

# PITTSBURGH LEGAL JOURNAL

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# PLJ

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

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

[www.acba.org](http://www.acba.org)

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Circulation 6,331

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## OPINIONS

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**Nello Fiore v.  
County of Allegheny, Pennsylvania**

*Expert Testimony—Fitzmartin Case*

1. Plaintiff claims an ownership interest in all of the coal contained within those portions of the “Pittsburgh Seam” of coal located in South Park Township, Allegheny County, Pennsylvania. The surface of the subject property lies in an area designated as “South Park,” component of the Allegheny County Park System.

2. Plaintiff sought to enter said property for the purpose of core drilling to determine the location of the coal, the amount of coal contained and the most feasible means of mining that coal.

3. Crux of litigation is whether Plaintiff must obtain permission from Allegheny County to strip mine portions of the “Pittsburgh Seam” that he believes he owns.

4. Allegheny County denied Plaintiff access to enter the property to begin the process of mining the coal.

5. It was not error for the trial court to admit opinion testimony on the ultimate issue in the case from an attorney who testified that the lack of specific language in the grant to allow strip mining was intended to limit the grantee to deep mining only.

6. The trial court did not err in holding that the language of the grants at issue were not general enough or broad enough to include strip/surface mining as set forth in *Commonwealth v. Fitzmartin*, 102 A.2d 893 (Pa. 1954). In *Fitzmartin*, the Court advanced a four (4) factor to determine whether strip mining may be an appropriate method of extraction of subsurface minerals when the deed is silent as to the acceptable method of mining.

7. Court did not find the surface of property in South Park Township to be “unimproved terrain,” the fourth factor in the *Fitzmartin* case.

(JoAnn F. Zidanic)

Thomas W. King, III for Plaintiff.

Michael H. Wojcik for Defendant.

No. GD 08-021519. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**OPINION**

Della Vecchia, J. and McCarthy, J., December 22, 2009—This matter comes before the Commonwealth Court on the appeal of Nello Fiore, Plaintiff (Plaintiff or Fiore) from the Memorandum and Order of this Court dated August 17, 2009.

**1. BACKGROUND**

Nello Fiore, Plaintiff in the above matters, filed two separate actions at the above numbers, the first being a declaratory judgment action at GD 08-21518 and the second being a Petition for the Appointment of a Board of Viewers, i.e. a de facto taking at GD 08-21549 regarding coal rights under a certain parcel of land in a public park known as South Park, which is owned and operated by Allegheny County.<sup>1</sup> The purpose of both actions is to obtain the right for or recognize the right of the Plaintiff to “strip mine” certain coal contained in a section of the Park without the permission of the surface owner, i.e. Allegheny County.

This matter was assigned to Judge Michael A. Della Vecchia, and by his request, Judge Michael E. McCarthy joined him in the resolution of these matters.<sup>2</sup> The parties specifically requested of the Court at a status conference on December 22, 2008, that the Court first resolve the issue of whether or not Plaintiff has the right to employ a strip mining method to extract coal from the subject property. The Court agreed to the parties’ request; and accordingly did not and has not ruled upon the pending Preliminary Objections.

The coal underlying the subject property was severed from the surface by Deeds from James W. Stewart to Albert C. Rohland (Deed Book Vol. 1161, Pg. 487 (dated February 15, 1902); Albert C. Rohland to the Pennsylvania Mining Company (dated March 6, 1902). The severance was not by reservation but by grant. The deed to Pennsylvania Mining Company is recorded in the Allegheny County Clerk of Records Office at Deed Book 1180 Page 148.

Thereafter, the March 6, 1902 Deed was corrected by Deed dated April 30, 1909 from Albert C. Rohland and Elizabeth G. Rohland to Pittsburgh Coal Company (formerly Pennsylvania Mining Company), now known as Consolidation Coal Company. This severance was also by direct grant and not by reservation. Said Deed is recorded in the Allegheny County Clerk of Records Office at Deed Book 1638 Page 65.

Plaintiff inherited his interest in the mineral rights from his brother, Fred Fiore. The late Fred Fiore had acquired said coal rights in a deed dated March 4, 1985 from Consolidation Coal Company. Said deed is recorded in the Allegheny County Clerk of Records Office at Deed Book 7233 Page 318.

Plaintiff claims an ownership interest in all of the coal contained within those portions of the “Pittsburgh Seam” of coal located in South Park Township, Allegheny County, Pennsylvania. The surface of the subject property lies in an area designated as “South Park,” a component of the Allegheny County Park System. The crux of this litigation is whether that circumstance requires Fiore to obtain permission from Allegheny County to strip mine portions of the “Pittsburgh Seam” that he believes he owns.

Plaintiff sought to enter said property for the purpose of core drilling to determine the location of the coal, the amount of coal contained and the most feasible means of mining that coal. Plaintiff insists that he has the right to extract the subject coal by strip and/or surface mining methods. Plaintiff further asserts that there are 716,700 tons of coal contained in said tract.

The dispute arose when, on or about June 17, 2008, Plaintiff communicated his intention and was denied access by Allegheny County to enter the property to begin the process of mining the coal. The denial was communicated by letter dated July 2, 2008, from the office of Allegheny County Chief Executive, the Honorable Dan Onorato.<sup>3</sup>

The Complaint as filed alleges that the value of metallurgical grade coal, the type that Plaintiff believes is under the subject property, is valued at One Hundred Forty-Three Dollars (\$143) per ton. Based on these figures, Plaintiff contends that the coal rights at issue are valued at One Hundred Two Million Four Hundred Eighty Eight Thousand Dollars. (\$102,488,000), (See, Complaint, Exhibit D).

Despite Plaintiff’s estimate of the value of the coal, said rights were purchased for Five Thousand Dollars (\$5,000) by Plaintiff’s brother, Fred Fiore, in 1985. Additionally, in September 1997, in the inventory filed in his capacity as Executor for the Estate of

*Fred Fiore, Deceased, Plaintiff reported value of the coal rights at One Hundred Dollars (\$100). See, Allegheny County Will Book Volume 567, Page 1096.*

## II. PROCEDURAL HISTORY

This cause of action was initiated by a Complaint in Civil Action – Declaratory Judgment, filed on October 9, 2008 at General Docket (hereinafter “GD”) number 2008-02158. Also, a Petition for Appointment of Viewers, asserting a *de facto* taking was filed at GD 2008-021549 based on the same facts and allegations. Allegheny County filed Preliminary Objections in both actions.

A status conference was held on December 22, 2008. The parties, through their respective counsel, requested that the Court answer the threshold question of whether or not the coal grant in Plaintiff’s chain of title authorized surface mining of the coal without the permission of the surface owner. On March 3, 2009, an Order was issued scheduling an argument regarding Plaintiff’s coal interest for April 15, 2009.<sup>4</sup>

Following said argument, this Court determined that, in light of Plaintiff’s great reliance on the *Fitzmartin* case, that a factual hearing should be held to determine whether or not the four factors used to establish the extent of a grantee’s mining rights under *Fitzmartin* were met in the present case. The Court did so without ruling as to the precedential impact of *Fitzmartin* in this matter.

On April 24, 2009, this Court issued an Order stating,

[H]aving heard argument on April 15, 2009, regarding the issue of “whether or not the grant of coal rights in Plaintiff’s chain of title confer upon Plaintiff the right to strip mine on the subject real estate” and the Court, after hearing argument and reviewing Briefs and Supplemental Briefs, has decided that a hearing is required to determine the following:

1. Whether or not Plaintiff’s case has met the criteria for surface mining set forth in the four factors of the *Fitzmartin* case.
2. The exact record of prior litigation involving the Plaintiff of his predecessors-in-title claim to coal and mining rights within South Park in 1978 and 1979 and any other years that litigation occurred.
3. What governmental entity(ies)(local, county, state or federal) has/have the authority to grant Plaintiff the right to mine the subject property, surface or deep, and what steps need to be taken by Plaintiff to obtain legal approval to mine the subject property.

(Order dated April 24, 2009)

The hearing was scheduled for July 20 and 21, 2009. The parties were instructed to file Pre-Hearing Statements with the Court ten (10) days prior to the hearing. In anticipation of said hearing, the Court (both judges), with all parties present, viewed the property on July 13, 2009.

Following the view and a two-day hearing, the Court authored a Memorandum and Order of Court, which was filed on August 18, 2009. The Court held that Plaintiff does not meet all of the qualifications in the *Fitzmartin* case, if in fact that case is still controlling (discussed *infra*). The Court held that the mere fact that the subject deeds do not specifically ban strip mining does not mean that this type of mining is permitted.

The Plaintiff took exception to this ruling and on September 14, 2009, and filed a Notice of Appeal to the Commonwealth Court. Based on this Notice and pursuant to Pa.R.C.P. 1925(b), this Court directed the Plaintiff to file a Concise Statement of Matters Complained of on Appeal. (Order dated September 28, 2009). Said Statement was timely filed on September 30, 2009, placing this matter before the Commonwealth Court of Pennsylvania.<sup>5</sup>

## III. ISSUES RAISED ON APPEAL

Plaintiff raises the following claims of error:

1. The Trial Court committed an error of law on holding that the Plaintiff does not possess the right to strip/surface mine the property subject to this action.
2. The trial court’s finding that Plaintiff does not have the right to strip/surface mine the subject parcel is not supported by the record.
3. The trial court erred in finding that the property subject to this case is “improved” within the meaning of *Commonwealth v. Fitzmartin*, 102 A.2d 893 (Pa. 1954).
4. There is not sufficient factual evidence of record to support the finding that the property subject to this action is “improved” within the meaning of *Commonwealth v. Fitzmartin*, 102 A.2d 893 (Pa. 1954).
5. The trial court committed an error of law in finding that the property subject to the present action is “improved” within the meaning of *Commonwealth v. Fitzmartin*, 102 A.2d 893 (Pa. 1954).
6. The trial court erred in holding that the language of the grants at issue are not general enough or broad enough to include strip/surface mining as set forth in *Commonwealth v. Fitzmartin*, 102 A.2d 893 (Pa. 1954).
7. The trial court erred in holding that the character of the property not subject to this action, i.e. adjoining property, is relevant to the matters at issue.
8. The County Parks Director’s testimony, and the record as a whole, was insufficient to support a finding that the Property subject to this case is “improved” within the meaning of *Commonwealth v. Fitzmartin*, 102 A.2d 893 (Pa. 1954).
9. The trial court’s finding that deep mining was the exclusive method of coal extraction is not supported by the record and an error of law.
10. The trial court erred in finding that a “mountain bike trail” is an “improvement” within the meaning of *Commonwealth v. Fitzmartin*, 102 A.2d 893 (Pa. 1954).
11. The trial court failed to consider the previous litigation involving the coal rights subject to this case in that the Defendant herein was a party to litigation in 1978 and 1979. The Defendant County sought to have the subject coal mined

by the surface mining method in 1979 by another mine operator. As settlement of the subsequent claim for Interference with Contractual relations, the subject coal was transferred to the Plaintiff's predecessor in interest. Said events establish Defendant's consent/concession that the subject coal would be mined by the surface/strip mining method.

12. The trial court failed to consider and recognize the Defendant's prior settlement and consent in the chain of [title] of the coal subject to this action. That is, the trial court failed to hold, contrary to the evidence of record, that the County consented in litigation filed in 1978 and 1979 that the subject coal would be surface/strip mined by the Plaintiff's predecessor in interest, Fred Fiore.

13. The trial court erred in admitting opinion testimony from an attorney relative to the ultimate issue for the Court. The question before the Court was the interpretation of the language contained in deeds and the attorney invaded the province of the Court.

14. The trial court erred in applying standards for deed interpretation when it found that the subject description did not permit extraction of the coal by the strip/surface mining method when it held that "deep mining was the exclusive method of coal extraction."

15. Such other matters as may be specified after receipt and review of the transcript of July 20-21, 2009 hearings.<sup>6</sup>

### III. DISCUSSION

For the purpose of setting forth a coherent discussion of the issues raised by Plaintiff Fiore, the Court has made the following groupings:

- A. Interpreting the coal clauses in the subject deeds (see matters complained of numbers 1, 2, 6, 9, 13 and 14).
- B. In determining whether or not the *Fitzmartin* case standards were met by Plaintiff Fiore (see matters complained of numbers 3, 4, 5, 7, 8 and 10).
- C. In determining the effect of prior litigation (see matters complained of 11 and 12).
- D. General Discussion

This Court makes the following response to Plaintiff Fiore's allegations of error:

#### A. Regarding Interpreting the Coal in The Subject Deeds And Related Matters:

Plaintiff reduces the pertinent language of the underlying instruments to the following:

##### The 1902 Grant:

All the coal...in and under all that certain tract of land.... Together with all and singular property improvements ways, waters, water-courses, rights, liberties, privileges, hereditaments and appurtenances whatever thereunto belonging or in anywise appertaining and the reservations and remainders rents, issues and profits hereof; and all the estate, right, to the interest property, claim and demand whatsoever, of the said party of the first part, in law, equity or otherwise howsoever of in and to the same and every part thereof.

