

PITTSBURGH LEGAL JOURNAL

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OPINIONS

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Console Energy Inc.**

**David Gillingham and Debra Gillingham, his wife v.
Console Energy Inc.**

*Remittitur—New Trial—Verdict Form—Pain and Suffering—Lost Earnings—Scope of Expert Testimony—Release—
Delay Damages—Borrowed Servant Doctrine*

No. GD 08-10867, GD 08-11621. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Wecht, J.—May 24, 2011.

MEMORANDUM

Background and Procedural History

On June 12, 2007, Plaintiffs Clifford Decker [“Decker”] and David Gillingham [“Gillingham”] were injured when an exterior stairway on which they were standing fell. The stairway had been attached to a building at Defendant CONSOL Energy Inc’s [“CONSOL”]’s South Park Research and Development facilities. Decker and Gillingham were at the facility as part of a pilot program known as the PFBC project. Decker and Gillingham sustained injuries in the fall.

Decker and Gillingham filed separate suits with their spouses seeking to recover for those injuries. The cases were consolidated. Trial was held before this Court from November 12 through November 23, 2010. The jury found for all Plaintiffs and awarded \$4,543,000 for Decker, \$457,000 for Pamela Decker [“Mrs. Decker”], \$1,877,000 for Gillingham, and \$923,000 for Debra Gillingham [“Mrs. Gillingham”].

On December 2, 2010, CONSOL filed a Motion for Post-Trial Relief. Also, on December 2, Plaintiffs filed motions for delay damages. Argument was set for April 25, 2011.

Standard of Review

CONSOL’s motion for post-trial relief seeks a judgment notwithstanding the verdict or, in the alternative, a new trial or remittitur. J.N.O.V. is granted when the movant is entitled to judgment as a matter of law or the evidence was such that reasonable minds could not disagree that the movant should have prevailed. *American Future Systems, Inc. v. BBB*, 872 A.2d 1202, 1215 (Pa. Super. 2005). A new trial should be granted if the verdict was against the clear weight of the evidence and the verdict shocks the conscience. *Alwine v. Sugar Creek Rest, Inc.*, 883 A.2d 605, 611 (Pa. Super. 2005). Improperly admitted evidence may be so prejudicial as to warrant a new trial. *Scranton Penn Furniture Co. v. City of Scranton*, 498 A.2d 469, 473 (Pa. Commw. 1985).

Issue Regarding Excessive Damages

CONSOL’s first argument is that it is entitled to entry of remittitur or a new trial because the damages awarded were excessive and beyond what the evidence warranted. CONSOL argues that the testimony about Decker and Gillingham’s past and future lost earnings was speculative. CONSOL asserts that the record was inadequate to support the loss of consortium awards. CONSOL claims that the non-economic damage awards were excessive when compared to the “out-of-pocket” expenses (past/future medical and past/future earnings) (*i.e.*, the non-economic damages were \$2.2 million of the total \$2.8 million verdict). CONSOL argues that Decker was awarded damages for future medical expenses and disfigurement when there was no evidence to support those claims. CONSOL also maintains that there was no evidence to support Gillingham’s claims for future medical expenses (other than medication) or future disfigurement, both of which the jury awarded.

As to the loss of consortium claims, CONSOL argues that the amount was excessive. CONSOL asserts that the testimony showed only that Decker no longer was able to perform certain household chores and some leisure activities, while Gillingham was precluded only from lifting his disabled mother-in-law, and from doing some household chores and leisure activities. CONSOL concedes that there was testimony of a lack of physical relations between the Gillinghams since the accident. However, CONSOL disputes Gillingham’s consortium claim because Gillingham injured only his shoulder.

Gillingham responds that there was evidence of the severity of his injuries, including multiple surgeries, physical therapy, and continuing pain and range of motion problems. He also argues that there was evidence of lost wages due to his inability to continue his self-employment. Gillingham maintains that the loss of consortium award was justified because he is unable to help in the care of his mother-in-law. Previously, Gillingham asserts, he had been instrumental in her care, but now Mrs. Gillingham has had to care for both her mother and husband. Further Mrs. Gillingham had testified about damage to the relationship and about the lack of a physical relationship.

Decker argues that the jury believed Plaintiffs’ medical experts but did not find Defendant’s medical expert credible. Decker’s expert testified about future knee problems and about weakness that hadn’t yet resolved. There was other testimony about continuing nerve damage and the need for continuing physical therapy. Decker asserts that, from that testimony, future medical damages were warranted. Decker argues that the pain and suffering awards were warranted from Decker’s testimony about the pain as well as the medical expert’s testimony. Decker argues that the embarrassment, loss of life’s pleasures, and loss of consortium claims were supported by the following: he was unable to go upstairs to the couple’s bedroom for a year; he was unable to participate fully in his sons’ weddings; he was unable to perform household chores; he needed assistance in personal hygiene while not being able to bear weight; and he was unable to engage in leisure activities with his wife and family.

In considering a request for remittitur, a trial court should consider the following factors, but only those relevant to the case: the severity of the injury; whether the injury is shown by objective or subjective evidence; whether the injury is permanent; whether the plaintiff can continue employment; the amount of out-of-pocket expenses; and the amount originally demanded. *Carrozza v. Greenbaum*, 866 A.2d 369, 382 (Pa. Super. 2004). The disparity between the entire award and the out-of-pocket expenses, by itself, does not warrant a new trial or remittitur. *Kemp v. Phila. Transportation Co.*, 361 A.2d 362 (Pa. Super. 1976). In *Carrozza*, a \$4 million award was not so excessive as to shock the conscience where a jury heard competent evidence of injury, pain and suffering, and reduced life expectancy. *Id.* Also, the disparity between the entire award and the out-of-pocket expenses, by itself, does not warrant a new trial or remittitur. *Kemp v. Phila. Transportation Co.*, 361 A.2d 362 (Pa. Super. 1976).

There was testimony by Steven Winberg, CONSOL’s vice president, that Gillingham returned to work a few days after the accident. N.T. Vol. I at 242. Mike Fenger, the CONSOL project manager, testified that Gillingham was walking and conscious a “couple” minutes after the collapse. *Id.* at 440. Fenger testified that Decker was laying on the stairway. *Id.* at 373. While Decker was

not moaning or screaming, Fenger testified that he appeared to be in pain because of the stress in his voice and because his foot was pointed in the wrong direction. *Id.* Fenger corroborated the fact that Gillingham returned to work within a couple days of the accident. *Id.* at 441.

Mitchell Rothenberg, M.D., testified that Decker had three fractures of his left leg. 11/8/10 Dep. at 10. Dr. Rothenberg described the repair to Decker's leg, including drilling into the bone, cleaning out the inside of the bone, inserting a rod into the bone, bolting the rod into place at the hip, and screwing it into place at the knee. *Id.* at 12-14. Dr. Rothenberg testified that this surgery is painful. *Id.* at 18. Dr. Rothenberg also testified that there were pieces of bone from Decker's femur that will be stuck in his muscle forever. *Id.* at 16. Dr. Rothenberg also described Decker's post-surgery condition, indicating that Decker was in a brace for two to three months, had to use a walker or crutches for almost six months, and was getting monthly x-rays to check his healing. *Id.* at 19. Dr. Rothenberg testified that Decker complained of tingling and weakness in his leg and that a nerve conduction test was performed to diagnose nerve injuries. *Id.* at 20. Three nerves were found to be injured. *Id.* at 21. Dr. Rothenberg testified that Decker received injections because of bone bruises in his knee and bursitis in his hip. *Id.* at 23-24. Dr. Rothenberg testified that a second surgery was performed a year later to remove the rod because it was causing Decker persistent hip pain. The surgery involved using a mallet to "bang [the rod] out." Afterward, Decker once again could not bear weight on the leg. *Id.* at 24-25. Dr. Rothenberg testified the Decker had been in physical therapy and continues to require it. *Id.* at 26. Dr. Rothenberg testified that, as of his last visit with Decker, Decker continued to have muscle weakness, nerve injury, and pain in the knee. *Id.* at 26-27. Dr. Rothenberg determined that the nerve injury was permanent and that this leads to atrophy in the leg muscle. *Id.* at 27-28.

On cross-examination, Dr. Rothenberg admitted that the complaints of muscle fatigue and weakness are subjective, but maintained that objective testing corroborated these complaints. *Id.* at 43. Dr. Rothenberg testified that, according to his notes, Decker was not taking pain medication. *Id.* at 53. Dr. Rothenberg also testified that, according to his notes, Decker was improving and healing well, with the exceptions of knee and hip pain and nerve problems in the months after the accident. *Id.* at 59-63. Dr. Rothenberg testified that the fall increased the probability of arthritis in the left knee. *Id.* at 78.

Decker's physical therapist, Joseph Agnello, testified that, at the beginning of treatment, Decker had a lot of muscle wasting, that his walk was abnormal, that there was stiffness in his joints, and that he had pain and weakness. N.T. Vol. II at 544-45. Mr. Agnello testified that Decker was receiving physical therapy for one and a half to two hours a day for three days each week after the first surgery. *Id.* at 548. He testified that Decker was still undergoing treatment and was working hard. *Id.* at 553-54. Mr. Agnello testified that Decker received about 200 physical therapy sessions, followed by the supervised exercises he was still doing. *Id.* at 554. Mr. Agnello testified that Decker could do the exercises at a gym and would benefit from this, but that continuing therapy with Mr. Agnello was the better course of action. *Id.* at 561.

Decker's family doctor, Michael McGonigal, M.D., testified that Decker was not doing well after the surgery and that he was in a lot of pain, was constipated and was experiencing insomnia. N.T. Vol. II at 780. Dr. McGonigal testified that the constipation was caused by the narcotics Decker was taking. *Id.* at 781. Dr. McGonigal testified that Decker was still experiencing chronic pain, *id.* at 783, as well as continuing balance problems, muscle atrophy, and pain. *Id.* at 788-89. Dr. McGonigal testified that there was no limit on the number of hours Decker could work. *Id.* at 819. Dr. McGonigal testified that pain medication was not helping Decker and that, essentially, Dr. McGonigal had given up trying to find a medication to deal with Decker's pain. *Id.* at 824-25.

Decker testified that he remembered laying upside down on the stairs with his leg twisted and feeling a great deal of pain. N.T. Vol. II at 846-47. He testified that in the ambulance he was yelling and screaming from the pain. *Id.* at 849. Decker testified that he was in the hospital twelve days, and that the pain worsened. *Id.* at 851-52. He testified that he had trouble getting into his house and that his wife had to pull the car up onto the front lawn. *Id.* at 853-54. Decker described constant pain and claimed that the pain medication caused total constipation. *Id.* at 855. He testified that, as he started to recover, the hardware in his leg caused additional pain. *Id.* at 862. He also testified to similar problems with pain and the pain medication after the second surgery. *Id.* at 863-64. The parties stipulated that Decker incurred \$123,691.08 in medical expenses. *Id.* at 959.

Mrs. Decker described the couple's lifestyle before the accident as very busy, including skating, skiing, fishing, golfing, walking, hiking, gardening, tennis, and going out. N.T. Vol. II at 918-19, 920. Mrs. Decker testified that Decker helped with household chores and home maintenance. *Id.* at 919. She also testified that Decker was in and out of consciousness on the day of the accident and the day after the accident, and that he kept talking about how bad the pain was. *Id.* at 924-25. Mrs. Decker testified that a wheelchair had to be specially designed to fit into the home's doorways and also described the difficulty of getting her husband home from the hospital. *Id.* at 927-29. Mrs. Decker described the modifications made to the house to accommodate Decker, including setting up a bedroom for him on the first floor. *Id.* at 929-30. Mrs. Decker testified that Decker stayed in the first floor bedroom for a year after the accident because he was afraid to go up the steps to their bedroom. *Id.* at 936. She testified that her husband still is very cautious and fearful and that she had to take over many of the household chores he used to perform. *Id.* at 937. Mrs. Decker testified to the activities that the couple is no longer able to do. She also stated that activities which the couple anticipated, such as helping their children work on their homes or teaching their grandchildren to skate, are no longer possible. *Id.* at 938. Mrs. Decker testified that Decker was in a wheelchair during two of his sons' weddings and that she had to travel to help with the wedding and needed someone to care for Decker during her trip. *Id.* at 939-40.

Jeffrey Kann, M.D., performed an independent medical evaluation of Decker. 11/4/10 Dep. at 11. He found no atrophy in the left leg and no evidence of nerve impairment. *Id.* at 24. Dr. Kann testified that there were no problems with the left knee, and that Decker had a full range of motion, well-healed incisions, and no pain. *Id.* at 25. Dr. Kann testified that there were no signs that Decker had an on-going nerve injury and that Decker's nerve had fully recovered. *Id.* at 35. Dr. Kann testified that Decker did not need to have any restrictions placed on his activities. *Id.* at 39-40. Dr. Kann admitted that Decker's physician had noted weakness and fatigue in Decker's left leg in the month prior to and two months after Dr. Kann's examination. *Id.* at 83-84. Dr. Kann also admitted that Decker had permanent scars on his leg. *Id.* at 95.

Gillingham's physician, Mark Baratz, M.D., testified that Gillingham has a torn tendon in his shoulder. 11/9/10 Dep. at 10. Dr. Baratz testified that he performed surgery to repair the tendon and that he trimmed bone spurs. *Id.* at 11. He testified that, after surgery, Gillingham was limited in his movement for about four weeks and that Gillingham then started physical therapy. *Id.* at 15. Dr. Baratz testified that Gillingham was having problems post-operatively, including pain, difficulty sleeping, and back pain. *Id.* at 18. Dr. Baratz testified that, a couple months after the surgery, he injected cortisone and cut back on therapy to allow Gillingham's shoulder to become less irritated. Dr. Baratz also prescribed a stronger pain medication. *Id.* at 19. Dr. Baratz testified to limitations on Gillingham's ability to work. *Id.* at 21. Dr. Baratz indicated that, by June of 2008, Gillingham's condition had worsened, requiring a second surgery to check the tendon repair and to free up scar tissue. *Id.* at 22-23. Dr. Baratz testified that, while

Gillingham's range of motion initially improved after the second surgery, it eventually worsened again. *Id.* at 25-27.

Gillingham's physical therapist, Lauren Nahas, testified that Gillingham started physical therapy for ankle and shoulder problems resulting from the fall. 11/4/10 Dep. at 9. She testified that Gillingham was experiencing pain in his spine, shoulder and heel and had limited mobility and strength in his ankle. *Id.* at 10. Nahas testified that, after the first surgery, Gillingham was experiencing a lot of pain, had limited motion, had trouble with daily activities, and had difficulty sleeping. *Id.* at 17. She testified that Gillingham was attending therapy about three times per week. *Id.* at 19. Nahas testified that Gillingham had reached a plateau and was discharged from therapy in November 2008. *Id.* at 21. She also testified that he returned to therapy in October 2009 after a third surgery. *Id.* at 23. At that point, Gillingham was experiencing pain, was limited in range of motion and strength, and was having trouble with daily activities. *Id.* at 24. She testified that Gillingham had pain in the non-injured shoulder resulting from overcompensating for the injured shoulder. *Id.* at 29. Nahas testified that Gillingham missed appointments at times because he was traveling for work. *Id.* at 54, 56. Nahas also testified that, after the third surgery, there was more progress and improvement. *Id.* at 57-58.

Gillingham's second surgeon, Mark Rodosky, M.D., testified that, when he first saw Gillingham, the patient suffered from reduced motion, stiffness, and pain. 11/5/10 Dep. at 10. Dr. Rodosky testified that in the third surgery, he cut the scar tissue to allow more motion and shaved some of the bone away. *Id.* at 14-15. Dr. Rodosky's diagnosis was chronic pain in the injured shoulder with continued frozen shoulder and mild impingement in the left shoulder. *Id.* at 19-20. Dr. Rodosky testified that Gillingham's condition was unlikely to change. *Id.* at 21.

Gillingham's chiropractor, Peter Peduzzi, D.C., testified that he treated Gillingham for severe back pain that started after the accident. 11/3/10 Dep. at 12. Dr. Peduzzi testified that there was tension and muscle spasm of the back muscles, as well as misalignment of the vertebrae. *Id.* at 15, 17. Gillingham received treatment that included cervical traction, deep heat, electrotherapy, and manipulation of the spine. *Id.* at 21-23.

Gillingham testified that, prior to the accident, he jogged regularly. N.T. Vol. III at 997. He and his wife would shop and go out, and he also played basketball and jogged with his son. *Id.* at 999-1000. He testified that, after the fall, he was in excruciating pain. *Id.* at 1024. He testified that, initially, he did not want to go to the hospital because he wanted to go home. *Id.* at 1027. Then, he said, he realized something was wrong with his arm and he wanted to go to the ER. *Id.* at 1028. Gillingham testified that he had a lot of pain in his right arm and left leg. *Id.* at 1030. Mrs. Gillingham testified that, when she arrived at the ER, her husband appeared pale, glassy-eyed, and out of it. N.T. Vol. IV at 1190. Gillingham testified that he had pain in his left heel and difficulty walking for approximately nine months. N.T. Vol. III at 1032. Gillingham testified that, at his initial doctor's visit, he was having pain in his shoulder, swelling in his arm, pain in his knee and foot, and difficulty and pain with walking. *Id.* at 1042-43. He testified that he was treated for a broken bone in his foot, and that his treatment helped greatly with that pain. *Id.* at 1046-47. Gillingham testified to the severe pain he had in his shoulder and to his attempt to limit his pain medication because it interfered with his ability to work. *Id.* at 1048. Gillingham testified that, after the surgery, his arm froze, causing great pain. *Id.* at 1053. Gillingham demonstrated for the jury the continuing limitations on the range of motion in his arm. N.T. Vol. IV at 1073-75. He testified that he is still taking steroids and narcotics regularly to deal with the pain and inflammation. *Id.* at 1075-76. Gillingham testified that he was back at the CONSOL project on a limited basis within a few days of the accident. *Id.* at 1132. Gillingham testified to scars he has on his shoulder from the surgeries. *Id.* at 1179. The parties stipulated that Gillingham owed medical expenses of \$76,052.57. N.T. Vol. V at 1227.

Gillingham testified that he has not been able to perform work that he planned to do around the house, such as fixing a retaining wall, maintaining the yard, remodeling, and washing the car. N.T. Vol. IV at 1101-02. He testified that he cannot play basketball with his son. *Id.* at 1102. Gillingham testified that he is unable to help care for his mother-in-law, who is in a wheelchair, that he can no longer help her move from the chair to the car, and that he cannot help take care of her home. *Id.* at 1102-03. He testified that his wife has had to take over many of his household responsibilities and must care for her mother without his help. *Id.* at 1105. Gillingham testified that he is more irritable with his wife and has stopped having sex due to the medication he takes. *Id.* at 1106.

Mrs. Gillingham testified that, before the accident, they were a very active family. *Id.* at 1190. She testified that he helped with her mother's care and her mother's home. *Id.* She testified that Gillingham helped transfer her mother into and out of the wheelchair, helped her into bed and helped her to the bathroom. *Id.* at 1191. She testified to home projects that Gillingham started but was unable to finish due to the injury. *Id.* at 1191-92. Mrs. Gillingham testified that they are no longer able to go on walks, go to water parks, or go swimming. *Id.* at 1193. She also testified that all of this had been hard on the relationship and that there was "no physical contact." *Id.* at 1194.

Steven Kann, M.D., performed an independent medical evaluation of Gillingham. He testified that Gillingham only complained of pain and decreased range of motion in his right shoulder. 11/2/10 Dep. at 18. Dr. Kann said that his examination showed decreased range of motion in the right shoulder. *Id.* at 22. He also testified that Gillingham has normal strength in the shoulder. *Id.* at 24. Dr. Kann testified that Gillingham did not complain about pain in his back or left shoulder. *Id.* at 25. Dr. Kann also testified that, from the records he reviewed, the back pain was unrelated to the fall. *Id.* at 27. Dr. Kann said Gillingham's range of motion was limited and that Gillingham could not climb or crawl or pull wire or play sports. *Id.* at 37-40.

The testimony summarized above provided ample evidence to support the jury's decisions on damages. Both Decker and Gillingham experienced significant pain, and both continue to suffer physical limitations. There was evidence of pain and suffering, embarrassment, and loss of life's pleasures. There was somewhat less evidence on disfigurement, but there was sufficient testimony and photographs in both cases of scars resulting from the accident. There also was sufficient testimony on the loss of consortium claims. It is clear from the verdict that the jury found the plaintiffs and their medical experts credible. It is also clear that the jury did not give weight to the independent medical examinations. That is not surprising. The plaintiffs' medical experts were the treating physicians and the physical therapists who had worked with the plaintiffs for years, while the independent evaluators saw the plaintiffs for only one brief visit each. While the verdict was substantial, particularly in regard to future pain and suffering awards, it does not shock the conscience, particularly when one considers the 20-30 year life expectancies of the plaintiffs as well as the continuing pain and physical limitations that the plaintiffs endure.

Issue Regarding the Verdict Form

CONSOL's second argument is that it is entitled to a new trial because the verdict form included 12 line items for damages. CONSOL argues that the verdict form was prejudicial and that awards for various forms of pain and suffering are not allowed under Pennsylvania case law. CONSOL asserts that the jury awarded duplicative amounts and amounts for items that were not supported by the evidence. CONSOL also argues that the placement of the borrowed servant question for Gillingham was prejudicial; by placing it first, the jury was permitted to make a decision based on sympathy, while if the question had been placed last, the jury's

sympathy would not have been a factor. Gillingham replies that Pennsylvania case law indicates that itemized damages are acceptable and that Rule 223.3 authorizes an instruction on the items that make up noneconomic damages. Gillingham argues that the placement of the borrowed servant question was logical because, if the jury found Gillingham to be a borrowed servant, the jury would have been spared wasted time deliberating on damages.

CONSOL cites the *Carpinet* case in support of its argument. In that case, the Superior Court said that there should not be piecemeal awards for pain and suffering. *Carpinet v. Mitchell*, 853 A.2d 366, 373 (Pa. Super. 2004). Specifically, the Superior Court was concerned that the trial court had listed emotional distress and loss of feeling of well-being separately from pain and suffering. *Id.* The appellate court also was concerned about a separate line for loss of life's pleasures since the case law was unclear on whether this was a distinct item of damages. *Id.* at 374.

