

PITTSBURGH LEGAL JOURNAL

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OPINIONS

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In Re: Establishment of Independent School District consisting of the Borough of Rosslyn Farms, Allegheny County, Pennsylvania

School District—Transfer Petition—Contiguous Boundary

No. GD 11-12214. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Wecht, J.—August 15, 2011.

MEMORANDUM

Petitioners are taxpayers of the Borough of Rosslyn Farms. On July 5, 2011, asserting that they constitute a majority of that Borough's taxpayers, Petitioners filed a petition seeking establishment of an independent school district. On July 7, 2011, Respondent, the Carlynton School District, filed a Notice of Intervention and a response to the petition. Rosslyn Farms currently lies within the Carlynton School District.

Transfer petitions are governed by 24 P.S. § 2-242.1 of the Public School Code. That provision states that a majority of "taxable inhabitants of any contiguous territory" may file a petition to switch from one school district to another. The school district to which petitioners seek to transfer must be adjacent and contiguous to the petitioners' current district. The petition must set forth four things: signatures of a majority of taxable inhabitants; the proper description of the boundaries of the territory to be included in the independent school district; the reasons for the requested transfer; and the name of the district that the petitioners seek to join. 24 P.S. § 2-242.1(a). Once the petition is filed, the trial court "shall hold a hearing." However, the hearing is limited to ensuring that the procedural requirements for the petition have been met (i.e. the four requirements); the hearing is not to weigh the merits of the petition. *In re: Establishment of Independent School District Consisting of the Borough of Wheatland*, 846 A.2d 771, 773 (Pa. Commw. 2004). If the trial court finds the petition to be procedurally sound, the petition is forwarded to the Secretary of Education for consideration of the merits.

Once the petition is presented, a rebuttable presumption arises that the signatures are valid, and that they represent a majority of taxable inhabitants. *Id.* at 775. The burden then shifts to the opposing party to challenge the validity of the petition. *Id.* The burden is on any opposing party to prove that any statutory requirement has not been met.

In the instant case, the petition alleges that there are 371 taxable inhabitants in Rosslyn Farms and that 291 of those inhabitants have signed. Those signatures, representing 78.44% of the inhabitants, are attached to the Petition. ¶ 1-2. The boundary of the territory is described as the present political boundary of Rosslyn Farms Borough, with reference to the map included within the Educational Impact Projection.¹ ¶ 4-5. The petition identifies the Chartiers Valley School District as the school district the Petitioners seek to join. ¶ 6. The petition also identifies the various reasons for the requested transfer. ¶ 7.

Respondent's first objection is that the petition was not verified. There is no verification, but that can be remedied by attaching a verification. That must be done, but is not a reason to find the petition insufficient as a matter of law.

Respondent states that it does not contest the presumption that the petition contains the signatures of the majority of taxable inhabitants, that the petition contains the reasons for the requested transfer, and that the proposed new school district is named in the petition. Respondent contests only Petitioners' claim that the boundary of Rosslyn Farms is contiguous with the boundary of Chartiers Valley School District.

On July 15, 2011, a hearing was held before this Court as required by the Public School Code. The parties presented their arguments and requested the opportunity to submit briefs.² At the hearing, counsel for both Petitioner and Respondent agreed that the sole issue for decision here is whether Rosslyn Farms is contiguous with the Chartiers Valley School District. The parties further agreed that Rosslyn Farms shares a boundary with Chartiers Valley, but only along a portion of Chartiers Creek. The parties also agreed that there are no roads or bridges over the creek at the boundary. The issue accordingly is whether a water boundary satisfies the contiguity requirement of 24 P.S. § 2-242.1.

Petitioners first argue that the statute does not mention water boundaries because the General Assembly did not intend for water boundaries to preclude transfer. Petitioners argue that neither common usage nor dictionary definition precludes two areas from being contiguous merely because their common boundary consists of water rather than dry land. Petitioners argue that this Court should not read into the statute a requirement not found in the text, i.e., that contiguity requires that the boundary be land rather than water.

Petitioners also argue that case law supports their claim. They cite the *Riegelsville* decision for the definition of a contiguous district: "one in which a person can go from any point within the district to any other point (within the district) without leaving the district, or one in which no part of the district is wholly physically separate from any other part." *In re Petition for Formation of Independent School District (Riegelsville II)*, 17 A.3d 977, 989 (Pa. Commw. 2011).³ Petitioners argue that this definition derives from law on legislative districts, and that this is particularly relevant inasmuch as there are legislative districts that contain communities separated by water boundaries that may be traversed only by going outside the district. Petitioners also point out that Rosslyn Farms is separated from Crafton in the Carlynton School District by Chartiers Creek and that there is no way to get from Crafton to Rosslyn Farms by road without leaving the district. Therefore, a water boundary must necessarily be acceptable.

Respondent states that there is no definition of contiguity under the Public School Code because no court has been called upon to make a determination of the issue presented here. Respondent points to a case involving school reapportionment that defined contiguous as "touching, in actual contact, next in space, meeting at a common boundary, bordering, adjoining; continuous with its part in uninterrupted contact." *In re Petition of the Board of Directors of Hazleton Area School District*, 524 A.2d 1083, 1084 (Pa. Commw. 1987) (quoting *Lancaster City Annexation Case (No. 5)*, 98 A.2d 34 (Pa. 1953)).

Respondent argues that, to the extent it is not dicta, the *Riegelsville* Court's language leans in Respondent's favor. Respondent reasons that the requirement of being able to get from any point within the district to any other point without leaving the district cannot be met here because to do so in the instant case would require traversing Chartiers Creek by water because the boundary portion includes neither bridge nor road.

Respondent further argues that the fact that Rosslyn Farms and Scott Township (which lies within the Chartiers Valley School District) share a legislative district does not make them contiguous for purposes of the Public School Code. Respondent also cites eminent domain and zoning authorities that indicate contiguity does not apply to areas separated by physical features such as roads or railroads.

This case presents a matter of first impression. Decisional law from other areas of law is inconclusive on the question of whether a water boundary destroys contiguity. The *Riegelsville* case is the closest authority on point, yet its discussion of contigu-

ity is dicta. Additionally, the *Riegelsville* definition could be read to support either position. Respondent makes a strong argument that one cannot get from Rosslyn Farms to Scott Township because there is no way to traverse the creek at the water boundary. Petitioners also make a good case in arguing that the *Riegelsville* court chose to use a definition from law on legislative districts, in which water boundaries do not defeat contiguity.

Overall, Petitioners' argument is more persuasive. It is significant that the Commonwealth Court chose the definition that it chose. It could have drawn from the law of zoning or eminent domain, but it instead chose to look at the area of legislative districts. From that choice, it can be inferred that the Commonwealth Court also intended to use the definition of contiguity as applied in the area of legislative districts. If water boundaries do not matter in creating legislative districts, it can be argued that they do not matter in school districts either.

The most convincing illustration in the case is Petitioners' Exhibit C. If the water boundary between Rosslyn Farms and Crafton prevents one from getting from Crafton to Rosslyn Farms without going outside the school district because of the water boundary, yet the two are still contiguous parts of the Carlynton School District, then either a water boundary cannot matter or the Carlynton School District should not exist.

It might reasonably be argued that a water boundary may be too large to allow two areas to be contiguous for purposes of the Public School Code. Suppose, for example, that two areas are separated by the Allegheny or Monongahela River. Can they still be contiguous? Could Verona transfer from Riverview School District to Fox Chapel Area School District on the rationale that the Allegheny River does not render it non-contiguous from O'Hara Township? These are vexing questions. However, this Court lacks the authority to go beyond the statutory purpose of this initial hearing. At this state of the proceedings, there is no principled distinction between wider and narrower water boundaries. Under the statute, this Court's only role is to determine whether the procedural requirements of the petition are met and, in the instant case, whether Rosslyn Farms is contiguous with Chartier Valley. Whether there is difficulty in traversing the water boundary, and whether any attending transportation issues may arise from such difficulty, are matters for consideration in evaluating the merits of granting the request to transfer to another school district. No doubt other merits issues will be examined and discussed by all parties as well. For example, what happens to the Carlynton School District if Rosslyn Farms is allowed to transfer, inasmuch as the two remaining parts of the school district, Crafton and Carnegie, are not contiguous. This Court is not permitted to probe these merits. The General Assembly has assigned that task to the Pennsylvania Department of Education.⁴

An Order in accordance with this Memorandum follows.

ORDER OF THE COURT

AND NOW this 15th day of August, 2011, following arguments on the Petition and consideration of these arguments, the briefs, and the applicable law, and in accordance with the foregoing Memorandum, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. This Court finds that the Petition meets the procedural requirements of 24 P.S. § 2-242.1; and
2. The Petition will be forwarded to the Secretary of Education for consideration of the merits thereof, pursuant to 24 P.S. § 2-242.1; and
3. Should the Secretary of Education approve the merits of the Petition, the next required hearing shall be scheduled before the Motions Judge presiding in Civil Division at the time and need not be presented to the undersigned.

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

¹ Exhibit G to the Petition. The Educational Impact Projection is a document that Petitioners intend to send to the Secretary of Education should the Petition be approved by this Court.

² Both parties submitted their briefs to this Court on July 29, 2011.

³ Petitioners also provided case law from other states in which contiguity was found despite water boundaries. None of these cases involved school districts.

⁴ The Public School Code requires that, once the trial court finds the petition to be procedurally sound, the petition shall be forwarded to the Superintendent of Public Instruction for consideration of the merits. 24 P.S. § 2-242.1. In 1969, the title Superintendent of Public Instruction was changed to the Secretary of Education. If the Secretary of Education gives approval, another hearing must be held to determine the amount, if any, of indebtedness and obligations of the school district from which the independent school district is severed and the prorating subsidies payable between the old and new school districts. *In re: Establishment of Independent School District Consisting of the Borough of Wheatland*, 846 A.2d 771, 773 (Pa. Commw. 2004).

Michael A. Harris v. Michael Moser

Legal Malpractice—Negligence—Certificate of Merit

No. GD 09-4769. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Wecht, J.—August 18, 2011.

OPINION OF THE COURT

Plaintiff Michael A. Harris ["Harris"] appeals this Court's May 16, 2011 Order. That Order granted summary judgment in favor of Defendant Michael Moser ["Moser"].

Background and Procedural History

On March 11, 2009, Harris filed a complaint against Moser alleging legal malpractice. Harris also filed a petition to proceed in forma pauperis ["IFP"]. On March 17, 2009, the IFP petition was granted. On April 30, 2009, an amended complaint was filed. The

complaints allege that Harris and his wife were victims of discrimination, that they met with Moser to seek his representation in a lawsuit, and that Moser did not initiate the suit prior to the expiration of the statute of limitations.

On October 14, 2010, Moser moved for summary judgment. The motion was denied. In January 2011, the case was assigned to the undersigned and trial was set for May 19, 2011. On March 29, 2011, Harris sought leave to present his malpractice case without an expert witness. This motion was denied. Moser again moved for summary judgment. On May 16, 2011, the motion was granted.

On June 16, 2011, Harris filed a Notice of Appeal. That Notice was returned by the Superior Court for appellant errors. On July 12, 2011, Harris filed an Amended Notice of Appeal.¹ On July 15, 2011, this Court ordered Harris to file a concise statement, pursuant to Pa. R.A.P. 1925 (b). On August 2, 2011, Harris timely served his concise statement upon this Court.²

Issues Raised on Appeal

In his Pa. R.A.P. 1925 (b) Statement, Harris averred, *verbatim*, as follows:

1. Court erred when Honorable Judge Gene Strassburger already ruled on summary judgment in favor of appellant on October 13, 2010, and on May 16, 2011, David Wecht, sitting as judge, rule on summary judgment in favor of appellee, without taking Honorable Judge Gene Strassburger [sic] opinion into consideration.
2. Court erred in ruling summary judgment, once in favor of the appellant and then in favor of appellee without opinion.
3. Court erred in legal malpractice for determination of whether damages were collectible in underlying case, appellant was entitled to have jury determine issues of collectibility if there were disputed facts or inferences or inferences which could be drawn from facts. Const. Art (1) & (6).
4. Court erred in evidence fact issue for the jury as to whether appellant suffered actual damages as a result of attorney's malpractice.
5. Court erred in fact issued for the jury as to non-expert testimony as to whether attorney breach his duties.
6. Court erred, negligence of defendant law firm was proximate cause of plaintiff's loss of a verdict on a civil rights violation.
7. Court erred, material facts questions precluded compulsory nonsuit in this case.
8. Court erred, in refusing to grant a judgment or trial in appellant favor, due to appellant failure to produce expert witness.
9. Court erred, proximate cause must be determined by the judge, and it must be established before the question of actual cause is put to the jury.
10. Court erred, appellant claim appellee's failure to notify him on the statute of limitation resulted constituted negligence, breach of contract and breach of fiduciary duty.
11. Court erred, appellant claim the parties fee agreement impose a continuing duty of representation and that appellee's failure to represent appellant also constituted negligence, breach of contract and breach of fiduciary duty.
12. Court erred, appellant was denied the opportunity to a trial.

Discussion and Analysis

Harris' allegations of error essentially challenge the grant of summary judgment in favor of Moser. Summary judgment may be granted when there is no genuine issue of material fact, and when the moving party is entitled to judgment as a matter of law. *Summers v. Certaineed Corp.*, 997 A.2d 1152, 1159 (Pa. 2010). An appellate court will review a grant of summary judgment for abuse of discretion or for an error of law. *Id.* Where the appellate court is reviewing a matter of law, that review is *de novo*. *Id.*

In the instant case, the first issue leading to the grant of summary judgment was the lack of expert testimony. Harris filed a certificate of merit. However, Harris later sought this Court's permission to proceed to trial without expert testimony. Harris alleged that expert testimony was not required in his legal malpractice case. He requested that the Court "make an expert assessment in the following case." 4/16/11 Motion at 2.