##### The 1909 Grant:

Together with the right to mine and remove all and any part of the coal, without being required to provide for the support of the overlying strata or surface, and without being liable for any injury to the same, or to anything thereon or therein by reason therefore by reason of the manufacture of the same, or other coal into coke, and with all reasonable privileges for ventilating, punching and draining the mine together with the free and uninterrupted right of way through and under said lands, and to build, keep and maintain, roads and ways, in and through said mines forever, for the transportation of said coal, and if coal and other things necessary for mining purposes, from and to other lands which now or hereafter may belong to said party of the second part, its successors and assign. This deed being made for the purpose of vesting mining rights in the said Pittsburgh Coal Company of Pennsylvania, formerly Pennsylvania Mining Company. Together with all and singular treatments, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversions, remainders, rents, issues and profits thereof; and also all the estate, right, title, interest, property, claim and demand whatsoever, as well in as in equity of the said parties of the first part, of, in or to the described premises, and every part and parcel thereof, with the appurtenances. To Have and To Hold, all and singular the above mentioned and described premises together with the appurtenances unto the said party of the second part, its successor and assigns forever.

Fiore maintains that the aforementioned grants are as general as could be fashioned. Fiore interprets this language liberally, by placing emphasis on the language "free and uninterrupted right of way through and under said lands," which is exactly what Fiore had planned to do, *i.e.* "move through the land (surface) to extract the coal.

Fiore further maintains that he would not be responsible for any damage to the property, noting that the 1909 grant explicitly provides that the grantee may "mine and remove all and any part of the coal, without being required to provide for the support of the overlying strata or surface, and without being liable for any injury to the same, or to anything thereon or therein" Plaintiff interprets the aforesaid language as a license to strip or surface mine the subject property.

Strip mining, as the term indicates, is the stripping away of the earth surface and the horizontal withdrawal of the mineral deposits at hand. Shaft mining involves the sinking of a vertical shaft into the ground and the developing from that point of tunnels and galleries which serve as vantage points from which to withdraw and [lift] the coal deposits through the shaft. Shaft mining does a minimum of damage to the outer crust of the earth; strip mining does a maximum of damage. Strip mining is affected through steam shovels and bulldozers which turn up the top layer of the earth. (*Commonwealth v. Fitzmartin*, 102 A.2d 893, 894-5 (Pa. 1954), *citing Rochez Bros., Inc. v. Duricka*, 97 A.2d 825, 826 (Pa. 1953)).

Plaintiff does acknowledge that he has a responsibility to reclaim the property after the proposed surface mining is complete pursuant to the laws and regulations of the Commonwealth. The Plaintiff will further acquiesce to "all rules and regulations of the Department of Environmental Protection which will govern the environmental impact of said mining operations" if he was to be

permitted to mine the subject property.

In summary, Plaintiff insists that the grant in the present case is sufficiently broad to include strip mining, as evidenced by the absence of a prohibition against strip mining in the language of the grant. Further, Plaintiff claims a right to mine all of the coal. Additionally, Plaintiff maintains he has a release of obligation to provide surface support and a waiver of liability for any surface damage that might occur. Plaintiff submits, that, in any event, inasmuch as the surface is unimproved, any surface damage would be negligible. (Brief of Fiore Regarding Coal Rights at p. 20).

Plaintiff takes exception to this Court's decision to allow the County to call Samuel L. Douglas as an expert in the field of writing and interpreting mineral rights. Mr. Douglas is an attorney with over fifty (50) years experience in a practice that specializes in mineral-coal, oil and gas rights. (Tr. at 175-76). Mr. Douglas has participated in the creation or examination of "thousands of coal severance deeds." (See Tr. at 178)

Mr. Douglas served as the coordinator and president of the Energy Mineral Foundation, a foundation engaged in the edification of lawyers by way of sharing case law concerning the subject matter at issue in the present case. (Tr. at 178-9). Plaintiff did not object on the record to Samuel L. Douglas being qualified as an expert by this Court, but, on the contrary, recognized Mr. Douglas as "an outstanding attorney in this county." (Tr. at 179). Moreover, to the extent that Mr. Douglas proffered background on conveyances that grant surface mining rights and practices historically observed within this region, such testimony was certainly not similar to the sort introduced in *Commonwealth v. Neal*, 421 Pa.Super. 478, 618 A.2d 438 (1992), as to the effectiveness of counsel. Plaintiff's reliance upon *Neal* is misplaced.

Furthermore, it was made explicit to the parties that Mr. Douglas was being allowed to render an opinion that this Court was free to accept or reject. (Tr. at 180). It was the opinion of Mr. Douglas that it would have been, "highly unusual for any case to say without the word 'strip mining' to allow strip mining. And I certainly don't think strip mining was anticipated in this case, or surface mining, whatever you want to call it by today's nomenclature." (Tr. at 187).

Mr. Douglas went on to explain that particular language used in the conveyance, "under," "across," "ventilation," "waiver of surface support" as well as language that was absent, such as "upon" or "waiver of lateral support." Said language, or lack thereof, leads Douglas to conclude that the grant was intended to limit the grantee to deep mining only. (Tr. at 188-9). This opinion was rendered over the objection of Plaintiff. (Tr. at 189).

Pennsylvania law allows expert testimony as to the ultimate issue. See *Commonwealth v. Daniels Co.*, 390 A.2d 172 (Pa. 1978); *Cooper v. Metropolitan Life Insurance Co.*, 186 A.2d 125 (Pa. 1936). "The trial judge has discretion to admit or exclude expert opinions on the ultimate issue depending on the helpfulness of the testimony versus its potential to cause confusion or prejudice." *McManamon v. Washco*, 906 A.2d 1259, 1278-79 (Pa.Super. 2006). Therefore, "the trial court will not be reversed in ruling upon the admissibility of testimony to the ultimate issue in the case unless the trial court clearly abused its discretion and actual prejudice occurred." *Childers v. Powerline Equipment Rentals, Inc.*, 681 A.2d 201, 210 (Pa.Super. 1996). Additionally, Pa.R.E. 704, entitled "Opinion on Ultimate Issue," provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

Plaintiff had the opportunity to introduce expert testimony on any pertinent matter. Plaintiff's counsel conceded Douglas was an expert, but saw no value in introducing expert testimony to rebut Douglas' testimony (Tr. at 179-181). Plaintiff did, however, introduce testimony from two experts (Kenneth Koten (Tr. 110 *et seq.*) and Jonathan Hiser (Tr. 82 *et seq.*). Both testified that the best way to mine the coal on the subject property was by strip mining. This testimony did not significantly aid the Court in resolving the underlying issue of whether or not Plaintiff possessed the right to strip the subject property without the County's permission.

More problematic for Plaintiff was testimony regarding the "red stone seam" that sits on top of the coal owned by Plaintiff (Tr. at 257-59; see also Exhibit 28). Mr. Simonetti testified that the red stone seam overlies the Pittsburgh seam, *i.e.* the Plaintiff's seam. The witness testified that, in order for Plaintiff to surface mine the property, he would need to also obtain permission to surface mine the red stone seam in which Plaintiff has no ownership interest. (Tr. at 260).

#### B. Regarding the *Fitzmartin* case:

Plaintiff maintains there are no permanent improvements or buildings on the subject property, no railroad lines, no public highways or any improvements of any kind that would be affected by the proposed surface mining. Plaintiff relies heavily on the *Fitzmartin* case. The "narrow question" involved in *Fitzmartin* was: did the reservation of mineral rights in the several deeds of conveyance of that particular tract of land give the defendants, the lessees of the mineral rights, the right to remove coal and other minerals from the land of the plaintiff by the open pit or strip mining method, or were they restricted to shaft or deep mining? See *Fitzmartin*, 102 A.2d 893, 894.

As in the instant case, the deed in *Fitzmartin*, did not clearly set forth the rights of the parties. "Where a deed or agreement or reservation therein is obscure or ambiguous, the intention of the parties is to be ascertained in each instance not only from the language of the entire written instrument there in question, but also from a consideration of the subject matter and of the surrounding circumstances." (*Id.*, string cite omitted).

The courts of this Commonwealth have routinely attempted to give effect to the reasonable intent of the parties at the time of conveyance when determining the rights to mine coal under a particular grant. *Heidt v. Aughenbaugh Coal Company*, 176 A.2d 400, 401 (Pa. 1962). It is the interpretation of the words of the document which determines whether the method of removing the coal may be by strip mining or another method. See, *Mt. Carmel Coal Co. v. M.A. Hanna Co.*, 89 A.2d 508, 510 (Pa. 1952)).

*Fitzmartin* advanced a four (4) factor test to determine whether strip mining may be an appropriate method of extraction of subsurface minerals when the deed is silent as to the acceptable method of mining: (1) the general language in the grant is broad enough to include strip mining, (2) there is no prohibition against strip mining, nor limitation to strip mining, (3) the owner clearly has the right to mine all the coal, together with a release of the right of support and all damages to the surface, and (4) the nature of the land is unimproved terrain.

Plaintiff contends that the four (4) factors considered by the Supreme Court in *Fitzmartin* are met in this case. Plaintiff summarizes that case to stand for the general proposition that ownership of a general grant of coal together with an absence of any obligation of surface support, without language to the contrary, accords a right to strip mine. Based upon that proposition, Plaintiff asserts that there is no question as to his "right to enter onto the subject property, explore the subject tract for the location and quantity of the said coal, and conduct surface mining operations on said tract, all without the consent of the Defendant surface owner."

Plaintiff maintains, consistent with the fourth factor of *Fitzmartin*, that the subject land is unimproved, differentiating the land from that described in *Rochez Bros, Inc. v. Duricka*.<sup>7</sup> In *Rochez Bros.*, the Supreme Court denied the mineral estate owner the right to strip mine the property based in part upon the fact that the property was agricultural and contained rich soil, ideally fit for farming. Plaintiff maintains that the subject property is more akin to the property in *Commonwealth v. Fisher*,<sup>8</sup> where the tract in question was unimproved mountain land and the Supreme Court ruled that the property could be strip mined.

Perhaps Plaintiff's most accurate assertion is that, "the case law interpreting documents regarding coal grants and the right to engage in surface/strip mining is fact specific...and that the "Pennsylvania appellate courts have issued decisions that are seemingly in conflict, but, upon close reading, are determined based upon the facts of the particular case." (Brief of Plaintiff below Regarding Coal Rights at p. 20). This case is no different. Based on the facts of this case, as applied to the body of law in this area, the Court found that the Plaintiff failed to prove compliance with factor one (1) and four (4).

At the time of the original conveyances, strip mining was not employed in the Commonwealth of Pennsylvania or in the Allegheny County area. Further, when there is no expressed intent in the deed concerning the means by which coal is to be mined, neither strip mining nor deep mining being specifically mentioned, the deed merely referring to 'mining' in general, the intent of the parties must therefore be implied. *Stewart v. Chernicky*, 266 A.2d 259, 263 (Pa. 1970)

In this case, the language of the grant states, "without being required to provide for the support over the overlying strata or surface and without being liable for any injury to same," this language has been held to refer specifically to deep mining operations. See, *Rochez Bros.*, 97 A.2d 825, 826. This Court cannot find that the grantor contemplated its property being decimated by bulldozers and steam shovels, resulting in a "maximum of damage" and forever changing the landscape of the property by a grant method that was not then prevalent in this area.

As to the fourth factor; the Court did not find the surface of said property to be "unimproved terrain." The County's Director of Parks, Andrew Baechle, credibly testified as to a 2002 study in which the property in question was selected as a "biological zone to be operated as open space reserve." (Tr. at 119-121). Mr. Baechle went on to testify that if Plaintiff were to be permitted to strip mine the property, the property would not be restored to its current state for one hundred (100) years. (Tr. at 126). Furthermore, the County master plan recommends that this area be preserved as a biological zone, which is the home of thirty (30) species of plants and twenty-seven (27) species of birds. (Tr. at 122-26).