Plaintiffs rely on the *McManamon* case. There, the Superior Court approved of a jury verdict form that had six categories, including past and future medical expenses, past and future lost earnings, past and future pain and suffering/embarrassment/humiliation/loss of enjoyment and disfigurement. *McManamon v. Washko*, 906 A.2d 1259, 1284 (Pa. Super. 2006). The Superior Court found that this was not improper because there was only one pain and suffering line, and pointed out that special jury interrogatories can assist the court. *Id.*

Although not cited by either party and not directly on point, the *Catalano* case is of interest. In that case, the Supreme Court was focused on the issue of whether an appellate court could remand for a new trial because a jury did not award pain and suffering damages when there was testimony about potentially painful surgery. *Catalano v. Bujak*, 642 A.2d 448, 449 (Pa. 1994). The Court included the verdict form in its opinion. That verdict form had nine damages categories, including separate lines for past pain and suffering, future pain and suffering, embarrassment and humiliation, disfigurement, and loss of enjoyment of life. *Id.* The Court mentioned no objection to the verdict form, nor to the separation of categories.

Rule 223.3 also is instructive. It specifically provides for the trial court to instruct the jury on pain and suffering, embarrassment and humiliation, loss of ability to enjoy life's pleasures, and disfigurement. Pa. R.C.P. 223.3. If the rule requires the instruction, it makes sense that the verdict form should be modeled on that instruction.

The *Carpinet* case is inapposite because there is no break-out in the instant case for emotional distress, and because the loss of life's pleasures question is answered by Rule 223.3. The *McManamon* case also is not directly on point because the verdict form in that case only had one pain and suffering line. *McManamon* did, however, expressly approve of separate damages categories. *Catalano* approved, at least implicitly, a jury verdict form that was very similar to the one in this case. Given the authority provided in *McManamon* and *Catalano* and Rule 223.2, the verdict form was appropriate, caused no prejudice, and does not warrant a new trial.

Issue Regarding Decker's Future Lost Earnings

CONSOL's third argument is that it is entitled to a new trial because the court allowed speculative testimony from Decker's employer and economic expert on future lost earnings. CONSOL challenges the basis for testimony about lost future commissions resulting from Decker's injuries. CONSOL points out that Decker's economic expert used that testimony as the basis for his opinion. CONSOL argues that there was no testimony that any commissions had ever been paid. CONSOL compares this to projecting profits for a start-up business and asserts that the evidence was too speculative. Further, CONSOL argues that Decker should not have been able to recover for lost wages because Decker testified that he is capable of working full-time.

Decker replies that there was evidence supporting future lost earnings based upon testimony that Decker would work until age 70 and based upon his expectations concerning commissions. Decker concedes that the jury award was less than the testimony referenced but says that the jury award was based on testimony concerning \$44,000 in lost income for 2009 and 2010 projected out until Decker was 70 (\$528,000) and lost commissions of \$15,000 projected out (\$180,000) which equals the \$708,000 awarded by the jury. Decker also argues that his employer was competent to testify about his wages and the potential for commissions and that the expert was therefore entitled to rely on that testimony.

To collect for future lost earnings, a plaintiff must establish that his economic horizon is shortened; if there is permanent damage, the whole life span must be considered. *O'Malley v. Peerless Petroleum, Inc.*, 423 A.2d 1251, 1255-56 (Pa. Super. 1980). A claim for lost wages must be supported by a reasonable basis for calculations. *Kaczkowski v. Bolubasz*, 421 A.2s 1027 (Pa. 1980).

Dr. Rothenberg testified that Decker is limited in the amount he can lift, and that he cannot climb or walk on uneven surfaces. 11/8/10 Dep. at 30-31. Yannick Beaulé, General Manager of Pump Action, Inc. (Decker's employer), testified that Decker was hired at a base salary of \$100,000/year and a 2 percent commission on realized sales. N.T. Vol. II at 600. Beaulé also testified that it was expected that Decker's base salary would increase to the level paid by his prior employer, \$125,000/year, after Decker established the new location. *Id.* at 602. Beaulé testified that he kept employing Decker after the accident, but that Decker's salary was reduced because of the reduced hours he could work, to around \$60,000 in 2007-2009 and around \$80,000 in 2010. *Id.* at 622-23. Decker ultimately did not receive any commissions under his contract. *Id.* at 623. Beaulé testified that he believed Decker lost approximately \$2 million in commissions and salary over his lifetime because of his injury. *Id.* at 653. The amount of commissions was based upon anticipated sales in the industries in which Decker was working. *Id.* at 650-53. On cross-examination, Beaulé testified that Decker had not earned any commissions in the almost two years Decker worked for him prior to the accident. *Id.* at 678. He also testified that there had been no sales in the mining industry, although he attributed that partly to Decker's inability to work. *Id.* at 679-80. Beaulé testified that Decker is setting his own hours and has resumed some business trips, including attending various trade shows and seeing customers. *Id.* at 692-94.

Steven Klepper, Ph.D., an economics expert, testified that he received the projections on commissions and base salary for Decker from Beaulé. N.T. Vol. II at 715-16. Dr. Klepper testified that Decker would be earning slightly less than \$2.5 million over his remaining working life based upon his projected commissions, salary and the age at which Decker expected to stop working. *Id.* at 719. Dr. Klepper testified that he projected, with the injury, that Decker would earn \$1.22 million during his remaining working years with a lifetime economic loss of \$1.25 million. *Id.* at 720.

Decker testified that he was earning \$125,000/year at his prior employer with the expectation of future promotions if he had stayed. N.T. Vol. II at 832, 834. Decker testified that it was his expectation that, with the potential for commissions at Pump Action, he was likely going to earn more than the salary he received at his prior employer. *Id.* at 838. Decker testified that he missed work time due to mandatory exercise and physical therapy prescribed after the accident. *Id.* at 869. He also missed work due to doctors' appointments, electrical stimulation, fatigue, and pain. *Id.* at 870. Decker testified that the injury prevents him from fully analyzing jobs because he cannot carry heavy loads, cannot climb stairs, and cannot walk on uneven surfaces. *Id.* at 871-73. Decker tes-

tified that he has been working approximately 35 hours/week for the past two years and has been able to travel for work. *Id.* at 898-99. Decker maintained that he needs to continue with the physical therapist and did not believe he could get the same result at a gym. *Id.* at 900.

James Fellin, CPA, a forensic accountant, testified that Decker's past wage losses were \$100,000-\$146,000. N.T. Vol. V at 1401. Fellin criticized Dr. Klepper's estimate because Dr. Klepper assumed the wage loss would be for the rest of Decker's working life and because Dr. Klepper assumed Decker would work until age 70 instead of his statistical work life. *Id.* at 1406-07.

From the verdict, it is clear that the jury credited Beaulé's and Decker's testimony that Decker's salary was planned to increase to \$125,000/year and that the \$81,000/year he was currently earning was his post-accident maximum. This was a reasonable conclusion from the testimony about Decker's limitations and the requirements of his job. This apparently formed the basis for the jury's decision that Decker lost \$44,000/year (\$125,000-\$81,000) for 12 remaining working years (\$528,000) total. The jury also credited testimony that Decker would have earned some commissions. This was reasonable based upon Beaulé's testimony that some commissions had been earned on previous contracts, but not paid to Decker. The jury used \$15,000/year in commissions, which is the amount Fellin used in his calculations. The jury's award was reasonably based upon testimony and showed that the jury was listening and carefully considering the evidence. The jury did not blindly choose one side's numbers.

Issue Regarding Gillingham's Future Lost Earnings

CONSOL's fourth argument is that it is entitled to a new trial because it was error to allow testimony on Gillingham's claim for lost wages, lost future earnings and earning capacity. CONSOL deems speculative the testimony that Gillingham would have bid on and been awarded two jobs as well as Gillingham's claim for future lost wages based upon his annualized temporary work and missed opportunities in his consulting business. CONSOL argues that the history of the consulting business shows only modest profits at best and nothing to support an award of \$300,000. Gillingham argues that expert testimony was not required and that his testimony supported the claim that his main employment and his consulting business were affected by his injury. Gillingham argues that the two "missed" opportunities were jobs offered to him, not ones he had to bid on, and that from his experience he lost approximately \$210,000 in profit.

The same standards applicable to Decker's claim also apply to Gillingham's future lost earnings claim. Dr. Rodosky testified about the limitations on Gillingham's ability to perform his job. 11/5/10 Dep. at 22-23. This included not being able to lift more than 10 pounds, not being able to climb a ladder, not being able to crawl on his arms, and not being able to pull wire. *Id.* Dr. Peduzzi also testified about the restrictions on Gillingham's ability to work. 11/3/10 Dep. at 34.

Gillingham described his consulting business, talking about having to install equipment, pull wires, lift objects, or climb or crawl to reach control panels. N.T. Vol. III at 987-89. Gillingham testified that he continued to try to work for Technical Solutions, Inc. ["TSI"] to the extent he could following the accident. N.T. Vol. IV at 1085. He testified that he stopped working on the CONSOL project through TSI in January 2009 because he wanted to focus on his recovery and because it was a time when his duties were current and he could be replaced. *Id.* at 1086. He testified that his consulting business suffered because he was not able to meet customer demands. *Id.* at 1087. Gillingham testified that he did not work at all between August 2009 and March 2010 because he was told that, if he would focus more on rehabilitation and therapy, he would have better results. *Id.* at 1088. Gillingham testified that he lost \$105,225 in wages from the time during which he could not work full-time with TSI and the period during which he did not work at all. *Id.* at 1088-89.

Gillingham testified that his consulting business was harmed because he could not do the kind of work required. N.T. Vol. IV at 1089-90. He discussed a \$300,000 project that he was unable to bid on and that actually occurred, and he testified that he was consulting for the company that won the bid. *Id.* at 1090-92. He testified that he believed he would have gotten the job because it was offered to him prior to the company seeking bids and it was only bid out because he was unable to do the job. *Id.* at 1093. He testified he would have received 50% profit. *Id.* at 1094. Gillingham testified that he had worked with the company before, but only on smaller jobs in the \$30,000-\$40,000 range. *Id.* at 1114. Gillingham also testified about a second \$150,000 job that he could not complete at a company with which he had an ongoing relationship. *Id.* at 1094-96. Gillingham expected 35-40% profit on that job. *Id.* at 1096. Gillingham testified that he is currently working about 50% of the time at his consulting business and is focusing on computer programming. *Id.* at 1108. Gillingham reviewed his income tax returns and showed, since 2000 until the accident, income ranging between \$17,000 and \$61,000. *Id.* at 1168-75.

Fellin testified that there was not a significant wage loss for Gillingham, in part because Gillingham had his highest earnings after the accident in 2008. N.T. Vol. V at 1412. Fellin also questioned Gillingham's computation of his wage loss because that computation looked at Gillingham's earnings through TSI only and not through his consulting business. *Id.* at 1414. Fellin opined that Gillingham's wage loss was below \$35,000. *Id.* at 1444.

The jury awarded Gillingham \$100,000 in past wage loss and \$300,000 in future wage loss. Of that, if the jurors believed Gillingham's testimony about the lost jobs he would have gotten, \$210,000 was for those jobs. There was no dispute concerning the medical testimony that Gillingham had a permanent disability to his shoulder. There was plenty of testimony for the jury to believe that those disabilities would limit Gillingham's ability to work. The jury apparently believed Gillingham lost wages with TSI during the accident and would be impaired in his consulting business in the future. Those decisions were supported by the record.

Issue Regarding Testimony of Plaintiff's Liability Expert

CONSOL's fifth argument is that it is entitled to JNOV or a new trial because the court erred in denying its motion *in limine* on liability expert witnesses and allowed speculative testimony. CONSOL argues that plaintiffs' liability expert was allowed to opine that there had been rework or replacement of some of the support pieces of the stairway which should have put CONSOL on notice of a problem with the stairway. CONSOL argues that it is impermissible to permit an expert to guess what could have happened. CONSOL argues it was prejudiced by this ruling because the expert was permitted to lead the jury to believe that CONSOL had notice of a problem and improperly installed the bolts, and because the ruling allowed the jury to give undue weight to the expert's testimony. Gillingham replies that the engineering expert offered six reasons for his conclusions about reworking after reviewing photos, doing testing, and visiting the site. Gillingham argues that the experts based their opinions on information submitted to them and that this is proper.

An expert's opinion may be based on conjecture if the opinion has an adequate basis in fact. *Hussey v. May Dept. Stores, Inc.*, 357 A.2d 635, 637 (Pa. Super. 1976). An expert's opinion is not speculation if it is based on legitimate inference. *Id.*

The expert, Behzad Kasraie, Ph.D., P.E., testified that the top two bolts were larger and had hammer marks on them. Dr. Kasraie concluded that this meant the bolts did not fit in the holes drilled and were hammered into place. N.T. Vol. I at 492. Dr. Kasraie

also testified that one of the bolts was bent from the hammering, and that the bending could not have been caused by the falling stairway. *Id.* at 494. Dr. Kasraie also testified that the bolts did not fit correctly because one bolt was sticking through about an inch while the other bolt, after being hammered through and being bent, was sticking through only enough to put the nut on. *Id.* at 497. Because the upper bolts were a different size, they were driven in by force, the nuts and washers were a different material, the drill holes were not the right size, and the nuts were different sizes, Dr. Kasraie concluded that rework had been done after the initial installation. *Id.* at 500. Dr. Kasraie admitted that it was possible the bolts were part of the original installation. *Id.* at 522-23. However, he testified that there were enough indications of rework that he stood by his conclusion. *Id.* at 523.

There was enough explanation provided by Dr. Kasraie to show that his testimony was not mere speculation. Dr. Kasraie pointed to several reasons why he believed there was rework and why the bolts were not original. While Dr. Kasraie admitted he could not be absolutely sure, he relied upon facts that served as an adequate basis for his opinion.

Further, it is not clear that CONSOL properly preserved the objection. CONSOL objected twice to testimony by Dr. Kasraie as speculative. N.T. Vol. I at 491, 499. In both cases, the Court instructed Plaintiff to lay a foundation. *Id.* CONSOL never reasserted the objection after it had been sustained and after a foundation was laid. The objection to speculative testimony was not properly preserved. An objection not preserved is waived.

Issue Regarding Preclusion of Design Defect Cross-Examination

CONSOL's sixth argument is that it is entitled to a new trial because the court limited its cross-examination of the liability experts. CONSOL argues that the Decker motion *in limine* which precluded evidence or reference to improper design or design defect of the stairway limited CONSOL's cross-examination. For example, CONSOL was unable to ask the architecture expert if he had any criticism of the builder of the building, and its cross-examination of the engineering expert was limited to showing the expert did not know who did the hammering of the bolts. CONSOL argues that once the testimony complained of in its fifth argument was allowed, CONSOL should have been allowed to cross-examine freely and point out that if the bolts were original, then CONSOL had no notice of the problem. Gillingham replies that the questions CONSOL tried to pose went to the design of the staircase, and that design inquiry was impermissible because plaintiffs' claims related to negligence in maintenance and repair only.

The standard of review on evidentiary issues is very narrow. *Miller v. Ginsberg*, 874 A.2d 93, 97 (Pa. Super. 2005). The trial court will only be reversed if the evidentiary ruling is erroneous and harmful or prejudicial. *Id.* Decker's motion *in limine* was based upon two points: first, that a design defect had not been raised as an issue prior to trial, and second, that raising it before the jury would be needlessly confusing. In arguing this motion, Decker was clear that he was seeking preclusion of CONSOL's ability to argue that any design defect caused the collapse, because design defect had never been raised and there was no expert report opining that there was a design defect. N.T., Vol. I at 2-3. CONSOL agreed that it was not going to raise the issue of a design defect. *Id.* at 4. The Court specifically said that there could be testimony or cross-examination about the facts of who built the staircase, when it was built and what kind of bolt was used in the original construction. *Id.* at 7. In fact, CONSOL agreed with the Court's statement that there could be cross-examination on the original construction and Decker conceded the fairness of that point. *Id.* at 8. Further, CONSOL was permitted to ask some questions about the original installation of the staircase when plaintiffs elicited some testimony about that installation.

Issue Regarding Expert Testifying Beyond Scope of His Report

CONSOL's seventh argument is that it is entitled to a new trial because the court erred in overruling its objection to the architectural expert's testimony as being beyond the scope of his report. CONSOL argues that the prior expert's report which was adopted by this expert said nothing about painting and sealing the building for water penetration, that the expert's testimony about sealing was in contradiction to the earlier report, and that CONSOL had no notice that the expert would testify differently. Gillingham argues that the expert merely testified that painting and sealing would act as a water repellent, and that this does not contradict the earlier report.

To determine whether an expert's trial testimony is within the fair scope of the expert's report, the court must decide whether the differences between the testimony and the report are "of a nature to prevent the adversary from preparing a meaningful response, or [] would mislead the adversary as to the nature of the appropriate response." *Wilkes-Barre Iron & Wire Works, Inc. v. Pargas of Wilkes-Barre, Inc.*, 502 A.2d 210, 212-13 (Pa. Super. 1985). In *Wilkes-Barre Iron & Wire Works, Inc.*, where a report said only that a cylinder without a protective collar was defective, testimony that the collar needed to be welded to the cylinder was deemed to be beyond the scope of the report. *Id.* at 213.

The architecture expert, Phil Hundley, licensed architect, testified that there was rust on the inside backing plate and that the rust would have been caused by moisture coming from the cavity in the wall. N.T. Vol. I at 321-22. CONSOL objected to this as beyond the scope of the report. *Id.* at 322. Mr. Hundley also testified that the 5/8-inch bolt was strong enough to hold up the stairs. CONSOL objected to this testimony as beyond the scope. *Id.* at 331. The Court sustained a scope objection with respect to the expert's attempt to testify as to methods of preventing moisture from entering the concrete wall. *Id.* at 333-36.

The report (Ex. 2 of Plaintiffs' Pre-Trial Statement) discusses moisture and water getting into the concrete wall. It also discusses application of a coating on the bolts and grouting of the concrete to prevent moisture. Given that part of the report, it cannot be said that the expert's testimony about sealing the wall was beyond the scope of the report such that CONSOL was prevented from preparing a meaningful response or that CONSOL was misled about the nature of the testimony.

Issue Regarding Preclusion of Defense Expert Testimony

CONSOL's eighth argument is that it is entitled to a new trial because the court precluded its expert from testifying about results of his testing. CONSOL complains that its expert provided a supplemental report which showed that none of the bolts had been replaced, but that this supplemental report was precluded as being late. CONSOL argues that this preclusion was too drastic, given that plaintiffs' engineering expert's supplemental report also was late. CONSOL argues that its expert should have been allowed to testify and that plaintiffs' expert could then have been called in rebuttal.

Gillingham responds that the Court's ruling was correct given that CONSOL's supplemental report was not received until after trial had started and after plaintiffs' experts had testified. Gillingham also argues that while plaintiffs' supplemental report was late, it still was received prior to trial and also was based upon testing done with both experts present so that there could be no surprise. Decker argues that it would have been unfair surprise to allow CONSOL's proffered testimony since all prior testing had been done with both experts, since there had been no discussion of additional testing, and since plaintiffs were deprived of the opportunity to discuss CONSOL's supplemental tests in their openings or in plaintiffs' case-in-chief. Additionally, plaintiffs would have been unable

to conduct their own tests to check CONSOL's proffered supplemental results without midstream delay to the trial.

The exclusion of an expert's testimony because of failure to comply with a discovery rule is a drastic sanction. *Green Construction Co. v. Dept. of Transportation*, 643 A.2d 1129, 1139 (Pa. Commw. 1994). The trial court must balance the circumstances of the case to determine the prejudice to each party in making the decision to preclude expert testimony. *Id.* The purpose of the rule requiring disclosure of expert opinions is to prevent unfair surprise. *Smith v. SEPTA*, 913 A.2d 338, 344 (Pa. Commw. 2006). In *Smith*, the Commonwealth Court found prejudice and unfair surprise when the expert was offered on the eve of trial. *Id.* The appellate court also found there was little prejudice to the party who proposed the expert testimony since there was other testimony on the issue. *Id.* at 345. An expert report offered on the day that trial was to begin was unfair surprise. *Kurian ex rel. Kurian v. Anisman*, 851 A.2d 152, 162 (Pa. Super. 2006). In *Kurian*, the court found the opposing party was unable to evaluate or prepare a response due to the lateness of the report. *Id.* Further, delaying the start of trial to allow time to prepare a response would disrupt "the efficient and just administration of justice." *Id.*

Decker brought a motion to preclude CONSOL's proffered testimony because he was unaware of the new report until it was handed to Decker's counsel during the trial on November 17. N.T. Vol. IV at 1060. Decker further complained that the report was dated November 13, that his expert testified on November 15, and that the report was not given to Decker's counsel until November 17. *Id.* at 1061. CONSOL indicated that an additional test was done by its expert that would indicate the bolts were original. N.T. Vol. V at 1200-01. Decker's objection was that the parties had agreed to certain testing and that this testing was performed and included in CONSOL's expert's initial report. *Id.* at 1203. Then, at a later date, CONSOL's expert performed additional testing without notice to the plaintiffs, and CONSOL's supplemental report was not received until after trial had begun. *Id.* at 1203-04. This Court indicated that the problem was that plaintiffs' expert had not been able to address this supplemental CONSOL test in his testimony and to allow rebuttal testimony by Dr. Kasraie would prolong the trial. *Id.* at 1206.

The report was properly excluded. If a report delivered on the eve of trial is unfair surprise, then certainly one delivered during trial is unfair as well. Plaintiffs had no notice that additional testing was being done and had no way to prepare. The only way to combat the unfair surprise and prejudice would have been to allow Plaintiffs' expert to replicate the testing and then testify a second time. This could not have been done without delaying the trial. This would have been particularly disruptive to the trial because the jury would have heard several days of trial, then there would have been several days of break to allow the testing, then more days of trial. That would not only have disrupted the jurors' lives, it also would have taxed their memories. Precluding the supplemental report was by far the wiser course of action.

Issue Regarding Jury Instructions

CONSOL's ninth argument is that it is entitled to a new trial because the court did not give requested jury instructions. CONSOL argues that the statements it requested were correct statements of law and were not otherwise covered in the jury instructions. These statements related to speculative testimony and opinions, the purpose of compensatory damages, and the burden of proof on damages. Gillingham argues that the jury instructions were adequate and proper and are within the court's discretion.