Moser filed a response in opposition. Moser noted that Harris filed a Certificate of Merit on April 30, 2009 under the option pertaining to derivative liability for malpractice. While that did not appear to be Harris' theory, the filing of the incorrect Certificate of Merit could have been considered to be in substantial compliance with the rule requiring that a Certificate of Merit be filed. Moser averred that Harris testified in his deposition that, despite stating in the Certificate of Merit that a licensed professional had supplied a written statement on liability, Harris never produced any expert who could provide a written statement or even verbally state that the case had merit. Moser argued that Harris must provide expert testimony: to prove the allegations of legal malpractice; to prove that, if Moser had filed suit, he would have been successful in that suit; and to prove damages.

In a legal malpractice suit proceeding under a negligence theory, the plaintiff must prove: (a) the employment of the attorney as a basis for a duty owed by the attorney; (b) the attorney failed to exercise ordinary skill and knowledge; and (c) that failure was a proximate cause of the harm suffered. *Wachovia Bank, N.A. v. Ferretti*, 935 A.2d 565, 570-71 (Pa. Super. 2007). In a 2008 case, a federal court in Pennsylvania held that an expert was required to prove that the attorney's representation fell below the standard of care, because the plaintiff was obligated to prove that she would have prevailed in her underlying case. *Redding v. Estate of Sugarman*, 2008 WL 4682617 (E.D.Pa. 2008). In *Redding*, the plaintiff sued the estate of her attorney, alleging that the attorney told her she did not need expert testimony for the underlying medical malpractice case.

It is well settled that, where issues are not beyond the knowledge of an average person, the standard of care can be established without expert testimony. *Rizzo v. Haines*, 555 A.2d 58, 66 (Pa. 1989). Examples of breaches of the standard of care that do not require expert testimony are failure to communicate a settlement offer to a client, failure to investigate a claim, and failure to explain financial dealings to a client. *Id.* at 67.

Harris cited an older federal case for the proposition that the court can make an expert assessment on the probability and value of a settlement. *Williams v. Bashman*, 457 F. Supp. 322 (E.D.Pa. 1978). In that case, oddly enough, the parties stipulated to the judge being able to act as an expert. *Id.* at 328. However, the judge noted that, ordinarily, expert testimony would be required to show the outcome and value of similar cases. *Id.*

Harris sought to frame the issue in the case as simple: a missed statute of limitations. However, the issues in the case likely

would have been more complicated. The fee agreement signed by Harris indicated that Moser was not required to file suit. This suggested Moser retained discretion in filing suit. Such discretion presumably would implicate a lawyer's specialized knowledge and experience and would accordingly lie beyond the understanding of the average party. Additionally, this only went to the issue of standard of care. Harris still needed expert testimony to show damages.

Harris' request to proceed without an expert was denied. He was ordered to provide an expert report and identify his expert no later than May 2, 2011. When May 2 passed with no expert report, Moser filed a Motion for Non Pros/Summary Judgment. By Order dated May 10, 2011, this Court ordered Harris to respond to Moser's motion.

Moser argued that Harris filed a false certificate of merit because Harris never had a professional who provided a written statement of liability, that Harris' request for the Court to make an expert determination as to legal malpractice was denied, and that Harris needed to present expert testimony and had not provided Defendant with the name of the proposed expert and any report. Moser argued that, without expert testimony, Harris could not meet his burden in a malpractice case. Moser asked for a judgment of non pros as Harris had not filed a proper certificate of merit. In the alternative, Moser sought summary judgment, arguing that without expert testimony, Harris could not meet his burden, as a matter of law.

In his response, Harris again argued that expert testimony was not required because there is an obvious causal relationship between the injury and the negligent act. Harris cited *Lattanze v. Silverstrini*, 448 A.2d 605 (Pa. Super. 1982) for that proposition. This was a correct statement of law from that case. Essentially, Harris seemed to be requesting reconsideration of the March 29 Order. However, *Lattanze* involved a directed verdict in a motor vehicle personal injury case. *Id.* at 606. There, the trial court had entered a directed verdict because there was no expert medical testimony showing the accident caused the plaintiff's injuries. *Id.* at 607. The Superior Court ruled that, when the causation is obvious, an expert is not required on that issue and it becomes a jury question. *Id.* at 608.

Lattanze is inapposite here, for several reasons. First, the *Lattanze* case was not a malpractice matter in which expert testimony is required. Second, in the *Lattanze* case, there was expert testimony about the injury and damages, but not about causation. *Id.* at 606-07. Here, there would be no expert testimony at all. Third, Harris must prove here that he would have prevailed in the underlying case against the car dealership, and he cannot do that without expert testimony. Fourth, Harris' measure of damages was what he could have obtained in the underlying suit. This he cannot prove without expert testimony.

As a matter of law, Harris could not meet his burden without expert testimony. This Court granted Moser's motion for summary judgment because Moser was entitled to judgment as a matter of law.

BY THE COURT:
/s/Wecht, J.

¹ This Court did not receive Harris' first notice of appeal until July 12, 2011 and has never been served a copy of the amended notice of appeal.

² While this Court received the concise statement, it does not appear that Harris filed the concise statement with the Department of Court Records.

Studio of Elegance, Inc. t/d/b/a Philip Pelusi v. Jodell Bridgen, Joseph Weltner, and Pamela L. Vasey d/b/a Divinity Salon

Contempt—Fine—Willful Violation

No. GD 10-22971. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Wecht, J.—September 7, 2011.

OPINION OF THE COURT

Defendants Jodell Bridgen ["Bridgen"] and Pamela Vasey d/b/a Divinity Salon ["Vasey"] (collectively "Defendants") appeal from this Court's June 16, 2011 Order. That Order found Defendants to be in contempt of a March 29, 2011 Consent Order ["the Consent Order"].

Background and Procedural History

Bridgen worked for Plaintiff Studio of Elegance, Inc. ["Plaintiff"] from 1997 through 2010. T. at 76. She was working at the Fox Chapel location when she left her employment with Plaintiff. T. at 18, 23. Bridgen entered into an employment agreement with Plaintiff that included post-employment restrictions. *Id.* The restrictions provided that Bridgen could not service or solicit any of Plaintiff's clients for a one-year period and could not work within a ten-mile radius of the Fox Chapel salon. T. at 19-20.

When Bridgen ended her employment with Plaintiff, she began to work for Vasey at a salon approximately one mile away. T. at 23. Plaintiff believed that Bridgen took clients with her in violation of her employment agreement. On December 8, 2010, Plaintiff filed a complaint. The parties were able to reach an agreement, and the Consent Order was entered on March 29, 2011.

On May 19, 2011, Plaintiff brought a Petition for a Rule to Show Cause, alleging that Defendants were in contempt of the March 29 Consent Order.¹ The Rule issued. On June 13, 2011, this Court held a hearing on the issue of contempt. On June 16, 2011, this Court entered an Order finding Defendants in contempt and setting purge conditions.

On July 15, 2011, Defendants filed a Notice of Appeal. On July 18, 2011, this Court ordered Defendants to file a concise statement of matters complained of on appeal, pursuant to Pa. R.A.P. 1925 (b). On August 8, 2011, Defendants timely filed their concise statement.

Issues Raised on Appeal

In their Pa. R.A.P. 1925 (b) Statement, Defendants averred as follows:

1. The June 16, 2011 Order of the Honorable David N. Wecht improperly found Defendants to be in civil contempt of the Consent Order dated March 29, 2011.

2. Judge Wecht's Order failed to resolve ambiguities in the parties' Settlement Agreement and/or the Consent Order in favor of the Defendants.
3. Judge Wecht's Order improperly found Defendants to be in civil contempt despite any evidence of wrongful conduct on behalf of Defendants.
4. Judge Wecht's Order was issued despite Pelusi's failure to establish that a valid court order existed, Defendants had knowledge of that Order and that Defendants disobeyed the Order.
5. Judge Wecht's Order failed to follow established case law that requires a five (5) step, two (2) hearing process to hold one in civil contempt. Specifically, the five step, two hearing procedure requires the Court to: 1) issue a rule to show cause; 2) require an answer to be filed and hold a hearing; 3) issue a rule absolute; 4) hold a hearing on a contempt citation; and 4) [sic] then, issue an adjudication of contempt. *Millick v. Millick*, 140 Pa. Commw. 252, 592 A.2d 788, *appeal denied* 529 Pa. 659, 604 A.2d 250 (1991); *Travitzky v. Travitzky*, 369 Pa. Super. 65, 534 A.2d 1081 (1987).
6. Judge Wecht's Order improperly found Defendants to be in civil contempt upon a showing of mere noncompliance.
7. Judge Wecht's Order failed to find from the totality of evidence presented that Defendants had the present ability to comply with the Settlement Agreement and/or Consent Order. *Sinaiko v. Sinaiko*, 445 Pa. Super 56, 664 A.2d 1005 (1995).
8. Judge Wecht's Order finding Defendants in civil contempt was based upon an incorrect and flawed interpretation of the parties' Settlement Agreement and, specifically, the definition of "Pelusi customer."
9. Judge Wecht's Order improperly permitted Plaintiff Studio of Elegance t/d/b/a/ Philip Pelusi ("Pelusi") to confess judgment on the Promissory Note between the parties.

Discussion and Analysis

Contempt is deemed civil in nature when the purpose is to coerce a party to comply with a court order. *Garr v. Peters*, 773 A.2d 183, 191 (Pa. Super. 2001). An unconditional fine as part of a civil contempt order does not make the contempt criminal if the purpose of the fine is to compensate for losses suffered and not to punish. *Id.* In the instant case, Plaintiff sought an order to stop Bridgen from working for Vasey, to provide an accounting of money received from "Pelusi customers," to require the payment of that money to Plaintiff, to stop Vasey from continuing to provide services to those "Pelusi customers," to require the payment of the entire promissory note, and to require payment of attorney fees and expenses. This is a matter of civil contempt.

This Court will first address Defendants' complaints about the procedure. A five-step process is outlined for adjudication of civil contempt. *Travitzky v. Travitzky*, 534 A.2d 1081, 1085 (Pa. Super. 1987). Decisional law establishes that strict compliance with this five-step process is not required to sustain a valid finding of civil contempt. In one case, the Superior Court determined that even though a rule absolute did not issue and no separate hearing was held on the contempt citation, adequate procedural safeguards had been afforded. *Schnabel Associates, Inc. v. Building Construction Trades Council of Phila.*, 487 A.2d 1327, 1333-34 (Pa. Super. 1985). The Schnabel Court held that the process due and required for contempt proceedings was notice of the violations alleged and the opportunity for explanation and defense. *Id.* at 1334. In a more recent case, the Superior Court held that as long as the due process requirements were substantially satisfied, the contempt finding was valid even if the trial court did not strictly follow the five-step process. *McMahon v. McMahon*, 706 A.2d 350, 357 (Pa. Super. 1998). Further, where a party found in contempt does not object to failure to follow the five-step process or raise it in post-trial motions, the party waives the issue. *Travitzky*, 534 A.2d at 1085.

In the instant case, there was substantial compliance with the procedural safeguards. Plaintiff filed its petition alleging violations of the Consent Order. A rule issued. Defendants filed their answer. An evidentiary hearing was held. The hearing generated testimony concerning several relevant issues, including the violations, whether the Consent Order was clear and unambiguous, whether there was willful intent, and whether compliance was possible. All parties were afforded the opportunity to present evidence and arguments at the June 13 hearing. At the conclusion of the hearing, this Court stated specifically that it found there was a violation of the Consent Order. T. at 113. Additionally, Defendants did not raise any objections to the procedure either at the June 13 hearing or in any post-hearing motion. Under *Travitzky*, Defendants have waived this issue.

The remainder of Defendants' issues on appeal complain, essentially, that this Court drew the wrong conclusions from the evidence presented. The main bone of contention was whether Defendants were providing salon services to clients whom the Consent Order barred them from servicing. That Consent Order precluded Defendants from providing services to any "Pelusi customer" as defined by the order, with the exception of customers listed in Exhibit B. Exhibit B to the Consent Order identified certain clients that Bridgen was allowed to continue to service at Vasey's salon. The Consent Order specifically defines a "Pelusi customer" as "any customer on [sic] whom services were provided at the Fox Chapel Salon during Defendant Bridgen's periods of employment." Consent Order at 3. Plaintiff alleged that Defendants were providing services to people who were within the definition of a "Pelusi customer." Defendants argued that the definition was too broad and that the Consent Order only referred to people who were Bridgen's regular clients when she worked for Plaintiff. T. at 13.

To allow for a contempt adjudication, the order alleged to have been violated must be definite, clear and specific. *Lachat v. Hinchcliffe*, 769 A.2d 481, 488-89 (Pa. Super. 2001). This Court concluded that the term "Pelusi customer" was clearly defined. T. at 113. For civil contempt to lie, the moving party must prove that the party alleged to be in contempt: had notice of the specific order; acted of its own volition in violating the order; and acted with wrongful intent. *Id.* at 489. When there is no evidence of an intentional failure to obey an order nor evidence that the party acted in reckless disregard of the order, there is insufficient evidence for contempt. *Comm v. Pruitt*, 764 A.2d 569, 575 (Pa. Super. 2000).

Instantly, there is no question as to the first element, inasmuch as this case concerned a Consent Order for which the parties themselves bargained and contracted. All parties and their attorneys had notice, and all entered into a deal. All parties and their counsel signed the Consent Order. The question is whether Defendants' actions were volitional and with wrongful intent. In the instant case, Defendants did not abide by the conditions of the Order. They bargained for and agreed to the broad definition of "Pelusi customer." Plaintiff's argument was that Defendants intentionally did not attempt to comply with the Consent Order so that they could continue to provide services to people who fell within the "Pelusi customer" definition. Defendants argued that they simply had a different understanding of the definition and that their actions were not willful.