Although such information was very powerful and thought provoking, perhaps more compelling in the context of this litigation was the fact that there are walking trails which are designated on maps provided by the County. In addition bike trails transverse the subject tract of land. (Tr. at 126). Mr. Baechle testified that he actually has ridden his bicycle on the trails (Tr. at 154).

The County's argument in this respect is bolstered by a grant of Two Hundred Fifty Thousand Dollars (\$250,000) the County received to improve and expand the trails and the County's intention to further utilize the property. (Tr. at 127). Additionally, the subject property is surrounded by an amphitheater, a game reserve that houses South Park's famous buffalo, a skateboard park, tennis courts, a wave pool and a BMX track that is regarded as the number one track of this kind in the nation over the past three (3) years. (Tr. at 127-28).

The instant case is easily distinguishable from *Fitzmartin*. The *Fitzmartin* Court found significant the fact that the surface of said property was uninhabited, unimproved, mountainous terrain. This Court finds the property more akin to *Rochez Bros.* than *Fitzmartin* and adopts the County's description of the subject property, in that, "South Park is part of the County's Regional Park System utilized by residents of the County for a vast array of recreational purposes. It is neither uninhabited nor unimproved and is a rustic oasis in a heavily urbanized county."

#### C. Regarding the Effect of the Prior Litigation:

Plaintiff takes exception with this Court's failure to consider or recognize the prior litigation, settlement and consent in the chain of title of the coal subject to this action taking place in the late 1970s. Plaintiff is mistaken; this Court considered this prior litigation but found it unfavorable to Plaintiff. This Court found significant that Consol, which granted rights to Fred Fiore in the 1985 deed, stated through that company's then vice president, Thomas G. Norris, stated that any entity planning to surface-mine the subject coal tract must obtain surface mining rights from the county. (Tr. at 219).

This Court finds it difficult to accept that Consol, a company actively engaged in the mining business would find it necessary to obtain Allegheny County's consent to surface mine when no such consent was required. This Court finds further difficulty in accepting the fact that Consol would sell said rights for Five Thousand Dollars (\$5,000) when the alleged true value is over One Hundred Million Dollars (\$100,000,000, present values accounted for).

#### D. General Discussion

Generally speaking, although this Court's ultimate decision is not predicated on this point, this Court finds that Plaintiff's plan for strip mining the subject property is further flawed by an inability to obtain the proper permits necessary to begin his mining operation. Both testimonial and documentary evidence was introduced asserting that Plaintiff would not be able to obtain the mandated government permits to commence a surface mining operation on the subject property. In this connection, Defendant called Thomas G. Simonetti, a senior engineer employed by the Boyd Company whose position since 1989 was to examine permitting issues as they relate to surface mining. Mr. Simonetti credibly testified as to his familiarity with Pennsylvania's Surface Mining Conservation and Reclamation Act, as well as the federal counterpart, the Federal Surface Mine Control and Reclamation Act. (Tr. at 230-39).

Mr. Simonetti testified that "the [proposed] surface mining activities are a very disruptive process. And it would certainly change the characteristics of this Sleepy Hollow area and its current use in a public park." (Tr. at 242). The witness was asked to turn his attention to 25 Pa. Code Section 86.102, relating to where mining is prohibited or limited.<sup>9</sup> The regulations involve the prohibitions and limitations of mining where publicly owned parks would be adversely affected. (Tr. at 243). Said limitations would require permission not only from Allegheny County, the owner having jurisdiction over the park, but also from the regulatory authority, the Department of Environmental Protection (hereinafter "DEP"). Further, in advance of filing an application for a surface mining permit, Plaintiff would need to file a Notice of Intent to Explore with the DEP. (Tr., at 244; See also, Exhibits 11B, 16). At the time of this litigation, none of the requisite notices or applications had been submitted. It must also be noted that the municipality in which the subject coal is located, South Park Township, has an Ordinance prohibiting mining.

Additionally, and apart from all of the above, Pennsylvania law is rich with cases that seem to militate against Plaintiff Fiore's position:

A party engaged in strip mining must either own (or lease from one who owns) both the estate of coal and the surface estate Or own (or lease from one who owns) a coal estate which includes the right to employ the strip mining method, for such a process entails the actual stripping away of the outer covering of the terrain.

*Owens v. Thompson*, 385 Pa. 506, 123 A.2d 408 (1956)

And this Court does not wish to interfere with its use or hinder its economic viability. Yet we cannot help but realize that 'in view of the surface violence, destruction and disfiguration which inevitably attend strip or open mining, \* \* \* no land owner would lightly or casually grant strip mining rights, nor would any purchaser of land treat lightly any reservation of mining rights which would permit the grantor or his assignee to come upon his land and turn it into a battleground with strip mining'.... Therefore, 'the burden rests upon him who seeks to assert the right to destroy or injure the surface'...to show some positive indication that the parties to the deed agreed to authorize practices which may result in these consequences. Particularly is this so where such operations were not common at the time the deed was executed.

What the parties manifestly intended was that the coal was to be removed by the method, then known, and accepted as usual and commonplace. This was vertical tunnel, or shaft mining. Needless to say, the nature and consequence of strip mining are vastly different. If what the defendant asserts was intended, the deed should have clearly said so. If any such rights were intended and reserved, then every public and private building in the anthracite coal region could be demolished, the surface ravaged, and the entire area leveled in ruin and desolation. Surely, no court of law should construe a writing to effectuate such consequences, unless the terms thereof are unmistakable and beyond doubt.

*Wilkes-Barre Twp. School Dist. v. Corgan*, 170 A.2d 97, 99-100, (Pa. 1961; internal citations omitted)

The specific question presented is whether the reservations quoted above allow the plaintiff company to remove coal through strip mining methods or whether it is restricted to shaft mining. Strip mining, as the term indicates, is the stripping away of the earth surface and the horizontal withdrawal of the mineral deposits at hand. Shaft mining involves the sinking of a vertical shaft into the ground and the developing from that point of tunnels and galleries which serve as vantage points from which to withdraw and lift the coal deposits through the shaft. Shaft mining does a minimum of damage to the outer crust of the earth; strip mining does a maximum of damage. Strip mining is effected through steam shovels and bulldozers which turn up the top layer of the earth as easily as a can opener lays bare the contents of a box of sardines.

It is obvious, in view of the surface violence, destruction and disfiguration which inevitably attend strip or open mining, that no landowner would lightly or casually grant strip mining rights, nor would any purchaser of land treat lightly any reservation of mining rights which would permit the grantor or his assignee to come upon his land and turn it into a battleground with strip mining.

There is nothing in the two quoted reservations which would cause the defendants to assume that they had contracted to allow steam shovels and bulldozers to invade their farm. In the 2.25 acres tract, all that is conveyed is the '\* \* \* right to enter in, upon and under the lands \* \* \* for the purpose of \* \* \* mining.' This phraseology contains no right to remove the overlying surface. If the grant was intended to include strip mining privileges, the immunity from responsibility for 'damages to the surface \* \* \* or the failure to provide support for the overlying strata' would be meaningless because strip mining encompasses the very tearing away of the overlying strata.

*Rochez Bros., Inc., supra*, at 826

#### IV. Conclusion

This Court granted Plaintiff an evidentiary hearing, argument and a view of the subject property. Nothing more could have been done to accommodate Plaintiff. After all of same, it seems abundantly clear to this Court that the Plaintiff does not possess the right to strip mine those portions of the Pittsburgh Seam that he owns underlying the Defendant's public park. For the reasons aforementioned, this Court respectfully requests the Commonwealth Court of Pennsylvania to affirm this Court's Memorandum and Order dated August 17, 2009.

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

Dated this 22nd day of December 2009

<sup>1</sup> The Plaintiff had filed another action at GD 08-21519, which he subsequently discontinued. The County has filed Preliminary Objections to both pending actions.

<sup>2</sup> Judge Della Vecchia is the former Recorder of Deeds of Allegheny County and Judge McCarthy is the former Chairman of the Board of Viewers of Allegheny County.

<sup>3</sup> The Court questioned whether or not the letter from the County's Chief Executive in fact denied Fiore permission to enter or required Fiore to perform certain acts precedent to entering on the subject property. (Tr. at 82).

<sup>4</sup> This Court did not agree to rule on the Preliminary Objections generally, but merely to opine as to Plaintiff's right to strip mine under the subject deeds.

<sup>5</sup> Whether or not this matter is properly before the Commonwealth Court is for that Court to decide.

<sup>6</sup> As of this writing, the Court has not been provided with any additional matters complained of.

<sup>7</sup> 97 A.2d 825 (Pa. 1953)

<sup>8</sup> 72 A.2d 568 (Pa. 1950)

<sup>9</sup> The approximate federal counterpart may be found at 30 CFR Section 761.11

### 3D Amusements Inc. v. Celebrations and More, Inc.

#### *Petition to Open Judgment Entered by Confession—Breach of Contract—Burden of Proof*

1. A clerical error resulting in an incorrect amount due in a confessed judgment can simply be corrected where the amount due is undisputed.

2. The defendant failed to adduce sufficient evidence that the plaintiff had breached the contract sufficient to create a question of fact for a jury in order to justify the opening of the confessed judgment. Specifically, the defendant did not demonstrate that his late notice of termination of a contract to the plaintiff was reasonable under the circumstances nor did he show that the plaintiff did not suffer prejudice from the late notice.

(Mary Long)

Michael F. Fives for Plaintiff.

M. Lawrence Shields III for Defendant.

No. GD 08-19235. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

#### MEMORANDUM IN SUPPORT OF ORDER

Friedman, J., December 30, 2009—Plaintiff confessed judgment against Defendant for the breach of a contract between them that allegedly was renewed for one year because Defendant did not properly terminate it.

Defendant filed a Petition asking this Court to either strike the judgment or open it. The basis for striking the judgment is the discrepancy between the amount stated as being due in the Complaint and the amount of the judgment actually entered. Defendant contends that this is fatal. The amount is \$13,447.89 in the Complaint; the amount of the judgment confessed is \$15,350.37. The discrepancy came from a clerical or mathematical error which Plaintiff asks that we correct. Defendant asks in the alternative that the judgment be opened if not stricken and that the error be corrected by that route. We conclude that an incorrect amount which comes from obvious overreaching would require the judgment be stricken, but an incorrect amount that comes, as is undisputed here, from a clerical mistake and which is undisputed requires only that the mistake be corrected.

This Memorandum will deal primarily with whether or not the judgment should be opened for other reasons. In order to support its Petition to Open, Defendant took the depositions of Lawrence Daurora, an owner and officer of Plaintiff, and Chris Scaff, an owner and officer of Defendant. Both depositions were taken the same day, Mr. Daurora's first and then Mr. Scaff's.

The evidence submitted by Defendant, taken in the light most favorable to Defendant, shows the following scenario. Defendant, through Arthur Scaff, the father of Chris Scaff, entered into a contract with Plaintiff dated October 10, 2003. A few years later, Arthur contracted meningitis and became disabled. He has not been declared incompetent, but his ability to understand and remember numbers is said to have been impaired. He was not deposed. In June 2008, Chris Scaff began reviewing the calculation of the commissions Plaintiff was paying Defendant from the cash collections Plaintiff made every two weeks. He did not understand why a particular amount was deducted from the bi-weekly gross. He believed the contract did not call for that and felt that Plaintiff was cheating Defendant. He raised this with Mr. Daurora on July 2, 2008 and told him Defendant was going to stop using Plaintiff's machines and would buy its own. Mr. Daurora said Defendant had made this threat not to renew before, prior to entering into the instant five-year contract dated October 10, 2003, so he told Chris Staff to be sure to follow the contract if that ended up being what Defendant wanted to do. (The contract provided, in ¶4B, that it would renew for an additional year automatically unless Defendant sent, by registered mail, its written notice of intent not to renew at least 90 days before October 10, 2008, i.e. by July 10, 2008.)

Defendant sent Plaintiff a letter on July 16, 2008, stating it was "no longer going to deal with" Plaintiff. The implication is that it also did not wish to renew. The reason given was that it regarded Plaintiff as "dishonest." Mr. Daurora's testimony was he does not have that letter in his file and does not recall seeing it before the date of his deposition. Despite the gist of Mr. Daurora's testimony being that he did not have such a letter, Defendant adduced no evidence of the letter being mailed. There is no contention that it was sent before July 10th nor that it was sent by registered mail. In early August, Defendant sent Plaintiff another letter, this one by certified mail, telling it to remove the various equipment that Plaintiff owned and Defendant leased per the contract.