The scope of review on an allegation of error with jury instructions is clear abuse of discretion or error of law by the trial court. *Butler v. Kiwi, S.A.*, 604 A.2d 270, 272 (Pa. Super. 1992). The reviewing court looks at the entirety of the charge and the background of evidence adduced at trial to determine whether an error was made and whether there was prejudice. *Id.* The reviewing court does not consider portions of the jury charge out of context. *Id.*

This Court gave the standard instruction on opinion testimony. N.T. Vol. V at 1678-80. The Court noted that requested jury instruction 19 on speculative testimony was covered in the standard instruction on opinion testimony. *Id.* at 1516. The standard instruction on burden of proof also was given. *Id.* at 1680-82. This Court also gave the standard instructions on damages and on the purpose of damages. *Id.* at 1682-90. This Court stated that requested instructions 27 and 28, which spoke about damages, were covered by the standard instructions. *Id.* at 1516-17. The jury instructions given were accordingly proper.

Issue Regarding Borrowed Servant Doctrine

CONSOL's tenth argument is that it is entitled to JNOV or a new trial because the evidence established that Gillingham was a borrowed servant. CONSOL argues that the control test showed that Gillingham was barred from his claims under the Workers Compensation Act because he was, effectively, an employee of CONSOL. CONSOL argues that the evidence showed CONSOL interviewed and hired Gillingham, that Gillingham worked under the supervision and control of an CONSOL employee, that Gillingham reported to a CONSOL employee, and that CONSOL is not bound by the characterization of Gillingham as an independent contractor if the facts show otherwise. Gillingham argues that whether he was a borrowed servant is a question of fact, that the proper standard was given to the jury, and that the jury decided the question of fact. Gillingham disputes the claim that his work was controlled by CONSOL.

The borrowed servant doctrine provides that an employee may become the employee of another employer if the other employer has the right to control the employee's work or the manner in which the work is done. *Bayada Nurses, Inc. v. Dept. of Labor*, 958 A.2d 1050, 1060 (Pa. Commw. 2008). Other factors to be considered are wage payment, the right to select and fire, and the skill required to perform the work. *Id.*

There was testimony by CONSOL's vice president of research and development, Steven Winberg, that Gillingham was not an employee of CONSOL. N.T. Vol. I at 176. Gillingham's name was given to CONSOL by TSI and Gillingham was interviewed by CONSOL prior to starting his work there. *Id.* at 236. There was a contract between TSI and CONSOL. *Id.* at 238. Winberg testified that Gillingham reported to a CONSOL employee, Mike Fenger, and that Fenger directed Gillingham's work. *Id.* at 239-40. However, Winberg also testified that CONSOL never paid Gillingham and that Gillingham worked for TSI on the PFBC-EET project. *Id.* at 255. Winberg also admitted that he never personally gave Gillingham instructions or supervised him and that he did not believe CONSOL provided Gillingham with the tools necessary to do his job. *Id.* at 257.

Fenger testified Gillingham was contracted through TSI and was paid by TSI. N.T. Vol. I at 369-70. Fenger testified that he selected Gillingham's resume from several supplied by TSI and interviewed him. *Id.* at 405. Fenger testified that Gillingham worked under his supervision at CONSOL. *Id.* at 408. Fenger testified that CONSOL paid TSI based upon TSI invoices for Gillingham's time and that he authorized overtime for Gillingham. *Id.* at 429-30. Fenger said that Gillingham reported to him on a daily basis and that Fenger gave Gillingham instructions for his work. *Id.* at 431.

Gillingham testified that he was employed by TSI and was a W2 employee of TSI. N.T. Vol. III at 1001. He testified that he was not an employee of CONSOL. *Id.* at 1003. Gillingham testified that he did not really receive direction from a supervisor, but would

get requests for the development of certain automation or aspects of the system. *Id.* at 1006. He testified that he would consult with Fenger, but would go days without seeing him. *Id.* at 1008. Gillingham testified that he was the only one with the expertise in his area so that no one directed the manner in which he was to do his job. *Id.* Gillingham testified that time off requests went to TSI. *Id.* at 1012. He testified that Fenger signed off on his time sheets. N.T. Vol. IV. at 1144. Gillingham said that if Fenger asked him to do a particular task, he could refuse, but it never came up. *Id.* at 1145-46.

There was testimony by Jim Locke, a CONSOL manager, that the contract with TSI referred to Gillingham as TSI's employee. N.T. Vol. V at 1219. The contract also said that Gillingham was to report to Fenger. *Id.* at 1222. Locke also testified that the contract required Gillingham to check in and out each day with Fenger. *Id.* at 1224. Jeff Mauser from TSI testified that once someone is placed with a company, TSI pays the employee, deducts taxes and provides benefits, but does not have day-to-day interaction with the employee. *Id.* at 1262. He testified that the employee works under the direction of the company, not TSI. *Id.* at 1272.

There was enough evidence presented on both sides of the issue to make it a jury question. The jury apparently found Gillingham credible in his testimony that Fenger did not direct his work and, accordingly, found Gillingham was not a borrowed servant. The evidence was in conflict, and the jury was entitled to resolve that conflict. It did so. There was no error.

Issue Regarding Release and Waiver

CONSOL's eleventh argument is that it is entitled to a JNOV or a new trial because Gillingham executed a valid release. CONSOL argues that Gillingham signed a release prior to starting work with CONSOL. CONSOL argues that the release was valid because Gillingham could have chosen not to sign it and that his mistaken belief about what the document was or his testimony that he did not read it did not invalidate it. Gillingham argues that he was not a free bargaining agent and that he had no choice but to sign it. Gillingham further argues that he was never told he was signing a waiver and release and that this was a jury question which the jury resolved.

A release is valid if it does not contravene public policy, if the contract is between parties relating to their own private affairs, and if each party is a free bargaining agent. *Vinikoor v. Pedal Pennsylvania, Inc.*, 974 A.2d 1233, 1238 (Pa. Commw. 2009). A contract of adhesion is one in which a party has no choice but to accept the terms or reject the entire transaction. *Todd Heller, Inc. v. United Parcel Service, Inc.*, 754 A.2d 689, 700 (Pa. Super 2000).

Gillingham testified that he was asked to sign a stack of documents after he had been at CONSOL for a little while and that he was told this was a non-compete agreement. N.T. Vol. IV at 1103. Gillingham said the stack was several hundred pages with flags for where his signature was to go. *Id.* at 1104. He testified that he was not told he was signing a release and waiver. *Id.* Gillingham testified that he believed he could not refuse to sign the documents and that if he had not signed them, he would have had to leave and he would have violated his contract with TSI. *Id.* at 1105. Gillingham testified that he did not read the document before he signed it, that he believed the CONSOL representative who said it was a non-compete agreement, and that this was not unusual. *Id.* at 1123.

This is a close issue. The evidence in support of the jury's verdict is Gillingham's testimony that he thought he had to sign the papers to continue working at CONSOL. This supports the jury's verdict. Resolution of the disputed evidence on this point was within the province of the jury. It is not within the province of this Court to overturn the jury's verdict on this point.

Issue Regarding Closing Arguments

CONSOL's twelfth argument is that it is entitled to a new trial because plaintiffs made prejudicial statements in closing arguments. CONSOL argues that these statements were made to inflame the jury and were not proper statements under the law. Gillingham argues that CONSOL did not object to these statements at the time and so cannot now raise them in post-trial motions. Gillingham argues that CONSOL only objected at the time that there was an incorrect statement of law, and that the statement was in any event correct. Decker argues that CONSOL asked for a curative instruction after the closing argument and that the instruction was given.

An assertedly objectionable statement made in closing arguments should not be viewed in isolation, but in the context of the entire argument. *Alexander v. Carlisle Corp.*, 674 A.2d 268, 271 (Pa. Super. 1996). To compel a new trial, the objectionable remarks must be both prejudicial and inflammatory. *Id.* In one case, while the main issue was whether the objection to remarks in a closing statement was properly preserved, the trial court also concluded that remarks concerning an "\$83-billion out-of-town bank" were not inflammatory and prejudicial and that any prejudice was ameliorated by a cautionary instruction. *Busy Bee, Inc. v. Wachovia Bank, N.A.*, 2006 WL 723487 (C.P. Lackawanna 2006). When there was an instruction to disregard the statement, a remark about maximizing profits did not require a new trial. *Taylor v. Celotex Corp.*, 574 A.2d 1084, 1095 (Pa. Super. 1990). Counsel are permitted to draw inferences in their closing arguments as long as liberties are not taken with the evidence. *Mak v. Rosenbloom et al.*, 1991 WL 1011091 (C.P. Phila. 1991). When a proper charge on burden of proof was given, it cured an inappropriate remark in summation which argued for an adverse inference because a witness was not called to testify. *Id.*

Gillingham's counsel stated in closing arguments that CONSOL could have accepted responsibility and not put on "this smoke screen defense." N.T. Vol. V at 1579. On the issue of the release and waiver, Gillingham also argued that CONSOL had someone witness Gillingham's signature and that this person could have testified if Gillingham's version of the signing the document was incorrect. *Id.* at 1589. Gillingham argued that because that witness did not testify, the jury could infer that the witness would have confirmed Gillingham's version. *Id.* Gillingham also argued CONSOL put profits ahead of safety. *Id.* at 1620.

In closing argument, Decker pointed out that there are no maintenance records on the building where the staircase collapsed and that CONSOL was "hiding the ball" or got rid of the reports. N.T. Vol. V at 1628-29. Decker also said CONSOL could coach witnesses to say surface rust, instead of rust. *Id.* at 1629-30. Decker did argue that CONSOL had a "bean counter" who weighed the cost of replacing the staircase and other "old steel" against the costs associated with trial if someone were injured. *Id.* at 1655-56.

CONSOL did not object to those statements until after the Court gave its charge to the jury. N.T. Vol. V at 1701-02. Even then, CONSOL objected only that Gillingham referred to an adverse inference and that Decker referred to the "bean counter." *Id.* at 1702. CONSOL requested a curative instruction that the closing arguments are not evidence. *Id.* The Court gave the jury that instruction over plaintiffs' objection. *Id.* at 1703-04.

Overall, the closing arguments were not prejudicial and inflammatory. The statements to which CONSOL now objects did not comprise the majority of plaintiffs' closings. It also is questionable whether CONSOL properly preserved its objections. CONSOL did not object until after the jury charge, so its objection may not have been timely made. CONSOL also did not object at trial to all the statements to which it now objects in post-trial motions. Objections not preserved at trial are waived. Further, CONSOL requested a curative instruction and got one, over objection from plaintiffs' attorneys.

Issue Regarding Mention of Insurance

CONSOL's thirteenth argument is that it is entitled to a new trial because Gillingham testified about insurance. Gillingham mentioned insurance in an answer to a question about who employed him. CONSOL argues this was prejudicial and that Gillingham's mention of it suggested CONSOL had liability insurance which would cover any claims. Gillingham argues that the reference was glancing and that it was not even clear what type of insurance he was referencing.

The mere mention of the word insurance by a witness does not automatically require a new trial. *Dolan v. Fissell*, 973 A.2d 1009, 1015 (Pa. Super. 2009). The mention must be examined within the totality of the circumstances. *Id.* Where there was no contemporaneous request for a mistrial (even when there was an objection made and overruled), where the mention appeared inadvertent, and where it was not exploited by the plaintiff, the trial was not unfair and a new trial was not required. *Id.*

Gillingham testified, "Initially I tried to get them to, you know, pay me 1099, because then my insurance covers me, and it just makes things easier." N.T. Vol. III at 1009. There was no other mention and no follow-up questions by Gillingham's attorneys to explain what type of insurance Gillingham was referencing. About two or three questions later, at sidebar, CONSOL's attorney objected and the issue was preserved until CONSOL could be consulted about how to proceed. *Id.* at 1010-12. At a conference in chambers, CONSOL did request a mistrial. N.T. Vol. IV at 1057. The motion was denied based on the Court's conclusion that the reference to insurance was "innocent and oblique." *Id.* at 1059.

The totality of the circumstances here shows that a mistrial was not warranted. The mention of insurance was inadvertent. It was not clear whether Gillingham was referring to health insurance or liability insurance. Plaintiffs' counsel did not try to exploit the reference and there were no questions about insurance. The question to which Gillingham was responding did not seek to elicit information about insurance. Gillingham's comment was indeed "innocent and oblique," and cannot reasonably be deemed to have influenced the jury.

Issue Regarding Delay Damages

Gillingham filed a Motion to Mold the Verdict. The motion is seeking delay damages from June 20, 2009 (one year after the date of service) to November 23, 2010 (the date of the verdict). Decker filed a Motion for Delay Damages, seeking delay damages from June 24, 2009 through November 23, 2010. CONSOL filed an answer to both motions. On both motions, CONSOL argues that delay damages are not available for loss of consortium claims.

At oral arguments, all parties conceded that delay damages are not available on the loss of consortium claims. Delay damages are not awarded for loss of consortium claims. *Anchorman v. Mack Trucks, Inc.*, 620 A.2d 1120, 1121 (Pa. 1993). CONSOL conceded that the interest rates and time periods in Plaintiffs' motions were correct.

For Decker, the amount of delay damages on his award would be \$273,482, plus costs of \$244.50. For Gillingham, the amount of delay damages on his award would be \$113,648.48, plus costs of \$244.50. The verdict should be molded to reflect these amounts.

An Order in accordance with this Memorandum follows.

ORDER OF THE COURT

AND NOW, this 24th day of May, 2011, following careful consideration, and for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED, ADJUDGED, and DECREED that Defendant's Motion for Post-Trial Relief is denied. Plaintiff Decker's Motion for Delay Damages is granted, and the verdict for Clifford Decker is molded to \$4,816,726.50, to include delay damages and costs. Plaintiff Gillingham's Motion to Mold the Verdict is granted, and the verdict for David Gillingham is molded to \$1,990,892.98, to include delay damages and costs.

SO ORDERED.
BY THE COURT:
/s/Wecht, J.

United Environmental Group, Inc. v. Bryan Mechanical, a division of SSM Industries, Inc.

Implied Warranty of Merchantability—Misuse of Product—Causation—Spoliation of Evidence—Subcontractor—Flow-Through Liability—Evidence of Trade Usage—Damages for Overhead

No. AR 06-1937. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Wecht, J.—June 7, 2011.

OPINION

Plaintiff United Environmental Group, Inc. ["UEG"] appeals from this Court's March 14, 2011 Order. That Order denied UEG's Motion for Post-Trial Relief.

Background and Procedural History

UEG is a regional supplier of fuel tank systems. N.T. Vol. 1 at 4. Defendant Bryan Mechanical ["Bryan"]¹ is an HVAC and plumbing contractor. *Id.* at 23. The parties had worked together in the past on various projects. *Id.* at 134. In 2001, Bryan contacted UEG about bidding as a subcontractor on a project Bryan was undertaking at Frostburg State University in Maryland. *Id.* at 45-49. Bryan's part of the Frostburg State job was to provide installation of HVAC, plumbing and automated controls for the Compton Science Center, including installing a fuel tank and piping from the tank to two buildings. N.T. Vol. II at 315-16. As part of this installation, UEG also was to install underground piping sumps, which are designed to prevent any spilled fuel from entering the environment. N.T. Vol. I at 80-81. In 2002, UEG submitted its bid and the university accepted it. *Id.* at 67. The tank was delivered in November 2002. *Id.* at 75. In May 2003, UEG trained university personnel in use of the tank and system. *Id.* at 163. The installed tank was metal and was surrounded by a concrete vault. *Id.* at 68. There was space between the tank and the vault. The parties referred to this as "the interstitial space."

In September 2003, water began to infiltrate the interstitial space of the Frostburg tank. N.T. Vol. 1 at 163. By February 2005, there were cracks in the concrete vault, and water continued to invade the interstitial space. *Id.* at 95-96. The tank itself became

damaged, requiring installation of a replacement tank. N.T. Vol. II at 204-05, 349, 352. UEG declined to replace the tank. Bryan eventually replaced the tank at its own cost. N.T. Vol. I at 120.

In the meantime, in December 2004, the parties entered into an agreement for UEG to provide certain goods to Bryan for unrelated work Bryan was doing at Mon Valley Hospital in Washington County, Pennsylvania. *Id.* at 122-23.

On March 9, 2006, UEG filed this action, alleging it was not paid for items UEG supplied to Bryan for the Mon Valley Hospital project. On April 20, 2006, Bryan filed its answer and asserted a counter-claim, alleging that UEG was liable for the replacement costs of the fuel tank that failed at Frostburg State University. Bryan also disputed the amount due on the Mon Valley Hospital project.

On June 1, 2006, UEG filed an amended complaint that included a count alleging that Bryan had not paid UEG for its work at Frostburg State. On June 19, 2006, Bryan filed an amended answer and counter-claim.

There did not seem to be a dispute about the amount of the unpaid portion of the Frostburg State job. Instead, the parties disputed whether anything was owed, given Bryan's counter-claim.

A non-jury trial was held before the undersigned on November 8, 9, and 10, 2010. On November 19, 2010, this Court issued its verdict. The verdict found for UEG on its claims and for Bryan on its counter-claim. After consideration of the off-setting amounts, Bryan was awarded \$72,732.66. On December 3, 2010, UEG filed a Motion for Post-Trial Relief. After oral arguments on February 9, 2011, this Court denied the motion on March 14, 2011.

On April 26, 2011, UEG filed a Notice of Appeal from the March 15 Order. On May 2, 2011, this Court ordered UEG to file a Concise Statement of Errors Complained on Appeal, pursuant to Pa. R.A.P. 1925(b). On May 6, 2011, UEG filed its four-page, eleven-point, ten-subpoint Concise Statement.

Issues Raised on Appeal

In its Pa. R.A.P. 1925 (b) Concise Statement, UEG averred, verbatim, as follows (emphasis in original):

1. **There is no two-year warranty by Plaintiff.** The operative documents exchanged between Plaintiff and Defendant at the time the contract was formed make clear that *at most* Plaintiff was required to warrant the fuel tank for one year.
 - a. Defendant, and Defendant alone, independently warranted the fuel tank for an additional year.
 - b. Plaintiff was led by Defendant, prior to bidding, to believe that a 2 year warranty or maintenance obligation was *not* required.
 - c. Defendant further informed Plaintiff, prior to bidding, that Defendant and Defendant alone was required to provide a bond for the work, or of any other kind, to the Project Owner.
 - d. Plaintiff was not bound by the terms of any contract between Defendant and the Project Owner. Plaintiff was not shown that contract until long after the work was complete; Plaintiff did not sign that contract; and Plaintiff did not agree to be bound by it.
 - e. Subsequently, the parties agreed, in a writing (Exhibit P-21) that expressly supersedes all prior agreements between the parties, that Plaintiff would provide only a 90-day warranty to Defendant. That agreement further expressly waives all other warranties, express and implied.
 - f. In sum, there is no evidence to support a conclusion that Plaintiff gave a two-year warranty, and therefore there was no warranty by Plaintiff at the time the tank failed.
2. **The tank did not malfunction within one year.** In fact, the evidence is uncontested that the tank involved operated correctly for more than one year, and the first demand that it be replaced was not made until almost two years after completion of the work, and indeed more than one year from the date *Defendant* unilaterally declared the warranty to commence.
3. **The Project Owner and Defendant voided any warranty by their intentional and/or negligent misuse of the tank.**
 - a. The evidence was uncontradicted that the Project Owner began operating the tank before its employees were trained in such operations.
 - b. More importantly, however, the evidence was uncontradicted that the Project Owner ignored water infiltration alarms in December, 2004 – indeed disabling the alarm and continuing to operate the tank.
 - c. The Project Owner notified Defendant (but not Plaintiff) of the alarm status in early January, 2005. Inexplicably, Defendant failed to notify Plaintiff until the end of January.
 - d. As noted below, Plaintiff had advised Defendant and the Project Owner that the type of tank they were insisting upon would require greater maintenance than a different type of tank recommended by Plaintiff. The evidence established that Defendant and the Project Owner were negligent in providing that maintenance.
4. **The uncontradicted evidence precluded implied warranties, including especially any warranty of fitness for a particular purpose.** Plaintiff had advised Defendant and the Project Owner, prior to contract formation, to use a different type of tank. The Project Owner insisted that it wanted a steel tank house in a concrete vault, against the advice and judgment of Plaintiff.
5. **There was no evidence that the tank or its installation were defective.** There was no evidence from which the Court could conclude that the tank failed due to a defect in the tank or an error in its installation. At the same time, there was substantial evidence that the tank failed because of mis-use by the Project Owner and Defendant.
6. **Defendant caused the tank to be destroyed before any independent expert could inspect it.** This spoliation of evidence prevented all parties from having the ability to determine whether there was any defect in the tank or its installation, and prevented all parties from having the ability to determine what caused the tank to fail. At a minimum, this should have resulted in the Court inferring that the result of an inspection of the tank, had it not been destroyed, would have been adverse to Defendant.

7. **The contract between Plaintiff and Defendant bars Defendant from recovering special, incidental, and consequential damages.**
8. **The contract between Plaintiff and Defendant limits the amount of damages to the contract price.**
9. **There was no basis in fact or law for Defendant to recover “overhead.”**
10. **The costs included in the counter-claim were excessive and unsupported by evidence or law.**
11. **The verdict was against the weight of the evidence.** In addition, the verdict on Plaintiff’s claim should be molded to include interest at the rate of 1.5% per month in accordance with the parties’ contract and course of dealing.

Discussion and Analysis

UEG’s Concise Statement encompasses twenty-one points, including subpoints. A Concise Statement “shall concisely identify each ruling or error that the appellant intends to challenge” and “should not be redundant or provide lengthy explanations as to any error.” Pa. R.A.P. 1925 (b)(4)(ii), (iv). “[T]he number of errors raised will not alone be grounds for finding waiver.” Pa. R.A.P. 1925 (b)(4)(iv). Where there was no bad faith by the appellant, a twenty-two-paragraph Concise Statement that included “proscribed argument” was not considered a waiver. *LSI Title Agency, Inc. v. Evaluation Services, Inc.*, 951 A.2d 384, 388 (Pa. Super. 2008). Here, UEG’s Concise Statement is identical to its Motion for Post-Trial Relief. While UEG could have winnowed its Concise Statement considerably by removing argument, this Court does not find any bad faith.