The definition in the Consent Order is clear. Defendants' purported understanding that the Order applied only to Bridgen's

clients does not square with the Order itself. Defendants' proffered definition might make sense in a vacuum, but it is clearly and patently inconsistent with the definition mutually used in the parties' Consent Order. Defendants admitted that they read the Order and that their attorneys read the Order. T. at 84, 101. Defendants must be charged with understanding the clear terms of the Order for which they bargained. Accordingly, the violation must be willful. If the definition was clear and Defendants knew the definition, then Defendants chose not to ask the proper questions of potential clients. This practice allowed Defendants to provide services to clients who were prohibited to them by the Consent Order.

Defendants also contend that there was no evidence of their ability to comply with the consent order. Bridgen testified that she turned away clients she knew from working at Plaintiff's salon who were not listed on Exhibit B, but took no other precautions to comply with the order. T. at 82-83, 85-86. Donald Vasey testified that the staff only inquired whether someone is a "Pelusi customer" if the client is scheduling an appointment with Bridgen and the client states that she has not visited Vasey's salon on a prior occasion. T. at 97. That simply is not sufficient to comply with the parties' own Consent Order. The query is not broad enough to identify "Pelusi customers" as defined in that Order. As Arthur DeConciliis, general manager for Plaintiff, testified, Defendants could have complied with the Consent Order by asking clients if they had received services with Plaintiff during Bridgen's period of employment. T. at 34. This is a question that could have been asked at the time an appointment was made. The Court determined that this would not have been overly burdensome and that compliance with the consent order was not impossible. It is possible that a client would not remember or would provide incorrect information. If so, Defendants could not be found to have willfully violated the Consent Order. However, in fact, Defendants did not attempt to identify "Pelusi customers" as defined by the order. Defendants' actions were willful.

The key point upon which the Court's determination of willfulness turned was the fact that Defendants failed to abide by the restrictions for which they themselves contracted. As this Court observed at the close of the hearing:

[T]he prohibition in the Order on the serving of any Pelusi customers for the entire period of Jodell Bridgen's employment is a broad prohibition, and presumably one of the reasons for the breadth of that prohibition is in [the] contravention of the ten-mile prohibition in the noncompete clause where the Defendant was permitted to work within a mile or so of the Pelusi Studio.

T. at 113. In other words, it appeared to this Court that, faced with the fact that Bridgen had violated her ten-mile noncompete agreement, the Defendants had little choice but to enter into a Consent Order that would allow Bridgen to continue to work one mile away from the Pelusi Studio only at the high cost of a prohibition on her servicing any Pelusi customers. As this Court noted, this was a broad prohibition, but it was not an unlawful one. And, it was certainly one of which the Defendants, who had bargained for it in the Consent Order, were well aware.

BY THE COURT:
/s/Wecht, J.

¹ Another Petition for Rule to Show Cause has been presented by Plaintiff. That claim of contempt is still pending.

**PNC Bank, National Association v.
R.H. Kuhn Company, Inc., a Pennsylvania corporation, et al.**

Contract

No. GD 10-021712. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Ward, J.—August 16, 2011.

MEMORANDUM

I. INTRODUCTION

This case involves the relatively nascent legal frontier of court-appointed receiverships with bank and government lenders fighting over what assets are left of a failed business venture and an industrial development project. We are tasked with determining the distribution of the proceeds from a going-out-of-business sale, the sale of warehouse real estate and the sale of other assets related to the defunct Roomful Express furniture business. We are also tasked with deciding whether a bank's claim for legal and forbearance fees are reasonable as well as whether those amounts and a termination fee owed to the bank under a derivative swap financing transaction should be considered as part of its "Superior Indebtedness," as defined by agreement. The subject of this Memorandum is the Motion to Determine Distribution of Sale Proceeds Pursuant to Intercreditor Agreement ("Disposition Motion") filed on behalf of the Intervenor, Pittsburgh Economic & Industrial Development Corporation ("PEIDC"), Urban Redevelopment Authority of Pittsburgh ("URA") and Pennsylvania Industrial Development Authority ("PIDA") (collectively "Government Lenders").

On November 22, 2010, Plaintiff, PNC Bank, National Association ("PNC" or "Agent") initiated this action by filing its Complaint in Confession of Judgment against various Roomful Express related Defendants, R.H. Kuhn Company, Inc. ("RH Kuhn"), HS Holdings, LLP, HS East, LLP, Chartiers Eagle Realty, L.P. ("Chartiers"), Soaring Eagle Partners, L.P. ("Soaring Eagle"), Chartiers Eagle Management, LLC, Chartiers Eagle Holdings, L.P., Eagle Eye Associates, L.P., HS Territories Management, LLC, HS Territories, LLC and Robert H. Kuhn Irrevocable Trust U/T/A Dated August 2, 1996 (collectively "Companies"). On December 7, 2010, upon consideration of PNC's Emergency Motion for the Appointment of a Receiver, this Court entered a Consent Order of Court Appointing Receiver ("Receivership Order"). Pursuant to the terms of the Receivership Order, Compass Advisory Partners, LLC ("Receiver") was appointed as the Receiver of the Companies "for the purpose of selling some or all of the Company Assets . . . for the benefit and protection of Defendants' creditors."

Soon after its appointment, the Receiver conducted a publicized going-out-of-business liquidation sale of the Roomful Express furniture stores' inventory at thirteen former store locations. As of April 6, 2011, the sale had generated more than \$3,000,000.00 in proceeds that has been made available to PNC. On March 22, 2011, PNC conducted a secured party private sale of furniture and equipment owned by RH Kuhn for \$460,000.00, with \$85,000.00 being paid directly to the Commonwealth of

Pennsylvania - Department of Community and Economic Development and the remainder of the proceeds being paid directly to PNC.

On March 15, 2011, the Receiver, acting in its capacity as receiver of Chartiers, entered into an Agreement of Sale and Purchase ("Agreement of Sale") of certain real estate that served as a warehouse for the former Roomful Express furniture stores located at 2250 Roswell Drive, Pittsburgh, PA 15205 ("Real Property"). The sale of Real Property was expected to yield net sale proceeds in excess of \$7,000,000.00. On April 25, 2011, all creditors having secured interests in the Real Property (collectively "Secured Interests") as evidenced by various mortgages and assignments of rents filed with the Recorder of Deeds of Allegheny County (collectively "Security Documents"), entered into a Stipulation and Consent Order Governing Sale of Real Property ("Stipulation and Consent Order") authorizing the sale of the Real Property. The priority of the Secured Interests and the Security Documents is governed by an Amended and Restated Lien Priority and Intercreditor Agreement among the secured creditors dated August 22, 2007, and effective as of September 10, 2007 ("Amended Intercreditor Agreement").

On July 7, 2011, this Court authorized amendments to the original Agreement of Sale pursuant to a Consent Order entered on a Motion to Terminate Agreement of Sale, to Substitute Buyer and to Confirm Sale. The amended Agreement of Sale, kept the Receiver as the Seller of the warehouse Real Property, in its capacity as Receiver for Chartiers, but substituted 2250 Roswell Associates, LP as the Buyer, changed the Purchase Price to \$7,375,000.00 and set the closing date to occur on July 7, 2011.

Pursuant to the terms of the Stipulation and Consent Order, if for any reason a consensual resolution of the interested parties or the entry of a final order on the Disposition Motion was not entered into or rendered prior to the closing of the sale of the Real Property, funds sufficient to pay the interested parties in full were to be held in escrow in a bank account under their joint control and the Court would resolve the disposition of the proceeds. As of April 15, 2011, the total amount allegedly owed to the Government Lenders was \$2,870,977.29 together with interest, fees and costs through the date of closing of the sale of the Real Property ("Disputed Proceeds"). On July 7, 2011, closing of the sale of the Real Property occurred without a consensual resolution or a final order on the Disposition Motion and the interested parties entered into a Deposit Account Control Agreement creating the jointly controlled escrow pursuant to the Stipulation and Consent Order.

II. UNDISUTED FACTUAL BACKGROUND

Summary of Original Financing

The financing provided by PNC far exceeded the financing provided by the Government Lenders. Based on the original principal loan balances, the amount financed by each secured creditor was:

PNC	\$22,900,000.00
PIDA	\$2,250,00.00
URA	\$1,200,00.00
Authority	\$205,500.00

The specific financing provided by each secured creditor is set forth below.

The Original PNC Loan

On February 7, 2006, PNC provided a loan to Chartiers and Soaring Eagle Partners, L.P. (collectively "Obligors") in the amount of \$10,750,000.00 ("Original PNC Loan"), as evidenced by a note from Chartiers and Soaring Eagle to PNC ("Original PNC Note"). The Original PNC Note was secured by an Amended and Restated Open-End Mortgage and Security Agreement from Chartiers to PNC dated February 7, 2006 ("Original PNC Mortgage") with respect to the Real Property. The Original PNC Note was further secured by an Assignment of Rents and Leases from Chartiers to PNC dated February 7, 2006.

The Industrial Development Project

The PEIDC, in order to facilitate certain business and financial transactions, acquired legal title to the subject Real Property upon which PEIDC established an Industrial Development Project, as defined in The Pennsylvania Industrial Development Act, as amended, ("Project"). The Project was owned by Chartiers (as "Beneficial Owner"), pursuant to a Deed dated as of May 18, 2006 between the PEIDC and the Beneficial Owner. The Project was leased, occupied and controlled by RH Kuhn (as "Industrial Occupant"), pursuant to a Lease Agreement, dated as of June 1, 2005, as amended on May 18, 2006, between the Beneficial Owner and the Industrial Occupant.

The PIDA Loan

On May 18, 2006, PIDA provided a loan to Chartiers, R.H. Kuhn and the PEIDC in the amount of \$2,250,000.00 ("PIDA Loan"), as evidenced by a note from the PEIDC, Chartiers and RH Kuhn to PIDA ("PIDA Note"). The PIDA Note is secured by an Open-End Mortgage dated May 18, 2006 from the PEIDC to PIDA on the Real Property ("PIDA Mortgage"), which was assumed by Chartiers pursuant to an Assumption and Indemnity Agreement between the PEIDC and Chartiers dated May 18, 2006.

The URA Loan

On May 18, 2006, the URA provided a loan to Chartiers and RH Kuhn in the amount of \$1,200,000.00 ("URA Loan"), pursuant to the terms of a Loan Agreement dated May 18, 2006 ("URA Loan Agreement"), as evidenced by a note from Chartiers and RH Kuhn to the URA ("URA Note"). The URA Note is secured by a Pittsburgh Development Fund Open-End Mortgage and Security Agreement dated May 18, 2006 from Chartiers to the URA on the Real Property ("URA Mortgage"). The URA Note is further secured by an Assignment of Leases and Rents dated May 18, 2006 from Chartiers to the URA on the Real Property. The URA Note is further secured by a Pittsburgh Development Fund Security Agreement dated May 18, 2006 from RH Kuhn to the URA ("URA Security Agreement").

The Authority Loan

On May 18, 2006, Redevelopment Authority of Allegheny County ("Authority") provided a loan to Chartiers and RH Kuhn in the amount of \$205,500.00 ("Authority Loan"), as evidenced by a note from Chartiers and RH Kuhn to the Authority ("Authority Note"). The Authority Note is secured by an Open-End Mortgage and Security Agreement dated May 18, 2006 from Chartiers and RH Kuhn to the Authority on the Real Property ("Authority Mortgage"). The Authority Note is further secured by an Assignment of Leases and Rents dated May 18, 2006 from Chartiers to the Authority on the Real Estate. The Authority Note is further secured by a Security Agreement dated May 18, 2006 from Chartiers and RH Kuhn to the Authority ("Authority Security Agreement").

The Credit Agreement

On September 10, 2007, PNC and Citizens Bank (“Citizens”) entered into a \$10,000,000.00 Revolving Credit Facility, \$7,000,000.00 Term Loan Facility and \$5,900,000.00 Term Loan Facility Credit Agreement (“Credit Agreement”) with the Companies. Pursuant to the Credit Agreement, a \$7,000,000 Term Loan 1 was made to Chartiers and Soaring Eagle on September 10, 2007 (“Term Loan 1”), which is evidenced by a \$4,200,000.00 Term Note 1 from Chartiers and Soaring Eagle to PNC (“PNC Term Note 1”) and a \$2,800,000.00 Term Note 1 from Chartiers and Soaring Eagle to Citizens (“Citizens Term Note 1”). Pursuant to the Credit Agreement, a \$5,900,000.00 Term Loan 2 was made to RH Kuhn on September 10, 2007 (“Term Loan 2”), which is evidenced by a \$3,500,000.00 Term Note 2 from RH Kuhn to PNC (“PNC Term Note 2”) and a \$2,360,000.00 Term Note 2 from RH Kuhn to Citizens (“Citizens Term Note 2”). Pursuant to the Credit Agreement, a \$10,000,000.00 Revolving Credit Facility was made to RH Kuhn, HS Holdings, LLP and HS East, LLP on September 10, 2007 (“Revolver Loan”), which is evidenced by a \$6,000,000.00 Revolving Credit Note from RH Kuhn, HS Holdings, LLP and HS East, LLP to PNC (“PNC Revolver”) and a \$4,000,000.00 Revolving Credit Note from RH Kuhn, HS Holdings, LLP and HS East, LLP to Citizens (“Citizens Revolver”).

Term Loan 1, Term Loan 2 and the Revolver Loan are secured by an Open-End Mortgage and Security Agreement executed September 4, 2007 and effective as of September 10, 2007 from Chartiers to PNC on the Real Property (“PNC Mortgage”). Term Loan 1, Term Loan 2 and the Revolver Loan are further secured by an Assignment of Rents and Leases executed September 4, 2007 and effective as of September 10, 2007 from Chartiers to PNC on the Real Property (“PNC Assignment”). Term Loan 1, Term Loan 2 and the Revolver Loan are further secured by a Security Agreement dated September 10, 2007 from the Loan Parties, as defined in the Credit Agreement, to PNC (“PNC Security Agreement”). Term Loan 1, Term Loan 2 and the Revolver Loan refinanced the Original Loan and the Other Original Bank Indebtedness in full such that the Original Loan and the Other Original Bank Indebtedness were terminated and all liens of the Original Bank Loan Documents released and/or satisfied.