Defendant says, in effect, that this pre-expiration action is not a breach of the contract but rather was a response to prior breaches by Plaintiff. Defendant also argues that it has adduced sufficient evidence of actual notice before the 90-day period of its intent not to renew and that Plaintiff was not entitled to "renew" the contract for another year.

In its brief, Defendant contends that it has three meritorious defenses to Plaintiff's claim, paraphrased below:

1. That Plaintiff is the breaching party by not paying \$5,000, so that Defendant was justified in canceling the contract and demanding that Plaintiff remove its equipment.
2. That Plaintiff is the breaching party by failing to pay Defendant the correct amount of commissions during the term of the contract, again thereby justifying Defendant's cancellation of the contract.
3. That Defendant had lawfully terminated the contract prior to asking Plaintiff to remove his equipment.

It is undisputed that the \$5,000 payment to Defendant had been promised, however, Defendant has not produced sufficient evidence of this alleged non-payment to raise a jury question.<sup>1</sup>

Defendant's deposition of Mr. Daurora elicited evidence that Plaintiff had paid Defendant in full via the father, Arthur Scaff, who had run Defendant until either 2005 or 2006 when he contracted meningitis. Defendant has adduced no evidence other than the unsupported suspicion of Chris Scaff that the \$5,000 was not paid to Defendant. Defendant has the burden of adducing sufficient evidence to require submission to a jury. Here, a jury would have to speculate.

Similarly, Defendant has adduced no evidence that supports Chris Scaff's suspicion of the miscalculation of commissions. Daurora Deposition Exhibit 1 is the relevant contract. Paragraph 3B clearly sets forth that "Touchtunes digital downloading jukebox systems have an \$80.00 per week guarantee for company [Plaintiff] and commissions paid to Proprietor [Defendant] will be 40% after the minimum guarantee is met."

Chris Scaff contends that the contract, taken literally, does not permit an initial deduction before Defendant's commission is calculated. This is incorrect, since ¶3B does call for that, as mentioned above. However, the evidence Defendant adduced from Mr. Daurora suggests that the written contract was modified orally by himself and Arthur Scaff, whenever circumstances changed during the term of the instant contract. No evidence was adduced from Arthur Scaff regarding Mr. Daurora's version of the oral

changes. In any case, Defendant has failed to raise a jury question regarding the correct method of calculation. At best, it has offered the unsupported conjecture of Chris Scaff, with whom Plaintiff never dealt until July 2, 2008, according to the evidence presented.

Since those two alleged breaches are what Defendant says justified the cancellation, that third “defense” must also fail.

Defendant says there are at least five questions to be submitted to a jury; although our conclusions regarding the insufficiency of evidence makes these questions moot, we will nevertheless discuss them, albeit somewhat repetitively. The questions Defendant says are raised are quoted below from its brief:

1. Did the Defendant validly terminate the Agreement on July 2, 2008?
2. Did the Defendant validly terminate the Agreement on July 16, 2008?
3. What, if any, actual damage did Plaintiff suffer as a result of written notice not being given by Defendant to Plaintiff on or before July 11, 2008?
4. Did the Plaintiff change its position to its detriment as a result of said notice not being given by Defendant to Plaintiff on or before July 11, 2008?
5. Is it unconscionable to give effect to the automatic renewal provision of the Agreement on the basis that termination notice was untimely under the facts and circumstances of this case?

Defendant has adduced no evidence to support a jury finding in its favor to any of the questions; in particular, it has not produced more than one person’s speculation regarding the alleged breaches by Plaintiff. It has produced no evidence to suggest that Plaintiff suffered no harm as the result of the late written notice of termination. The burden at this stage is not on Plaintiff to do anything. It is Defendant that must come forward with evidence, if only to rebut the presumption that there must have been a business reason for the 90-day notice. We cannot presume the 90-day notice provision is unconscionable *per se*, and Defendant has not produced any evidence of circumstances here that would make enforcement of the notice provision unconscionable.

Defendant cites to *Music Inc. v. Henry B. Klein Co.*, 213 Pa.Super. 182, 245 A.2d 650 (1968) for the proposition that strict enforcement of a notice period is not required where time was not made of the essence in the contract. Defendant’s reliance is misplaced. *Music Inc.* involved an appeal of a judgment entered after a trial, not a petition to open a judgment entered by confession. The burdens of adducing evidence in those two situations are vastly different. Here it is solely Defendant who must adduce sufficient evidence to raise a jury question. The standard set forth in *Music, Inc.*, regarding notice provisions such as that at issue here, is a two-pronged one, that “a finding [is permitted] that a termination notice is sufficient even though delivered later than the period specified in the contract *when the terminating party acted reasonably under the circumstances and there is no demonstrable prejudice resulting from the delayed notice.*”

Here, Defendant has adduced no evidence to suggest it acted reasonably under the circumstances nor has it adduced evidence that Plaintiff did not suffer any prejudice. At most, Defendant produced contradictory testimony from one of its owners, Chris Scaff, who says at one point in his deposition that he never saw the contract until after Plaintiff sent him a copy after the cancellation, and, at another point, that he read the contract and could not see where it allowed the deduction before commissions, and that he therefore concluded that Plaintiff was cheating. Regardless of when he himself actually read the contract, the testimony of Chris Scaff does not show that he was *reasonable* in sending the written notice on the 16th of July (by ordinary mail) or the 11th of August (by certified mail). Notice was due July 10th. The first prong of the *Music Inc.* test, reasonableness of the Defendant, is clearly not met.

Similarly, there is no evidence at all regarding the second prong, lack of prejudice to Plaintiff. Lawrence Daurora for Plaintiff admits that Chris Scaff told him on July 2, 2008 that he was not satisfied with Plaintiff’s calculation of the commissions Defendant was entitled to and that Defendant was not going to use Plaintiff’s services in the future. However, Mr. Daurora also indicated that Defendant had made similar threats in the past. Mr. Daurora further testified that he told Chris Scaff to be sure to cancel properly under the contract. Chris Scaff’s response in his own testimony was that he didn’t know that notice of non-renewal had to be in writing. His deposition was taken immediately after Mr. Daurora’s and, in that context, his failure to deny Mr. Daurora’s version of that aspect of the conversation is an implicit admission that he was reminded to check the contract if he wanted to cancel properly.

Defendant says it is entitled to have a jury evaluate Plaintiff’s credibility. However, it is Defendant, not Plaintiff, who, in order to *open a judgment*, has to *adduce* evidence to *contradict* Plaintiff’s statement. That statement is part of *Defendant’s* evidence here. Defendant had the burden to produce evidence that *untimely* notice was nevertheless *sufficient* notice *in the circumstances*. The *circumstances* shown by the evidence Defendant adduced include the un rebutted and uncontradicted “fact” that Defendant had made a similar threat at the earlier renewal period and had then carried it out by sending notice as required by the contract, after which Defendant renewed anyway. Defendant does not contest this so we have no jury question here either.

We therefore must deny both the Petition to Strike and the Petition to Open. However, we grant the Plaintiff’s request to correct the amount of the judgment. See Order filed herewith.

BY THE COURT:  
/s/Friedman, J.

Dated: December 30, 2009

#### ORDER OF COURT

AND NOW, to-wit, this 30th day of December 2009, it is hereby ORDERED that Defendant’s Petition to Strike and Petition to Open are DENIED for the reasons set forth in the accompanying Memorandum in Support of Order. Plaintiff’s request to correct the amount of the judgment to \$13,447.89 is hereby GRANTED, and the Department of Court Records, Civil Division is directed to mark the docket accordingly.

BY THE COURT:  
/s/Friedman, J.

<sup>1</sup> The \$5,000 seems to have been an incentive from Plaintiff to Defendant to renew on an earlier occasion after Defendant had properly notified Plaintiff of its intent not to renew. Its actual purpose is immaterial as both sides agree it was promised.

**Neal R. Grove v.  
Robert L. Smith, et al.**

*Breach of Fiduciary Duty—Gist of the Action Doctrine—Extrinsic and Parol Evidence—Evidence of Motive*

1. A mere coalescence of votes of individual stockholders with equal standing whose shares cumulatively constitute a majority is not necessarily sufficient to suggest an abuse of controlling influence that is the essence of a breach of fiduciary obligations owed to a minority shareholder.

2. Because Plaintiffs claim of breach of fiduciary duty is premised solely upon the assertion that the defendants breached the Stock Restriction Agreement (“SRA”), his argument presupposes a breach of the SRA by defendants. The gist of the action doctrine precludes recasting breach of contract claims into tort actions.

3. Individual defendants barred supervision of a sales territory by an employee of a competitor and rejected the nomination of a Qualified Replacement Shareholder (“QRS”) based upon concerns of alienation of, or possible litigation by, a customer was sufficient to defeat claim of breach of fiduciary duty.

4. The contract language presented an ambiguity and the court acquired extrinsic or parol evidence to assist in resolving the ambiguity. The Court, as a matter of law, determines the existence of an ambiguity and interprets the contract. The resolution of conflicting parol evidence relevant to what the parties intended by the ambiguous provision is for the trier of fact.

5. The goal in contract law is not to punish the breaching party, but to make the nonbreaching party whole; proof of a financial motive or even an illicit motive will not enlarge damages. Therefore, the Court did not err in denying the admission of evidence of the compensation paid to the individual defendants and the salesman who replaced Plaintiff.

(JoAnn F. Zidanic)

Stephen D. Wicks for Plaintiff.

Thomas M. Castello for Defendant.

No. GD 07-012408. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**OPINION**

McCarthy, M., November 23, 2009—Plaintiff, Neal R. Grove, appeals in this matter following a judgment taken on a jury verdict that found against Grove on a breach of contract claim brought by Grove against the defendants. Grove and the three (3) individual defendants are the original and only shareholders of the corporate defendant, Sales Marketing Group. Because all shareholders own equal shares of the common stock of Sales Marketing Group, the individual defendants, cumulatively, possess a majority of the common stock; Grove asserts that, in this instance, he is a minority shareholder.

The three (3) individual defendants are also employees of the Sales Marketing Group. Grove is a former employee. The corporation is engaged in independent representation of electrical manufacturers, cultivating sales for various manufacturing lines. As an employee of the corporation, Grove managed a sales territory in central Pennsylvania.

On November 15, 1994, at the inception of the business, all four (4) shareholders, together with the corporation, entered into a Stock Restriction Agreement (“SRA”). Article VI of the SRA addresses the matter of a shareholder terminating employment with Sales Marketing Group, whether by reason of permanent disability or by reason of a shareholder’s election to terminate following completion of ten (10) years of employment with Sales Marketing Group. Article VI states, in part:

VI. Disability and Normal Retirement

A. In the event a Shareholder terminates his employment with the Corporation due to said Shareholder’s permanent disability or following his completion of ten (10) years of employment with the Corporation and/or its predecessor entity, the terminated Shareholder shall be permitted to sell his Stock to a “Qualified Replacement Shareholder” (QRS) pursuant to the following terms and conditions:

1. A QRS shall be an individual who has been approved to assume the duties of the terminated Shareholder by all of the remaining Shareholders, whose approval shall not be unreasonably withheld.
2. The QRS and the terminated Shareholder shall enter into a contract for the sale of the terminated Shareholder’s Stock. The contract terms shall provide for a division of the terminated Shareholder’s future compensation from the Corporation between the terminated Shareholder and the QRS. It is intended that the division of compensation shall continue for five (5) years. The contract must be approved by all of the remaining Shareholders, whose approval shall not be unreasonably withheld. The terminated Shareholder shall be responsible for the supervision of the QRS and for transferring responsibility for his accounts to the QRS.

In April 2006, Defendant Robert L. Smith, the President of Sales Marketing Group, received information from Grove that another employer, Hubbell Corporation, a competitor of Sales Marketing Group, had made an offer of employment to Grove. Shortly thereafter, and effective May 31, 2006, Grove terminated his employment with Sales Marketing Group. On June 13, 2006, Grove submitted the name of Justin Irvin to the individual defendants for approval as a Qualified Replacement Shareholder (“QRS”). Following an interview of Irvin, the individual defendants declined to approve or disapprove Irvin as a QRS. Subsequently, by means of an unsigned document appearing on corporate letterhead and dated July 17, 2006, Grove learned of specific reservations regarding approval of Irvin as a QRS. Among those expressed reservations was that Grove’s employment by a competitor would preclude supervision of Irvin by Grove, that Irvin lacked pertinent experience and that, because Irvin was a newer employee of a current customer of Sales Marketing Group and because that customer had contributed significantly toward Irvin’s college education, “repercussions” might result from acceptance of Irvin as a QRS.