UEG’s Motion for Post-Trial Relief sought either a reconsideration of the verdict or a new trial. A new trial should be granted if the verdict was against the clear weight of the evidence and the verdict shocks the conscience. *Alwine v. Sugar Creek Rest, Inc.*, 883 A.2d 605, 611 (Pa. Super. 2005). A new trial should not be granted if the evidence was conflicting and the fact-finder could have decided for either party. *Kraner v. Kraner*, 841 A.2d 141, 145 (Pa. Super. 2004).

None of the issues on appeal relate to the Mon Valley Hospital project.

Warranty Issues

Several of UEG’s issues on appeal relate to warranties. Bryan’s counter-claim asserted that UEG’s warranty required it to repair the vault. Bryan alleged that, when UEG failed to make the repairs, the tank sustained damage. Bryan asserted that UEG should have replaced the tank. Robert Birch, superintendent of SSM Industries (which owns Bryan, see n. 1), testified that UEG was under a two-year warranty because it was bound by the general contract terms and specifications of which UEG should have had notice. N.T. Vol. II at 328-29. Birch further testified that, even if UEG was only bound by a one-year warranty, the tank started to have problems within three months of installation such that UEG was still required to make the repairs and to make good on costs associated with replacement of the tank. *Id.* at 410-11.

There was no written contract between UEG and Bryan. The parties exchanged documents, but specified no information or agreement on warranties. Steven Klesic, president and owner of UEG, testified that UEG was unaware of the conditions of the general contract between Gilbane, the general contractor, and Bryan, such as the two-year warranty, and that UEG cannot be liable for those provisions which were unknown to UEG and to which UEG did not consent. N.T. Vol. I at 151-55. Bryan countered that, if UEG was not aware of the contract requirements, it was because UEG did not investigate them. N.T. Vol. II at 378-80.

The specifications for the fuel oil system included section numbers or codes that were part of the original contract and that were unique to this contract. N.T. Vol. III at 432-36. UEG used the correct section codes in its final quote. Ex. D2. David McNall, sales manager of UEG, testified that UEG got those numbers by copying the quote from Core Engineered Solutions, another company that bid for the job of providing the fuel tank. N.T. Vol. II at 300-02. However, those codes did not appear in the Core Engineered quote. Ex. D1. They do appear in the contract between Gilbane, the general contractor, and Bryan. Ex. D4. This indicated that UEG must have seen the general contract or the Gilbane-Bryan contract. N.T. Vol. III at 432-33, 438-39. The Gilbane-Bryan contract contained a clause making Bryan responsible for all conditions in the general contract between Frostburg and Gilbane and for the two-year warranty. Ex. D4, p. 13, 23.

Klesic testified that the tank was installed in November 2002 and that the university began using it during the winter. N.T. Vol. II at 243-44. Letters in February 2003 showed that the installation was not complete but that the system may have been partially in use by that time. Ex. D18, D19. The training for university staff was scheduled for May 2003. Ex. D23. Water was detected in the tank and sumps in September 2003, and again in September 2004. N.T. Vol. I at 163, 165, 168-70. In February 2005, there were about nine feet of water in the tank. *Id.* at 184-85. Bryan was notified in early January 2005, but there is no evidence that Bryan notified UEG until January 30, 2005. N.T. Vol. II at 347, N.T. Vol. III at 443-44, 467.

UEG did the work for which it bid; it installed a fuel oil system. There were problems with the installation, particularly the sump work that a sub-contractor performed. N.T. Vol. I at 80-81, 82-83. However, the system did appear to work for at least some period of time. Klesic was credible in his testimony that UEG did not perform any repairs to the vault because UEG believed this would void the manufacturer’s warranty. N.T. Vol. I at 170-71. UEG did try to have the manufacturer repair the vault, but because the manufacturer was defunct, UEG was unsuccessful. N.T. Vol. II at 203-06.

In the absence of a written contract, the issue is whether UEG can be held responsible for the two-year warranty. In closing argument, UEG cited case law for the proposition that there can be no pass-through or flow-through liability without an integration clause in the contract between the subcontractor and the prime subcontractor. N.T. Vol. III at 537. The proffered cases, however, involved claims of negligence and injury. See *Bernotas v. SuperFresh Food Markets, Inc.*, 863 A.2d 478, 484 (Pa. 2004); *Integrated Project Services v. HMS Interiors, Inc.*, 931 A.2d 725 (Pa. Super. 2007). These cases are not controlling because they do not address whether the subcontractor would be held to warranty requirements in the general contract.

Bryan argued that, because the two-year warranty was a requirement of the general contract, the prime contractor and subcontractors both were liable for it. N.T. Vol. II at 328-29. Thomas Szymczak, president of SSM Industries, testified that it is standard knowledge in the construction industry that subcontractors are responsible for the general conditions in the contract. N.T. Vol. III at 426, 432-33. Essentially, Bryan made a usage of trade argument. Usage of trade is “a practice or method of dealing having such regularity of observance in a . . . trade as to justify an expectation that it will be observed.” 13 Pa. C.S.A. § 1303(c). Whether a practice is a usage of trade is a matter to be determined by the fact-finder. Szymczak and Birch were credible in their testimony on this point. UEG was responsible for replacement of the defective fuel oil system.

Even if there was no usage of trade, UEG could still be liable under the implied warranty of merchantability. A merchant is defined as one who “deals in goods of the kind” or who holds oneself out as “having knowledge or skill peculiar to the goods

involved.” *Gavula v. ARA Services, Inc.*, 756 A.2d 17, 21 (Pa. Super. 2000). There is a breach of the warranty of merchantability when it is shown that merchandise is defective. *Altronics of Bethlehem, Inc. v. Repco, Inc.*, 957 F.2d 1102, 1105 (3d. Cir. 1992). This can be proven through circumstantial evidence. To prevail, the buyer must show that the product malfunctioned, that the buyer used the product as intended, and that there is an absence of secondary causes. *Id.* Here, the product malfunctioned; there was not supposed to be water in the interstitial space. There was no evidence that the product was not used as intended. There was no evidence of secondary causes. Klesic’s testimony speculating as to possible vandalism as the cause of water getting into the vault was not credible. N.T. Vol. I at 185.

UEG argued that there was no implied warranty because UEG advised Bryan against buying the tank that UEG supplied. Klesic testified that he recommended a Fireguard tank because he believed it is superior to the concrete vaulted tank that Frostburg wanted. N.T. Vol. 1 at 59. There is a warranty of merchantability when the seller has reason to know (actual knowledge not required) of the specific use for which the buyer is purchasing goods and when the buyer is relying on the seller’s skill and judgment. *Walsh v. Pa. Gas & Water Co.*, 449 A.2d 573, 576 (Pa. Super. 1982). Here, even though a specific brand of tank was listed in the specifications, Bryan was relying on UEG’s skill and judgment to select an equivalent tank. UEG had reason to know that. N.T. Vol. III at 452-53. UEG saw the specifications, and had actual knowledge of the use for which the tank was purchased. N.T. Vol. II at 265. There was an implied warranty of merchantability, and UEG breached it.

Spoilation Issue

UEG also raised a spoliation claim, alleging that, because Bryan did not preserve the tank, an adverse inference should be drawn. In spoliation claims, courts are to consider the degree of fault of the party that destroyed evidence, the degree of prejudice suffered, and the availability of lesser sanctions. *Schroeder v. PennDOT*, 710 A.2d 23, 27 (Pa. 1998). The destructor’s degree of fault is a major factor in determining whether sanctions are appropriate. *Dansak v. Cameron Coca-Cola Bottling Co., Inc.*, 703 A.2d 489 (Pa. Super. 1997). In a case involving the cause of a fire, the Superior Court affirmed the trial court’s decision to give a spoliation instruction, rather than to direct a verdict. *Eichman v. McKeon*, 824 A.2d 305, 314, 315 (Pa. Super. 2003). In that case, the court found that the party which did not preserve the fire scene acted in good faith in demolishing the burned structure because of the dangerous condition and because the township had directed the party to undertake the demolition. *Id.* at 314. The court also found that there was little prejudice to the other party because photos of the fire scene and investigation reports were available. *Id.* at 315.

Here, there is no indication that Bryan was acting in bad faith when it removed and destroyed the fuel tank. Bryan was under pressure from the university and the general contractor to replace the system. N.T. Vol. III at 442-43, 445, 461. There was financial pressure, because Bryan would be liable for costs incurred by the university if it was not able to switch from natural gas to fuel oil. *Id.* at 441-42, 457. The university also was concerned about the possibility of the tank leaking fuel oil since it had been damaged. *Id.* at 455. It was not practical for Bryan to store the 12,000-gallon tank while litigation was being pursued. UEG had notice that the tank was being removed, although not the exact date, because Bryan sent letters telling UEG to remove the tank and then letters indicating that Bryan would have to do it. N.T. Vol. II at 362-63, N.T. Vol. III at 469-70. If UEG was concerned about inspecting the tank, it could have done so at that time or it could have requested that Bryan preserve the tank. There is no evidence that UEG did either. Finally, at trial, UEG was able to use the alarm report as well as photographs of the tank. N.T. Vol. I at 83, 100. Hence, the prejudice to UEG, if any, was minimal.

Negligence Issues

UEG claimed that there was negligent use of the tank, especially because UEG was not notified of alarms in December 2004 and January 2005. N.T. Vol. I at 102-04. In its Trial Brief, UEG raised this as an estoppel issue. Br. at C. UEG claimed Bryan is estopped because Bryan did not immediately notify UEG that there was water in the interstitial space when Bryan became aware of this in early January 2005. Instead, UEG argued, Bryan waited to inform UEG until January 31, 2005, causing the condition of the tank and vault to deteriorate.

However, the record established that UEG was aware that there were problems with the tank and vault well before January 31. Even if UEG had been informed on January 6 that there was water in the vault, it does not appear that this would have changed the outcome. UEG knew about the water in the tank on January 31, 2005, and saw the water in February 2005. N.T. Vol. I at 108, N.T. Vol. II at 347. However, UEG did not pump the water out until June 2005. N.T. Vol. II at 208-10. There is no indication that UEG would have done anything differently if it had known about the water earlier.

UEG also claimed that intervening negligence of third parties (i.e. university personnel) caused the problems. Klesic speculated that, because university personnel did not undertake snow and ice removal from the vault and appear to have turned off the alarm system, UEG cannot be liable for the vault’s failure. N.T. Vol. I at 103-04, 173. This argument ignores two critical points: first, it is purely speculative to assert that no snow removal was done; and second, the vault was already failing prior to any alleged snow removal deficiency and/or any alleged switching off of the alarm system. Further, it is not clear that the university’s alleged negligence is relevant to a breach of warranty claim. When a case sounds in contract, and not negligence, third parties’ actions are not relevant. *Lobianco v. Property Protection, Inc.*, 9 Pa. D&C 3d 655, 658 (C.P. York 1978). In that case, a homeowner sued for breach of warranty when the burglar alarm failed and the home was robbed. *Id.* The court denied the company’s motion for summary judgment, holding that the criminal acts of the burglars, even though they were an intervening proximate cause of the homeowner’s loss, were not sufficient to relieve the company of its warranty obligations. *Id.*

Damages Issues

Relying on the December 9, 2004 agreement, UEG asserted that its contract bars recovery of special, incidental and consequential damages, and limits damages to the contract price. The December 9, 2004 agreement (which included Mon Valley Hospital) was signed after the university job was started and after the tank installation. Credible testimony suggested that Bryan understood the agreement concerned only future work between the parties. N.T. Vol. III at 497-98. There was no consensus that this December 2004 document was meant to modify past agreements between the parties. It is not relevant to interpretation of the agreement between the parties on the Frostburg State project.

UEG also asserted that there was no basis for Bryan to recover its overhead. A claimant may recover overhead expenses as a remedy for breach of warranty. *Royal Pioneer Paper Box Mfg. Co. v. Louis De Jonge & Co.*, 115 A.2d 837, 841 (Pa. Super. 1955). Bryan was required to spend time and labor on replacing the damaged tank. N.T. Vol. III at 479-81. That time and labor could have gone instead into profitable business for Bryan. Szymczak testified as to the normal overhead that Bryan would have charged and

that Bryan used a lesser rate for the requested damages. *Id.* at 485-86. Since Bryan was forced to forgo profitable business to remedy the failed fuel tank, Bryan is entitled to recover overhead as part of its damages.

BY THE COURT:
/s/Wecht, J.

¹ In April 2002, SSM Industries purchased Bryan. N.T. Vol. III at 423.

**James A. Sprung v.
Core Network, LLC
t/d/b/a Centers for Rehab Services**

Employment—Wrongful Termination—E-mail—Public Policy Exception—Freedom of Speech in Workplace

No. GD 11-002164. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
James, J.—June 10, 2011.

OPINION

Plaintiff, James A. Sprung, appeals from this Court's Order which dismissed his Complaint in Civil Action against his former employer, Defendant, Core Network, LLC, t/d/b/a Centers for Rehab Services ("CRS"). Mr. Spring alleges that CRS violated his rights pursuant to Article I, §7 of the Constitution of the Commonwealth of Pennsylvania. He also alleges Wrongful Discharge. Mr. Sprung was employed at CRS as a Rehabilitation Aide at UPMC Mercy Hospital in Pittsburgh until July 27, 2010 when CRS terminated his employment. On or about July 20, 2010, Mr. Sprung received an e-mail attachment on his computer at UPMC Mercy sent from another CRS employee, Deborah A. Bonanno, from her computer at UPMC Mercy. The e-mail attachment consisted of a photograph of President Barack Obama coming out of the water on a beach with a notation stating, "Beach Report! First tar ball washes up in Panama City Fla." After receiving the e-mail, Mr. Sprung attempted to forward it to his sister, but inadvertently sent it to another person. Mr. Sprung claims in his Complaint that the e-mail was an expression of his and Ms. Bonanno's opinion that the President and his administration were dithering while oil continued to gush as a result of the April 20, 2010 Deepwater Horizon explosion in the Gulf of Mexico. CRS terminated Mr. Sprung's employment stating that he "utilized the e-mail system for an inappropriate e-mail that contained political and discriminatory content" and was "an offensive use of electronic communications which created a hostile work environment for a staff member who received it." Mr. Sprung alleges that as a result of CRS' actions, he has suffered severe economic damages, emotional distress, mental anguish, embarrassment, humiliation, pain and suffering, inconvenience, lost compensation and earning capacity, loss of enjoyment of life, feelings of worthlessness, fear that he would not be able to get another job, pressure from bill collectors, fear that he would not be able to pay the expenses of his support, depression, difficulties in personal relationships with members of his family and others, and lack of being able to provide emotional support and comfort to them.

This Court sustained CRS' preliminary objections in the nature of a demurrer. Rule 1028(a) of the Pennsylvania Rules of Civil Procedure allows for preliminary objections based on legal insufficiency of a pleading (demurrer). When reviewing preliminary objections in the form of a demurrer, "all well-pleaded material, factual averments and all inferences fairly deducible therefrom" are presumed to be true. *Tucker v. Philadelphia Daily News*, 757 A.2d 938, 941-942 (Pa. Super. 2000). Preliminary objections, whose end result would be the dismissal of a cause of action, should be sustained where "it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief. *Bourke v. Kazara*, 746 A.2d 642, 643 (Pa. Super. 2000). In applying this standard, the pleader's conclusions of law, unwarranted inferences from the facts, argumentative allegations, or expressions of opinions are not considered to be admitted as true. *Giordano v. Ridge*, 737 A/2d 350, 352 (Pa. Cmwlth. 1999),

CRS's action in discharging Mr. Sprung does not violate the Pennsylvania Constitution, Article I, §7. That section states:

The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.

There is no cause of action for wrongful discharge for violation of freedom of speech by a private employer. Mr. Sprung claims that CRS used "the power to hire and fire to strip Mr. Sprung of his rights to political expression, association, and activity, and as such, implicates an important public policy of this Commonwealth, which is protected by the Constitution of The Commonwealth of Pennsylvania." (See Complaint paragraph 27).

However, if not contrary to a contract, an employee is presumed to be employed at will and therefore may be discharged at any time for any reason or for no reason at all. *McLaughlin v. Gastrointestinal Specialists, Inc.*, 750 A.2d 283, 287 Pa. 2000). However, an employer may not discharge an employee if it violates a clear mandate of public policy. *Shick v. Shirey*, 716 A.2d 1231, 1233 (Pa. 1998). The Superior Court has held that there is no actionable public policy violation when an employer discharges an employee for his exercise of freedom of expression. In *Veno v. Meredith*, 515 A.2d 571 (Pa. Super. 1986), two newspaper employees were discharged because of an unflattering article written about a judge. Similar to the instant case, the former employees claimed that their discharge violated the public policy favoring freedom of speech. The Superior Court disagreed finding that no public policy was implicated because they had no constitutional right to exercise free speech in their employer's newspaper. *Id.* at 581. The Superior Court stated in *Martin v. Capital Cities Media, Inc.*, 511 A.2d 830, 843 (Pa. Super. 1986) that "[e]ven when the Constitution allows one to speak freely, it does not forbid an employer from exercising his judgment to discharge an employee whose speech in some way offends him."

Therefore, based on the foregoing, CNS had the right to discharge Mr. Sprung and therefore this Court sustained CNS' demurrer and dismissed Mr. Sprung's Complaint with prejudice.

**In Re: I.J.
a/k/a Baby Boy J., a minor**

Shelter Hearing—Juvenile Dependency—Removal of Child—Emergency Custody Proceeding—Jurisdiction

No. JV-10-2742. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division, Juvenile Section.
McVay, J.—June 13, 2011.

OPINION

S.J. (mother) of I.J. (child) D.O.B. 12/09/2010, filed a Notice of Appeal on April 18, 2011. The appeal is collateral to the child's dependency and was first raised by mother on January 6, 2011 when the Superior Court "quashed, sua sponte, without prejudice to raise the issues in an appeal from a final order of dependency and disposition of the child" by order dated February 8, 2011. Specifically, Mother's Concise Statement of Matters Complained of on Appeal avers:

1. The Trial Court committed an error of law and/or abused its discretion by assuming jurisdiction and ordering a shelter hearing after denying the request for an Emergency Custody Authorization/Order for Emergency Protective Custody by the Office of Children Youth and Family Services for a child in the care of his natural mother who is neither dependent nor the subject of a pending dependency petition at that time.
2. The Trial Court abused its discretion and/or committed an error of law by denying natural mother's request for a hearing before a judge instead of a master as provided for in the Juvenile Act 42, Pa. C.S. § 6305 (b) and Rule 1187 Authority of Master of the Pennsylvania Rules of Juvenile Court Procedure.

HISTORY

Mother and her family have a long history with CYF dating back to November of 2007. Mother's parental rights for her three other children were terminated on November 24, 2010.¹ Approximately two weeks later mother gave birth to the child on December 9, 2010 at Magee Woman's Hospital, Pittsburgh, Pennsylvania. That same day CYF caseworker, Jessica Maroney, requested a shelter hearing with the Allegheny Court of Common Pleas, Family Division-Juvenile Section which was approved and scheduled for the next day before Hearing Officer Hobson on 12/10/2010 at 8:30 am.

On 12/10/2010, mom's counsel requested a continuance of the shelter hearing to allow the mother to attend the hearing as she was still in the hospital at that time with the child.² Hearing Officer Hobson granted mother's motion which was confirmed by Judge Ignelzi. Approximately at 4:30 pm that same day, a Friday, CYF presented an Emergency Custody Authorization (ECA) to this court requesting permission to remove the infant from mother in that mother's other three children were in care due to "mom testing positive for THC at the time of their birth and that her parental rights to those children had been terminated". CYF had further indicated that mother and this child had tested negative for illegal substances at birth but mother had not yet completed her D&A treatment or been compliant with her FSP goals.(a copy is attached as exhibit 1) This court was aware at the time of the ECA request that a continued shelter hearing had already been scheduled for Monday 12/13/2010, before Hearing Officer Franklin at mom's request.

Based on the fact that the mother and child had tested negative for drugs and that the child would remain in the hospital until the next day (Saturday, December 11, 2010), this court denied CYF's request to separate the infant child from its mother, but signed an Authorization Directing Attendance at the "shelter hearing" on Monday, December 13, 2010, and consistent with mom's previous request for a continuance.³

On December 13, 2010, this matter was brought before Hearing Officer Franklin for the scheduled "shelter hearing". At this hearing mother's counsel made an oral motion to dismiss this hearing from the schedule challenging the court's jurisdiction. Mother's counsel argued that the court lacked jurisdiction to conduct a "shelter hearing" since there had been no removal of the child and the Juvenile Act defines a shelter hearing as one that occurs within 72 hours after a removal of a child (See H.T. H.O. Franklin 12/13/2010 p.p. 2-3).

CYF's legal counsel responded that the case had been scheduled on December 9, 2010 when it was originally filed, reviewed and approved, to be heard by a hearing officer. H.O. Franklin responded that she believed that this court wanted a "shelter hearing" regarding this child to take place which had been communicated to her by e-mail. (See H.T. H.O. Franklin 12/13/2010 p.p. 4-5) H.O. Franklin acknowledged that even though the general definition and purpose of a shelter hearing is to find an appropriate safe place for a child after it has been removed from a parent or guardian, she stated, "[h]owever, as a matter of practice, this courthouse, this division has heard 'shelter hearings' on many cases where the child had not been removed. And insofar as jurisdiction, I believe we do have it." (See H.T. H.O. Franklin 12/13/2010 p.p. 5-6).

CYF responded that the case should be immediately heard since the agency was requesting removal of the child. H.O. Franklin agreed to defer the issue of jurisdiction to this court. Counsel representing the parties in this matter approached this court's tip staff requesting that they be permitted to speak with the court.⁴ They approached the bench between cases at which time there was a short, off the record conversation regarding jurisdiction. This court directed that the attorneys go back to H.O. Franklin and conduct a hearing to ensure that the child was safe. This court does not recall Mother's attorney making any request to have a "shelter" hearing heard by a judge, but rather presented the issue of jurisdiction to the court (See H.T., H.O. Franklin 12/13/10 p.p. 13-16).

The attorneys returned to H.O. Franklin's courtroom and a hearing was conducted. After a hearing upon CYF's request for removal of the child from the mother, H.O. Franklin denied the request which was consistent with this court's original concerns regarding separating the infant from mom unless it was unsafe and without a hearing, and CYF indicated it would be filing a dependency petition anyway.