The Swap Documents

Chartiers and Soaring Eagle, as Obligor, entered into an ISDA [International Swaps and Derivatives Association] Master Agreement with PNC and a related Schedule dated February 7, 2006 (“Swap Agreement”), as supplemented by a Confirmation Letter dated February 8, 2006 (“Confirmation Letter”) (collectively “Swap Documents”). The Swap Documents created an interest rate swap, which was not a loan of new money. The swap was an exchange of interest payments with no principal debt owed to either party to the swap. According to the Swap Documents, PNC was entitled to recover an “Early Termination Amount” upon an occurrence of an Event of Default by the Obligor. As is common in such a derivative transaction, the swap was never terminated with the September 10, 2007 PNC refinancing. The swap continued in effect until Chartiers and Soaring Eagle committed payment defaults in November of 2010. When the swap was terminated early on November 24, 2010, Chartiers and Soaring Eagle were “out of the money” due to fluctuating interest rates and had an obligation to pay a swap termination fee of \$1,117,000.00 to PNC.

The Amended Intercreditor Agreement

On September 10, 2007, the creditors holding secured liens on the Real Property and certain business assets of the Companies entered into the Amended Intercreditor Agreement to address lien priority and other rights. The Amended Intercreditor Agreement distinguishes the obligations of the Companies to PNC between the “Superior Indebtedness” and “Subordinated Indebtedness” of PNC.

The term “Superior Indebtedness” is defined in the Amended Intercreditor Agreement as follows:

The lien of the Agent Mortgage to the extent that it secures all of the principal indebtedness under the Term Notes 1 together with all accrued and unpaid interest, late charges, protective advances, fees and costs, including but not limited to attorneys’ fees and costs and costs in connection with the enforcement or collection of such indebtedness or the preservation of the Agent’s collateral or first lien position, due and owing from Beneficial Owner and/or Soaring Eagle to the Agent or any Bank under the terms of the Term Notes 1 and any other Agent Loan Document (hereinafter, collectively referred to as the “Superior Indebtedness”)

Amended Intercreditor Agreement, Section 2(a) at p. 7.

The term “Subordinated Indebtedness” is defined in the Amended Intercreditor Agreement as follows:

The lien of the Agent Mortgage to the extent it secures (i) the Other Agent Indebtedness; or (ii) any Subsequent Advances (as defined below) (hereinafter, such excess and Subsequent Advances may be referred to, collectively, as the “Subordinated Indebtedness”)

Amended Intercreditor Agreement, Section 2(b) at p. 8.

The Amended Intercreditor Agreement controls the allocation and disposition of the payments and proceeds of the sale of the Real Property. The Amended Intercreditor Agreement also establishes the lien priorities with respect to the Real Property. The PNC Mortgage is first in lien priority to the Superior Indebtedness. The PIDA Mortgage is second in lien priority. The URA Mortgage and the Authority Mortgage share pro rata the third lien priority. The Subordinated Indebtedness of PNC is fourth in lien priority.

The Amended Intercreditor Agreement also controls the allocation and disposition of the payments and proceeds of the sale of certain personal property business assets of the Companies that are commonly referenced in the PNC Security Agreement, URA Security Agreement and Authority Security (collectively “Collateral”). The Amended Intercreditor Agreement establishes the lien priorities with respect to the Collateral identified therein. The PNC Security Agreement is first in lien priority with respect to the Collateral. The URA Security Agreement and Authority Security Agreement share pro rata second lien priority with respect to the Collateral.

The Forbearance Agreements

The Companies and PNC entered into a Forbearance Agreement dated August 29, 2008 (“Initial Forbearance Agreement”) to address certain defaults as described therein (“Initial Defaults”), which was amended by a First Amendment to Forbearance Agreement dated November 24, 2008 and a Second Amendment to Forbearance Agreement dated June 29, 2009.

PNC’s Proposed Calculation of Superior Indebtedness

As of May 12, 2011, PNC calculated the following to be its Superior Indebtedness:

Principal balance under Term Notes 1:	\$5,522,222.18
Interest due under Term Notes 1:	\$340,368.86
SWAP Termination Charges	\$1,117,000.00
Legal Fees:	\$828,333.31*
Forbearance Fee:	\$50,000.00
TOTAL:	\$7,857,924.35

*This amount is the total 15% attorney's commission contained in the confessed judgments attributable to Term Notes 1. The amount of the 15% attorney's commission attributable to Term Notes 1, Term Notes 2 and the Revolving Notes is actually \$2,459,010.00. Actual legal fees and costs of PNC from November 1, 2010 to May 1, 2011 were \$222,543.88.

See PNC's Response to the Disposition Motion at p. 4 and attached Affidavit.

III. ISSUES PRESENTED:

The four issues presented to this Court by the Government Lenders in their Brief in Support of Disposition Motion are the following:

- (1) Is the Swap Breakage Fee (hereinafter "Swap Early Termination Amount") part of PNC's Superior Indebtedness or Subordinated Indebtedness?
- (2) Does the Amended Intercreditor Agreement authorize PNC to apply the proceeds from the sale of the Collateral to the Subordinated Indebtedness?
- (3) Are PNC's attorney fees and forbearance fees reasonable and properly included as part of the Superior Indebtedness?
- (4) Does PNC's breach of the Notice of Default requirements of the Amended Intercreditor Agreement and subsequent actions to drastically pay down the Subordinated Indebtedness without notice to Government Lenders provide a basis to invalidate the subordination of the Government Lenders' interests?

Brief in Support of Disposition Motion at p. 4.

IV. ANALYSIS:

(1)(a) The Swap Early Termination Amount of \$1,117,000.00 is not part of PNC's Superior Indebtedness.

This Court does not accept PNC's position that the Swap Early Termination Amount must be determined to be part of the Superior Indebtedness. PNC's position is contradicted by the fact that a *swap is not a loan*, which PNC has already conceded in its Response to the Disposition Motion. See PNC's Response to Disposition Motion at pp. 15-16 citing article attached thereto, *Interest Rate Hedging Products*, American Loan Institute, SR048 ALI-ABA 623 (2010): "Furthermore, since the swap is *separate* from the loan, it does not necessarily have to be terminated when the loan is repaid." at p. 3. (emphasis added). The definition of PNC's Superior Indebtedness in Section 2(a) of the Amended Intercreditor Agreement includes "fees and costs . . . in *connection* with the enforcement or collection" of amounts owing to PNC "under the terms of the Term Notes 1 and any other Agent *Loan Document*." (emphasis added). The Swap Early Termination Amount cannot be reasonably considered to be part of the Superior Indebtedness because a "Swap Document" is not a "Loan Document" as that term is used in the definition of Superior Indebtedness. Moreover, PNC's own notice letters regarding the early termination of the Swap Agreement clearly identify the Swap Agreement and corresponding Confirmation Letter as "Swap Documents," not as "Loan Documents." See PNC's Response to Disposition Motion, Exhibits G and H. Since the Swap Documents are *separate* and *disconnected* from any Loan Document, we determine that the Swap Early Termination Amount shall not be categorized as part of PNC's Superior Indebtedness.

(1)(b) The Swap Early Termination Amount of \$1,117,000.00 is part of PNC's Subordinated Indebtedness.

We determine that the Swap Early Termination Amount is part of PNC's Subordinated Indebtedness as that term is defined in the Amended Intercreditor Agreement. As previously stated, Section 2(b) of the Amended Intercreditor Agreement defines "Subordinated Indebtedness" to include "(i) the Other Agent Indebtedness; or (ii) any Subsequent Advances." The "Other Agent Indebtedness" is defined on p. 6 of the Amended Intercreditor Agreement as "certain other Obligations (as defined in the Credit Agreement) of the Loan Parties (as defined in the Credit Agreement)." Those "certain other Obligations" are specifically identified in the second sentence of the Credit Agreement's definition of "Obligations" on p. 19, which expressly states, "Obligations shall include the liabilities to any Bank under any Bank-Provided Hedge or Purchasing Card Obligation but shall not include the liabilities to other Persons under any other Hedge Agreement." Since payment of the Swap Early Termination Amount is an obligation to PNC under the Bank-Provided Hedge Swap Agreement, we determine that the Swap Early Termination Amount shall be categorized as part of PNC's Subordinated Indebtedness.

(2) The Amended Intercreditor Agreement authorizes PNC to apply the proceeds from the sale of the Collateral to the Subordinated Indebtedness.

We determine that Section 4(c) of the Amended Intercreditor Agreement authorizes PNC, as first lien holder on all personal property, to apply the proceeds from the sale of the Collateral to its Subordinated Indebtedness. Section 4(c) of the Amended Intercreditor Agreement provides that upon an event of default, PNC may liquidate the "Other Agent Collateral" and apply the proceeds to its Superior or Subordinate Indebtedness at its discretion. Section 6(b) of the Amended Intercreditor Agreement provides that the rights of PNC in its collateral are without limit unless expressed therein as follows: "this Agreement shall not limit any rights, privileges or immunities of the Agent . . . in and to such collateral . . . except as expressly set forth herein."

The Government Lenders reliance on Section 4(a) of the Amended Intercreditor Agreement is misplaced because that provision only provides that payments received by PNC from Chartiers, as the Beneficial Owner of the Real Property, must be applied

to the Superior Indebtedness following an event of default. Chartiers, as a real estate holding company, owned only the warehouse Real Property. Payments from Chartiers do not involve personal property because Chartiers owned no personal property. RH Kuhn, as the Industrial Occupant, owned all of the personal property, including the furniture and equipment.

Further, a “marshalling” of the personal property collateral (i.e. requiring a senior lienholder to resort first to a fund or other security in a manner that will not defeat the interests of a junior lienholder) is expressly prohibited under Section 6(b) of the Amended Intercreditor Agreement which, “waives any right or claim that the Agent or any Bank exercise or conduct a marshalling of the assets of the Beneficial Owner or the Industrial Occupant or any other party to pay the Term Notes 1 or the Other Agent Indebtedness.”

(3)(a) PNC’s claimed attorney fees of \$828,333.31 are not reasonable and not properly included as part of the Superior Indebtedness.

The case cited by PNC, *Federal Land Bank of Baltimore v. Heiser and American Bank & Trust Co. of Pa.*, 36 Pa. D & C 3d 115 (Pa. Comm. Pl. 1985), to support its claim that the Government Lenders have no standing to challenge the attorneys’ commission of 15% is distinguishable. In *Heiser*, the Cumberland County Court of Common Pleas relied on the Pennsylvania Supreme Court of *Zug v. Searight*, 150 Pa. 506 (1892) as follows: “In *Zug v. Searight*, 150 Pa. 506 (1892), the Pennsylvania Supreme Court held that a subsequent judgment creditor has no standing to raise the issue of attorney’s fees awarded to a creditor *after a Sheriff’s sale* unless it can be shown that fraud or collusion was present.” (emphasis added). *Heiser*, 36 Pa. D & C 3d at 120-21. Here, however, there has been *no Sheriff’s sale*. Rather, the Receiver has negotiated and sold the Company Assets, on behalf of Chartiers, to third parties pursuant to the Receivership Order, which explicitly states that the Receiver is appointed “for the purpose of selling some or all of the Company Assets ... for the benefit and protection of Defendants’ creditors.”

Under the circumstances involving the sale of the Company Assets by a Receiver for the benefit and protection of all of Defendants’ creditors, it is reasonable for the Court to exercise its equitable powers by reducing the amount of attorney fees and costs that PNC has requested to be part of its Superior Indebtedness.

PNC has calculated its Superior Indebtedness to include Legal Fees in the amount of \$828,333.31 by using the total 15% attorney’s commission contained in so-called “confessed judgments” attributable Term Notes 1. However, even if PNC had obtained a recorded confessed judgment, instead of consenting to the sale of the Company Assets by the Receiver, the Court may still exercise its equitable powers to reduce a fixed percentage attorney fee commission that is unreasonable under the circumstances. *PNC Bank v. Bolus*, 655 A.2d 997 (Pa. Super. 1995). In *PNC Bank*, the bank obtained a confessed judgment and applied a fixed percentage attorney fee commission of 10% as provided for in the promissory note to a principal balance due of \$706,477.74. *Id.* at 998-1000. On appeal, the Superior Court of Pennsylvania, in *PNC Bank*, approved the trial court’s reduction of the attorney’s fee charge of more than \$70,000.00 to nearly \$10,000.00. *Id.* Although the Superior Court, in *PNC Bank*, decided to strike off the confessed judgment in its entirety, it expressly “encourage[d] trial courts to monitor the amounts charged in such circumstances, and to reduce clearly excessive fees.” *Id.* at 1000. Here, PNC’s use of a fixed 15% attorney commission to calculate the amount of attorney fees and costs to be included in its Superior Indebtedness is clearly excessive.

Further, PNC admittedly did not notify the Government Lenders of the Companies’ events of default until November 2010 in violation of its notice obligations under the terms of the Amended Intercreditor Agreement. *See* PNC’s Response to Disposition Motion at pp. 10-11. Considering this fact, we determine that the Superior Indebtedness shall properly include PNC’s *actual* attorney fees and costs incurred from November 1, 2010 (notice of events of default) to July 7, 2011 (closing the sale of the Real Property) in connection with the enforcement or collection of amounts owing to PNC under the terms of the Term Notes 1 and any other Agent Loan Document. As previously noted, according to PNC, its actual attorney fees and costs from November 1, 2010 to May 1, 2011 in this matter were \$222,543.88.

(3)(b) PNC’s claimed forbearance fees are reasonable and properly included as part of the Superior Indebtedness.

