jeopardized unreasonably frustrates the legitimate expectations of the insured victim. "Therefore, we now hold that the law of this Commonwealth requires that we see to it that clear public policy requiring UIM coverage not be frustrated by conflicting clauses in an insurance contract." *Id.* at 971.

The *Lehman* Opinion reached the same result. The Court, citing *Daley-Sand*, held that the settlement of the underlying case without the consent of the insured did not defeat UIM coverage where the insurance company could not show that it justifiably withheld consent.

In *Lehman*, the Court stated that *Brakeman* offered guidance. The purpose of a clause barring a suit to recover UIM benefits unless the insured has consented to the settlement of the underlying tort action is to protect viable subrogation rights. The clause operates as a forfeiture of the statutory right to UIM coverage where the consent is withheld when the insurer has no viable subrogation rights. *Id.* at 940-41.

The UIM cases have nothing to do with the right of an insurance company to manage litigation in which it is providing coverage and a defense. The balancing in the UIM cases of the contractual subrogation rights of the insurance company against the statutory rights of the insured to UIM coverage offers no guidance to a court that is considering when and to what extent the contractual right to control the litigation in an underlying tort action against the insured will be enforced.

SCENARIO THREE

The present case is not a Scenario One fact situation (insurance company refuses to provide coverage or a defense) or a Scenario Two fact situation (verdict in excess of policy limits where the insurance company could have settled the case within the policy limits) but, instead, is a Scenario Three fact situation in which the insured settled within the policy limits over the objection of its insurance company that was providing coverage and a defense.

The parties have not cited, and I am not aware of, any Pennsylvania appellate court case law that has addressed an insured's indemnification claim against an insurer to recover money the insured paid to settle a claim where (1) the claim was settled within the policy limits, (2) the insurer was providing coverage and a defense, and (3) the insurer disagreed with the decision to settle.

As I previously stated, each party has submitted a proposed standard to be applied in determining the coverage obligations of the insurer in the circumstances where an insured settles an underlying covered claim without the consent of an insurer that is providing coverage and a defense. Neither party offers a fallback position. Thus, my task is to determine which proposed standard is most consistent with the Pennsylvania case law.

The insured is seeking a ruling that the court should recognize its decision to settle rather than the decision of the insurance company not to settle as long as the settlement is reasonable and entered into in good faith. See standard proposed by Babcock/Atlantic at page 2 of this Opinion.

Since there are no formulas for valuing personal injury claims, there is a wide range of decisions to accept or to reject settlement demands that may meet a reasonableness standard. Furthermore, negotiating tactics also come into play in determining whether conduct is reasonable. A decision by an insurance company to reject what would appear to be an attractive demand is not necessarily unreasonable because of the possibility that an even more attractive demand may be made in the future coupled with a belief that the demand which the insurance company is rejecting will be available at a later date. See, e.g., *Trustees of the University of Pennsylvania v. Lexington Ins. Co.*, *supra*, where the Court recognized the danger that the insured would enter into an unreasonably high settlement (815 F.2d at 901 n.1) and that "At the margins, a settlement's good faith and reasonableness may be hard to disprove." *Id.* at 902.

Because many decisions can meet the reasonableness standard, if I accepted plaintiffs' proposed standard, I would be transferring to the insured the authority which the policy gives to the insurer to control the litigation. Furthermore, I would be applying the same standards that are applied in Scenario One where the insurer has denied coverage and is not providing a defense.

It is in the insured's interest that the case be settled at any amount within the policy limits. It has no incentive to reject a demand that is at the high end of a reasonableness standard. It is the insurer's interest, on the other hand, to resolve the case through a defense verdict or a payment at the low end of the reasonableness standard. Consent to settlement clauses should be enforced in Scenario Three fact situations because they permit the entity whose money is at stake to negotiate with the other side and to try those cases that may result in a defense verdict or a verdict less than the final demand.

For these reasons, I reject Babcock/Atlantic's contention that the standards governing Scenario One should also govern Scenario Three.

ANI'S PROPOSED STANDARD

I next consider ANI's proposed standard: the Scenario Two standard established by *Cowden* and its progeny. ANI states that this standard that it is proposing does not give ANI an "unfettered" right to control settlement, or to otherwise adopt unreasonable positions. Rather, the right to control settlement decisions is bounded by a duty to consider in good faith whether to settle or try covered claims.² ANI's Reply Brief, p. 5.

I agree with ANI that the use of the *Cowden* standard, as opposed to the standard proposed by Babcock/Atlantic (see page 15 of this opinion), is more consistent with Pennsylvania case law. In the *Cowden* fact situation in which the insured has been harmed by the decision of the insurance company not to settle, the consent to settlement clause protects the insurance company's decision unless bad faith is established. It would be difficult to justify the use of a more relaxed standard for the situation in which Babcock/Atlantic might never have been harmed by the decision of ANI to oppose the settlement which Babcock/Atlantic proposed.

I recognize that in *Cowden*, the insured was seeking recovery in excess of the policy limits but this would not justify the adoption of the only standard proposed by Babcock/Atlantic that the insurance company that is providing a defense and coverage loses its contractual right to control the litigation without any showing of bad faith.

For these reasons, I will enter a court order which selects the *Cowden* standard proposed by ANI³ to govern the situation in which an insurance company that is providing coverage and a defense does not consent to a settlement within policy limits proposed by the insured.

ORDER OF COURT

Upon consideration of the motions of the parties for a ruling on the legal standards to be applied in determining ANI's insurance coverage obligations,

It is ORDERED, ADJUDGED, AND DECREED that the *Cowden* standard will be applied in this litigation upon a showing that ANI did not give its consent to a settlement proposal within policy limits at a time when ANI was providing coverage and a defense.

BY THE COURT:
/s/Wettick, J.

Dated: December 1, 2009

¹The Court cited *Daley-Sand v. West American Ins. Co.*, 564 A.2d 965 (Pa.Super. 1989)—uninsured motorist coverage; *Alfiero, supra*—Scenario One; and *Birth Center, supra*—Scenario Two.

²ANI states that an insurer either acts in good faith or bad faith. ANI Reply Brief at 5 n.1.

³While I am adopting the *Cowden* standard, I do not consider at this time what Babcock/Atlantic must show in order to establish bad faith.