On December 17, 2010, this court granted Mother's Motion to Supplement Record for Appeal requesting that this court order H.O. Franklin to transmit copies of e-mails received from this court concerning the "shelter hearing" that took place on December 13, 2010. At the presentation of this motion by mother's counsel, this court put on the record its recollection that the issue presented on December 13, 2010 was jurisdiction as to whether a "shelter hearing" could take place that day. It was (and remains) this court's recollection that the attorneys were told to conduct a hearing before H.O. Franklin to ensure the safety of the child as it had jurisdiction to do so and that mother had never requested a hearing before a judge.

On January 4, 2011, CYF did file its dependency petition (attached as exhibit 2) repeating verbatim the allegations contained in the ECA. On February 11, 2011, the court continued the first dependency hearing until March 18, 2011 and ordered that the child

remain with mother and comply with Family Group Decision Making. On February 23, 2011, CYF filed a Praecipe to Schedule Hearing for Petition for Aggravated Circumstances and on March 18, 2011, this court adjudicated the child dependent pursuant to the Pennsylvania Juvenile Act at 42 Pa. C.S.A. § 6301 (10).⁵

DISCUSSION

Initially, this court would address mother's second averment of error claiming an abuse of its discretion and/or commission of an error of law by denying natural mother's request for a hearing before a judge instead of a master as provided for in the "Juvenile Act" at 42 Pa. C.S.A. § 6305(b) and the Pennsylvania Rules of Juvenile Court Procedure, Pa. R.J.C.P. 1187 B. As stated above, this court was unaware that mother had requested a hearing before a judge and if this request had been made clear to the court on December 13, 2010 or the previous Friday, December 10, 2010, it would have provided mother with a hearing later that day and probably after completion of its delinquency docket. It should be emphasized that this court believes that this issue was never raised at the time of mother's request for a continuance on December 10, 2010 and that mother's attorney had previously indicated that his client wanted to attend the hearing so she could present additional information to prevent removal of her child from her! Again, this court believes that the jurisdiction was the only question presented on December 13, 2010 by mother's counsel and the court promptly ruled that the safety of the child should be immediately assessed through a hearing and that jurisdiction existed to do so.

Mother's primary averment of error and the heart of this appeal is the claim that this court committed an error of law and/or abused its discretion by assuming jurisdiction and ordering a "shelter hearing" after denying the request for an Emergency Custody Authorization/Order for Emergency Protective Custody by the Office of Children Youth and Families Services for a child in the care of his natural mother who is neither dependent nor the subject of a pending dependency petition at that time. What mother is essentially contending is that this court does not have jurisdiction to hear or order an emergency hearing when the subject child has not been found dependent; no dependency petition has been filed; the agency's request for an ECA has been denied by the court and the subject child remains in the custody of the biological mother. See Pa. R.J.C.P. 1240,1241,1242.

The Rules of Juvenile Court Procedure, *Rule 1200 Commencing Proceedings* (Pa. R.J. C.P. 1200), provides this court with immediate jurisdiction upon the submission of an emergency custody application, and further, essentially equates the filing of a dependency petition with the submission of an emergency custody application providing:

Rule 1200. Commencing Proceedings:

Dependency proceedings within a judicial district shall be commenced by:

- (1) the filing of dependency petition;
- (2) **the submission of an emergency custody application;**
- (3) the taking of child into protective custody pursuant to a court order or statutory authority;
- (4) the court accepting jurisdiction of a resident child from another state; or
- (5) the court accepting supervision of child pursuant to another state's order.

Pa. R.J.C.P.1200 (emphasis added).

Rule No.1200(2) clearly establishes that the court's jurisdiction in a case commences upon the submission of an Emergency Custody Application by CYF i.e. jurisdiction initially attaches upon application. The fact that the court does not immediately issue an ECA should not extinguish the court's jurisdiction until a dependency petition is filed as argued by mom's counsel when serious allegations are being made as to the need to take action to protect the health and safety of a child from possible imminent danger for the following reasons:

First, it is clear to this court that the filing of an ECA by CYF is substantially the equivalent of CYF filing a dependency petition. This court opines that when an application for an ECA is filed and presented to the court for consideration, CYF is making allegations that not only is the child dependent, but further, that the emergency step of removing the child from a parent must be taken to ensure their safety. An ECA application is in essence a de facto dependency petition requesting the court to take immediate action and grant interim relief to ensure immediate assessment of the child's safety pending filing of the actual dependency petition.

Second, mother's contention that this court somehow loses jurisdiction if it does not immediately remove a child ex-parte because a dependency petition has not been filed would be contrary to one of the primary purposes of "The Juvenile Act" 42 Pa. C.S.A. § 6301 (b), (1.1) i.e. "[t]o provide for the care, protection, safety and wholesome mental and physical development of children coming within the provisions of this chapter." The court ordered the emergency hearing expressly for the statutory purpose of providing for the child's safety. Furthermore, this court opines that the safety of the child is the shared responsibility of the family, the agency and the trial court. Consequently, all decision makers should seek as much information as possible before separating an infant or any child from a parent. Once an ECA is brought before the court, the court must also be able to determine that the child is safe. The best way to ensure that the child is safe when the ECA pleading does not necessarily support an immediate removal of the child but raises safety concerns, is for the court to direct the parties to appear before the court in an expedited manner, which is exactly what this court did here. The trial court must have as much information as possible to make an informed safety decision.

Third, the standard procedures governing emergency authorizations and restraining orders in the Court of Common Pleas of Allegheny County Pennsylvania Family Division-Juvenile Section has been Administrative Order of Court No. 376 of 2007 signed by the Honorable Kim Clark, Administrative Judge, on August 31, 2007 and in effect since September 10, 2007. (a copy is attached as Exhibit 3)

This order provides that upon receipt of a CYF request for an ECA the court may take several different actions, specifically: 1.) the court can issue the ECA and CYF is authorized to remove the child and a shelter hearing must take place within 72 hours; 2.) the court can deny the ECA request if it does not believe that the facts as presented do not constitute an imminent threat to the child's safety; 3.) **the court can sign an authorization directing the parents, legal guardians, or any other adults having custody of the child to appear with the child in Family Division for a shelter hearing on a certain date (no later than 72 hours) or as soon thereafter as the parents, legal guardians, or any other adults can be notified;** 4.) the court can issue a restraining order

which requires the child to remain in the care of the person designated in the court order and the child shall not be removed from said custody or care unless authorized by CYF and a shelter hearing must be held within 72 hours from the date of the order. **(emphasis added)**

Clearly the intent and purpose of this order allows the judge to balance the primary goals and purposes of “The Juvenile Act” 42 Pa. C.S.A. § 6301 et seq.:

(b) **Purposes** – This chapter shall be interpreted and construed as to effectuate the following purposes:

(1) To preserve the unity of the family whenever possible or to provide another alternative permanent family when the unity of the family cannot be maintained.

(1.1) To provide for the care, protection, safety and wholesome mental and physical development of children coming within the provisions of this chapter.

(2) (...)

(3) To achieve the forgoing purposes in a family environment whenever possible, separating the child from parents only when necessary for his welfare, safety or health or in the interest of public safety.

(4) To provide means through which the provisions of this chapter are executed and enforced and which the parties are assured a fair hearing and their constitutional and their legal rights recognized and enforced.

42 Pa. C.S.A. § 6301(b)(1)(1.1)(3)(4). (subsection (2) omitted.)

In any ECA request, the court is faced with balancing the goal of protecting a child to ensure its safety with the goal of attempting to preserve the unity of the family and separating the child from parents only when necessary while providing the parties a fair hearing.

The procedure for obtaining an ex-parte emergency removal of a child under the Rules of Juvenile Court Procedure, Rule No.1210 *Order for Protective Custody*, (Pa. R.J.C.P. 1210) does not specifically provide the court with flexibility to balance the goals of ensuring the safety, welfare and best interest of a child with keeping the child with his or her parent. Under Rule No.1210 the court is given two choices; grant the ECA and remove the child from its parents or guardians or deny the ECA and allow a possibly unsafe child to remain with the parents until CYF files a dependency petition and schedules a hearing which could delay review by the court for up to two weeks. In most cases the court is faced with serious allegations regarding the child’s safety and therefore removal of the child from its parents or guardians might be avoided if the matter can be brought before the court for an expedited hearing (e.g. within 72 hours or sooner). The emergency hearing as permitted by Administrative Order No. 376 provides for the child and parents or guardians to be present at the hearing. The parties are permitted to provide evidence as to why the child should or should not be removed and what steps can be taken to ensure the safety and welfare of the child. Under the order the trial court is provided the flexibility to deny the immediate removal of a child by ECA and avoid trauma to the child caused by removal and third party placement without compromising the safety of the child since an expedited hearing is scheduled. Insufficient information regarding the safety decision leads to the trial court rubber stamping agency requests without knowing what’s driving the safety decisions. The child’s safety requires the trial court to assess the threat of danger, the child’s vulnerability and the parent’s capacity to protect. Without the emergency hearing, a trial court will almost always err on the side of caution and grant the ECA causing children that might otherwise be safe to be removed from their parents unnecessarily. An emergency hearing equals a better informed safety decision.

Finally, 42 Pa. C.S.A. § 6301 (b) (4) provides that this act be interpreted and construed to effectuate and “provide a means through which the provisions of this chapter are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced”. The use of the emergency hearing under Administrative Order No. 376 accomplishes this purpose. The parents/ guardians are afforded due process protections not provided through Pa. R.J.C.P. 1210 which only provides due process after an ex-parte removal.

Mother’s parental rights to three other children had been terminated by this court approximately two weeks prior to being presented with an ECA by CYF. The court was familiar with the mother’s prior history with CYF and the dependency of her other children. This knowledge alone could have warranted removal of the child by ECA. However, because the child was still in the hospital and not to be released until the next day (Saturday, 12/11/2010) and a hearing was already scheduled for (Monday 12/13/2010), this court was able to avoid the removal of the child from mother through an emergency hearing to ensure that the child was safe. If this option was not available to the trial court it would almost always error on the side of safety and remove the child via an ex-parte ECA order.

This court is perplexed by mother and her counsel’s averment that the use of the emergency hearing was an abuse of discretion by assuming jurisdiction. But for the availability of the authorization for an emergency hearing this court would have removed the child from mother. Therefore, this court does not understand why mother and counsel would object to a procedure that affords the parent the opportunity to keep the child from being removed by an ex-parte ECA procedure pursuant to Pa. R.J.C.P. 1210 and provides an expedited emergency hearing providing due process protections not afforded pursuant to Pa. R.J.C.P. No.1210. This court opines that Rule Nos.1210, 1240, 1241, 1242, should be construed as affording the parties due process once an ex-parte removal has occurred and nothing more. It should be construed to authorize emergency removals ex-parte and require a follow up due process hearing. It should not be construed to limit the trial court’s discretion to immediately require more information without delay until CYF files a dependency petition when in effect, they already have.

This court also recognizes that mother’s jurisdiction issue is significant to all child safety decision makers and because the child was found dependent on March 18, 2011, the issue could now be considered moot. There also is a question as to what remedy if any is available to mother at this point in the proceeding. Though the above requirements for being moot exist this court would ask that the Superior Court address this issue as it is a matter of significance to the trial court and all safety decision makers as to whether the trial court has the jurisdiction to order an emergency hearing to assess child safety.

CONCLUSION

In conclusion, no reversible error occurred and the court’s finding should be affirmed and S.J.’s appeal should be dismissed with prejudice.

BY THE COURT:
/s/McVay, J.

¹ Mother filed appeals to the termination of her parental rights to the Superior Court at Nos. 1896, 1899 and 1900 WDA 2010 on December 15, 2010.

² Although the court did not review the hearing transcript from 12/10/2010 before the hearing officer, there is nothing of record that indicates that mother's counsel had made an objection to this matter being heard by a hearing officer (Master) at that time or had challenged jurisdiction and only had requested a continuance. Certainly the matter could have been scheduled before a judge at that time.

³ The hearing that was scheduled for December 13, 2010 was not a shelter hearing as required under 42 Pa. C.S.A. § 6332 or Pa. J.C.P. No. 1242 where a child has been removed from parent's custody and placed in shelter care. The informal hearing that is at issue in this case is an emergency hearing based on allegations on an ECA request that was ordered by the court. The use of the term "shelter hearing" is used interchangeably with emergency hearings for administrative purposes to allow the court personnel to schedule an expedited hearing that is placed on the shelter hearing list.

⁴ On December 13, 2010, this court had approximately thirty delinquency (non dependency) cases on its docket requiring hearings.

⁵ The court completed and filed this order on at least three separate occasions. Due to CPCMS issues this order failed to file electronically and was eventually filed manually on April 18, 2011. This court raises this issue in response to Mom's attorney's averments in her letter to the Superior Court that it failed to act and delayed the signing of the order adopting H.O. Franklin's recommendations of 12/13/10. Again, due to systemic problems with CPCMS this court along with other judges in the juvenile section have signed orders in numerous cases multiple times before they are finally filed electronically. The court did not delay or fail to act in this case.

Commonwealth of Pennsylvania v. Ronald Kyles

Criminal Appeal—Ineffective Assistance of Counsel—Wants to Withdraw Plea—Must Wait to Raise Claim in Collateral Review

No. CC 2009-06314, 2009-08779, 2009-17469. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Williams, III, J.—June 20, 2011.

OPINION

Mr. Kyles has appealed to the Superior Court of Pennsylvania from his collective sentence of 15 to 30 years incarceration.¹ This sentence was imposed on November 30, 2010. On December 10, 2010, counsel for Mr. Kyles ("Kyles") filed a *Petition for Leave to Withdraw Guilty Pleas*. The Petition advanced two reasons: (1) his lawyer was constitutionally ineffective; and (2) his plea was not knowing, intelligent and voluntary. Simultaneously with this filing, a *Petition for Leave to Withdraw as Counsel* was also docketed. On January 5, 2011, this Court denied Kyles' request to withdraw his three guilty pleas. The denial finalized the Court's November 30th sentence and triggered appellate deadlines. On February 4, 2011, Kyles filed a *Notice of Appeal*. A 1925(b) order was then issued and, after one request for more time was granted, Kyles filed his *Concise Statement* on June 10, 2011.

The *Concise Statement*, while including two areas of focus, really boils down to a single assertion of error. According to Kyles, this Court abused its discretion when it did not conduct a hearing on the ineffective assistance of counsel (IAC) claim. Kyles takes this one step further and says the Court's failure to conduct a hearing on the IAC claim prevented him from demonstrating that his plea was invalid. *Concise Statement*, paragraph 2, (June 10, 2011).

A micro analysis of this claim is rather simple. Our Supreme Court decisions in *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002) and *Commonwealth v. Bomar*, 826 A.2d 831 (Pa. 2003) control. In *Grant*, the Court overruled a longstanding rule that allowed new counsel to raise previous counsel's ineffectiveness at the first opportunity, even if that opportunity would be on direct appeal. In its place, the Supreme Court announced a new rule that requires a defendant to "wait to raise claims of ineffective assistance of trial counsel until collateral review." 813 A.2d at 738. In *Bomar*, the Supreme Court created an exception to *Grant*. *Bomar* permits review of an ineffective assistance claim on direct appeal where a sufficient record concerning the claim has been established. 826 A.2d at 855.

The *Bomar* exception to *Grant* does not apply here. There was no hearing where the facts surrounding this assertion of IAC were explored. This deficiency strikes at the very heart of the rationales supporting *Grant* and its wait and see attitude on collateral attacks.

The macro analysis of this claim frames the issue as whether Kyles, and those similarly situated, can ever litigate IAC claims within the confines of post-sentence motion practice. This Court believes post-sentence motion practice is not the place to litigate IAC claims and gains strength in its position from various justices on our state Supreme Court.

For several years now, Chief Justice Castille has been banging the drum on this topic. The sound waves have fallen on receptive ears and recently culminated in discretionary review being granted on that very issue.

The first note of discord came in *Commonwealth v. Oberg*, 880 A.2d 597 (Pa. 2005), where Justice Castille, the author of *Bomar* just two years earlier, concurred in the result but said:

"I do not believe that this Court is remotely obliged to permit **any** criminal defendant — no sentence, short sentence, long sentence, capital sentence — to raise collateral claims, such as ineffective assistance of trial counsel, as **a matter of right** upon post-trial motions. One of the salutary, corrective, and visionary features of *Grant* was its recognition that direct and collateral review should be permitted to play the distinct and essential roles they are supposed to serve in the criminal justice system. The appropriate forum for litigating claims of ineffectiveness is under the PCRA."

880 A.2d at 605 (emphasis in original).

In *Commonwealth v. Rega*, 933 A.2d 997 (Pa. 2007), *cert. denied*, 128 S.Ct. 1879, 170 L.Ed.2d 755 (U.S. 2008), Justice Castille authored a concurring opinion and talked at length about the matter. Here is just a snippet of his thoughts.

“Given the existence of the PCRA as the presumptive repository for collateral claims, the general rule should be that the defendant **cannot** expand post-verdict motions and direct appeal to encompass collateral claims (at least, absent an agreement to waive his PCRA rights). There may be certain fundamental, albeit collateral complaints (such as a relevant new and retroactive rule of constitutional law) that require immediate vindication. But, post-verdict motions should not become an accepted repository for laundry lists of collateral-appropriate complaints, with concomitant delay, such as occurred here — all in advance of a second round of statutorily-authorized collateral attack via the PCRA as of right.”

Rega, 933 A.2d at 1032 (emphasis in original). Then Chief Justice Cappy joined the Castille chorus.

“I join the majority opinion subject to similar concerns raised by Justice Castille in his concurring opinion regarding the scope of the ‘Bomar [] exception’ to this court’s decision in *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002). I agree with Justice Castille that ‘we should examine more squarely the procedural question of whether and when criminal defendants ... should be afforded the post-verdict and direct appeal unitary review which occurred in Bomar.’ Concurring Opinion at 2 (Castille, J.). My fear is that continued employment of the ‘Bomar exception’ will eventually swallow the rule we announced in *Grant* governing the presentation of ineffectiveness claims.”

933 A.2d at 1029.

Two months after *Rega*, *Commonwealth v. Cooper*, 941 A.2d 655 (Pa. 2007) is decided and Justice Castille did not miss the opportunity to speak on the matter.

“First, I reiterate the view I expressed recently in my Concurring Opinion in *Commonwealth v. Rega*, 593 Pa. 659, 933 A.2d 997, 1032 (Pa. 2007) (Castille, J., concurring, joined by Saylor, J.) that, absent waiver of PCRA rights, defendants generally should not be permitted to expand post-verdict motions and direct appeal to encompass collateral claims. See also *id.* at 1029 (Cappy, C.J., concurring) (sharing my concerns in this area).”

941 A.2d at 670.

The very next year, 2008, Justice Eakin wrote the majority opinion in *Commonwealth v. Wright*, 961 A.2d 119 (Pa. 2008). In the course of affirming a murder conviction and sentence of death, he made the following comment.

“Prolix collateral claims should not be reviewed on post-verdict motions unless the defendant waives his right to PCRA review, because the PCRA does not afford the right to two collateral attacks. See *Commonwealth v. Rega*, 593 Pa. 659, 933 A.2d 997, 1032-33 (Pa. 2007) (Castille, J., joined by Saylor, J., concurring) (“[P]ost-verdict motions should not become an accepted repository for laundry lists of collateral-appropriate complaints, with concomitant delay ... all in advance of a second round of statutorily-authorized collateral attack via the PCRA as of right.”); see also *Rega*, at 1029 (Cappy, C.J., concurring).”

961 A.2d at 148 f.n. 22.²

In 2009, *Commonwealth v. Liston*, 977 A.2d 1089 (Pa. 2009) is decided. In reversing the Superior Court’s effort at creating another exception to the rule in *Grant*, Chief Justice Castille, through yet another concurring opinion repeats the melody.

“[T]he circumstances in this case provide a greater and additional reason for this Court to counsel the lower courts not to take affirmative steps to accommodate unitary review under the so-called Bomar exception to *Grant*. * * * [O]ur intent in *Bomar* was never to create a ‘right’ to hybrid review. * * * I would formally limit Bomar to its pre-*Grant*, unitary review facts, and I would direct trial judges and the Superior Court not to create or indulge unitary, hybrid review in the post-verdict and direct appeal context, unless such review is accompanied by an express, knowing and voluntary waiver of PCRA review.”

977 A.2d at 1096. It is significant to note that Justices Saylor and Eakin joined the Chief Justice’s view in *Liston*.

Four months after *Liston* comes down, the Supreme Court decides *Commonwealth v. Montalvo*, 986 A.2d 84 (Pa. 2009), *cert. denied*, 2010 U.S. LEXIS 6229 (U.S. Oct. 4, 2010). In joining the opinion affirming the conviction and sentence of death, Chief Justice Castille’s concurring opinion repeats the refrain.

“[G]oing forward, the lower courts should not indulge hybrid review by invoking Bomar [.] I would explicitly limit Bomar to Hubbard-era cases, and make clear that there is no ‘Bomar exception’ to *Grant*.”

986 A.2d at 111-112.

Finally, some 5 years after Chief Justice Castille’s initial pronouncement in *Oberg*, at least three members voted to grant allocatur³ on the following issues:

“Whether the claims of ineffective assistance of counsel which are the exclusive subject of this nunc pro tunc direct appeal: (1) are reviewable on direct appeal under *Commonwealth v. Bomar*, 573 Pa. 426, 826 A.2d 831 (Pa. 2003); (2) should instead be deferred to collateral review under the general rule in *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726 (Pa. 2002) that defendants should wait until the collateral review phase to raise claims of ineffective assistance of counsel; or (3) should instead be deemed reviewable on direct appeal only if accompanied by a specific waiver of the right to pursue a first PCRA petition as of right. See *Commonwealth v. Wright*, 599 Pa. 270, 961 A.2d 119, 148 n.22 (Pa. 2008) (“Prolix collateral claims should not be reviewed on post-verdict motions unless the defendant waives his right to PCRA review . . .”); see also *Commonwealth v. Liston*, 602 Pa. 10, 977 A.2d 1089, 1095-1101 (Castille, C.J., concurring, joined by Saylor, J., & Eakin, J.).”

Commonwealth v. Holmes, 996 A.2d 479 (Pa. 2010).⁴

Given the historical perspective set forth here, the Court firmly believes the days of the *Bomar* exception to the *Grant* rule are numbered. The *Holmes* decision will put an end to the practice of IAC claims being litigated under the band shell of post-sentence

motions. In anticipation of this ruling, the Court did not conduct a hearing on Kyles' IAC claim.

BY THE COURT:
/s/Williams, III, J.