The lengthy forbearance agreements agreed upon by the Companies entitles PNC to collect forbearance fees upon default under any Agent Loan Document. Again, since the definition of Superior Indebtedness in the Amended Intercreditor Agreement includes fees and costs in connection with the enforcement or collection of amounts owing to PNC under the terms of the Term Notes 1 and any other Agent Loan Document, it follows that PNC’s forbearance fees shall be included as part of the Superior Indebtedness.

Furthermore, the debt of PNC and the Government Lenders were both amortized and paid down after the Events of Default. As a result, the Government Lenders also benefited from the lengthy forbearance agreements. We determine that the Forbearance Fees are reasonable and properly included as part of the Superior Indebtedness.

(4) PNC’s breach of the Notice of Default requirements of the Amended Intercreditor Agreement and subsequent actions to drastically pay down the Subordinated Indebtedness without notice to Government Lenders does not provide a basis to invalidate the subordination of the Government Lenders’ interests.

The Court has been provided no basis to nullify the Amended Intercreditor Agreement or invalidate the subordination of the Government Lenders’ interests as a result of PNC’s breach of the agreement’s Notice of Default requirements. Our own research reveals sparse law on this specific issue. However, it is clearly the law of Pennsylvania that a court may refuse to nullify an intercreditor agreement as requested by junior lien holders despite allegations of fraud. *Landau v. Western Pennsylvania National Bank*, 282 A.2d 335, 340-41 (Pa. 1971).

Accordingly, we conduct our own analysis of this issue. Although PNC admittedly did not notify the Government Lenders of Obligors’ events of defaults until November 2010, the Amended Intercreditor Agreement does not specifically provide that failure to provide notice of default shall invalidate the entire subordination of the Government Lenders’ interests. Furthermore, the purpose of the notice rights for the Government Lenders was to give them an opportunity to cure the Obligors’ defaults. Here, since all of the events of defaults that took place prior to November of 2010 were historical and the Government Lenders could not identify or articulate a realistic cure, we determine that there exists no tangible basis to completely invalidate the subordination of the Government Lenders’ interests.

V. CONCLUSION:

For the above stated reasons, the Court determines the Superior Indebtedness of PNC as of May 12, 2011 to be:

Principal balance under Term Notes 1:	\$5,522,222.18
Interest due under Term Notes 1:	\$340,368.86
Swap Early Termination Amount	\$0.00
Legal Fees:	\$222,543.88*
Forbearance Fee:	\$50,000.00
TOTAL:	\$6,135,134.92

* This amount reflects the actual attorney fees and costs of PNC from November 1, 2010 to May 1, 2011 are \$222,543.88, which shall be adjusted to reflect PNC's actual attorney fees and costs to July 7, 2011.

This determination is in accordance with the law and provisions of the Receivership Order and Amended Intercreditor Agreement. An appropriate Order of Court follows.

BY THE COURT:
/s/Ward, J.

Dated: August 16, 2011.

ORDER OF COURT

AND NOW, this 16th day of August, 2011, in accordance with the Stipulation and Consent Order Governing Sale of Real Property and upon consideration of the Motion to Determine Distribution of Sale Proceeds Pursuant to Intercreditor Agreement ("Disposition Motion"), the entire record in this matter, the consent of the parties that the Disposition Motion is ripe for adjudication without the need for formal discovery or an evidentiary hearing, and following oral argument thereon, it is hereby ORDERED, ADJUDGED and DECREED that the Disposition Motion is hereby GRANTED in part and DENIED in part as follows:

(1) The Disposition Motion is GRANTED in part as follows:

(a) The Swap Early Termination Amount is determined to be not part of PNC's Superior Indebtedness as that term is defined in the Amended Intercreditor Agreement. The Swap Early Termination Amount is determined to be part of the PNC's Subordinated Indebtedness as that term is defined in the Amended Intercreditor Agreement.

(b) The amount of PNC's Legal Fees to be included as part of PNC's Superior Indebtedness is determined to be the actual attorney fees and costs incurred by PNC from November 1, 2010 to July 7, 2011 in connection with the enforcement or collection of amounts owing to PNC under the terms of the Term Notes 1 and any other Agent Loan Document. The Government Lenders shall be entitled to an accounting of such attorney fees and costs upon request.

(2) The Disposition Motion is DENIED in part with all remaining requests for relief in the Disposition Motion being hereby denied.

(3) This Order of Court shall constitute the final order on the Disposition Motion directing the payment of the Disputed Proceeds in accordance herewith.

BY THE COURT:
/s/Ward, J.

Keystone Consultants, Inc. v. Allegheny Natural Resources, Inc.

Contract—Settlement—Express Authority—Repudiation

No. GD 08-010772. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—September 7, 2011.

OPINION

Defendant Allegheny Natural Resources, Inc. ("Allegheny" hereinafter) has appealed to the Superior Court of Pennsylvania from my determination that it entered into a settlement agreement with Plaintiff Keystone Consultants, Inc. ("Keystone" hereinafter). This Opinion provides my reasons for this determination as is required by Pennsylvania Rule of Appellate Procedure No. 1925(a).

Allegheny is in the business of oil and gas exploration, and Keystone orally agreed to provide Allegheny land title research services and to secure gas leases for Allegheny. Keystone performed this work between March and July of 2006 and submitted invoices to Allegheny. Allegheny did not pay seven of Keystone's invoices that total \$42,020. Keystone met with Allegheny's President and discussed why the invoices were outstanding. In January of 2007, with Allegheny having made no payment, Keystone's attorney sent Allegheny's President a certified U.S. mail letter that demanded prompt payment of the \$42,020.

In April of 2007, Allegheny's attorney responded with a letter to Keystone's attorney stating "...my client has authorized the offer of \$25,000 to settle your client's claim." Approximately one week later, Allegheny's attorney sent Keystone's attorney a two page agreement for settlement, that included payment to Keystone of \$25,000. Keystone's attorney, approximately three weeks later, returned the agreement with the signature of Keystone's President. However, Keystone deleted from the agreement a provision that required Keystone to give Allegheny "the documents generated by Keystone's research on the National Fuel Leases." Four days later, Allegheny's attorney sent Keystone's attorney a letter stating that his client had been notified of the deletion and insists that the provision for giving Allegheny the National Fuel leases be included. Allegheny's attorney wrote that he was enclosing "another original Agreement for your use."

Keystone's President then signed this Agreement with the provision for giving Allegheny the National Fuel Leases included and returned it about two weeks later, on May 30, 2007. Notwithstanding the fact that Allegheny's attorney drafted the settlement agreement that Keystone signed, Allegheny did not execute it or pay Keystone \$25,000. Allegheny also did not respond to Keystone's subsequent inquiries concerning the settlement agreement, and Keystone then initiated the subject litigation.

Keystone's Complaint contained one Count for Enforcement of the \$25,000 Settlement Agreement and a Second Count for

Breach of the \$42,020 Contract, effective only in the alternative that the Count for Enforcement of the Settlement Agreement were denied. After conducting discovery, Keystone filed a Motion for Summary Judgment relative to the Count for Enforcement of the Settlement Agreement. It is my Order that granted Keystone's Motion for Summary Judgment for \$25,000 plus interest that Allegheny appealed to the Superior Court. Allegheny thereafter timely filed a Statement of Errors Complained of on Appeal ("Statement of Errors" hereinafter). This Opinion will next address each of Allegheny's complaints, albeit in a different sequence than they appear in the Statement of Errors.

Allegheny argues I made an error in determining there was a settlement agreement because Allegheny never signed the agreement. *See* Statement of Errors, ¶ Nos. 3 and 12. Pennsylvania law, however, does not require Allegheny's signature for there to be a valid, enforceable agreement. "As a general rule, signatures are not required unless such signing is expressly required by law or by the intent of the parties." *Shovel Transfer and Storage, Inc. v. Pennsylvania Liquor Control Board*, 559 Pa. 56, 63 739 A.2d 133, 136 (1999), citing *L.B. Foster Co. v. Tri-W Construction Co.*, 409 Pa. 318, 186 A.2d 18, 19 (1962) and Pennsylvania Law Encyclopedia, Contracts §29. Allegheny does not contend signatures are expressly required by law, but instead contends that a provision in the agreement requires it to be signed by both parties. *See* Statement of Errors, ¶ No. 12. The provision, however, simply states that the "[a]greement shall be executed in two (2) counterpart originals with each party retaining a duplicate original." *Id.* This language just means there are plans for two original signed agreements, one to be kept by each party. This language falls far short of saying the Agreement is nullified if both parties do not sign it. Examples of provisions that have been found to require signatures are "this document does not become a contract until approved by an officer of Franklin Interiors" (*Franklin Interiors v. Wall of Fame Management Co.*, 510 Pa. 597, 511 A.2d 761 at 762 (1986)) and the agreement is not "deemed accepted until it [is] signed by an authorized officer or manager..." (*Commerce Bank/Pennsylvania v. First Union National Bank*, 2006 PA Super 305, 911 A.2d 133, 145 citing *Info Comp, Inc. v. Electric Prods.*, 109 F.3d 902 (3rd Cir. Pa. 1997)). Hence, there was no error in my determination that the settlement agreement was enforceable without Allegheny's signature.

Allegheny also argues I made an error in determining there was a settlement agreement because the settlement negotiations and correspondence "were authorized and exchanged by Keystone and [Allegheny] counsel." Statement of Errors, ¶ No. 4. In other words, Allegheny argues the settlement negotiations and correspondence had to be exchanged directly between the parties, not their counsel, for there to be a valid settlement agreement. However, the law in Pennsylvania is that counsel binds a client to a settlement agreement if there is express authority from the client. *Reutzel v. Douglas*, 582 Pa. 149 at 154, 870 A.2d 787 at 789-790 (2005). There is extensive, undisputed evidence of Allegheny's express authority to its attorney to settle Keystone's claim. Examples of this express authority are the April 12, 2007 letter from Allegheny's counsel that begins, "[p]lease be advised that my client has authorized the offer of \$25,000.00 to settle your client's claim...." and the May 15, 2007 letter from Allegheny's counsel that states, "I notified my client of the change [and my] client is [sic] not agreed and insists that the deleted [provision] be returned as an integral part of the Settlement Agreement." As a result of this undisputed, abundant documentation that Allegheny's counsel had express authority to settle, it was not error for me to find Allegheny was bound to the agreement made by its attorney.

Even without this undisputed evidence of express authority, if Allegheny believed its attorney exceeded his authority, it was obligated to promptly repudiate its attorney's settlement offers or have them ratified as Allegheny's own acts. *Piluso v. Cohen*, 2000 PA Super 335, 764 A.2d 549 at 550 (citing *Yarnall v. Yorkshire Worsted Mills*, 370 Pa. 93 at 96, 87 A.2d 192 at 193 (1952)). In fact, a copy of each letter sent by Allegheny's attorney to Keystone's attorney also was sent to Allegheny's President, H. James Adams. Hence, Allegheny knew of its attorney's settlement offers as they were made on April 12, 2007, April 20, 2007 and May 15, 2007. Allegheny made no attempt to deny the settlement until April 13, 2009 when it filed an Answer in the instant litigation. Having failed to promptly repudiate its attorney's offers, Allegheny was therefore bound to them.

Allegheny additionally argues that, because the letters between counsel and the settlement agreement were inadmissible offers to compromise, I erred by considering them. *See* Statement of Errors, ¶ Nos. 8, 9 and 13. Allegheny premises this argument exclusively on Pennsylvania Rule of Evidence No. 408(a)'s prohibition against the admission into evidence of the offer or acceptance of "a valuable consideration in compromising" a claim. The purpose of this Rule is to give parties in a dispute the ability to freely communicate settlement proposals without having to fear that, if they did not resolve the dispute, an adversary could later use the proposals to prove liability. For example, if a party alleged to have caused a personal injury makes a \$5,000 settlement offer that is not accepted, the opposing party cannot put the settlement offer into evidence to prove negligence at trial. If this Rule also prohibited communications to prove that a settlement agreement was actually reached, no party to any settlement would ever be bound since the settlement could never be proved.

42 Pa. C.S. §6141, while also prohibiting the use of settlements at trial as "an admission of liability by the person making the payment," permits their use at trial "in an action in which final settlement and release has been pleaded as a complete defense...." While neither Rule 408 nor §6141 carve out an exception for a Plaintiff offering settlement communications and the settlement agreement for the purpose of proving the agreement's existence, cases dating from the early nineteenth century clearly point out this exception. *See, Slocum v. Perkins*, 3 Serg. & Rawle 295, 297 (Pa. 1817) (evidence of defendant's offer to compromise prohibited "unless that offer be accepted by his adversary....") and *Duff v. Vogt*, 89 Pa. Super. 412, 415 (1926) (defendant's offer of compromise, "not accepted," cannot be used at trial).

Since it is inconsistent with the purpose of Rule 408(a) and long established case law supports my ruling, I made no error by considering the letters between counsel and the settlement agreement.

Allegheny also argues that "[t]he Court, in error, has ignored the fact that the only evidence Keystone claims to have to prove the existence of an alleged settlement agreement are five (5) items of correspondence and two (2) documents exchanged by and between the parties' attorneys dated from January 29, 2007 to June 28, 2007." Statement of Errors, ¶ No. 6. I interpret this language as an argument that there was insufficient evidence of a settlement agreement.

....Settlement agreements are enforced according to principles of contract law. *Pulcinello v. Consolidated Rail Corp.*, 784 A.2d 122, 124 (Pa. Super. 2001), *appeal denied*, 568 Pa. 703, 796 A.2d 984 (2002). "There is an offer (the settlement figure), acceptance, and consideration (in exchange for the plaintiff terminating his lawsuit, the defendant will pay the plaintiff the agreed upon sum)." *Muhammad v. Strassburger, McKenna, Messer, Shilobod and Gutnick*, 526 Pa. 541, 547 587 A.2d 1346, 1349, *cert. denied*, 502 U.S. 867, 112 S. Ct. 196, 116 L. Ed.2d 156 (1991).