Also on or about July 17, 2006, Grove received a document setting forth “Supervision Requirements” to be observed by him in connection with the acceptance of a QRS. Grove refused to accept those supervision requirements. Thereafter, by letter dated October 5, 2006, Attorney Richard Brabender<sup>1</sup> advised plaintiff’s counsel that the individual defendants regarded “the provisions of Article VI [of the SRA] regarding normal retirement [as] irrelevant because Mr. Grove did not retire.” (Complaint, Exhibit B). Subsequently, negotiations for alternative evaluations having failed, defendants deemed Grove to be entitled solely to the book

value of his shares in the corporation pursuant to provisions of the SRA relating to termination of employment for reasons other than retirement or disability.

Grove thereafter filed a two-count complaint in civil action asserting, as to all defendants, breach of contract and, as to the individual defendants only, breach of fiduciary duty. The breach of contract action was predicated upon an alleged unreasonable failure to approve as a QRS the individual with whom plaintiff had purportedly contracted to sell his stock. (Complaint, at Paragraphs 25-30). The breach of fiduciary duty count averred that the individual defendants, as majority shareholders, owed a fiduciary obligation to Grove and that, "as a result of their desire to reduce the number of owners in the corporation and secure for themselves a greater share of the profits," those defendants failed to comply with the terms of Article VI of the SRA. (Complaint, at ¶¶ 33-34)

The matter eventually proceeded to trial before a jury. At the conclusion of plaintiff's case, upon the motion of defendants, the Court dismissed the claim for breach of fiduciary duty. At the conclusion of all testimony and argument, the jury received a verdict slip jointly approved by the parties, and, following deliberations, found against Grove on the breach of contract claim. Grove now appeals, asserting that the Court erred in the dismissal of the claim for breach of fiduciary duty, in refusing certain of Grove's proposed points for charge, and in certain evidentiary rulings that, Grove maintains, affected the jury's construction of the SRA, resulting in an improper verdict.

#### Breach of Fiduciary Duty

Because majority shareholders occupy a quasi-fiduciary relation toward a minority shareholder, they may not use their power in such a way as to exclude the minority from a proper share of the benefits accruing from the enterprise. See, *Ferber v. American Lamp Corp.*, 503 Pa. 489, 469 A.2d 1046 (1983); *Hornsby v. Lohmeyer*, 364 Pa. 271, 275; 72 A.2d 294, 298 (1950). This does not mean that majority shareholders may never act in their own interest. When, however, such shareholders act in their own interest, their actions must be also in the best interest of all shareholders and the corporation. *Weisbecker v. Hosiery Wide Patents, Inc.*, 356 Pa. 244, 251, 258, 51 A.2d 811, 814, 817 (1947). Grove contends in this matter that the individual defendants abused their majority standing "by failing to comply with the provisions of Article VI [of the SRA] which permit Plaintiff to sell his shares in the corporation to the QRS." Complaint at ¶ 26.

The SRA requires unanimous approval of remaining shareholders before any QRS proposed by a departing shareholder will be accepted. Grove appears to presume that, because Irvin was not approved as a QRS, the individual defendants acted in concert to reject Irvin, to the detriment of Grove. A mere coalescence of votes of individual stockholders with equal standing whose shares cumulatively constitute a majority is not necessarily sufficient to suggest an abuse of controlling influence that is the essence of a breach of fiduciary obligations owed to a minority shareholder. A group of shareholders ordinarily cannot use its control over the corporation to provide benefits to the majority that are not shared with the minority. However, the record in this case indicated neither any past pattern of corporate control by the individual defendants to the exclusion of Grove nor any joint pursuit by them in this particular matter of a disparate application of the SRA to Grove. The defendants merely sought to hold Grove to the requirements of a contract that they believed that they and Grove, all as equally situated individuals, had crafted and executed at the inception of their enterprise, and to which all would be held equally. That Grove disagreed with and was damaged by that construction of the SRA in this instance did not convert a contractual dispute into a claim of a breach of a fiduciary relationship. The dispute is contractual; the shareholder cannot legitimately complain about discriminatory treatment if he assented to an agreement that arguably provided for that treatment.

Additionally, because Grove's claim of breach of fiduciary duty is premised solely upon the assertion that the defendants breached the SRA, his argument presupposes a breach of the SRA by defendants. In that regard, the SRA being central to the dispute, it is difficult to look past the gist of the action doctrine, which precludes recasting breach of contract claims into tort actions. *Etoll, Inc. v. Elias/Savion Advertising, Inc.*, 2002 Pa.Super. 347, 811 A.2d 10 (2002). That is particularly so in an instance in which the thrust of the breach of fiduciary claim is that the majority unreasonably withheld approval of a proposed QRS, conduct that is explicitly addressed by Article VI of the SRA. The gist of the action determines the essential nature of the claims; contract and tort actions are distinguished on the basis of the source of the duties allegedly breached. If the complaint essentially alleges a breach of duties flowing from an agreement between the parties, the action is contractual in nature; if the duties allegedly breached were of a type imposed on members of society as a matter of social policy, and the contract is collateral, the action is essentially tort-based. See, *Redevelopment Authority of Cambria v. Int'l Insurance Co.*, 685 A.2d 581, 590 (Pa.Super. 1996); *Phico Ins. Co. v. Presbyterian Medical Serv. Corp.*, 444 Pa.Super. 221, 229, 663 A.2d 753, 757 (1995). The contract is hardly collateral to a claim that not only cannot exist independently from its terms but also seeks to enforce the very standard of conduct dictated by those terms.

Defendants, not implausibly, asserted that Article VI restricts sales of a shareholder's interests to a QRS nominated by that shareholder to occasions in which the shareholder retired. "Retirement," according to the defendants, contemplates both a cessation of any active employment and an availability to supervise a QRS candidate pending transfer of responsibility of accounts to the QRS. Were it construed otherwise, a withdrawing shareholder might well be placed in the anomalous circumstance of selecting and supervising a QRS for Sales Marketing Group while in the employ of a competitor or, indeed, while establishing a competing enterprise funded by the proceeds of the sale of stock to a QRS.<sup>2</sup> In fact, among the reservations stated by Sales Marketing Group in the July 2006 listing of supervision requirements were both that Grove "is currently employed with a major competitor of one of our key Principal Lines" and that, because the proposed QRS was then employed by a customer who had substantially funded that individual's tuition, Sales Marketing Group might reasonably expect "repercussions."

Defendants advanced a construction of the disputed contract language that insulates the corporation from sabotage. Notwithstanding that that interpretation might also redound to the benefit of each individual defendant and limit the benefits available to Grove, the fact remains that the majority acted in a manner they believed to be protective of the corporation. Assuming that a breach of fiduciary duty action were not precluded by the strictly contractual nature of Grove's claim, the fact that the individual defendants pursued a course that barred supervision of a sales territory by an employee of a competitor and rejected the nomination of a QRS based upon concerns of alienation of, or possible litigation by, a customer is sufficient to defeat the claim.

#### Extrinsic and Parol Evidence

Grove charges that the Court erred in permitting "extrinsic or parol evidence and argument to interpret Article VI." Where a contract is ambiguous and susceptible of more than one reasonable interpretation, the court may receive extrinsic or parol evidence to assist in resolving the ambiguity. See, *Baney v. Eoute*, 784 A.2d 132, 136 (Pa.Super. 2001).

In this instance, the contract language presents an ambiguity. Article VI, A.2 provides that "[t]he terminated Shareholder shall

be responsible for the supervision of the QRS...,” but fails to state the meaning or intended application of the term “supervision” or otherwise meaningfully restrict that term. Because, under the explicit terms of Article VI A.2 and 3, a successful, completed transfer from a terminated shareholder to a QRS cannot be accomplished within a period of less than two (2) years and the division of compensation between a terminated shareholder and the QRS extends over a period of five (5) years, the supervision requirement is, if nothing else, temporally ambiguous. The ambiguity is patent.

Further, although Article VI, which sets forth the mechanics of installing a QRS, refers to a “terminated employee,” and, indeed, appears to place no restriction upon the meaning of that term, Article VII provides that in all instances “other than death, disability or retirement following ten (10) years of employment...the terminated Shareholder shall offer to sell and the Corporation shall purchase all of the terminated Shareholder’s Stock.” Because Article VII appears to preclude sale to a QRS except in instances of death, permanent disability or retirement, because the meaning of “retirement” is neither defined within the SRA nor ascertainable from a reading of that contract, and because the SRA itself provides no adequate means by which to resolve the conflict between Article VII and Article VI, there is an ambiguity that requires recourse to extrinsic resources that might lend meaning to the parties’ agreement. Indeed, it would have been error for the Court to ignore that patent ambiguity and to fail to acquire evidence that might assist the jury in resolving it. *Walton v. Philadelphia National Bank*, 376 Pa.Super. 329, 545 A.2d 1383 (1988).

Grove complains, however, that the Court erred in permitting parol evidence that addressed the parties’ intent as to all of Article VI rather than solely the meaning of the term “supervision” within that article. Among the specific errors alleged by Grove is that the Court allowed defendants to use extrinsic or parol evidence in the form of Plaintiff’s Exhibit 8 for the purpose of defining the scope of the supervision requirement in Article VI. Plaintiff’s Exhibit 8 is the October 5, 2006 correspondence from Attorney Brabender that is appended as Exhibit B to Grove’s complaint and that communicated defendants’ view that because, among other things, Grove had not retired, “[n]ot a single requirement set forth in Article VI of the Stock Restriction Agreement had been met by Mr. Grove.” Grove complains, moreover, that the Court erred in permitting the defendants’ use of “the content of Article VII” and “pre-contractual discussions with Plaintiff about the intent of [Article VI].”

The Court, as a matter of law, determines the existence of an ambiguity and interprets the contract. The resolution of conflicting parol evidence relevant to what the parties intended by the ambiguous provision is for the trier of fact. See, *Hutchinson v. Sunbeam Oil Corp.*, 513 Pa. 192, 519 A.2d 385 (1986); *Lang v. Meske*, 2004 Pa.Super. 166, 850 A.2d 737 (2004). Grove contends, in effect, that extrinsic evidence that is instructive of the parties’ competing construction of the SRA should be withheld from the jury. Grove’s position would deprive the triers of fact of the ability to perform their function.

Grove further argues that the Court should not have permitted the heading of Article VI of the SRA to enter the record. According to Grove, that heading, “Disability and Normal Retirement,” could only serve to mislead and prejudice the jury. The jury was expressly cautioned, however, that the heading was not substantive and was instructed that the subject headings of the paragraphs and subparagraphs of the SRA served purposes of convenience only and did not affect the construction or interpretation of contract language. The jury was to arrive at the intent of the parties based upon what the parties themselves had been aware of or had negotiated, viewed and executed. For that reason, the jury was properly exposed to the contract without redaction and could consider that contract without engaging in speculation that might attend viewing a censored version.

#### Evidence of Motive

Grove states that the Court erred in denying the admission of evidence of the compensation paid to the individual defendants and the salesman who replaced Grove. That evidence had been offered for the purpose of proving a financial motive on the part of the individual defendants to frustrate Grove’s effort to sell his stock.

That the remaining shareholders might benefit financially by foreclosing efforts to install a QRS and effectively expanding their respective financial interests in Sales Marketing Group from one-fourth to one-third was evident. All particulars of the advantages that might result to the defendants did not need to be explored. Moreover, the goal in contract law is not to punish the breaching party, but to make the nonbreaching party whole; proof of a financial motive or even an illicit motive will not enlarge damages. Therefore, the motives for breaking a contract are largely immaterial in a dispute that involves purely a breach of contract claim. See generally, 22 Am. Jur. 2d Damages §75.

#### Jury Instructions

Grove complains that the Court erred when it denied five (5) proposed jury instructions. More specifically, Item 9 of Grove’s “Statement of Matters Complained of on Appeal” states:

That the Court erred as a matter of law and abused its discretion in denying Plaintiff’s points 4, 5 and 7 in Plaintiff’s Proposed Jury Instructions and points 2 through 4 of Plaintiff’s Supplemental Proposed Jury Instructions.