¹ At 200917469, the sentence was 7 and a half years to 15 years plus restitution of \$1.00. At 200908779, the sentence was 7 and a half years to 15 years plus restitution of \$758.40. The sentence at 8779 was consecutive to the sentence at 7469. The sentence at 200906314 was 5 to 10 years in jail concurrent with the confinement at 7469.

² Justice Bear, in his own concurring opinion, agreed "with the observation" that post sentence motions are not the place to litigate such issues but highlighted the fact that, at present, Bomar allows such litigation to happen. 961 A.2d at 158-159. Surprisingly, Justice Castille did not author a concurring opinion in *Wright*.

³ Internal Operating Procedures of the Supreme Court, Section 5C ("A petition for allocator is granted upon the affirmative vote of three or more members of the Court.")

⁴ Allocatur was granted on June 4, 2010. A merits docket number of 40 MAP 2010 was assigned. The case was submitted on the briefs of both parties on October 26, 2010.

Commonwealth of Pennsylvania v. Andre Minter

Criminal Appeal—Sentencing—Merger—Withdrawal of Plea—Lacking of Hearing on Post Sentence Motion

No. CC 2010-03096. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Williams, III, J.—June 20, 2011.

OPINION

Mr. Andre Minter has filed an appeal with the Superior Court of Pennsylvania. His desire to seek appellate review causes this Court to write this opinion.

Mr. Minter ("Minter") was charged with committing three crimes on two separate dates. He was charged with delivery of cocaine, possession with intent to deliver cocaine and possession of cocaine. Both sets of charges, 6 in total, were brought under the present Information.¹ Counts 1 (delivery), 2 (PWI) and 3 (possession) of the Information relate to an October 2008 incident. Counts 4 (delivery), 5 (PWI) and 6 (possession) relate to a December 2008 incident.

On December 1, 2010, Minter, with the assistance of counsel, appeared before this Court and changed his not guilty position to one of *nolo contendere* for each charge. This Court accepted the *nolo* plea and proceeded to sentencing. The Court heard from counsel and allowed Minter to exercise his right of allocution. Plea and Sentencing Transcript ("PST"), pgs. 9,10 (Dec. 1, 2010). The pitch from Minter was to impose a sentence of 1-to-2 years in the state system. That was his only request. The Court complied with that request and imposed the following sentence.

October 2008

Count 1 (Delivery)	1-2 years incarceration, 10 years probation
Count 2 (PWI)	10 years probation consecutive to Ct. 1
Count 3 (possession)	no further penalty

December 2008

Count 4 (Delivery)	no further penalty
Count 5 (PWI)	no further penalty
Count 6 (possession)	no further penalty

On December 13, 2010, Minter sought relief by way of a post sentence motion ("PSM").² He advanced two positions: (1) the terms of an unexecuted plea agreement, including a particular sentence, be accepted after the fact; and, (2) his plea was constitutionally infirm because his *nolo* plea was not knowing, intelligently and voluntarily entered into. On January 6, 2011, this Court issued an order denying his post-sentence motion. On February 4, 2011, Minter filed a *Notice of Appeal*. After some extensions of time were granted, Minter's *Concise Statement* was docketed on May 20, 2011.³

Minter raises two claims. His initial argument concerns the legality of his sentence. Minter asserts his sentence on Count 1 (delivery) foreclosed any additional sentence being imposed on Count 2 (PWI.) His reasoning is two-fold. Initially, Minter argues the PWI charge is a lesser included offense of the delivery charge and, through application of the merger doctrine, any sentence on the lesser included charge is illegal. His second reason is made alternatively. Minter argues delivery and PWI are alternate means to prove a crime "thus making multiple sentences illegal even if the two alternative" do not merge. *Concise Statement*, pg. 2, paragraph 1 (May 20, 2011). Minter's second claim is that this Court improperly denied his request to withdraw his *nolo contendere* plea. Connected to this claim are various veins of arguments, if you will, that will be addressed within this opinion.

Sentencing

The Court finds merit to Minter's argument concerning his sentence. *Commonwealth v. Edwards*, 449 A.2d 38 (Pa.Super. 1982) held the crime of possession with intent to deliver is a lesser included offense of delivery of the same substance. *See also*, *Commonwealth v. Harris*, 719 A.2d 1049 (Pa. Super. 1998); *Commonwealth v. Eicher*, 605 A.2d 337 (Pa. Super. 1992), *appeal denied*, (Pa. 1992). Based on this precedent, the sentence of 10 years of consecutive probation at Count 2 (PWI) must be vacated as it is a lesser included offense of Count 1 (delivery).

Considering the structure of the Court's sentence, its express desire to have Minter under supervision for 20 years and the improper imposition of 10 years of probation on a merged count of conviction, the entire sentencing scheme has been upset and remand is in order. *Cf.*, *Commonwealth v. Thur*, 906 A.2d 552, 569 (Pa. Super. 2006) (When appellate disposition does not upset overall sentencing scheme, there is no need for a remand), *appeal denied*, 946 A.2d 687 (Pa. 2008); *see also*, *Commonwealth v. Vanderlin*, 580 A.2d 820,831 (Pa. Super. 1990)(If a trial court errs in sentencing on one count in a multi-count case, then all sentences for all counts will be vacated as that the trial court can restructure its entire sentencing scheme); *Commonwealth v. Goldhammer*, 517 A.2d 1280 (Pa. 1986), *appeal denied*, *Goldhammer v. Pennsylvania*, 480 U.S. 950, 107 S. Ct. 1613, 94 L. Ed. 2d 798 (1987); *Commonwealth v. Bartrug*, 732 A.2d 1287 (Pa. Super. 1999); *Bozza v. United States*, 330 U.S. 160, 166-167, 67 S.Ct. 645, 648-649, 91 L.Ed. 818 (1947)("The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner."); *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)(The imposition of a harsher sentence upon re-sentencing, while not constitutionally prohibited, may not, under the Due Process Clause, be the result of judicial vindictiveness.); *United States v. Murray*, 144 F.3d 270, 275 (3d Cir. 1998) (Due process claim based on *Pearce* rejected because the new sentence did not exceed the total length of his original sentence and there was no evidence of judicial vindictiveness).

Hearing on Post-Sentence Assertions

An undercurrent within Minter's *Concise Statement* is that the Court acted improperly when it did not grant a hearing on his post-sentence assertions. There is a reason why this course of action was taken. Minter never asked for a hearing. He asked that he be allowed to withdraw his guilty plea, PSM, paragraph 11, and that the terms of a non-existent plea agreement be honored. *Id.*, paragraph 12, but there was no corresponding request for a hearing.⁴ Our Rules of Criminal Procedure state a motion "shall include any request for hearing or argument, or both." Pa.R.Crim.P. 575(A)(2)(e). Our Rules also say that failure to do so leads right to waiver. "[T]he failure, in any motion, to state a type of relief...shall constitute a waiver of such relief..." Pa.R.Crim.P. 575(A)(3). Minter's failure to ask for a hearing through a proper procedural device is why no hearing was granted.

Withdraw of *Nolo Contendere* Plea

Minter takes the position this Court erred when it denied his post-sentence request to withdraw his *nolo contendere* plea⁵. According to Minter, his plea was not made intelligently and it was not made knowingly. Because there was no request for a hearing, there are no "new" facts from which this Court can review and make a determination that Minter's plea was not knowing or intelligently made. What this Court is left with is the facts as they unfolded before it.

The present facts do not support Minter's claim. At the outset of the change of plea proceeding, defense counsel made clear the plea was going to be a *nolo contendere* plea. At the top of a 10 page written *Explanation of Defendant's Rights* form this county has long used, the word "Guilty" is crossed out and right above it appears the phrase "No-Contest". Counsel also added some language on page 9 of the form as follows: "I understand that the evidence, if believed by the fact finder, would be sufficient to support a conviction". Immediately to the right of this added language are the initials "AM". Those initials appear very similar to the "A" and the "M" of Andre Minter's signature. When raising this issue with the trial court, counsel indicated that Minor acknowledged this added provision with his initials. PST, pg.3. Within this written colloquy, Minter confirmed he understood the maximum possible sentences and the trial court's power to deviate from any recommended sentence. The Court's oral colloquy reviewed with him his trial rights, the presumption of innocence and other important issues that contribute to a full understanding of the proceeding. The government provided a factual basis for the Court to accept Minter's decision not to contest the charges and to be sentenced as if he had entered a regular guilty plea. The totality of the record facts show Minter's plea is not susceptible to a post-sentence withdrawal.

Modification of Sentence

Buried within his *Concise Statement*, Minter claims this Court erred when it did not modify his sentence "to comport with the agreement that had been reached by the parties for a guilty plea." *Concise Statement*, pg. 2, paragraph 2 (May 20, 2011). Assuming for sake of argument that there was an agreement reached between the parties,⁶ their supposed agreement is belied by the facts of record.

Upon the case being called and after introductions, the Court inquired of the government's lawyer as to how the case was going to proceed. The government's lawyer responded as follows:

ADA : There's no agreement in this case, Your Honor. It's going to be a general plea.

"PST", pg. 2 (Dec. 1, 2010).⁷ This manner of disposition was then confirmed by defense counsel. The sentencing guideline form is also supportive that there was no plea agreement. In the area for types of disposition there are several choices. One is a negotiated guilty plea. That box is not checked. Another choice is *nolo contendere*.⁸ That box is checked. Review of this issue, through the lens Minter has constructed does not engender sympathy. He evidently did not like the proposal the government presented. He thought he could do better; so he rolled the dice. The dice roll did not turn out like he hoped.⁹

No Post Sentence Counsel

Minter ends his *Concise Statement* by claiming he was denied the assistance of counsel at the post-sentencing stage. Ineffective assistance of counsel (IAC) claims must be raised on collateral review unless there is a sufficient record. *Commonwealth v. Bomar*, 820 A.2d 831, 853-53 (Pa. 2003), *cert. denied*, 540 U.S. 1115 (2004); *see also*, *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002). There is not a sufficient record for this Court or the Superior Court to review. As such, this IAC claim must await collateral review under the Post-Conviction Relief Act.

BY THE COURT:
/s/Williams, III, J.

¹ Offense dates in 2008 and a 2010 charging document is explained by Minter being detained in Ohio and operation of the Interstate Agreement on Detainers.

² Consistent with Pa.R.Crim.P. 720 (A)(1), which requires such motions be filed "no later than 10 days after imposition of sentence" and 1 Pa.C.S. Section 1908 which excludes the first day of an event, Minter's motion was timely filed. The 10 day clock began on December 2nd and ended on Sunday, Dec. 12th. When a deadline falls on a Saturday or Sunday, that day gets "omitted from the computation." 1 Pa.C.S. Section 1908

³ Court's order of May 25, 2011 deemed the Concise Statement to have been timely filed.

⁴ The inattention to the Rules of Procedure also appear in the WHEREFORE clause of the Post-Sentence Motion. It is here where Minter "submits this Omnibus Pretrial Motion."

⁵ A *nolo contendere* plea has long been a staple of Pennsylvania jurisprudence. *Commonwealth v. Ferguson*, 44 Pa. Super. 626 (Pa. Super. 1910) ("A plea of *nolo contendere*, when accepted by the court, is, in its effect upon the case, equivalent to a plea of guilty. It is an implied confession of guilt only, and cannot be used against the defendant as an admission in any civil suit for the same act. The judgment of conviction follows upon such plea as well as upon a plea of guilty."); *Commonwealth v. Boyd*, 292 A.2d 434 (Pa. Super. 1972) ("A recent exposition of the plea '*nolo contendere*' appears in the case of *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), where Justice White said in a footnote: 'Throughout its history, that is, the plea of *nolo contendere* has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer of leniency.' In *Hudson v. U. S.*, 272 U.S. 451 (1926), the court describes a plea of *nolo contendere* as one by which the defendant 'does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for the purpose of the case to treat him as if he were guilty.'"); *see also*, Pa.R.Crim.P. 590(A)(2).

⁶ Given the lack of any verification of these "facts" set forth in the post-sentence motion, paragraphs 3-10, the Court can only assume. Pa.R.Crim.P. 575(A)(2)(g) requires the facts that do not already appear of record be verified by affidavit or by an unsworn statement. Counsel's lack of compliance with this provision does not help in its quest for relief.

⁷ The transcript was filed on June 8, 2011 and carries a tracking number of T11-1021.

⁸ Given the lack of any verification of these "facts" set forth in the post-sentence motion, paragraphs 3-10, the Court can only assume. Pa.R.Crim.P. 575(A)(2)(g) requires the facts that do not already appear of record be verified by affidavit or by an unsworn statement. Counsel's lack of compliance with this provision does not help in its quest for relief.

⁹ Considering the incarceration aspect of the sentence was exactly what Minter asked for, his contempt for the sentence must be the length of his probation.

Commonwealth of Pennsylvania v. Robert Lynn Cash

Criminal Appeal—Sentencing (Discretionary Aspects)

No. CC 200500844. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Machen, J.—June 22, 2011.

OPINION

Defendant was charged at CC200500844 with Count 1 and 2 - Rape, 18 Pa.C.S. §312(a)(1) and (2); count 3 and 4 - Involuntary Deviate Sexual Intercourse, 18 Pa.C.S. §3123(a)(1) and (a)(2); count 5 - Robbery - Serious Bodily Injury, 18 Pa.C.S. §3701(a)(1)(i) or (ii); count 6 - Burglary - 18 Pa.C.S. §3502; count 7 - Criminal Conspiracy, 18 Pa.C.S. §903(a)(1); count 8 - Carrying Firearm Without a License, 18 Pa.C.S. §6106. A jury trial was held before the Honorable David R. Cashman from February 20, 2007, through February 23, 2007, after which the defendant was found Not Guilty at Counts 1 and 2 of Rape; Not Guilty at Count 8 of Carrying a Firearm Without a License. The defendant was found Guilty of all other charges (Counts 3-7 and 9-27). Defendant was sentenced and, after appeal to the Superior Court, the case was remanded for re-sentencing and assigned to this Court for that re-sentencing. At a re-sentencing hearing which was held on September 20, 2010, the defendant was sentenced as follows:

Count 3 - 66 to 132 months with credit for time served;

Count 4 - 66 to 132 months, consecutive to Count 3;

Count 5 - 66 to 132 months, consecutive to Count 4;

Count 6 - 60 to 120 months, consecutive to Count 5;

Count 7 - 60 to 120 months, consecutive to Count 6;

Counts 9, 10, 11, 12 each, a term of probation of 5 years consecutive to each other and consecutive to incarceration; and

Count 13 - 27 - No further penalty.

Defendant filed a Motion for Modification of Sentence which was denied and this timely appeal followed.

On appeal, the defendant raises one claim asserting that the court erred when it denied defendant's Motion to Modify Sentence where it failed to adequately consider the sentencing factors set forth at 42 Pa.C.S.A. 9721.

It is well settled in Pennsylvania that "sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion." *Commonwealth v. Johnson*, 446 Pa. Super. 192, 666 A.2d 690 (1995). "To constitute an abuse of discretion, the sentence imposed must either exceed the statutory limits or be manifestly excessive." *Commonwealth v. Gaddis*, 432 Pa. Super. 523, 639 A.2d 462, 469 (1994) (citations omitted). In this context, an abuse of discretion is not shown merely by an error in judgment. *Commonwealth v. Kocher*, 529 Pa. 303, 602 A.2d 1308 (1992). Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision. *Commonwealth v. Rodda*, 723 A.2d 212 (Pa. Super. 1999). In further discussion of this issue and as quoted in *Com. v. Mouzon*, 828 A.2d 1126, 1128 - 1129 (Pa. Super. 2003),

In determining whether a sentence is manifestly excessive, the appellate court must give great weight to the sentencing court's discretion, as he or she is in the best position to measure factors such as the nature of the crime, the defendant's character, and the defendant's display of remorse, defiance, or indifference. *Commonwealth v. Ellis*, 700 A.2d 948, 958 (Pa.Super. 1997). Where an excessiveness claim is based on a court's sentencing outside the guideline ranges, we look, at a minimum, for an indication on the record that the sentencing court understood the suggested sentencing range. 42 Pa.C.S.A. § 9721(b); *Rodda*, 723 A.2d at 214. When the court so indicates, it may deviate from the guidelines, if necessary, to fashion a sentence which takes into account the protection of the public, the rehabilitative needs of the defendant, and the gravity of the particular offenses as it relates to the impact on the life of the victim and the community, so long as the court also states of record "the factual basis and specific reasons which compelled him to deviate from the guideline range." *Commonwealth v. Cunningham*, 805 A.2d 566, 575 (Pa.Super.2002) (quoting *Commonwealth v. Burkholder*, 719 A.2d 346, 350 (Pa.Super. 1998)).

In the present case, this court did not deviate from the guidelines so the only question to be reviewed is if the sentence was manifestly excessive. Based upon this sentencing court's evaluation of pre-sentence report, the Victim Impact Statements (from the record), the nature of the crimes, defendant's history, compliance, remorse, and demeanor, the court used its discretion to sentence the defendant to each count to run consecutively.

The sentence imposed by the sentencing court was not manifestly excessive. As such, the defendant's claim is without merit.

June 22, 2011

Commonwealth of Pennsylvania v. Kathleen McCullough

Criminal Appeal—Evidence—Sentencing (Discretionary Aspects)—Prior Bad Acts—Theft—Character Witness Evidence

No. CC 200910526, 200807911. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—June 28, 2011.

OPINION

On June 1, 2010, Appellant, Kathleen McCullough, was convicted by a jury of two counts of Theft by Deception, one count Unlawful Use of a Computer and one count of Computer Trespass. Appellant was sentenced on August 27, 2010 to two consecutive terms of incarceration of one to two years, with RRRRI¹ minimums of nine months each, and two consecutive sentences of five years probation. Post sentence motions were filed on September 7, 2010, heard on November 1, 2010, and denied on November 15, 2010. Appellant filed a Notice of Appeal on November 19, 2010. After extensions due to a delay in obtaining transcripts, Appellant filed a Statement of Errors Complained of on Appeal on January 26, 2011.²

MATTERS COMPLAINED OF ON APPEAL

Despite the length of the Appellant's Statement of Errors on Appeal, Appellant raises only six issues on appeal. First, Appellant asserts that evidence regarding one criminal matter was improperly introduced at trial Under Rule 404(b) of the Pennsylvania Rules of Evidence in a separate criminal matter. (Statement of Errors to be Raised on Appeal, p. 4-5) Next, Appellant asserts that the evidence was insufficient in numerous ways to establish that Appellant took funds from either of the victims. *Id.* at 6-7. Further, Appellant asserts that the convictions were against the weight of the evidence. *Id.* at 7-9. Appellant asserts that trial counsel provided ineffective assistance of counsel by failing to call character witnesses on the issue of her reputation for being law-abiding and truthful. *Id.* at 9-10. Appellant also asserts the Court erred in failing to conduct any colloquy on the record regarding character witnesses. *Id.* at 10. Appellant lastly asserts that the sentence imposed was manifestly excessive, unreasonable, and an abuse of discretion. *Id.* at 11-12.