Mastroni-Mucker v. Allstate Insurance Company, 2009 PA Super 101, 976 A.2d 510, 518. Clearly, the five items of correspondence between Allegheny and Keystone and the settlement agreement contain an offer, acceptance and consideration. The April 12, 2007

letter from counsel for Allegheny contains the offer to settle for \$25,000, the May 30, 2007 letter from counsel for Keystone is the acceptance¹ and consideration per the settlement agreement is Allegheny releasing its claim in exchange for Keystone paying it \$25,000. Accordingly, there was no error by me in finding an enforceable settlement agreement from the five items of correspondence and the settlement agreement.

Allegheny also claims I made an error by ignoring “an Affidavit from [Allegheny’s] President that [Allegheny] did not get what Allegheny bargained for from Keystone to-wit, a promised number of Gas Leases in Jefferson County, Pennsylvania.” Statement of Errors, ¶ No. 7. I did, in fact, ignore the Affidavit. But, rather than being an error, ignoring the Affidavit is required by Pennsylvania law. To consider whether Keystone provided the promised number of Gas Leases to Allegheny would require me to re-evaluate the settlement agreement. “If courts were called on to re-evaluate settlement agreements, the judicial policies favoring settlements would be deemed useless.” *Mastroni-Mucker v. Allstate Insurance Company*, 2009 PA Super 101, 976 A.2d 510, 518, citing *Greentree Cinemas Inc. v. Hakim*, 289 Pa. Super. 39, 432 A.2d 1039, 1041 (1981). Therefore, it was not an error for me to ignore Allegheny’s Affidavit.

Allegheny additionally argues I erroneously considered cases such as *Mastroni-Mucker, supra* that involve settlement negotiations that occurred during court proceedings. See Statement of Errors, ¶ Nos. 14 and 15. In essence, Allegheny contends that the holdings in *Mastroni-Mucker, supra.*, *Shovel Transfer and Storage, Inc., supra.*, and other appellate decisions concerning the formation of settlement agreements are limited to court settings. There is no merit to such an interpretation of these cases. The principles of law enunciated in these cases also apply to disputes that are settled before litigation has to be initiated. In addition to the principles quoted above, other law on the formation of settlement agreements mentioned in these decisions includes the rules that oral agreements to settle are enforceable without a writing, a court must enforce the terms of a settlement agreement containing all of the requisites for a valid contract and once an offeree exercises the power to create a contract by accepting an offer, revocation is ineffective. See *Step Plan Services, Inc. v. Koresko*, 12 A.3d 401 at 409 (Pa. Super. 2010) and *Mastroni-Mucker, supra* at 518. The authority for the final rule on the offeree’s acceptance terminating the offeror’s ability to revoke is Sections 36 and 42 of the Restatement (Second) of Contracts, which do not ever mention court proceedings. Limiting the use of the principles of law described above to court proceedings also violates Pennsylvania’s established policy in favor of parties settling their legal disputes. See *Step Plan Services, Inc.* at 408-409. Therefore, these cases apply to pre-litigation settlements and I did not make an error by considering them.

Allegheny also argues that I erroneously relied upon *Mazzella v. Koken*, 559 Pa. 216, 739 A.2d 531 (1999), since in that case the Pennsylvania Supreme Court decided the parties did not reach a settlement agreement. See Statement of Errors, ¶ No. 16. Although I relied upon *Mazzella v. Koken*, there is no merit to Allegheny’s claim that this constitutes error. I relied upon *Mazzella v. Koken* for the important principles of law that the Pennsylvania Supreme Court set forth, including the requirement that there be a meeting of the minds of the parties before there is a valid settlement agreement. *Id.*, 739 A.2d at 536-537. In fact, the reason there was no settlement agreement reached in *Mazzella v. Koken* is that the proposals and counterproposals in that case contained material changes from the previous proposals that prevented a finding that the parties had come to a meeting of the minds on all essential terms. While Keystone initially deleted a term from the settlement agreement prepared by Allegheny, it thereafter executed an unmodified version establishing the meeting of the minds upon all the terms of the agreement. Because the parties in *Mazzella v. Koken* did not do so, that case is factually dissimilar and a determination that there was a valid settlement agreement in the subject litigation is appropriate. Hence, I made no error in relying on *Mazzella v. Koken*.

Allegheny further argues that I made an error by granting Keystone’s Motion for Summary judgment when I had denied a similar Keystone Motion for Summary Judgment six months earlier. Statement of Errors, ¶ Nos. 17 and 18. While Allegheny correctly states that I denied a similar motion six months before I granted the motion that is the subject of the appeal, this occurred because Keystone produced new evidence. In Allegheny’s Brief in response to Keystone’s initial Motion for Summary Judgment, Allegheny described the events after May 11, 2007 when Keystone returned the settlement agreement with the deleted provision, as follows:

The “Settlement Agreement” returned by Keystone on May 11, 2007 was a counter-offer not acceptable to [Allegheny]. From April 20, 2007 to June 28, 2007, correspondence was exchanged by the parties concerning a compromise. All efforts to compromise failed and Keystone subsequently filed a writ on June 3, 2008, and later a Complaint on March 24, 2009....

I denied the initial Motion for Summary Judgment because what had occurred between May 15, 2007, when Allegheny renewed its offer by sending the initial settlement back to Keystone, and May 30, 2007, when Keystone sent that unchanged, signed agreement back, was not quite “clear and free from doubt.” *Swords v. Harleysville Ins. Cos.*, 584 Pa. 382, 883 A.2d 562, 566-567 (2005). I thought there could have been a communication during this time period that modified the offer.

The new evidence in Keystone’s second Motion for Summary Judgment is discovery responses from Allegheny that admit it “is not aware of any communications with Keystone after May 15, 2007 and before May [30] 2007.” New evidence permits a trial judge to grant a previously denied summary judgment motion. *Parker v. Freilich*, 803 A.2d 738, 745-746 (Pa. Super. 2002). Accordingly, I did not make an error by granting Keystone’s Motion when I had denied a similar one six months earlier.

The remaining argument made by Allegheny is I erroneously “accepted Plaintiff’s allegation that the only document exchanged by the parties in an effort to compromise the parties’ claim....” is the unaltered agreement signed by Keystone. Statement of Errors, ¶ No. 5. The premise that Keystone alleged this agreement was the “only” document exchanged is incorrect as Keystone’s “Brief in Support of Second Motion for Summary Judgment” references letters and email between counsel that are attached to it. The letters and email also are of record in Keystone’s Motion to Compel that was filed on June 29, 2009. While the agreement may have been the only document attached to Keystone’s Second Motion for Summary Judgment, I also considered the letters and email in granting Keystone’s Motion. Since I considered more than just the agreement, I did not make this error that is claimed by Allegheny.

BY THE COURT:
Hertzberg, J.

¹ Allegheny also claims I made errors by finding an oral settlement agreement was reached on November 7, 2006 and the attorneys entered into a formal settlement on April 20, 2007. Statement of Errors, ¶ Nos. 10 and 11. Since the significance of the date November 7, 2006 is not clear from the statement of Errors, I will assume it is the date of the meeting between Keystone and Allegheny’s President. April 20, 2007 is when Allegheny’s attorney initially sent Keystone’s attorney the settlement agreement. Allegheny’s claims that I determined there was an oral agreement on November 7, 2006 and a formal agreement on April 20, 2007 have no merit since I determined that the settlement agreement was reached on May 30, 2007 when Keystone’s attorney accepted Allegheny’s offer by returning the original, unchanged, signed settlement agreement.

**Lynn Levitzki v.
Commonwealth of Pennsylvania
Department of Environmental Protection**

Summary Judgment—Premature—Mitigation

No. GD 05-28493. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
McCarthy, J.—September 14, 2011.

OPINION

In November 2005, plaintiff, Lynn Levitzki, filed a five-count complaint against the Pennsylvania Department of Environmental Protection (“DEP”) based upon damages in the approximate amount of \$89,000.00 that allegedly resulted to personal property held in storage at the Island Boat Club during the time the marina had been seized by the DEP. The marina had been seized in or around October 2003 purportedly due to non-compliance by the marina owner with Dam Safety and Encroachment Act-related regulations. The record disclosed that, in advance of seizing the marina, the DEP had posted a sign directing all parties having personal property at the marina to remove that property by October 17, 2003 or risk seizure by the Commonwealth. The record additionally disclosed that at that same approximate time, that is, in early September 2003, the DEP mailed notices to all registered boat owners at the marina, including Levitzki, instructing those owners to remove their boats and personal property within thirty (30) days or risk seizure by the Commonwealth. In early November 2003, a majority of boat owners having complied with the posted and mailed notices, the DEP began erecting a fence to prevent further access to the marina.

Levitzki’s complaint averred that subsequent to the seizure of the marina, her “personal property was damaged and destroyed by several flooding events, looting and vandalism”. Levitzki sought damages under theories of bailment, conversion, negligence, violation of due process, and unlawful seizure.

Levitzki apparently did not respond to the defendant Commonwealth’s discovery requests and did not comply adequately with a Court directive to respond to such requests or suffer sanctions. Accordingly, by Order of Court dated December 19, 2008, the Honorable Stanton Wettick granted defendant’s motion for sanctions, which precluded Levitzki from presenting any evidence or testimony at trial that had not been produced to the Commonwealth in advance of the date of that order. Approximately two (2) years later, on December 14, 2010, Levitzki placed the case at issue.

On or about March 7, 2011, defendant filed and served on Levitzki’s counsel a Motion for Summary Judgment. Calendar Control subsequently posted an order scheduling argument on the motion for June 13, 2011. In the interim three (3) months between filing and service of the motion and the scheduled argument date, Levitzki did not respond to the pending Motion for Summary Judgment notwithstanding that any response is generally required within thirty (30) days following service.¹

On the scheduled date of argument, counsel for presented the Court and opposing counsel with “Plaintiff’s Reply to Defendant’s Motion for Summary Judgment”. The Court noted at that time that, although counsel would be permitted to present argument, plaintiff’s response was grossly tardy and, for that reason, the case was at risk of dismissal irrespective of the merits of the parties’ arguments on the substance of the motion. Upon hearing argument and reviewing Levitzki’s submission, the Court concluded that the submission did not satisfactorily explain a delayed response. On that basis alone, judgment should have been granted for the Commonwealth and against Levitzki.

The Court nonetheless reviewed the entire record before entering judgment. Summary judgment predicated on a failed response is not favored. Rather, it is preferred that the record be reviewed and that a determination be made as to whether the moving party has, in fact, demonstrated that a trial is not warranted, a demonstration typically accomplished by setting forth the results of discovery and, in that manner, dispelling the existence of any genuine factual issue involving the matter on which judgment is sought.

The purpose served by motions for summary judgment is to avoid continued futile litigation on incontestable aspects of a case or on the case as a whole. The fact, in itself, that a party fails to respond timely to a motion is not necessarily entirely indicative of the merits of a respondent’s position, and does not require a grant of summary judgment under Rule 1035.3. Instead, as the 1996 explanatory notes of the Rules Committee indicate, Rule 1035.3 *permits* entry of judgment for failure to respond to the motion but does not require it. Of course, inattention by a party confronted with a motion for summary judgment might well be predictive of a failure to prepare for trial generally and, therefore, a grant of summary judgment against a party who is wholly unresponsive to a motion achieves the intended purpose of the device of summary judgment: early, economic and final disposition of a position doomed to failure.

In this case, Levitzki insisted that her position was not doomed to failure, that additional discovery would show the merit of her case, and that the motion for summary judgment should, therefore, be dismissed as premature. Levitzki further argued that the Commonwealth failed to demonstrate that the doctrine of sovereign immunity was available to it in this case. This Court considered and rejected those arguments.²

I. The Motion for Summary Judgment was not Premature.

Pa.R.C.P. No. 1035.2 permits any party to a case to move for summary judgment “after the relevant pleadings are closed, but within such time as not to unreasonably delay trial”. This matter was placed at issue by praecipe filed on behalf of Levitzki on December 14, 2010, after the matter had lain dormant, without activity of record, for nearly two years. The most recent prior activity of record had been Judge Wettick’s preclusionary order of December 19, 2008. By placing the case at issue, Levitzki certified that the matter could appropriately be placed on the next available trial list. Levitzki’s current contention that the defense motion for summary judgment should be dismissed as precipitous is at odds with the certification plaintiff placed on the record six months earlier.

At argument, Levitzki asserted that her complaint adequately set forth a “broad outline of their [*sic*] claim against the Defendant” and that augmentation of that outline through discovery would eventually establish an evidentiary record sufficient to prove plaintiff’s contentions. On that basis, Levitzki sought additional time in which to conduct discovery:

While the Plaintiffs [*sic, passim*] have no [*sic*] conducted extensive discovery as of this date, the Plaintiffs intend to conduct discovery to secure such evidence to support the claims advanced by them. Where discovery has not closed, a motion for summary judgment filed by the Defendant must be dismissed as prematurely filed.³

Levitzki cited *Kerns v. Methodist Hospital*, 574 A. 2d 1068; 393 Pa. Super. 533 (1990) in support of the contention that the Commonwealth's motion for summary judgment should be dismissed as premature. It appears, however, that the *Kerns* Court would have disfavored Levitzki's position. The Superior Court observed in *Kerns* that an indulgence of extended discovery is available in instances in which the party that has yet to complete discovery has both exercised due diligence throughout the discovery process to date and can proffer to the Court the particulars of the proof that that party hopes to obtain through continued discovery:

On the other hand, if an adequate time for discovery has already expired when a continuance is sought, the party opposing summary judgment must establish both materiality and due diligence with regard to the further discovery sought. Applying these rules in the instant case, we find no abuse of discretion in the trial court's denial of a continuance to complete further discovery.