A review of the trial transcript discloses that Proposed Jury Instruction No. 5 was given, as was Proposed Supplemental Jury Instruction No. 4. Of the requested instructions that Grove asserts were improperly refused, it suffices to note that Plaintiff’s Proposed Jury Instruction Nos. 4 and 7 and Plaintiff’s Supplemental Proposed Jury Instruction No. 3 find inadequate support in the record for the findings of law requested in those instructions. Plaintiff’s Supplemental Proposed Jury Instructions contain two (2) instructions numbered as 2, the first of which requests an instruction that the defendants breached the SRA. The determination of whether or not a breach occurred was a matter appropriately sent to the jury. The second of the proposed supplemental instructions marked as No. 2 read:

Where there is a question about whether the plaintiff would have succeeded in attaining a prospective business transaction in the absence of defendant’s interference, you may, in determining whether the proof meets the requirement of reasonable certainty, give due weight to the fact that the question “was made hypothetical by the very wrong” of the defendant.

Although Pennsylvania courts have accepted Section 774A, Comment b of the Restatement of Torts 2d, from which the proposed instruction was taken, it is likely that the proposed instruction as crafted would be confusing, if not indecipherable, to a jury. Moreover, the instruction presumes defendants’ commission of tortious interference with a prospective business relationship, a presumption contradicted by the record both with respect to whether any tort occurred and whether a sufficiently definite business prospect had developed.

#### Conclusion

Grove has failed to demonstrate a prejudicial abuse of discretion in the exclusion or admission of evidence or the charge to the jury. The jury, after receiving instructions and considering all that had been presented, was free to determine, as it did, that a breach

of the agreement did not occur. There is nothing of record or in the law that compels setting aside that verdict and granting judgment to Grove.

BY THE COURT:  
/s/McCarthy, J.

Date: November 23, 2009

<sup>1</sup> Mr. Smith is copied on the correspondence; it is unclear whether Mr. Brabender was functioning as corporate counsel.

<sup>2</sup> Article XXI of the SRA provides: “A terminated Shareholder shall not be restricted from competing with the Corporation following his termination of employment with the Corporation.” If “terminated” is not narrowly construed in the manner urged under by defendants for purposes of Article VI, then a shareholder may both select and supervise a QRS while competing with the Corporation. Although the Court determined that defendants could not argue that working for a competitor would divest a shareholder who had completed ten (10) years employment of all interests under the SRA, it did accept defendants’ concerns over a competitor’s employee supervising a key employee of the Corporation as an indication that the individual defendants were acting to enforce contract terms that they believed were in place and protected the Corporation.

### Mary C. Henderson v. UPMC, et al.

*Class Action—Pennsylvania Wage Payment and Collection Law, 43 P.S. §260.1 et seq., Pennsylvania Minimum Wage Act of 1968, 43 P.S. §333.101, et seq.*

1. UPMC’s Preliminary Objections asserting that it could not be included in class action against Plaintiff’s employer Shadyside Hospital because the law did not intend employer to include a parent company were overruled.

2. The court found that, although the definition of *employer* did not include the word *parent*, in all likelihood, the Legislature did not include the parent of a subsidiary within the definition because it did not intend to impose liability on a parent that exercised no control over the manner in which employees of a subsidiary would be compensated.

3. The purpose of the Wage Payment Law is furthered by defining the term *employer* to reach the entity that allegedly made the decisions that resulted in employees not being paid for work performed.

4. UPMC is covered by the Minimum Wage Act even though it does not directly employ Plaintiff, since *employer* is defined to include any person acting “indirectly, in the interest of an employer in relation to any employee.” 43 P.S. §333.103 (g).

(Lynn E. MacBeth)

Joseph N. Kravec, Jr., John C. Evans, Gary F. Lynch, R. Bruce Carlson, Stephanie K. Goldin, Paul A. Lagnese, James M. Pietz, and Ellen M. Doyle for Plaintiff.

John J. Myers and Mariah L. Lewis for Defendants.

No. GD 09-013303. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

#### OPINION AND ORDER OF COURT

Wettick, Jr., J., February 22, 2010—This is a class action brought by a nurse working at UPMC Presbyterian Shadyside (“Shadyside Hospital”) to recover money for alleged uncompensated work that she was required to perform. Defendants are UPMC and eleven hospitals, including the hospital (Shadyside Hospital) where Ms. Henderson works.

The complaint alleges that UPMC is a healthcare system that includes 20 hospitals, eleven of which are named defendants in this lawsuit. UPMC is the parent company of each of the eleven hospitals.

Plaintiff’s claims are based on the Pennsylvania Wage Payment and Collection Law, 43 P.S. §260.1 *et seq.*, the Pennsylvania Minimum Wage Act of 1968, 43 P.S. §333.101 *et seq.*, and Pennsylvania common law.

The preliminary objections of UPMC seeking dismissal of plaintiff’s claims against UPMC based on the Wage Payment and Collection Law and the Minimum Wage Act are the subject of this Opinion and Order of Court.<sup>1</sup>

Under the Wage Payment Law, every employer is required to pay wages within certain periods of time (43 P.S. §260.3). Employees may sue to recover unpaid wages and counsel fees in any common pleas court (43 P.S. §260.9a). In certain circumstances, the employee may also recover liquidated damages in an amount equal to twenty-five percent of the total amount of unpaid wages (43 P.S. §260.10).

The Wage Payment Law defines the term *employer* as follows:

[E]very person, firm, partnership, association, corporation, receiver or other officer of a court of this Commonwealth and any agent or officer of any of the above-mentioned classes employing any person in this Commonwealth. 43 P.S. §260.2a.

The Law does not define the terms *employee* or *employ*.

The Minimum Wage Act establishes minimum wages which every “employer” shall pay to each of his or her employees (43 P.S. §333.104(a)). The Minimum Wage Act provides that employees shall be paid for overtime not less than one and one-half times the employee’s regular rate (43 P.S. §333.104(c)). The Act also provides for each employer of employees to keep a true and accurate record of the hours worked by each employee and the wages paid to each employee (43 P.S. §333.108). Under §333.113, any employee paid by his or her employer less than the minimum wages provided for by the Act may recover in a civil action the full amount of the minimum wage less the amount actually paid, together with costs and reasonable attorney fees that may be allowed by the court.

At §333.103(f) (footnote omitted), (g), and (h), the Minimum Wage Act defines the terms *employ*, *employer*, and *employee* as follows:

(f) “**Employ**” includes to suffer or to permit to work.

(g) “**Employer**” includes any individual, partnership, association, corporation, business trust, or any person or group of

persons acting, directly or indirectly, in the interest of an employer in relation to any employee.

(h) “**Employee**” includes any individual employed by an employer.

In this Opinion, I consider whether UPMC comes within the above definitions of *employer* of the Wage Payment Law and/or the Minimum Wage Act based solely on allegations that UPMC, as the parent of Shadyside Hospital, required Shadyside Hospital and the other defendant hospital entities to adopt the wage policies that are the subject of plaintiffs complaint.<sup>2</sup>

This issue is important to both parties. If plaintiff prevails, she will claim that she is an appropriate class representative for employees of each of the defendant hospital entities that allegedly are required to use UPMC wage policies. If UPMC prevails, plaintiff can be a class representative for only Shadyside Hospital employees.

With respect to the Wage Payment Law, plaintiff raises the following argument: The definition of *employer* includes every corporation employing any person and the agent or officer of the corporation employing any person. Third persons cannot impose compensation programs. Thus, if UPMC is requiring Shadyside Hospital to adopt UPMC’s compensation program, it is doing so in its capacity as an employer. According to plaintiff, there is no reason why there cannot be more than one employer within the meaning of the Wage Payment Law where more than one entity is imposing the terms and conditions of plaintiffs employment.

Alternately, plaintiff contends that when a parent and a subsidiary hold themselves out as separate entities, actions of the parent designed to further the interests of the subsidiary may be characterized as actions of an agent of the subsidiary employer.

UPMC contends that any compensation programs that it requires its hospitals to follow<sup>3</sup> are not imposed because of UPMC’s status as the employer of persons working for these hospitals or as an agent of the hospitals. To the contrary, such policies are imposed because of a parent/subsidiary relationship between UPMC and Shadyside Hospital. If the Legislature had intended for the term *employer* to include the parent of a subsidiary, it would have said so.

I do not find merit to UPMC’s position that the Legislature never intended to reach a parent corporation because the definition of *employer* does not include the word parent. In all likelihood, the Legislature did not include the parent of a subsidiary within the definition of *employer* because it did not intend to impose liability on a parent that exercised no control over the manner in which employees of a subsidiary would be compensated. *Compare, Ward v. Whalen*, 129 P.L.J. 377, 379 (1981).

When I consider only the language of the Act, I do not find the positions of either plaintiff or UPMC to be convincing. While the Wage Payment Law defines the term *employer*, the definition is not helpful. It is clear that the term *employer* is meant to be broader than a traditional definition based on the exercise of control. However, the definition provides little guidance as to the outer limits of the term *employer*. Since the language of the Wage Payment Law does not provide clear direction as to whether UPMC is an employer under the Wage Payment Law for purposes of challenges to the legality of compensation policies that its hospitals are allegedly required to follow, I look to the purpose of the Law.

Recovery under the Wage Payment Law is not limited to recovery against the immediate corporate employer. Instead, the Law also allows recovery against other decision makers whose decisions resulted in unpaid wages.

In *International Association of Theatrical Stage Employees v. Mid-Atlantic Promotions, Inc.*, 856 A.2d 102, 105 (Pa.Super. 2004), the Superior Court explained the reason why the Wage Payment Law is intended to reach decision makers:

On appeal to this Court, the employee argued the trial court’s finding was contrary to the legislative intent and the plain meaning of the WPCL. This Court stated the purpose of the legislature holding officers or agents liable:

[W]as to subject these persons to liability in the event that a corporation or similar entity failed to make wage payments. Its reason for doing so is obvious. Decisions dealing with personnel matters and the expenditure of corporate funds are made by corporate officers and it is far more likely that the limited funds of an insolvent corporation will be used to pay wages and that a work force will be reduced while the corporation is still capable of meeting its obligations to its employees if personal liability is imposed on the persons who make these decisions.

*Id.* at 343-44, 568 A.2d 682 (quoting *Laborers Combined Funds of Western Pennsylvania v. Mattei*, 359 Pa.Super. 399, 518 A.2d 1296 (1986)). Thus, the *Mohney* Court reasoned there is no basis for liability under the WPCL, if there is no indication that a defendant “exercised a policy-making function in the company.” *Id.* at 345, 568 A.2d 682 (adopting reasoning of *Central Pennsylvania Teamsters Pension Fund v. Burten*, 634 F.Supp. 128 (E.D.Pa. 1986)).

If UPMC’s decisions resulted in employees of a subsidiary hospital not receiving wages which the subsidiary hospital should have, paid, the purpose of the Law is furthered by defining the term *employer* to reach this entity which allegedly made decisions that resulted in employees not being paid for work performed. If the CEO of Shadyside Hospital made the decision to adopt these policies, he or she is liable. There is no reason why the Legislature would not have intended to reach a decision maker that is above the CEO.<sup>4</sup> The Law can be, and should be, construed to provide that any person, firm, partnership, association, or corporation making decisions resulting in employees not receiving wages to which they are entitled, is, for purposes of these decisions, “employing” such persons.<sup>5</sup>

I next consider whether UPMC is covered by the Minimum Wage Act with respect to the mandated policies that are the subject of plaintiffs complaint.

As I stated at page 2, an employee may bring a civil action against his or her employer to recover the full amount of the minimum wage less the amount actually paid. Plaintiff contends that the definition of *employer* (§333.102(g)) reaches UPMC. This definition includes any “corporation” or “any person or group of persons acting directly or indirectly in the interest of an employer in relation to any employee.” Plaintiff contends that UPMC is “any person” acting “indirectly” in the interest of an employer in relation to any employee.<sup>6</sup>

UPMC, on the other hand, focuses upon the definitions of *employee* (“any individual employed by an employer”) and *employ* (“to suffer or to permit to work”). It appears to contend that the Act only allows an employee, defined as an individual employed by an employer, to sue the entity that employed the employee.

The language supports plaintiff’s position that UPMC is covered by the Minimum Wage Act. Plaintiff is an individual who is employed by Shadyside Hospital because only Shadyside Hospital suffers or permits plaintiff to work. Since plaintiff is an employee of Shadyside Hospital, she is entitled to bring a civil action against “her employer” which is defined to include any person acting “indirectly, in the interest of an employer in relation to any employee.” 43 P.S. §333.103(g) (emphasis added).