HISTORY OF THE CASE

The testimony in this case is summarized as follows. Lori Cherup, MD testified that she is a board-certified plastic surgeon who ran a successful outpatient surgical practice.³ (TT 39) In October, 2006, Cherup advertised for a Chief Financial Officer ("CFO") and Appellant responded to that ad. (TT 40-41) Cherup interviewed Appellant, and Appellant offered to do payables for Cherup for a week or two to help Cherup get caught up while Cherup decided who to hire as CFO. (TT 42-43) Cherup agreed to pay Appellant one thousand dollars a week or two thousand dollars a month to do payables. (TT 43) Cherup hired Appellant on that interim basis in November 2006. *Ibid.* In March 2007, Cherup decided to retain Appellant as CFO. (TT 43-44) In that capacity, Appellant was to be paid \$100,000 salary. (TT 44) Appellant managed payroll benefits (in concert with Cherup), managed accounts payable from the practice and the surgical center and generated checks for Cherup to sign. (TT 46-47) Cherup stated that she would write three hundred checks a month on behalf of her practice and the surgical center. (TT 47) Cherup testified that she signed all checks herself. *Ibid.* She testified that she had one signature stamp, and that it was used exclusively for medical records purposes. (TT 49)

On February 21, 2008, Appellant abruptly left Cherup's employment. When Cherup entered Appellant's vacated office, she discovered a signature stamp in Appellant's desk drawer. (TT 50) She later learned that several files had been deleted from the computer server.⁴ (TT 53) Additionally, Cherup discovered that Appellant failed to pay numerous federal and state taxes. (TT 57) Cherup estimated the total damage incurred due to the Appellant's deletions to the computer and database, including the labor to reconstruct the information was approximately \$300,000. (TT 58) Finally, Cherup testified that Appellant wrote checks to herself, without Cherup's consent, totaling \$139,591.76. (TT 82)

Maureen Stankevich, Cherup's office manager, testified that numerous checks and financial records were missing when Appellant stopped working for Cherup. (TT 179) Stankevich eventually retrieved several check registers⁵ where the amount in the register was inconsistent with the amount on the checks themselves. (TT 181) Several checks were made directly to Appellant, including twenty-five which were endorsed by a stamp bearing Cherup's signature. (TT 182, 194) Stankevich indicated signature stamps were never used for check-writing purposes. (TT 186) All twenty-five checks were also signed by Appellant or deposited directly into her account. (TT 196) These checks were logged into Cherup's software to individuals other than Appellant. (TT 202)

Italo "Ody" Mackin testified that he is the majority shareholder in Mackin Engineering, a transportation engineering business that designs highways and bridges. (TT 244, 246) Mackin said that his company employs over one hundred people during the busier portion of their year. (TT 244) Mackin hired Appellant as Controller of his company in 1996. (TT 248) Appellant's duties included bookkeeping, writing checks, payroll and preparing federal, state and local tax returns and other forms. (TT 249)

According to Mackin, Appellant was supervised by Jerome Schwartz, the Executive Vice President of the company and also Mackin's son-in-law. (TT 250) In May, 1996, Mackin requested to see the financial statements after discovering only \$20,000.00 in the company bank account, despite a net business income in excess of \$1,000,000.00. (TT 251) Appellant prepared a spreadsheet in response to Mackin's request, which listed numerous vendors and amounts. (TT 252) However, when later compared to the actual checks it was discovered that all of the checks listed on the spreadsheet were actually written to Appellant and not to the listed vendors. (TT 253) Some checks written to Appellant had "advance" written on them. (TT 254) Neither Schwartz nor Mackin approved the advancement of any payment to Appellant. *Ibid.* Mackin estimated at the time that Appellant had written checks totaling almost \$400,000.00 to herself and to pay her personal American Express bills. (TT 276) Mackin fired Appellant upon discovering this information. (TT 277)

After Appellant was fired, her brother contacted Mackin Engineering to set up a meeting. (TT 281) The parties negotiated a settlement agreement containing a confidentiality clause, which Mackin signed to protect his wife and daughter from the embarrassment of his son-in-law's affair. (TT 284)

Subsequently, Mackin became aware of Appellant's employment with Cherup. (TT 304) Mackin met with Cherup mainly to determine if Appellant had violated the terms of the confidentiality agreement. (TT 305) During their conversation, Cherup indicated that she was aware of some mishandling of funds. *Ibid.* Mackin indicated that his experience was of "substantial damage of the same type of things." *Ibid.*

Schwartz testified that Appellant had complete control of the company's financial records. (TT 349) On July 11, 2006, Schwartz discovered a \$310,000.00 discrepancy between what was in the bank account and what Appellant had indicated was in the bank account the previous day. (TT 344) Schwartz said he informed Mackin of the discrepancy the following day. *Ibid.* Appellant explained the discrepancy by admitting that she had failed to record manual checks written against the account. (TT 346) Appellant then prepared a spreadsheet accounting for \$107,000.00. (TT 348)

Schwartz obtained the bank statements and cancelled checks and determined that the payments on the spreadsheet, which Appellant indicated were to vendors, actually corresponded to checks which Appellant had made payable to herself. (TT 351-355) Schwartz calculated approximately \$87,000.00 of checks were written to Appellant in this manner. (TT 355) Further investigation led Schwartz to determine that Appellant used company funds to pay her personal American Express credit card bills in the amount of \$872,118.91. (TT 365) Schwartz also determined that Appellant wrote additional unauthorized checks for her own benefit totaling \$211,701.59 and stole \$82,214.80 from petty cash. (TT 365-366) Schwartz admitted to having a long-term sexual relationship with Appellant, but denied ever giving her authorization to take money for her personal use from petty cash, to write checks to herself or to pay her personal credit card bills with Mackin Engineering funds. (TT 339, 367)

Detective Kevin Flanigan of the Allegheny County Police Department testified that he conducted a forensic examination regarding the allegations of theft from both Dr. Cherup and Mackin Engineering. He testified that, pursuant to a search warrant, one hundred thirty-two blank checks from Dr. Cherup's companies were recovered from Appellant's residence. (TT 436)⁶ Flanigan testified that several of these checks were in succession to checks deposited into Defendant's account. (TT 437) Several of the checks that were deposited into Appellant's account had not been signed, but were stamped with Dr. Cherup's signature instead. (TT 445) Flanigan determined that over a nine month period, Appellant paid herself \$19,263.79 above her salary in direct deposits to her bank account, and made additional deposits from Dr. Cherup's business accounts. (TT 447-448)

Flanigan also determined that Appellant used Mackin Engineering funds to pay her personal American Express credit card bill, which totaled up to \$95,000 monthly. (TT 460-462, 471) Flanigan testified that from May 14, 2003 through July 10 2006, Appellant billed \$872,118.91 to her personal American Express card for personal items such as clothing and paid those bills with Mackin Engineering funds. (TT 460) The total amount Appellant billed to her American Express card from June 2003 through August of 2006 was \$1,440,050.92. (TT 468-469) Flanigan concluded that the total amount Appellant had taken from Mackin Engineering to pay her personal American Express card bills was \$1,148,372.70. (TT 482) In addition to paying her personal American Express bill with Mackin Engineering funds, Flanigan testified that Appellant wrote checks payable to cash or petty cash totaling \$82,214.80 that were actually deposited into Appellant's personal account. (TT 472) Appellant also wrote checks to herself and then voided them out on the computer system. (TT 478)

Appellant testified on her own behalf, and admitted taking Mackin Engineering funds, starting in 2000, to pay her American Express card bills. (TT 525-526) She stated Schwartz was aware she was using company funds to pay her personal credit card, as well as making direct deposit transfer of funds from Mackin Engineering into her personal account, and that he encouraged these practices. *Ibid.* Appellant testified that Schwartz was generous with the company's money, and wanted her to have "the things he thought I deserved," including expensive clothes and a horse. (TT 525-527) Appellant denied having created a spreadsheet to explain discrepancies in the Mackin Engineering bank account. (TT 528)

With regard to Cherup, Appellant claimed she was both an employee with an annual salary of \$100,000.00, and at the same time an independent consultant, at a rate of \$10,000.00 per month. (TT 537) According to Appellant, Cherup agreed to pay her this additional amount from January 2007 through December 2007. (TT 538) Appellant testified that this agreement was never reduced to writing, as Appellant indicated she did not want to be subject to a non-compete clause regarding Regent Surgical Health, Cherup's prior management company. (TT 538-539) She further testified that any additional money received from Cherup was for reimbursable expenses. (TT 541) Appellant indicated that she personally paid for software upgrades, flowers or gifts for employers who had a death in the family, and for an office Christmas party. *Ibid.* She estimates the total of these expenses to be nineteen or twenty thousand dollars. *Ibid.*

John Krivda, a CPA who managed Cherup's accounting, testified that Appellant was never issued a 1099 form, which she would have received if she had been paid as an independent contractor. (TT 652) Krivda further stated that IRS rules prohibit one from being both an employee and an independent contractor with the same organization. *Ibid.*

PROCEDURAL SUMMARY

On July 16, 2008, a criminal information was filed against Appellant at CC 200807911. Appellant was charged with Theft by Deception, Unlawful Use of a Computer and Computer Trespass regarding her employment with the Cherup companies. On August

11, 2009, another criminal information was filed against Appellant at CC 200910526. At that information, Appellant was charged with Theft by Deception-False Impression regarding the alleged Mackin Engineering theft and also charges involving an elderly woman named Shirley Jordan over whom Appellant's brother had Power of Attorney. The Commonwealth filed a Rule 404(b)(2) and 404(b)(4) Notification on March 18, 2009, seeking to introduce evidence in the Cherup case of the Mackin Engineering case and the Shirley Jordan case. In response, Appellant filed a Motion in Limine to exclude this evidence. After a hearing, this Court determined that the Mackin Engineering evidence would be admissible in the Cherup case but excluded the testimony regarding the separate allegation involving Appellant's brother. On September 30, 2009, Appellant filed a Motion to Join the Theft by Deception-False Impression count of Petition CC# 200910526 with petition CC# 20087911. This Court granted the Motion on October 5, 2009, severing the Mackin Engineering case from the Shirley Jordan case and joining it to the Cherup case.

DISCUSSION

Appellant first argues that that evidence regarding the criminal matter relating to Mackin Engineering was improperly introduced at trial in the criminal matter relating to Dr. Cherup. "Evidence of a defendant's distinct crimes are not *generally* admissible against a defendant solely to show his bad character or his propensity for committing criminal acts, as proof of the commission of one offense is not *generally* proof of the commission of another." *Commonwealth v. Billa*, 555 A.2d 835, 838 (Pa. 1989); See Pa.R.E. 404; See also *Commonwealth v. Lark*, 543 A.2d 491, 497 (Pa. 1988).

However, this general proscription against admission of a defendant's distinct bad acts is subject to numerous exceptions if the evidence is relevant for some legitimate evidentiary reason and not merely to prejudice the defendant by showing him to be a person of bad character. *Billa*, *supra*. Exceptions that have been recognized as legitimate bases for admitting evidence of a defendant's distinct crimes include, but are not limited to: (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design such that proof of one crime naturally tends to prove the others; (5) to establish the identity of the accused where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other; (6) to impeach the credibility of a defendant who testifies in his trial; (7) situations where defendant's prior criminal history had been used by him to threaten or intimidate the victim; (8) situations where the distinct crimes were part of a chain or sequence of events which formed the history of the case and were part of its natural development (sometimes called "res gestae" exception). *Ibid.* citing Pa.R.E. 404(b); See also *Lark*, *supra*. This list is by no means exhaustive. See *Commonwealth v. Watkins*, 843 A.2d 1203, 1215 n. 1 (Pa. 2003). Additional exceptions are recognized when the probative value of the evidence outweighs the potential prejudice to the trier of fact. *Commonwealth v. Claypool*, 495 A.2d 176 (Pa. 1985) For example, an additional exception, explaining a delay in reporting a crime, was recognized in *Commonwealth v. Dillon*, 925 A.2d 131, 139 (Pa. 2007).

Appellant contends that the alleged crime with respect to Mackin Engineering does not fit the exceptions to Rule 404(b)(2) and, in the alternative, the probative value of this evidence does not substantially outweigh its prejudicial effect in the alleged crimes involving Dr. Cherup. Appellant fundamentally misunderstands Rule 404 as it relates to this case. As the non-exhaustive list of exceptions illustrate, evidence of prior crimes or acts may be admitted for any legitimate purpose, so long as the evidence is not offered "merely to prejudice the defendant by showing [her] to be a person of bad character." *Commonwealth v. Horvath*, 781 A.2d 1243, 1245 (Pa.Super. 2001)

Evidence regarding thefts from Mackin had several legitimate purposes under which it could be admitted, including evidence of a common scheme, plan or design. Evidence of a common scheme, plan, or design involving various similarly situated complaints is relevant to bolster the credibility of those complaints. *Commonwealth v. Hacker*, 959 A.2d 380, 381 (Pa.Super. 2008). While at Mackin Engineering, Appellant began a pattern of writing unauthorized checks to herself well beyond her salary, taking from petty cash and paying her American Express bills with Mackin Engineering funds. She would then falsify or delete records in order to cover up her theft. When she worked for Dr. Cherup, she continued to write unauthorized checks to herself well beyond her salary, take from petty cash and pay her American Express bills with unauthorized funds, this time from Dr. Cherup's practice. Appellant created false financial forms while at Mackin Engineering to conceal her theft. Appellant deleted computer files containing Cherup's financial information to conceal her theft. Appellant's use of the same scheme, plan or design of using her position of trust to divert company assets to her personal account and then covering up the thefts is admissible under 404(b).

Evidence of theft from Mackin Engineering over a prolonged period of time also tends to establish Appellant's motive to steal from Cherup. The test for admissibility of prior bad acts as it relates to motive is as follows:

In order for evidence of prior bad acts to be admissible as evidence of motive, the prior bad acts "must give sufficient ground to believe that the crime currently being considered grew out of or was in any way caused by the prior set of facts and circumstances."

Commonwealth v. Reid, 811 A.2d 530, 550 (Pa. 2002), citing *Commonwealth v. Schwartz*, 285 A.2d 154 (Pa. 1971) Although she was a single woman living in her mother's home, Appellant could not support her extravagant lifestyle on her salary from Dr. Cherup alone. She wanted to continue to live in the manner to which she had become accustomed, which had previously been supported by her theft from Mackin Engineering. The theft from Dr. Cherup is simply an extension of her theft from Mackin Engineering, continuing the pattern of using company funds to pay personal debts in order to have and enjoy the finer things in life which she thought she deserved. This Court properly admitted the evidence of theft from Mackin Engineering to establish motive.

Furthermore, evidence of theft from Mackin Engineering is relevant to establish intent regarding Cherup. Intent may be shown through a pattern of similar acts. *Commonwealth v. Miller*, 664 A.2d 1310 (Pa. 1995) *cert. denied*, 516 U.S. 1122 (1996). Appellant's intent to steal from Cherup is clear, given the pattern described above. Moreover, evidence is relevant to the issues at hand when it forms part of the history and natural development of the events and offenses for which a defendant is charged, and the court does not need to eliminate those facts from the jury's consideration. *Commonwealth v. Melendez-Rodriguez*, 856 A.2d 1278, 1283 (Pa.Super. 2004). Appellant's criminal conduct, stealing a large sum of money over ten years from a trusted employer, provides the first chapter of Appellant's continued criminal behavior, providing motive and intent, and revealing a common scheme, design or plan. Ody Mackin's visit to Dr. Cherup, which formed the basis for her further investigation and ultimate discovery of Appellant's crimes while employed by Cherup, is part of the history and development of events and offenses, and is also information from which a jury can infer motive and intent.

In the case *sub judice*, the Commonwealth was not attempting to show through evidence of prior bad acts that Appellant has a propensity toward theft or other criminal conduct. Rather, her prior conduct regarding Mackin Engineering shows a commonality in scheme, plan, design and intent with her actions in the Cherup matter, as well as motive for her additional criminal conduct, and it is

admissible to show the history and natural development of the events and offenses for which Appellant was charged. As such, it is highly probative and this Court did not err in determining that its probative value outweighs the resulting prejudice to Appellant.⁷

Next, Appellant challenges the sufficiency of the evidence. The test for reviewing a sufficiency of the evidence claim is well settled:

[W]hether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences favorable to the Commonwealth, the jury could reasonably have determined all elements of the crime to have been established beyond a reasonable doubt ... This standard is equally applicable to cases where the evidence is circumstantial rather than direct so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt. *Commonwealth v. Hardcastle*, 546 A.2d 1101, 1105 (Pa. 1988) (citations omitted)

Commonwealth v. Torres, 617 A.2d 812, 236-237 (Pa.Super.1992).

Appellant alleges that the evidence was insufficient to establish that Appellant took funds from either of the victims. First, Appellant alleges that the evidence was insufficient to establish theft by deception regarding both Cherup and Mackin Engineering.

A person is guilty of theft if he intentionally obtains or withholds property of another by deception. A person deceives if he intentionally fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship.

18 Pa. C.S.A. § 3922 (a) (3).

The evidence is sufficient to show that Appellant intentionally obtained property of Cherup by deception. Cherup testified that all checks written on behalf of the practice were signed in her own hand, and that she never authorized the use of a signature stamp. Maureen Stankevich, Cherup's office manager, also testified that signature stamps were never used for check writing purposes. After Appellant abruptly ended her employment, Cherup testified that she discovered a signature stamp in Appellant's desk drawer, which was used to stamp several unauthorized checks made directly to Appellant. In sum, the Commonwealth offered evidence that twenty-five unauthorized Cherup checks were signed by Appellant or deposited directly into her personal bank account. These checks totaled \$139,591.76. Additionally, Stankevich testified that numerous checks and financial records were missing when Appellant ended her employment for Cherup. Contrary to Appellant's testimony, Cherup denied the existence of any oral consulting contract that would justify additional compensation and no tax records exist reporting such additional income. This evidence sufficiently established theft by deception in the Cherup matter.

Turning to the theft by deception regarding Mackin Engineering, Mackin and Schwartz testified that they discovered many checks were in fact written to Appellant, although she had recorded the checks as though they were used to pay vendors. Several checks made payable to Appellant had "advance" written on them. Schwartz and Mackin denied ever having approved the advancement of any payment to Appellant. Detective Flanigan testified that Appellant used Mackin funds to pay her personal credit card bill. Again, Schwartz and Mackin deny ever authorizing Appellant to use company funds to pay her personal credit card debt. Appellant admitted to having used Mackin money to pay her credit card bills. Her defense was that Schwartz authorized her to do so. The jury was free to make its own determination of credibility on that issue. Furthermore, Appellant's recurring pattern of falsifying checks is sufficient to demonstrate she was deliberate and purposeful in her ongoing theft from Mackin Engineering. These facts support the charge that Appellant intentionally obtained property of Mackin Engineering by deception.

Appellant also alleges that the evidence presented at trial was insufficient to establish that she was guilty of one count Unlawful Use of a Computer. A person commits the offense of unlawful use of a computer if she:

accesses or exceeds authorization to access, alters, damages or destroys any computer, computer system, computer network, computer software, computer program, computer database, World Wide Web site or telecommunication device or any part thereof with the intent to interrupt the normal functioning of a person or to devise or execute any scheme or artifice to defraud or deceive or control property or services by means of false or fraudulent pretenses, representations or promises.

18 Pa. C.S.A. §7611 (a) (3).

Testimony established that Appellant accessed Cherup's computer server and deleted several files from it containing important Cherup financial data. Cherup indicated that Appellant's action caused a significant interruption in the functioning of Cherup's office and that she had to expend tremendous time and resources to recover the financial data that Appellant deleted. Cherup estimated the total damage to the computers and database, along with the labor to reconstruct the information was approximately \$300,000. Cherup testified that Appellant did not have authorization to access and delete these files. The evidence supports a conclusion that Appellant deleted Cherup financial records to eliminate evidence of her financial crimes. The sufficiency argument as it pertains to the unlawful use of a computer charge is without merit.

Next, Appellant contends the evidence presented at trial was insufficient to establish Computer Trespass.

A person commits the offense of computer trespass if [s]he knowingly and without authority or in excess of given authority uses a computer or computer network with the intent to temporarily or permanently remove computer data, computer programs or computer software from a computer or computer network.

18 Pa. C.S. A. § 7615 (a) (1).

The evidence at trial showed that Appellant attempted to conceal her theft of funds from Cherup by deleting Cherup's financial records from her computer, which Appellant had ensured was the only source of this data. Cherup testified that this conduct was without her knowledge or permission. The evidence establishes that Appellant knowingly, and in excess of her given authority, tampered with and destroyed computer data, and in so doing, committed computer trespass.

Appellant's next issue, that the verdict was against the weight of the evidence, is also without merit. The standard for a "weight of the evidence" claim is as follows:

Whether a new trial should be granted on grounds that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial judge, and [her] decision will not be reversed on appeal unless there has been an abuse of discretion.... The test is not whether the court would have decided the case in the same way but whether the verdict is so contrary to the evidence as to make the award of a new trial imperative so that right may be given another opportunity to prevail.

Commonwealth v. Taylor, 471 A.2d 1228, 1230 (Pa.Super. 1984). See also, *Commonwealth v. Marks*, 704 A.2d 1095, 1098 (Pa.Super. 1997) (citing *Commonwealth v. Simmons*, 662 A.2d 621, 630 (Pa. 1995)).

Appellant alleges that the verdict is against the weight of the evidence to support a finding that Appellant is guilty of Theft by Deception, Unlawful Use of a Computer, and Computer Trespass. To the contrary, the evidence supported the jury finding that all of the elements of the crimes for which Appellant was convicted were established beyond a reasonable doubt.

The evidence supported a finding that Appellant falsified financial records in her capacity as controller and CFO for Mackin Engineering and Cherup. Both employers testified that Appellant was not authorized to write company checks to herself. The jury need not find credible Appellant's assertion that the moneys received were owed to her as payment for services rendered or were otherwise authorized by her employers. In fact, such an assertion is inconsistent with the testimony of her employers, Mackin and Cherup. In the Cherup matter, Cherup and her office manager testified that the signature stamp was never used for check writing purposes, yet Appellant had both a signature stamp in her desk drawer and a stack of checks payable to her stamped with Cherup's signature. Because the checks were endorsed with a signature stamp, rather than obtaining Cherup's hand-written signature, a fact-finder could infer that Appellant could not rightly claim the authority or approval to receive these checks. Furthermore, Appellant's claim of an additional oral employment agreement as an independent contractor for Cherup is belied by the lack of a Form 1099.

In the Mackin Engineering matter, Mackin and Schwartz testified that Appellant was never given authority to pay her personal credit card bills with Mackin Engineering monies. In addition, Appellant's assertion of lawful entitlement is belied by the testimony that Appellant created false spreadsheets and withheld or destroyed business records in order to conceal money she stole from her employer. The verdict does not so shock the conscience such that a new trial should be ordered.

Appellant asserts that this Court erred in failing to conduct any colloquy regarding character witnesses.⁸ The Court is not required to conduct an on the record colloquy when a defendant waives his or her rights. See *Commonwealth v. Duffy*, 832 A.2d 1132, 1137, n.3 (Pa.Super. 2003) (citing *Commonwealth v. Todd*, 820 A.2d 707, 712 ((Pa.Super. 2003), *appeal denied*, 833 A.2d 143 (Pa. 2003))⁹ The Court is however, responsible for ensuring that Appellant received a fair trial, including ensuring that she was aware of all of her rights.

At a hearing on Post-trial motions, defense counsel testified that he discussed Appellant's right to call character witnesses with her early on in his representation of Appellant. Along with her brother, a lawyer, Appellant provided to counsel at their first meeting a several page list of proposed witnesses, including character witnesses. (Transcript of November 1, 2010 Post-Sentence Motion hearing, hereinafter PST 19) Counsel testified that he discussed with Appellant the pros and cons of such testimony, and outlined a trial strategy with Appellant that did not include calling character witnesses. (PST 23) While Appellant disputes defense counsel's testimony, this Court presided over the jury trial and finds that Appellant is not credible. Based on defense counsel's testimony, this Court found that Appellant was well aware of her right to call character witnesses and the attendant risks.

Next, the Court must consider whether the failure to present available character witnesses constitutes ineffective assistance of counsel. Counsel is presumed to be effective, and Appellant bears the burden of proving otherwise. *Commonwealth v. Williams*, 570 A.2d 75, 81 (Pa. 1990). Moreover, to prevail on a claim of ineffectiveness, Appellant must demonstrate that the course followed by trial counsel was unreasonable, that another meritorious course was available and that Appellant was prejudiced by counsel's ineffectiveness. *Ibid.* Counsel shall not be considered ineffective for failing to raise claims that are without merit. *Commonwealth v. Pursell*, 495 A.2d 183 (Pa. 1985).

In a criminal case, the accused may offer witnesses to testify to the accused's relevant character traits. Pa.R.E. 404(a)(1). Character refers to one's general reputation in the community for a relevant trait of character. *Commonwealth v. Fisher*, 764 A.2d 82, 87 (Pa.Super. 2000). The Commonwealth is entitled to attempt to impeach those witnesses. *Commonwealth v. Morgan*, 739 A.2d 1033, 1035 (Pa. 1999).

In *Commonwealth v. Van Horn*, 797 A.2d 983, 988 (Pa. Super. 2002) the court held that counsel was not ineffective in failing to call character witnesses where the witnesses could have been cross-examined concerning the defendant's prior convictions. *Commonwealth v. Van Horn*, 797 A.2d 983, 988 (Pa. Super. 2002). Likewise, in *Alexander v. Shannon*, 2005 WL 1213903 at 17 (E.D. Pa. Feb. 2, 2005), ineffective assistance of counsel was not found when counsel failed to present character evidence; counsel's decision not to put defendant's character into issue was tactically prudent. *Alexander v. Shannon*, 2005 WL 1213903 at 17 (E.D. Pa. Feb. 2, 2005).