Here, the summary judgment motion was filed November 15, 1988, 3 years, 7 months, and 27 days since the initial complaint was filed on March 18, 1985. Both discovery requests outstanding at the time summary judgment was granted were initiated *after* the summary judgment motion had been filed.

574 A 2d at 1076; 393 Pa. Super., at 545-546

Levitzki merely stated an intention to undertake discovery and did not purport to have discovery requests outstanding on the date of argument. In that regard, Levitzki is more delinquent than was the plaintiff in *Kerns*, who had previously prepared discovery requests and had attached copies of those requests to the response to the motion for summary judgment. Neither the fact that requests were pending nor the relevance of those pending requests was in dispute. Here, Levitzki provided only an allusion to the mere possibility that discovery requests might yet be formulated and proof might then be gathered to support a claim that had languished unattended by any meaningful discovery efforts on plaintiff's behalf for more than (5) years but was now at issue. In this case, the argument made by plaintiff is, in substance, that, because plaintiff had not yet begun discovery, the time for discovery should be extended. That is insufficient to set aside the defense motion for summary judgment as premature.

Levitzki insisted, however, that, because the discovery period did not close until July 11, 2011⁴ for cases on the September 2011 trial list, adequate opportunity remained available in which to pursue additional discovery in advance of actual trial. Levitzki's calculation is incorrect. Local rules provide that discovery is to be *completed* not less than sixty (60) days before the commencement of the trial term. That is, discovery requests must be propounded in adequate time to allow *responses* to be served more than sixty (60) days before scheduled commencement of the trial term. Local Rule 214(5)(b) cautions that any party serving discovery requests must do so by a date sufficient to permit the responding party the full time allowed for a response by the Pennsylvania Rules of Civil Procedure. Generally the time allowed for a response to discovery requests is thirty (30) days.⁵ At the time that Levitzki's counsel arrived for argument on June 13, 2011 and served a reply indicating that "Plaintiffs intend to conduct discovery", the deadline to initiate further discovery had expired. Levitzki's request that the Commonwealth's motion for summary judgment should be set aside in order that Levitzki might begin discovery invited the collateral, unacceptable consequence of a postponement of the scheduled trial.

It is important to note that Levitzki had had three (3) months in which to assemble evidence specifically responsive to the Commonwealth's motion and, of course, had had a number of years before that to develop her case generally. The Court is mindful of the fact that, in the context of a summary judgment proceeding, denying a request for additional or extended discovery may be "the functional equivalent of the harshest form of discovery sanction available, termination of the underlying action". *Biddle v. Preet Allied American Street, LP* 2011 PA Super 161, 2011 WL 3306297. In the case at hand, however, the request for additional discovery time was unaccompanied either by any indication of prior diligence on plaintiff-respondent's part or by any description of any sort of the nature of the discovery that plaintiff hoped to conduct or the evidence that might be secured. Levitzki failed to identify what benefit, other than delay itself, might be gained from further delay. The materiality aspect of the *Kerns* requirements has not been met in this matter.

Given that Levitzki did not identify any prior effort to undertake discovery and apparently squandered the months intervening between service of the defense motion for summary judgment and the scheduled argument on that motion, and given that Levitzki did not point to any specific benefit that discovery might yield, her contention that the motion for summary judgment should be dismissed as premature cannot be accepted.

II. The Record Assembled by the Commonwealth was Sufficient to Foreclose Plaintiff's Claims of Common-Law Conversion, Negligence and Violation of Due Process.

The record submitted by the Commonwealth in support of its Motion for Summary Judgment established that, by letters dated September 5, 2003, written notice "to remove all your physical property within thirty (30) days or risk seizure by the Commonwealth", was mailed to residents at the marina, including Levitzki. The September 5, 2003 letter additionally apprised addressees that the Commonwealth would erect a fence prohibiting all access to the property. (Commonwealth Exhibits A, D). Levitzki acknowledged that the address that appears on the notice was her correct mailing address at the time of the seizure and that she received other mail at that address at that same time. (Commonwealth Exhibit O; excerpt of transcribed deposition testimony of Levitzki). Levitzki did see and read letters addressed to other owners and saw those letters in advance of the Commonwealth undertaking construction of a security fence at the marina. (Commonwealth Exhibit L; excerpt of transcribed deposition testimony of Levitzki). Levitzki did not respond to the Commonwealth's New Matter, which alleged at ¶31 that "plaintiff had notice and opportunity to remove any claimed personal property from the illegal marina *prior to any damage to the property...*" (Emphasis added)⁶.

Generally, the act of depositing a properly addressed prepaid letter in the post office raises the presumption that it reaches the destination by due course of the mail, and mailing a letter in such a way is *prima facie* evidence that it was received by the persons to whom it was addressed. *See, In re Cameron's Estate*, 388 Pa 25, 35, 103 A 2d 173 (1957). Testimony contravening the receipt of the notice does not put into issue the question of whether the letter was received. *See, Meierdierck v. Miller*, 394 Pa 484, 147 A. 2d 406 (1959). Because the Commonwealth provided both documentation and an affidavit indicating that written notice was mailed to Levitzki and, indeed, because Levitzki admits that she saw and read notices mailed to others at the boat club who were noticed by similar, contemporaneous mailings, the record compels a rebuttable presump-

tion that a mailed notice was in fact received by Levitzki. Plaintiff's Reply to Defendant's Motion for Summary Judgment does not deny receipt of notice by mail, but states that Levitzki "does not recall specifically receiving such notice". (Plaintiff's Reply at ¶6. Even if Levitzki were to deny actual receipt and that testimony were credited, that mere denial of receipt would not be sufficient, in itself, to rebut the presumption of delivery. *Berkowitz v. Mayflower Sec., Inc.* 455 Pa. 531, 317 A.2d 584 (1974); *Universal Premium Acceptance Corporation v. The York Bank and Trust Company*, 1996 WL 511515 (E.D. Pa; 1996).

The demonstrated fact that Levitzki had advance notification that she must either remove her property from the marina or risk seizure by the Commonwealth forecloses recovery of damages. Levitzki's persistent subsequent failure to take action to mitigate any potential loss would similarly bar recovery. Even in the particular context of conversion, an intentional tort, a plaintiff's failure to use reasonable effort to ameliorate any loss may limit or bar recovery. *Universal Premium Acceptance Corporation v. The York Bank and Trust Company*, supra. The matter is addressed at Restatement 2d of Torts, §918(2):

One is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregarding of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests.

Although Pennsylvania case law assigns a duty to mitigate damages to the plaintiff, mitigation is an affirmative defense, and the burden of proving failure to mitigate is, therefore, defendant's burden. See, *Moorhead v. Crozer Chester Medical Center* 564 Pa 156, 765 A2d 786 (2001); *Thompson v. DeLong*, 267 Pa. 212, 110 A. 2d 251, 253 (1920); *Atlantic Contracting, Inc., v. International Fidelity Ins. Co.*, 86 F. Supp. 479, 142 (E.D. Pa 2000). A defendant must adduce testimony or demonstrative evidence sufficient to establish that damages claimed by a plaintiff were occasioned by plaintiff's own inaction. Such evidence may establish that plaintiff so stubbornly neglected his or her own interests that no legal redress is appropriate. In this case, the Commonwealth demonstrated that Levitzki was timely apprised of the seizure and what must be done by her to preserve her property, that she repeatedly visited the marina before during and after events that she alleges caused damage to her property, that on those occasions she conversed a number of times with DEP representatives and with property owners similarly situated to her, some of whom had shown Levitzki their copies of a notice mailed by the DEP and instructing owners to remove their property from the marina, that DEP posted a sign on the Island Boat Club, which directed all parties at the marina to remove property by October 17, 2003 or risk seizure by the Commonwealth. Plaintiff's Reply proffers no rebuttal to the Commonwealth's proof of Levitzki's aloofness to specific notices and events that mandated, well in advance of any alleged damage to her property, that she take action, as others did, to protect property.

Plaintiff's Reply does little more than restate the theories of negligence, implied bailment and conversion. At the summary judgment stage of proceedings, a mere discussion of theories is unavailing; it is the stage at which to put forth evidence sufficient to demonstrate the inadequacy of the opposing party's position. Any suggestion that Levitzki might yet obtain evidence supportive of her causes of action and present the same at a trial overlooks, among other things, the impediment presented by Judge Wettick's Order of December 19, 2008. That order precluded Levitzki from "supporting such claims or introducing into evidence any documents, records, photographs, videos, testimony or other evidence of liability and damages against the Commonwealth ... that has not been produced as of this date".

More pointedly, plaintiff's focus on the elements of the causes of action pled in the complaint is simply unresponsive to the Commonwealth's evidence relative to mitigation. Levitzki has not put forth an argument or a record sufficient to answer the Commonwealth contention that, due to plaintiff's failure to mitigate, no damages would be available to her even assuming she could meet the evidentiary burden of a *prima facie* case as to those any of causes of action – an assumption entirely unwarranted by the record provided.

Levitzki's inaction in the face of repeated notice would also seem to vitiate her allegations of violation of due process. Moreover, as the Commonwealth noted, Levitzki elected not to avail herself of the administrative procedures available to her to obtain relief for any wrongful taking. Having had the opportunity to be heard through procedures provided under the Dam Safety Act and the Pennsylvania Administrative Code of 1929, Levitzki cannot now claim to have been deprived of constitutional due process. See, *Commonwealth v. Derry Township, Westmoreland County*, 10 Pa. Cmwlth. 619, 314 A.2d 874 (1973); *Seropian v. State Ethics Commission*, 20 A.3d 534 (Pa. Cmwlth., 2011).

For the reasons stated, this Court not only determined "Plaintiff's Reply to Defendant's Motion for Summary Judgment" to be untimely, but also concluded that, even viewed in the light most favorable to the plaintiff, the evidentiary record required that the Commonwealth's motion for summary judgment be granted.

BY THE COURT:
/s/McCarthy, J.

Date: September 14, 2011

¹ Pa. R.C.P. 1035.3. Allegheny County Court of Common Pleas Local Rule No. 1035.2(a)(1) additionally provides that: "a response in opposition to the motion shall be filed as provided for in Pa. R.C.P. 1035.3".

² Upon receiving notice of appeal, the Court issued a Rule 1925B Order. However, the envelope containing the Order was mis-addressed and was returned as "not at this address". Rather than re-issue an Order, the Court elected to proceed without further delay and issue its opinion. Although the Order appears on the docket, plaintiff has not been required to submit a statement of matters complained of on appeal and is not in violation of any such order.

³ Levitzki Reply, at ¶16

⁴ In fact, September 6, not September 11, was the scheduled commencement date for the September 2011 trial term.

⁵ See, e.g., Pa.R.C.P. Nos. 4006(2); 4009.12

⁶ The Commonwealth's Answer and New Matter was endorsed with the necessary notice to plead.

George Girty v. Montour Trail Council

Negligence—Willful—Rails to Trails

No. GD 11-2395. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Wecht, J.—October 17, 2011.

MEMORANDUM

On February 7, 2011, Plaintiff George Girty [“Girty”] filed a complaint alleging that he fell and was injured when his bicycle hit ice in the National Tunnel, a part of the Montour Trail. Girty alleges that Defendant Montour Trail Council [“Montour”] was negligent in failing to guard against a dangerous condition, in failing to warn of a dangerous condition, and in failing to prevent bike riders from using the trail while there was a dangerous condition.

Montour moved for summary judgment. Montour argues that the Rails to Trails Act (32 P.S. § 5611 *et seq.*) bars Girty’s claims unless Girty can prove a willful or malicious failure to guard or warn against a dangerous condition. Montour asserts that Girty cannot do so here. As there appears to be no case law interpreting this statute, Montour cites cases decided under the Recreational Use of Land and Water Act (“RULWA”), a statute that has a limitation on liability similar to the one Montour invokes here. Montour argues that this decisional law bars Girty’s claims. Montour maintains that the icy condition was open and obvious, and that Girty should have been aware of the ice and avoided it.

Girty responds that the motion is untimely because discovery is not yet completed. Girty avers that he may well be able to discover facts that indicate a willful or malicious failure by Montour. Girty cites RULWA cases holding that the bar to liability is for unimproved land, and that, if land is improved, there is liability for failed upkeep. Girty argues that the tunnel is an improvement, and that Montour should be liable for failure to perform appropriate upkeep.

The statute at issue is 32 P.S. § 5621. Section (a) states that an owner who provides the public with land for use as a trail under this program owes no duty of care to keep the land safe or to give warnings of dangerous condition, use, structure or activity. Section (d)(1) provides that the act does not limit liability which otherwise exists for willful failure to guard against or warn about dangerous conditions and uses. Like the parties, this Court can find no decisional law that interprets this provision of the Rails to Trails Act.

Also, this Court agrees with the parties that RULWA is an appropriate statute to compare for this case. It has a similar purpose - to provide public access to land for recreational purposes. It has a similar bar to liability. It has a similar exception for willful failure to guard or warn.

There are two issues to consider. The first is whether there was willfulness. The second is whether the land is improved.

For a finding of willfulness under RULWA, the plaintiff must prove that the land owner had actual knowledge of the dangerous condition and that the danger was not obvious to those entering the land. *Flohr v. Penn. Power & Light Co.*, 821 F.Supp. 301, 304 (E.D. Pa. 1993). In the instant case, Girty has made those allegations. He argues that, without discovery, he cannot determine whether Montour had knowledge of the condition. Montour replies that, even if it had knowledge, the condition should have been obvious. Montour has a strong argument. Girty testified in his deposition that the ice buildup was very large.

The tunnel also was dark. Girty testified that he turned his bicycle lights to the side of the tunnel to catch the reflectors on the wall. If Girty had his light pointing forward, it is possible that he might have seen the ice buildup. However, at this stage of the proceeding, this Court cannot say that, as a matter of law, Girty acted unreasonably in not having his light facing forward and that the ice buildup would have been obvious had he done so. Because it is unclear at this point whether the ice condition was obvious, there is a question of fact. That is a question for a jury.