Furthermore, a legislative intent to reach those who have made the decision to pay an employee less than the wage payments required under the Act is shown through the use of a definition of *employer* that includes persons acting indirectly in the interest

of the employer in relation to the employee. The reading of the term *employer* in this fashion is consistent with the provisions of the Minimum Wage Act governing penalties (§333.112(b)) which provide that any “employer or the officer or agent of any corporation” who pays or agrees to pay less than the minimum wage shall upon conviction in a summary proceeding be sentenced to pay a fine or to undergo imprisonment.

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

**ORDER OF COURT**

On this 22nd day of February, 2010, it is ORDERED that UPMC’s preliminary objections seeking dismissal of Counts I and II are overruled.

BY THE COURT:  
/s/Wettick, J.

<sup>1</sup> I wish to thank counsel for furnishing briefs that succinctly and competently present the respective positions of their clients and for their effective presentations at oral argument.

<sup>2</sup> At this stage of the litigation, I do not consider whether plaintiff would be able to raise a claim under the Wage Payment Law upon a showing that UPMC exercised control over the day-to-day operations of Shadyside Hospital, that Shadyside Hospital was not a financially independent entity, or other related theories.

<sup>3</sup> It appears that UPMC challenges the allegations that the policies that are the subject of plaintiff’s complaint are mandated by UPMC.

<sup>4</sup> See 1 Pa.C.S. §1928(c) which provides that legislation shall be liberally construed to effect its objects.

<sup>5</sup> UPMC relies on *Commonwealth v. Pro-Pak Foods, Inc.*, 65 D&C2d 494 (C.P. Dauphin 1974), where the Dauphin County Common Pleas Court ruled that a parent corporation could be subject to the Wage Payment Law only upon an instrumentality theory of ignoring the corporate entity. In that case, the Commonwealth did not appear to make the arguments which plaintiff makes in this case, and I do not find the Court’s reasoning to be convincing, assuming that it was addressing a situation in which the subsidiary failed to pay wages because of decisions made by the parent.

<sup>6</sup> The term *person*, defined in the Statutory Construction Act at 1 Pa.C.S. §1991, provides that a *person* “includes a corporation, partnership, limited liability company, business trust, other association, government entity (other than the Commonwealth), estate, trust, foundation or natural person.”

**In Re: In the Interest of: M.S., a minor**

*Recusal Request—Evidence of Delinquency—Aggravated Assault*

1. M.S., a minor, was involved in three separate incidents at school, during two of which she struck school personnel with her crutches.

2. In 2007, M.S. had committed a series of similar delinquent acts and a local police officer contacted the judge asking whether the police should file a petition alleging delinquency. The judge’s staff told the officer that a petition should be filed if warranted. A petition was filed and the judge recused herself, upon request of M.S.’s counsel, to avoid the appearance of impropriety.

3. The judge instructed school personnel to file a delinquency petition based upon testimony at the dependency review hearing. Thereafter, she refused to recuse herself from hearing the resulting delinquency case.

4. M.S.’s behavior in striking school personnel in the head was sufficient for the court to find that she was guilty of attempting to cause bodily injury to an employee of a school while acting in his or her employment pursuant to 18 C.S.A. §2502(a)(5).

(Mary K. McDonald)

Nikki A. Tufano for M.S.

Edward T. Smith for the Commonwealth.

No. 2245-03. In the Court of Common Pleas of Allegheny County, Family Division-Juvenile Section.

**OPINION**

Mulligan, J., January 11, 2010—M.S., a minor, appeals her adjudication of delinquency on the charges of Aggravated Assault, Indecent Exposure, Simple Assault, Terroristic Threats, and Disorderly Conduct.<sup>1</sup>

On August 10, 2009, M.S. was adjudicated delinquent on the charges of Aggravated Assault, Indecent Exposure, Simple Assault, Terroristic Threats, and Disorderly Conduct. On August 17, 2009, I entered a dispositional order placing M.S. on probation, reserving a determination as to whether the minor should be placed.<sup>2,3</sup>

At the adjudication hearing on August 10, 2009, various officials from the Highlands School District testified to three separate incidents which formed the basis for the three delinquency petitions filed against M.S. These incidents occurred on May 13, May 22, and May 26, 2009. The first witness to testify was Debbie Beucker, the assistant principal at Highlands High School. She stated that she was working on all three dates in question, and that the incident on May 13th began when she was called to the school auditorium, where M.S. was being held in a pod after she was removed from her classroom. Once Ms. Beucker arrived at the auditorium, she observed M.S. exposing herself, as well as being disruptive by turning over tables and verbally harassing school personnel. On May 22, 2009, Ms. Beucker again interacted with M.S., this time when M.S. was brought to Ms. Beucker’s office after M.S. refused to go to class. M.S. later assaulted Ms. Beucker by hitting her on the head with a pair of crutches. M.S. also called Ms. Beucker a profane name, and then spit on her. Ms. Beucker testified to a similar incident on May 26, 2009, when M.S. again refused to go to class and was brought to her office. M.S., once at the assistant principal’s office, began exposing herself and touching herself sexually in front of Ms. Beucker. M.S. also hit Ms. Beucker twice on the head with her crutches. M.S. then hit a security guard

with a yardstick, and then she hit a principal with her hand. M.S. then told the staff that she was going to blow up the school, and that she was going to bring a gun to school the next day.

On cross-examination, Ms. Beucker described M.S.'s physical limitations, testifying that M.S. arrives at the school in an Access van, enters the school in a wheelchair, and then is on crutches for the rest of the school day. Ms. Beucker also testified that M.S. has vision problems. Describing being hit by the crutches in her office, Ms. Beucker stated that while her injuries were not severe, she did have a bump on her head following the assault and that it hurt to be hit by the crutches. Ms. Beucker found that despite her physical limitations, M.S. was able to forcefully swing the crutches and turn over tables. Ms. Beucker similarly described the incident on May 26th, and stated that she once again received a bump on her head, this time from being struck twice with crutches.

Amanda Coulter, a teacher at Highlands High School, described the extent of her involvement with M.S. on the three dates in question. On May 13, 2009, Ms. Coulter recalled being called to assist M.S., who was refusing to go to class. Upon approaching the minor, Ms. Coulter was spit upon by M.S. and M.S. proceeded to hit Ms. Coulter with her crutches. On May 22, 2009, Ms. Coulter was again called to assist M.S., and M.S. spit on her, tried to hit her, and verbally harassed her. On the 26th, Ms. Coulter stated she was hit by a yardstick by M.S. in the assistant principal's office. On cross-examination, Ms. Coulter stated she did not receive any injuries from these scuffles.

Following Ms. Coulter's testimony, Stacia Boguslowski testified to the incidents on May 13 and May 22, 2009. On May 13, 2009, Ms. Boguslowski stated that she accompanied M.S. to the auditorium, and after arriving at the auditorium, M.S. became angry and began turning over tables and swinging her arms and crutches. M.S. was trying to hit various members of the faculty according to Ms. Boguslowski. On May 22nd, Ms. Boguslowski witnessed the incident where M.S. hit Ms. Beucker in the face with her crutches. In addition, on May 22nd Ms. Boguslowski testified that she too was spit upon, and hit on the side of the face by M.S.

Following Ms. Boguslowski's testimony, and testimony by additional members of the faculty which related identical stories with respect to the dates and incidents in question, I found M.S. delinquent on the charges of aggravated assault, terroristic threats, simple assault (one of the individuals assaulted was not school personnel), indecent exposure, and disorderly conduct. I did not find that M.S.'s cane or crutches were dangerous weapons, but I did find that M.S. attempted to cause bodily injury by swinging her crutches and striking school personnel in the face and head with her crutches and her hands. I also found M.S. in need of treatment, rehabilitation, and supervision, and thus delinquent.

In her statement of matters complained of on appeal, M.S. alleges two categories of error.<sup>4</sup> M.S. first avers that I erred by not recusing myself in this matter. M.S. uses as support for her recusal request the fact that I had previously recused myself in a delinquency proceeding involving M.S. in 2007.

On April 11, 2007, I issued a Permanency Review Order in M.S.'s dependency proceeding that stated, among other things, that M.S.'s school was to take appropriate disciplinary action when necessary, and was expected to file charges should it become necessary in order to control M.S.'s behavior.<sup>5</sup> Subsequent to that order, M.S. committed a similar series of delinquent acts as the ones alleged in this petition (striking teachers with her fists, using lewd language, etc.). An officer from the Harrison Township Police Department phoned my office and asked whether the police should file a petition with respect to M.S.<sup>6</sup> I instructed my staff to inform the officer that charges should be filed if the circumstances warranted it. A delinquency petition was later filed.

When the petition was scheduled to be heard, M.S.'s counsel sought, and I granted, my recusal. While I did not believe that I was biased or lacked impartiality, given the nature of the extra judicial communications between the police and my office, in an abundance of caution, I recused myself due to the perception of impropriety which the *ex parte* communication could have triggered.<sup>7</sup>

M.S. alleges in her 1925(b) statement that I should have again recused myself in the this matter. At a dependency review hearing on May 15, 2009, I heard testimony from various school personnel about the difficulty in controlling M.S., and that they were at a loss as to what to do with her. At the hearing, I instructed the caseworker to take the school principal to the delinquency intake department in order to file delinquency petitions. My June 12, 2009 order in the dependency proceeding reflected that the probation officer was directed to file the charges which were already in process so that the case could be heard and resolved.

M.S. alleges in her 1925(b) statement that the same reasons that led to my recusal in 2007 were in play in this case. While recusal may not have even been necessary in the 2007 case, the circumstances here were different. The entire reason for my recusal in 2007 was the nature of the communication between the police and my office and the appearance of impropriety that may have come from that communication. Because the officer called my office outside of a court proceeding and asked about filing these charges, I determined that this communication was extra judicial and could lead to an appearance of impropriety. Here, all of the alleged communications which led to the filing of this petition took place within the courtroom in M.S.'s dependency proceeding and was on the record. Simply because I am privy to some details of the case through my role as M.S.'s dependency judge does not render me unable to be an impartial arbiter in the delinquency matter.<sup>8</sup>

A party asserting that the trial judge must be disqualified bears the burden of producing evidence establishing bias, prejudice, or unfairness necessitating recusal. *Hall v. Hall*, 482 A.2d 974 (Pa.Super. 1984). The alleged bias must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. *Municipal Publications, Inc. v. Snyder*, 469 A.2d 1084 (Pa.Super. 1983). This extrajudicial bias is bias that is not derived from evidence or the conduct of the parties that the court observes in the course of the proceedings.

The opinions and rulings that I have made in this case were based entirely on the evidence presented and free from any extrajudicial bias. In the 2007 correspondence with the police, the communication did not produce any sort of bias, but the communication was certainly outside of the walls of the courtroom and therefore a perception of impropriety could be formed. Therefore, even though I was not biased, I still decided not to hear that particular case. Here, everything was on the record so no such perception could have been formed. Further, the overwhelming evidence presented in the delinquency proceeding makes it obvious that my decision was based on the evidence presented in court.

M.S.'s second allegation of error is that the evidence presented at the August 10, 2009 delinquency hearing did not support a finding of delinquency on the charges of aggravated assault.<sup>9</sup> A person is found delinquent of aggravated assault, 18 Pa.C.S.A. §2502(a)(5), if he/she attempts to cause or intentionally or knowingly causes bodily injury to a teaching staff member, school board member or other employee, including a student employee, of any elementary or secondary publicly-funded educational institution, any elementary or secondary private school licensed by the Department of Education or any elementary or secondary parochial school while acting in the scope of his or her employment or because of his or her employment relationship to the school. The entire purpose of the above section is to recognize that one who attempts to intentionally cause *any* bodily injury (serious or not) to school personnel is guilty of aggravated assault whether or not he or she succeeds.