By putting his "character in issue," the defendant would have allowed the prosecution to present otherwise inadmissible, derogatory evidence. *Id.* at 18. First, he would have permitted the prosecution to present its own anti-character witnesses. See Rule 404(a)(1); 1 West's Pa. Prac., Evidence § 404-3 (2d ed. 2004) ("Another consequence of putting character in issue is that the prosecution may call anti-character witnesses.") *Id.* Second, while Alexander's witnesses would have been able to testify only about his reputation-by answering "what have you heard" questions-the prosecution would have been able to ask about "specific instances" of noncriminal misconduct. Pa.R.E. Rule 405(a). *Id.* Third, the prosecution would have been able to attack each witness's foundation by asking its own "have you heard" questions. See *Commonwealth v. Fletcher*, 861 A.2d 898, 915-16 (Pa.2004) *Id.* ("[A] character witness may be cross-examined regarding his or her knowledge of particular acts of misconduct by the defendant to test the accuracy of his or her testimony and the standard by which he or she measures reputation.") (quoting *Commonwealth v. Busanet*, 817 A.2d 1060, 1069 (Pa.2002), *cert. denied*, 514 U.S. 1085 (2003)).

Alexander v. Shannon, 2005 WL 1213903 at 17 (E.D. Pa. Feb. 2, 2005).

Specifically, defense counsel testified at the Post-trial Motion's hearing that any potential character witnesses could have been impeached by the Commonwealth, perhaps by asking, *inter alia*, if the witness was aware of Appellant's ten year affair with her married boss, the son-in-law of the owner, or that she had lied to her mother, her brother and everyone she worked with at Mackin Engineering as to the affair, and whether this information would affect the witnesses' opinion as to Appellant's reputation for honesty in the community. Furthermore, any such witness could have been cross-examined regarding whether knowing that Appellant admits to having used Mackin Engineering funds to pay \$1,148,372.70 of her personal credit card debt would impact their opinion as to her reputation for honesty. Likewise, any such witness could have opened the door for the Commonwealth to bring in elements of the severed case involving Appellant receiving payments from a trust set up for Shirley Jordan, an elderly woman, by Appellant's brother who had Power of Attorney over Ms. Jordan. Counsel assessed the potential for character witnesses to do more harm than good to Appellant's case and so advised her. (PST 23) Counsel's decision not to call character witnesses was not unrea-

sonable and Appellant's argument regarding ineffective assistance of counsel is without merit.

Lastly, Appellant asserts that the sentence imposed by this Court was manifestly excessive, unreasonable, and an abuse of discretion. Appellant alleges that the sentence was unreasonable because Appellant's crimes did not involve violence, she had no criminal history, she has diabetes, and she is a lifelong resident of the area who cares for her elderly mother.

Before addressing the alleged sentencing errors, this Court notes that Appellant must first establish that a substantial question exists that the sentence imposed is inappropriate under the Sentencing Code. 42 Pa.C.S.A. § 9781(b); *Commonwealth v. Urrutia*, 653 A.2d 706, 710 (Pa.Super. 1995). The determination of whether a particular issue constitutes a "substantial question" can only be evaluated on a case by case basis. *Commonwealth v. House*, 537 A.2d 361, 364 (Pa.Super. 1988). It is appropriate to allow an appeal "where an appellant advances a colorable argument that the trial judge's actions were: (1) inconsistent with a specific provision of the sentencing code; or (2) contrary to the fundamental norms which underlie the sentencing process." *Commonwealth v. Losch*, 535 A.2d 115, 119-120 n. 7 (Pa.Super. 1987).

Appellant essentially argues that her sentence is manifestly unjust because the Court failed to give appropriate weight to numerous factors suggested by Appellant.

An allegation that a sentencing court "failed to consider" or "did not adequately consider" certain factors does not raise a substantial question that the sentence was inappropriate. *Commonwealth v. McKiel*, 427 Pa.Super. 561, 629 A.2d 1012 (1993); *Commonwealth v. Williams*, 386 Pa.Super. 322, 562 A.2d 1385 (1989) (*en banc*). Such a challenge goes to the weight accorded the evidence and will not be considered absent extraordinary circumstances. *McKiel*, 427 Pa.Super. at 564, 629 A.2d at 1013.

Commonwealth v. Urrutia, 653 A.2d 706, 710 (Pa.Super. 1995). Therefore, Appellant has not established a substantial question for appellate review.

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

This Court considered numerous factors in sentencing Appellant, including the sentencing guidelines and the presentence report, as well as the letters introduced into the record, the exhibits in the case and the testimony at the sentencing hearing. (ST 73) Regarding the pre-sentence report, the Pennsylvania Supreme Court has held:

Where pre-sentence reports exist, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors.... Having been informed by the pre-sentence report, the sentencing court's discretion should not be disturbed.

Commonwealth v. Devers, 546 A.2d 12, 18 (Pa.Super. 1988).

In addition to the Pre-Sentence Report, this Court considered Appellant's lack of acceptance of responsibility when sentencing Appellant. (ST 74) Appellant engaged in a continuous period of conduct wherein she stole well over a million dollars from two separate employers in order to maintain an opulent lifestyle. Appellant placed herself in positions of trust with both companies, and systematically abused that trust to her benefit and to the detriment of others, to whom she showed no remorse. Her ongoing actions could have eventually destroyed two companies with over one hundred employees, innocent victims who would have had to find new jobs or seek financial assistance from the state.

This Court sentenced Appellant to an aggregate of two to four years incarceration, with a RRRRI minimum of eighteen months, a sentence in the middle of the standard range of the Sentencing Guidelines. Sentences were imposed consecutively to reflect that the crimes involved separate victims. The Court considered the protection of the community and the length and breadth of Appellant's criminal conduct, as well as her lack of remorse. Regarding her diabetes, this Court considered a letter from the Pennsylvania Department of Correction offered by the Commonwealth indicating that the Department regularly cares for many diabetic inmates. As a result, this Court determined that the Department could meet Appellant's medical needs. The transcript reflects that factors considered by this Court in sentencing Appellant were both relevant and appropriate. Considering the totality of the circumstances, the sentence was not excessive or unreasonable.

CONCLUSION

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

BY THE COURT:
/s/Rangos, J.

¹ Recidivism Risk Reduction Initiative, 42 Pa.C.S.A. § 9756(b.1).

² Appellant filed a thirteen page Statement of Errors Complained of on Appeal in violation of Pa.R.A.P. Rule 1925(b)(4)(ii) and (iv), which requires the Statement of Errors to be concise and not provide lengthy explanation as to any error.

³ Dr. Cherup referred to three separate financial entities: her surgical practice, Lori Cherup M.D.; the company that managed the surgical center itself, Radiance Surgery Center; and a company she set up with her husband to finance the building, Kandabarow Cherup Corporation. (TT 41-42)

⁴ Rob McCafferty, an IT consultant, testified that the accounting files were deleted from Appellant's computer, which, per Appellant's request, was the only computer to contain the accounting information. (TT 161, 167)

⁵ McCafferty was able to recover the deleted check registers from Appellant's computer. (TT 180)

⁶ In addition, numerous financial records from Mackin Engineering were recovered from Appellant's residence. (TT 433)

⁷ Given Appellant's subsequent Motion to join the cases, Appellant may have waived any objection under 404(b). In the alternative, after this Court granted Appellant's joinder motion, any 404(b) argument would be moot.

⁸ This Court notes that it is the common practice of this Court to include such a colloquy, however the record does not reflect that such a colloquy was recorded. While it is possible that such a colloquy was inadvertently omitted in this case, it is also possible that it accidentally occurred in the absence of the court reporter as it cannot be done before the jury and thus would have occurred during a break, or that it was done by a relief reporter called to take pleas in other matters during the jury's lunch recess. Neither the assistant district attorneys nor defense counsel raised to this Court any oversight regarding the normal character witness colloquy, nor did any member of the court's staff note such an oversight. While this Court cannot say with absolute certainty that such a colloquy did occur, as it is this Court's standard practice to conduct one, such an omission would be both unusual and noticeable by its absence.

⁹ Although both cases refer to a defendant's right to testify, this Court notes that the right to call character witnesses is no less important than the right to testify, and should be considered accordingly.

Commonwealth of Pennsylvania v. Kevin Peretik

Criminal Appeal—Commonwealth Appeal—Suppression—No Reasonable Suspicion

No. CC 200817440. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Cashman, J.—July 6, 2011.

OPINION

On October 15, 2008, the appellee, Kevin Charles Peretik, (hereinafter referred to as "Peretik"), was charged with two counts of driving under the influence of alcohol or a controlled substance. Peretik filed a motion to suppress the physical evidence and statements made Peretik at the time of his arrest on the basis that there was no basis for reasonable suspicion that a motor vehicle violation had occurred, which would permit the stop and subsequent detention. A hearing was held on May 17, 2010, and following that hearing, this Court granted Peretik's motion to suppress. The Commonwealth filed a timely appeal and filed a certification pursuant to *Commonwealth v. Dugger*, 506 Pa. 537, 486 A.2d 382 (1985), that the granting the suppression motion substantially handicapped or effectively terminated its ability to prosecute the defendant on the charges filed against him.

In its statement of matters complained of on appeal the Commonwealth has asserted that this Court erred in finding that Peretik was unlawfully seized when the police were investigating the report of a domestic disturbance and that this Court erred in failing to find that the arresting officer had reasonable suspicion to believe that Peretik was operating a motor vehicle while he was under the influence of alcohol or a controlled substance, making him incapable of the safe operation of that vehicle.

Officer David Mitchell of the Hampton Township Police Department, testified that on October 4, 2008, he was responding to a domestic disturbance call at 2524 Toner Avenue in Hampton Township. As Officer Mitchell approached the residence, he saw a pickup back out of a grassy area adjacent to the house and stop on Toner Avenue and then backup into the grassy area adjacent to the house. Officer Mitchell approached Peretik who was the driver of that pickup truck and told him that he was responding to a domestic call at the residence. Peretik told him that there was no such problem. Officer Mitchell was asked what led him to gain information that subsequently led to Peretik's arrest and he stated: "It alerted me, yes, the way he was walking, the way he was standing, the way he was speaking, and the odor an alcoholic beverage upon his person." (Motion to Suppress Transcript, page 7, lines 18-21).

In *Commonwealth v. Henry*, 943 A.2d 967, 969 (Pa. Super. 2008), the Superior Court set forth the standard to be used in reviewing an order granting a motion to suppress as follows:

When reviewing an Order granting a motion to suppress we are required to determine whether the record supports the suppression court's factual findings and whether the legal conclusions drawn by the suppression court from those findings are accurate. *Commonwealth v. Mistler*, 590 Pa. 390, 912 A.2d 1265, 1268 (2006), citing *Commonwealth v. Davis*, 491 Pa. 363, 421 A.2d 179 (1980). In conducting our review, we may only examine the evidence introduced by appellee along with any evidence introduced by the Commonwealth which remains uncontradicted. *Id.* at 1268-1269. Our scope of review over the suppression court's factual findings is limited in that if these findings are supported by the record we are bound by them. *Id.* at 1269, citing *Commonwealth v. Bomar*, 573 Pa. 426, 826 A.2d 831, 842 (2003). Our scope of review over the suppression court's legal conclusions, however, is plenary. *Id.*, citing *Commonwealth v. Nester*, 551 Pa. 157, 709 A.2d 879, 881 (1998).

The only person to testify at the suppression hearing was Officer Mitchell and this Court, in reviewing that testimony, did not believe that he had reasonable suspicion to believe that a motor vehicle violation had occurred so as to stop, detain and subsequently arrest Peretik for the charge of driving under the influence. In his direct testimony, Officer Mitchell testified that Peretik backed his pickup truck onto Toner Road so that all four wheels were on Toner Road, whereas, during cross-examination, Officer Mitchell also testified that he did not believe that the pickup truck moved more than two feet, stopped and then was backed onto the property adjacent to the house where he was going to investigate the domestic disturbance.

The bigger problem with the testimony educed by the Commonwealth at the time of the suppression hearing was that there was no indication which would support Peretik's arrest for driving under the influence. Officer Mitchell testified that he was alerted to that particular possibility by virtue of the way Peretik was walking, the way he was standing, the way he was speaking and the odor of an alcoholic beverage on him. At no time did he ever describe the manner in which he was standing, the manner in which he was walking, the manner in which he was speaking or the strength of the odor of an alcoholic beverage that was emanating from Peretik. Officer Mitchell did not say whether the odor was slight, moderate or strong but, rather, he only stated that Peretik had an odor of alcohol. Similarly, he did not describe the manner in which Peretik was standing nor whether he was swaying or having difficulty maintaining his balance. With respect to the manner in which he was speaking, Officer Mitchell never indicated that he was slurring his words, mumbling or having difficulty enunciating his speech. Officer Mitchell did not indicate what, if any, problems he was having walking, whether he was stumbling, falling over, unable to maintain his balance but, rather, only indicated that

he observed him walking.

While Officer Mitchell may have lawfully been present at the scene to investigate the call of domestic disturbance, there was no evidence presented at the time of the suppression hearing which this Court could reasonably and logically draw the conclusion that Officer Mitchell had reasonable suspicion to suspect that Peretik might have committed the crime of driving under the influence of alcohol or a controlled substance. The best that Officer Mitchell could say was that he was alerted to that possibility by the way Peretik was standing, the way he was walking, the way he was speaking and the odor of alcohol. Without further description of those signs, this Court was unable to make an assessment as to whether or not Officer Mitchell's suspicion that Peretik was driving under the influence of alcohol or a controlled substance was reasonable. Accordingly, this Court granted Peretik's suppression motion.

Cashman, J.

Dated: July 6, 2011

Commonwealth of Pennsylvania v. Edward D. Johnson

Criminal Appeal—Sufficiency—Possession/PWID—Resisting Arrest

No. CC 2006-07065. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Williams, III, J.—July 18, 2011.

OPINION

On December 7, 2009, the defendant, Edward D. Johnson, (“Johnson”), had a bench trial on the accusation that he possessed heroin with the intent to distribute it to another person, he resisted arrest and possessing that same heroin for his own personal use. The Commonwealth presented two witnesses. When it rested, the defense sought a judgment of acquittal. Trial Transcript, pg. 51-54.¹ The motion was denied. *Id.*, 54. Johnson then testified. He was the only defense witness. Closing arguments were held. The Court found Johnson guilty of the three crimes he was facing. A presentence report was ordered. Sentencing was held on February 22, 2010. Sentencing Transcript, pg. 1-17.² The mandatory minimum of 3 to 6 years was imposed at Count 1, possession with intent to deliver (PWI), as was a consecutive ten years of probation. *See*, 18 Pa.C.S.A.7508(A)(7)(i). No further penalty was leveled at the other two charges.

Two days after sentencing, Johnson sought relief through a post sentence motion. He attacked only the PWI conviction. According to Johnson, the evidence was not sufficient to support the intent element of the PWI verdict. PSM, paragraph 5, (Feb. 24, 2010). On July 8, 2010, the post sentence motion was denied.

On August 9, 2010, through new counsel, a *Notice of Appeal* was filed.³ An order was issued on August 23, 2010, directing Johnson's *Concise Statement* be filed before November 1, 2010. After three extensions of time, Johnson's *Concise Statement* was filed March 4, 2011. Johnson identified two issues. These issue statements, however, are somewhat in conflict with the specificity which follows. In his first issue, Johnson says the “verdict was against the weight of the evidence as the evidence presented at trial was legally insufficient” to support the PWI verdict. *Concise Statement*, pg. 2 (March 4, 2011). His second issue says the “verdict was against the weight of the evidence as the evidence presented at trial was legally insufficient” to support the resisting arrest verdict. *Concise Statement*, pg. 5 (“[t]he finding of guilt was improper as the elements of the crime were not established”). The Court will disregard Johnson's use of the phrase “weight of the evidence” and treat both issues for what they are – challenges to the evidence's sufficiency.⁴

Both sufficiency challenges are properly before this Court. Pa.R.Crim.P. 606(A)(7) allows for a “challenge to the sufficiency of the evidence” to be made for the first time on appeal. *Commonwealth v. Gezovich*, 7 A.3d 300,301 f.n.1(Pa. Super. 2010)(“[I]t is established that a defendant can challenge the sufficiency of the evidence for the first time on appeal.”).

Possession With Intent To Deliver

Johnson was found guilty of possessing heroin with a corresponding intent to distribute it to another person. He claims the evidence was insufficient. *Concise Statement*, pg 4 (March 4, 2011)(“[I]t was not established beyond a reasonable doubt that Defendant possessed the heroin with the intent to distribute.”). The elements of possession with intent to deliver (PWI) are as follows: (1) the item is in fact a controlled substance; (2) the item was possessed by the defendant; (3) the defendant was aware of the item's presence; and (4) the defendant possessed the item with the specific intent to deliver the item to another. Pa. SSJI (Criminal) 16.01., 2d Ed. (2006).

The *Concise Statement* does not delineate which of these elements is at issue. Review of the facts sharpens the pencil of contention. Johnson was also charged with basic possession of heroin. That crime is not being litigated. Johnson admits those elements have been satisfied. The elements of simple possession overlap with the elements of PWI set forth above. The overlap is element #1, #2 and #3. They are not in dispute. Nevertheless, the government's proof has satisfied these three elements. Det. Rosato was walking about 15-20 feet behind Johnson on a February afternoon when he saw Johnson remove his hand from his pants pocket and drop several objects. TT, 7, 12, 17. Rosato gets closer. He sees heroin sitting on the ground. He picks up 4 bundles. TT, 27. There are 46 bags in all. TT, 16,17,27,28. The crime lab report identifies the items as heroin. TT, 16, 17. Johnson confirmed his possession and his awareness of the drugs. TT, 60 (Q: Did you drop those drugs on the ground? A: yes, ma'am. Q: So you admit that you did possess those drugs? A: Yes, ma'am.”). This collection of evidence establishes that heroin is a controlled substance, Johnson possessed the stuff and he was aware of its presence.

The remaining element – intent to deliver it to another person – is what Johnson complains about. His argument fails to persuade. Evidence of Johnson's intent comes from two sources: the factual circumstances and expert opinion. The government elicited expert opinion from Det. Rosato. The facts central to his opinion that this particular sum of heroin was possessed with the intent to deliver it to another person⁵ included the following: he did not appear under the influence of heroin, TT, 18; he did not have any use paraphernalia on him such as a syringe or cooking spoon, *Id.*; he appeared in good health and did not show the tale-tale signs of heroin use, TT, 18,19; he possessed almost a brick of heroin and very little money indicating that his selling had not yet begun,

TT,22; this amount of heroin alone is unusual for a heroin user, *Id.*; his experience is that it is rare to find even 10 bags on a user; TT, 23; the location of the interaction was in an area that was a hub of heroin distribution and he was stopped on his way to the open air marketplace, TT,25,33; and the lack of empty bags or “scrapes” is not consistent with a user, TT,26. From these facts and filtered through Det. Rosato’s experience and training, an opinion was rendered that Johnson had the intent to deliver that heroin to another person. There was a factual basis for the Court to believe this opinion and it did so.

Contributing to the Court’s believability of the government’s evidence is the partial lack of credibility Johnson engendered with this Court on the issue of his intent. Johnson told this Court the heroin ended up on the ground because he missed his pocket as he was putting the drugs in his pocket. TT, 73-74. To believe this assertion, the Court would have to disbelieve Det. Rosato’s testimony that from a distance of maybe 6 yards away he saw Johnson go into his pocket and remove the heroin. The Court choose to believe Det. Rosato on this point.

Resisting Arrest

Johnson was also found guilty of resisting arrest. He claims the evidence was not sufficient to sustain this determination of guilt. *Concise Statement*, pg. 5 (March 4, 2011). In particular, Johnson advances two predicates in support. First, he argues that the “short length of time involved” “fails to meet the requirements of the statute”. *Id.* In addition, and perhaps in conjunction with the aforementioned time dimension, Johnson says there was a “lack of any injury or intent to cause injury to the officers”. *Id.*

Neither of Johnson’s supporting points, viewed individually or in concert, dissuades the Court to change its mind. A person is guilty of resisting arrest if he, “with the intent of preventing a public servant from effecting a lawful arrest or discharging other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance.” 18 Pa. C.S.A. Section 5104.

The evidence presented satisfies this definition. Officers Shanahan and Freeman are approaching Johnson after having received a signal from a fellow officer to arrest Johnson. They exit their car. Badges are displayed. Johnson is informed that he is under arrest.⁶ Handcuffs are removed. Johnson’s arm is grabbed. He pulled away. A “good struggle” ensues. TT, 42. The struggle continues for about 30 seconds. Eventually, Johnson is in custody, but not before, two other officers have to assist Officer Shanahan in subduing Johnson. TT, 43, 50. Of some assistance to all three officers is a nearby guardrail that stands maybe 3 foot off the ground. The officers used this guardrail to bend Johnson over it, thereby enabling them to get both of his hands behind his back so that handcuffs could be secured on his wrists. TT, 50. Johnson refused to yield to a police officer’s legitimate exercise of authority. In doing so, he knowingly engaged in a conflict with law enforcement that required substantial force to squelch. It took three officers to get Johnson handcuffed. There was sufficient evidence presented to support the conviction for resisting arrest.

BY THE COURT:
/s/Williams, III, J.

¹ The trial transcript was filed on August 6, 2010 and has a tracking number of T10-1591.

² Sentencing transcript was filed on March 16, 2010 and has a tracking number of T10-0493.

³ Day 30 fell on Saturday, August 7th and, as a result, the August 9th filing is timely.

⁴ See generally, *Commonwealth v. Widmer*, 744 A.2d 745, 751-52 (Pa. 2000) (differentiating challenges to the sufficiency of the evidence from those involving the weight of the evidence).

⁵ TT, 24-25 (Person with that number of stamp bags and limited amount of cash is “just beginning” his work day “as far as selling that heroin to make a profit.”).

⁶ The lawfulness of the arrest is not being questioned. *Commonwealth v. Jackson*, 924 A.2d 618,620 (Pa. 2007), citing, *Biagini*, 655 A.2d 492,497 (Pa. 1995)(“[T]o be convicted of resisting arrest, the underlying arrest must be lawful.”).