Here, M.S. alleges that because she did not cause bodily injury, and because she did not attempt to cause bodily injury, as the

behavior was merely rude and inappropriate, that the charge of aggravated assault was unfounded. While M.S.'s behavior was rude, inappropriate, and unruly, it was also highly dangerous and the individuals involved are lucky to escape without serious bodily injury. At the August 10, 2009 hearing, Assistant Principal Beucker testified that she was struck twice in the head with crutches, and that this assault left her with a bump on her head. While Ms. Beucker downplayed the seriousness of the event, she did testify that she received a bump on her head and that the injury hurt. Whether or not the injuries sustained in this incident constitute bodily injury (and I found they did) M.S. was clearly attempting to cause bodily injury to the individuals involved. This was not a case where a teacher got in the middle of a fight and was recklessly struck by one of the participants. Here, M.S. in three separate incidents within the same month struck teachers, aides, and other school staff. She also used dangerous objects, like her crutches, as weapons against the faculty. The evidence presented during the minor's adjudication hearing overwhelmingly supports the conclusion that she be found delinquent on the charges of aggravated assault, among other offenses. For the foregoing reasons my August 17, 2009 order should be AFFIRMED.

K.R. Mulligan, J.

Date filed: January 11, 2010

<sup>1</sup> While M.S. was found to have committed these delinquent acts, M.S. in her 1925(b) statement of errors complained on appeal alleges error only with the finding of delinquency on the aggravated assault counts.

<sup>2</sup> On November 24, 2009, I placed M.S. at the Schuman Center, a juvenile detention facility, for a period of three consecutive weekends with permission to increase or decrease depending on her behavior.

<sup>3</sup> M.S., in her 1925(b) statement, does not allege any errors with regards to the Delinquency Commitment order.

<sup>4</sup> While the 1925(b) statement contains four (4) allegations of error, allegations (b) and (c) are moot. In issue (b), M.S. alleges that her motion for recusal, preserved in her 1925(b) statement, did not need to be formally filed in writing. As I am addressing issue (a) in the body of this opinion, and I told M.S.'s counsel specifically that she need not file the motion as I would deny it, I agree that the issue is preserved pending appeal. Likewise, any issue of M.S.'s trial counsel being incompetent for not filing the motion is without merit, as I specifically instructed her not to file said motion as it would be unnecessary.

<sup>5</sup> In addition to her physical problems, M.S. is a dependent child due to the fact that her Mother has a drug addiction and her Father is deceased.

<sup>6</sup> The officer was understandably hesitant to file charges against M.S. given her physical limitations, but I have found that M.S.'s handicaps give her considerably more room to offend than an ordinary student. Part of the overriding theme of this case is the minor's belief that no one can do anything to her because of her handicap. While I understand M.S.'s frustration with her handicap and certainly I am sympathetic, it does M.S. no service to disregard criminal behavior because of her disability.

<sup>7</sup> The prior case was continued to observe M.S.'s behavior and was subsequently dismissed.

<sup>8</sup> It is part of the role of a judge (particularly without a jury in juvenile court) to disregard information which he or she ruled inadmissible and render a decision based solely on the admissible competent evidence presented.

<sup>9</sup> M.S. does not allege any allegations of error with the other delinquency charges, including simple assault, disorderly conduct, terroristic threats, and indecent exposure.

## Commonwealth of Pennsylvania v. Elroy Layne

*Voir Dire—Abuse of Discretion—Hearsay*

1. Defendant was sentenced to a mandatory term of life imprisonment for conviction of First-Degree Murder and Burglary.

2. Defendant raised following issues on appeal:

a. *Voir Dire* Issues – Defendant argued that Court erred in not permitting his attorney to voir dire the jury panel regarding their feelings on interracial marriage. The Defendant is African-American and his estranged wife is not. The fact that they had been involved in an interracial marriage had no bearing on the Defendant's guilt or innocence in the murder of his wife's boyfriend and was in no way relevant to whether a person was competent to serve on the jury. Court exercised discretion in denying the voir dire request.

b. *PFA* Issues – It was not an abuse of discretion for Court to admit *PFA* order. Although Defendant's wife was not at home at the time of the attacks, her children – who were "protected" pursuant to the Order – were, and the Defendant was excluded from the residence where the attacks occurred. Court acted within its discretion in allowing the testimony of Beth Keenan, Esquire, the Coordinator of the *PFA* Office in the Family Division of the Court of Common Pleas.

c. Police Officer Roger Krawchyk's testimony regarding child's statements was not made for the truth of the matter, but rather to further explain his and the other officers' course of conduct in searching and securing the home. The statements are clearly within the "course of conduct" rule and were properly admitted.

3. Judgment of sentence was affirmed.

(JoAnn F. Zidanic)

David Spurgeon for the Commonwealth.

Robert L. Foreman for Defendant.

No. CC 200800427. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

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**OPINION**

McDaniel, P.J., December 2, 2009—The Defendant has appealed from the judgment of sentence entered by this Court on March 9, 2009. A review of the record reveals that the Defendant has failed to present any meritorious issues on appeal and, therefore, the judgment of sentence must be affirmed.

The Defendant was charged with Criminal Homicide<sup>1</sup> and Burglary.<sup>2</sup> Following a jury trial held before this Court, the Defendant was convicted of First-Degree Murder and Burglary. On March 9, 2009, he appeared before this Court and was sentenced to a mandatory term of life imprisonment. Timely Post-Sentence Motions were filed and were denied by this Court on March 19, 2009. This appeal followed.

Briefly, the evidence presented at trial revealed that during the late evening hours of December 7, 2007, the Defendant went to the home of his estranged wife, Angelina to confront her about statements she had purportedly made that she had never loved him. He brought with him duct tape, pepper spray and a utility knife. When he arrived at the house, located at 21 Queen Street in the Spring Hill section of the City of Pittsburgh, Angelina was not there, but her new boyfriend, Timothy David Staley, was, as were her four small children. The Defendant then attacked Staley, beating him and stabbing him repeatedly in locations both outside and, later, inside the house. The attack was witnessed by Angelina's 10-year-old son, Charlie.

In the meantime, Angelina had returned home, and upon seeing blood outside her house, remained in her car and called the police. When the Defendant heard the sirens, he jumped out of a bedroom window and fled into the woods, eventually jumping off a highway overpass and landing on I-279 North. On autopsy, Staley was found to have 38 stab wounds, which, along with blunt-force trauma to the head, were determined to be the cause of his death. The Defendant presented a defense of self-defense, averred that he only stabbed Staley three times, and testified that an unknown attacker inflicted the remaining 35 stab wounds in the short time between the Defendant's hearing the sirens and the entry of the police into the home. At the time of the incident, the Defendant was the subject of a PFA Order which protected Angelina and her four children and which excluded the Defendant from Angelina's residence at 21 Queen Street.

On appeal, the Defendant raises a number of issues which are discussed as follows:

1. *Voir Dire Issues*

Initially, the Defendant argues that this Court erred in not permitting his attorney to voir dire the jury panel regarding their feelings on interracial marriage. This claim is meritless.

"The scope of voir dire rests in the sound discretion of the trial court, whose decision will not be reversed on appeal absent palpable error.... The purpose of voir dire is solely to ensure the empanelling of a competent, fair, impartial and unprejudiced jury capable of following the instructions of the trial court." *Commonwealth v. Bomar*, 826 A.2d 831, 849 (Pa. 2003).

During voir dire, this Court denied the Defendant's request to voir dire the jury panel regarding their feelings on interracial marriage and bi-racial children for the simple fact that it was not relevant to the case at hand. The fact that the Defendant – who is African-American and Angelina Layne – who is not – had been involved in an interracial marriage had absolutely no bearing on the Defendant's guilt or innocence and was in no way relevant to whether a person was competent to serve on the jury. The Defendant apparently feels that he was convicted because the jurors were racist [much as he testified to believing that all white people and all police officers were racist (T.T. p. 286, 293)], but such a supposition is completely belied by the evidence and the eyewitness testimony. This Court was well within its discretion in denying the voir dire request and this claim must fail.

2. *PFA Issues*

The Defendant raises two (2) claims of error with regard to the PFA: that this Court erred in allowing its admission at all, and that this Court additionally erred in allowing the testimony of Beth Keenan, Esquire, the Coordinator of the PFA Office in the Family Division of the Court of Common Pleas. Both are meritless.

As to the Defendant's initial claim of error regarding the admissibility of the PFA, it is by now well-established that "the admissibility of evidence is a matter for the discretion of the trial court and a ruling thereon will be will be reversed on appeal only upon a showing that the trial court committed an abuse of discretion.... 'An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness or partiality, prejudice, bias or ill-will or such lack of support as to be clearly erroneous.'" *Commonwealth v. Sherwood*, 2009 WL 3682606, p. 9 (Pa. 2009). "Admissibility depends on relevance and probative value.... Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact." *Commonwealth v. Crews*, 640 A.2d 395, 402 (Pa. 1994).

In *Commonwealth v. Stallworth*, 781 A.2d 110 (Pa. 2001), our Supreme Court addressed the admissibility of civil PFA Orders in criminal cases generally, and particularly those which involved burglary charges. Specifically, the Court held that the PFA Order was admissible to make out the elements of the burglary charge as well as to show the defendant's "intent and motive." It stated: "As to the burglary prosecution, a person is guilty of burglary if he enters a building or occupied structure with the intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter.... Evidence that the victim had obtained a court order specifically excluding [the defendant] from her residence was probative of the Commonwealth's allegation that [the defendant] entered the residence while not licensed or privileged to do so." *Commonwealth v. Stallworth*, 781 A.2d 110, 118 (Pa. 2001).

In the instant case, although Angelina Layne was not home at the time of the attacks, her children – who were "protected" pursuant to the Order – were, and the Defendant was excluded from the residence where the attacks occurred. Under these circumstances, the PFA Order was admissible and was properly ruled as such by this Court.

In light of the admissibility of the PFA Order, this Court was well within its discretion in allowing the testimony of Beth Keenan, Esquire. A review of the record reveals that Ms. Keenan's very brief testimony simply provided some basic background information regarding what a PFA is, and, in the manner of a records custodian, introduced the PFA Angelina Layne had obtained against the Defendant, identified its protected persons and the excluded residence. Ms. Keenan's testimony was relevant and was properly admitted by this Court. These claims must fail.

3. *Hearsay Issue*

Finally, the Defendant argues that this Court erred in allowing the admission of hearsay testimony. Again, this claim is meritless.

During the testimony of police officer Roger Krawchyk, the following occurred:

Q. (Mr. Spurgeon): When you got upstairs, did you make any observations?

A. (Officer Krawchyk): Yes. When we got up there, we found an individual laying on the floor bleeding.

Q. And what did you do when you saw that?

A. Checked him. He was unresponsive. There was a little bit of shaking of the arm. He was bleeding profusely.

Q. Did the little boy tell you about who may have done this?

A. Yeah. At that time he said that –

MR. FOREMAN: Your Honor, may we approach.

THE COURT: You may.

(Sidebar discussion held on the record.)

MR. FOREMAN: I object to hearsay. Some of it, I have not objected to as to why the officer did what he did. This is purely a narrative from a non-witness, the little boy.

MR. SPURGEON: Charlie is telling him what happened, where the person is and what he did as a result. It's not being introduced as hearsay. It's the natural course of events as to why the officer did what he did.

THE COURT: I will overrule the objection. Charlie will be here to testify?

MR. SPURGEON: That's correct.

(Sidebar discussion concludes.)

Q. So you come in contact with the little boy?

A. Yes.

Q. And he indicated what?

A. As to the gentleman who did it, a man by the name of EJ was still in the house, possibly in the third floor of the house.

Q. What did you guys do with that information?

A. At that time we started to go – we notified dispatch that the individual is possibly still in the house. I believe at that time the lieutenant closed off the area. As we started to check the house, two officers in front of me started to go upstairs.

I opened the rear door located right in that room to make sure the individual would not jump out the window...

(T.T. p. 28-30)

The Pennsylvania Rules of Evidence define hearsay as “a statement, other than one made by the declarant while testifying at the trial...offered in evidence to prove the truth of the matter asserted.” Pa.R.Evid. 801(c). “The purpose for which evidence is offered determines its admissibility.” *Commonwealth v. Carson*, 913 A.2d 220, 258 (Pa. 2006). “Certain out-of-court statements offered to explain a course of conduct are admissible as an exception to the hearsay rule as those statements are not offered for the truth of the matter asserted; they are offered to show information upon which the police acted.” *Commonwealth v. Shotwell*, 717 A.2d 1039, 1042 (Pa.Super. 1998).

As reflected in the record, Officer Krawchyk's testimony regarding Charlie's statements was not made for the truth of the matter, but rather to further explain his and the other officers' course of conduct in searching and securing the home. The statements are clearly within the “course of conduct” rule and were properly admitted. This claim must fail.

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

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

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<sup>1</sup> 18 Pa.C.S.A. §2501

<sup>2</sup> 18 Pa.C.S.A. §3502