Under RULWA, courts have decided that the act was meant to protect owners of largely unimproved land and not to relieve owners of the liability for maintaining improvements to the land. *Hatfield v. Penn Tp.*, 12 A.3d 482, 486 (Pa. Commw. 2010). Therefore, liability can hinge on whether or not a particular area of land is improved. Factors to consider in making that determination include whether the land is altered from its original state and whether there are any improvements that require maintenance for safe use. *Id.* Other factors to consider are the land’s use, size, location, openness and extent of any improvements. *Stanton v. Lackawanna Energy, Ltd.*, 951 A.2d 1181 (Pa. Super. 2008). At this point, this Court is unable to make these determinations as a matter of law.

The motion for summary judgment is premature. Without further information and discovery, it is impossible to know whether the tunnel is an improvement such that liability for maintenance would attach, or whether Montour had knowledge of the condition.

An Order in accordance with this Memorandum follows.

ORDER OF THE COURT

AND NOW this 17th day of October, 2011, following oral and written arguments on Defendants’ Motion for Summary Judgment, and following consideration of those arguments and the applicable law, and in accordance with the foregoing Memorandum, it is hereby ORDERED, ADJUDGED and DECREED that Defendants’ Motion for Summary Judgment is denied without prejudice to reassertion once discovery is concluded.

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

Commonwealth of Pennsylvania v. Luke John Gauthier

Criminal Appeal—Ineffective Assistance of Counsel—Sentencing—Illegal Sentence—Plea Agreement

No. CC 200908562; 200813478. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Cashman, J.—August 31, 2011.

OPINION

On August 5, 2008, the appellant, Luke Gauthier, (hereinafter referred to as “Gauthier”), was charged with the crimes of robbery, access of a device of fraud, simple assault, theft by deception, theft by unlawful taking and two counts of receiving stolen property. On May 12, 2009, Gauthier was charged with one count of retail theft. Gauthier’s cases were consolidated for the purpose of trial

and on October 8, 2009, Gauthier's trial counsel advised this Court that she had negotiated a plea agreement with the Commonwealth wherein Gauthier would plead guilty to one count of simple assault and one count of theft filed at his first case at CC 200813478 and one count of retail theft filed at CC 200908562, in exchange for a sentence at both cases of time served with no period of probation and no order of restitution to be entered against him. This Court rejected that plea agreement and later in the day on October 8, 2009, sentenced him to two periods of probation, one for three years at his first case and the other of five years at his second case with the requirements of random drug screening and directed that his periods of probation were to run concurrently.

Gauthier did not file any post-sentence motions but, rather, elected to exercise his right to take an appeal to the Superior Court and filed a timely appeal on November 5, 2009. Gauthier was a resident of the State of Florida and mail that was sent to the address that he provided to the probation office was returned. This Court appointed his current appellate counsel to represent him and on August 10, 2011, he filed a concise statement of matters complained of on appeal on behalf of Gauthier. In that statement, Gauthier has raised two claims of error as to the ineffectiveness of his trial counsel, the first being that his trial counsel was ineffective for objecting to the sentences imposed upon him which were not in accordance with the plea agreement. The second claim of error was that his trial counsel was ineffective in failing to withdraw Gauthier's pleas when the plea agreement was not honored. Gauthier's final claim of error is that his sentence was illegal in that this Court accepted his plea agreement and then failed to sentence him in accordance with the plea agreement.

In *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726 (2002), the Pennsylvania Supreme Court declared that claims of the ineffectiveness of counsel must be raised in a petition for post-conviction relief so that an appropriate record can be generated so that an Appellate Court can review these claims of ineffectiveness. In *Commonwealth v. Bomar*, 573 Pa. 426, 826 A.2d 831 (2003), the Commonwealth recognized an exception to that directive when the appellant has raised the claims of ineffectiveness with the Trial Court in post-sentence motions and a record had been developed which would permit not only the Trial Court but also any Appellate Court an opportunity to review those claims. In the instant case Gauthier never filed post-sentence motions and, accordingly, there is no record upon which those claims can be adjudicated.

With respect to his remaining claim that his sentence was illegal since he was not sentenced in accordance with the plea agreement after this Court accepted that plea agreement, it is clear that this claim is patently erroneous. At the time that this Court was conducting a colloquy with Gauthier, he demonstrated an attitude of indifference and disrespect for the entire proceeding that was taking place. His arrogance and condescending manner was acknowledged not only by this Court but, also, his own counsel. While the terms of the plea agreement were set forth on the record, this Court never accepted that plea agreement and, in fact, rejected it by virtue of revoking Gauthier's bond, remanding him to the custody of the Sheriff and rescheduling his trial date for April 15, 2010. Later in the afternoon of October 8, 2009, Gauthier's counsel asked this Court to reconsider the proposed plea agreement in light of Gauthier's newfound respect for the criminal justice system. This Court never accepted the plea agreement and rejected it by revoking Gauthier's bond and rescheduling his trial date and, accordingly, it was not obligated to sentence him to the proposal that it had previously rejected. When Gauthier came back he entered a plea of guilty and this Court sentenced him in accordance with the guidelines that were applicable to Gauthier's case. Since there was no plea agreement accepted by this Court, his probation sentences could not have been illegal as not comporting with that alleged plea agreement.

Cashman, J.

Dated: August 31, 2011

Commonwealth of Pennsylvania v. Darnell Louis Adams

Criminal Appeal—PCRA (3rd)—Ineffective Assistance of Counsel—Faulty Pleading—No Jurisdiction to Hear Petition

No. CC 9213271; 9314675; 9314841; 9400020. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Cashman, J.—September 1, 2011.

OPINION

On June 8, 2010, the appellant, Darnell Louis Adams, (hereinafter referred to as "Adams"), filed his third petition for post-conviction relief. This Court, after reviewing that petition in light of his previous petitions for post-conviction relief, denied that petition without a hearing. Adams filed a timely appeal to the Superior Court and was directed, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), to file a concise statement of matters complained of on appeal. In that statement, Adams has asserted three claims of error. Initially, Adams maintains that this Court erred in failing to conduct an evidentiary hearing to prove the layered ineffectiveness of his trial and appellate counsel. Adams further maintains that this Court in failing to grant him his appellate rights nunc pro tunc as a violation of his due process rights. Finally, Adams maintains that this Court erred in invoking the previously litigated rule in order to dismiss this petition for post-conviction relief.

In entering its Order dismissing Adams' petition for post-conviction relief, this Court reviewed his current petition for post-conviction relief in light of the previous petitions he had filed and concluded that the issues that Adams sought to raise have previously been litigated. It should be noted that there is no absolute right to a hearing on a petition for post-conviction relief but, rather, the hearing depends on the merits on the contentions raised in the petition for post-conviction relief. In *Commonwealth v. Jordan*, 772 A.2d 1011, 1014 (Pa. Super. 2001), the Court explained the reason why there is no absolute right to a hearing on a petition for post conviction relief.

The right to an evidentiary hearing on a post-conviction petition is not absolute. *Commonwealth v. Granberry*, 434 Pa. Super. 524, 644 A.2d 204, 208 (1994). A PCRA court may decline to hold a hearing if the petitioner's claim is patently frivolous and is without a trace of support in either the record or from other evidence. *Id.* A reviewing court on appeal must examine each of the issues raised in the PCRA petition in light of the record in order to determine whether the PCRA court erred in concluding that there were no genuine issues of material fact and denying relief without an evidentiary hearing. *Commonwealth v. Hardcastle*, 549 Pa. 450, 701 A.2d 541, 542 (1997).

In order to be entitled to relief under the Post-Conviction Relief Act, a petition must meet the eligibility requirements set forth in Section 9543 of that Act,¹ which provides:

(a) General rule.—To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:

- (1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:
 - (i) currently serving a sentence of imprisonment, probation or parole for the crime;
 - (ii) awaiting execution of a sentence of death for the crime; or
 - (iii) serving a sentence which must expire before the person may commence serving the disputed sentence.
- (2) That the conviction or sentence resulted from one or more of the following:
 - (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
 - (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
 - (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.
 - (iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
 - (v) Deleted.
 - (vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.
 - (vii) The imposition of a sentence greater than the lawful maximum.
 - (viii) A proceeding in a tribunal without jurisdiction.
- (3) That the allegation of error has not been previously litigated or waived.

<Subsec. (a)(4) is permanently suspended insofar as it references "unitary review" by Pennsylvania Supreme Court Order of Aug. 11, 1997, imd. effective.>
- (4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

The boilerplate allegation of the ineffectiveness of his counsel which sets forth one of the enumerated basis for relief under the Post-Conviction Relief Act is insufficient to establish that ineffectiveness since that petition is required to prove and to plead in what manner counsel was ineffective. In *Commonwealth v. Rivers*, 567 Pa. 239, 786 A.2d 923, 927 (2001), the Supreme Court set forth the burden of proof imposed the petitioner when he is requesting relief in a post-conviction relief petition when his claim is predicated upon the ineffectiveness of his counsel.

A cursory reading of the PCRA reveals that PCRA petitioners, to be eligible for relief, must, inter alia, plead and prove their assertions by a preponderance of the evidence. Section 9543(a). Inherent in this pleading and proof requirement is that the petitioner must not only state what his issues are, but also he must demonstrate in his pleadings and briefs how the issues will be proved. Moreover, allegations of constitutional violation or of ineffectiveness of counsel must be discussed "in the circumstances of the case." Section 9543(a)(2)(i-ii). Additionally, the petitioner must establish by a preponderance of evidence that because of the alleged constitutional violation or ineffectiveness, "no reliable adjudication of guilt or innocence could have taken place." Section 9543(a)(2)(i-ii). Finally, petitioner must plead and prove that the issue has not been waived or finally litigated, § 9543(a)(3), and if the issue has not been litigated earlier, the petitioner must plead and prove that the failure to litigate "could not have been the result of any rational, strategic or tactical decision by counsel." Section 9543(a)(4).

Moreover, because each of Rivers' claims is couched in terms of ineffectiveness of counsel, she must also prove, by a preponderance of the evidence, the following:

- (1) that there is merit to the underlying claim; (2) that counsel had no reasonable basis for his or her course of conduct; and (3) that there is a reasonable probability that, but for the act or omission challenged, the outcome of the proceeding would have been different. *Commonwealth v. Jones*, 546 Pa. 161, 175, 683 A.2d 1181, 1188 (1996). Counsel is presumed to be effective and Appellant has the burden of proving otherwise. *Commonwealth v. Marshall*, 534 Pa. 488, 633 A.2d 1100 (1993). Additionally, counsel cannot be considered ineffective for failing to raise a claim that is without merit. *Commonwealth v. Peterkin*, 538 Pa. 455, 649 A.2d 121 (1994)....

Commonwealth v. Holloway, 559 Pa. 258, 739 A.2d 1039, 1044 (1999).

Although all of Rivers' guilt phase claims are couched in the boilerplate language that there has been constitutional error and "to the extent that [counsel] failed to properly preserve, raise and litigate this claim, prior counsel was ineffective and such ineffective assistance of counsel undermines confidence in the outcome of the proceeding," for no guilt-phase claim does Rivers offer proof that in the circumstances of the case, no reliable adjudication of guilt or innocence could have taken place; and nowhere does she present the three-part ineffectiveness analysis set out above, and in no case does Rivers establish that her claims are not waived, § 9543(a)(3), or that the failure to litigate an issue earlier "could not have been the result of any rational, strategic or tactical decision by counsel," Section 9543(a)(4).^{FN1}

FN1. Rivers' guilt-phase claims are that (1) the trial court erred in failing to qualify the jury (2) the trial court improperly death qualified the jury; (3) the Commonwealth exercised peremptory challenges that were racially discriminatory; (4) trial counsel was ineffective in failing to request cautionary instructions concerning evidence of the appellant's other crimes and bad acts; (5) the trial court erred in preventing the defense from impeaching a Commonwealth witness; (6) the court erred in instructing the jury concerning prior convictions of Commonwealth witnesses; (7) trial counsel was ineffective in failing to request cautionary instructions with respect to inflammatory photographs of the deceased; (8) the trial court erred in failing to record the guilt and penalty phase charge conferences; (9) trial counsel was ineffective in failing to present the defense that the victim was killed by multiple perpetrators under circumstances which cast doubt on appellant's participation.

Discussion of the circumstances of the case in claims of ineffectiveness of counsel is a particularly important requirement of the PCRA. Circumstances include not only the totality of the evidence that was introduced at trial, but may include also facts concerning the prosecution of the case and the appellant's interactions with her lawyer. Nowhere does Rivers discuss her ineffectiveness claims in the circumstances of the evidence at trial.^{FN2} This is crucial, for courts need to be told why, when considering the totality of the case, the petitioner believes the claims she is making establish that the trial court could not have reliably adjudicated her guilt or innocence.

It is clear that Adams has failed to meet his burden to plead and to prove the basis for his claim that his trial counsel was ineffective. In reviewing the prior Opinions of the Superior Court filed in connection with Adams' first two petitions for post-conviction relief, it is unquestioned that the current claims of error are nothing more than a restatement of his former claims of error. While this Court set forth that it believed that the issues currently being raised by Adams had been previously litigated, his petition is fatally flawed since it is barred by the time jurisdiction requirements of the Post-Conviction Relief Act.

The Post-Conviction Relief Act, in Section 9545(b), sets forth the time requirements for filing a petition for relief.

§ 9545. Jurisdiction and proceedings

(b) Time for filing petition.—

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.

(4) For purposes of this subchapter, "government officials" shall not include defense counsel, whether appointed or retained.

These time limitations are jurisdictional in nature. *Commonwealth v. Fahy*, 558 Pa. 313, 737 A.2d 214 (1999). Since these time limitations are jurisdictional in nature, they are to be strictly construed and the Courts have no ability to ignore this mandatory requirement in an effort to resolve the underlying claims. *Commonwealth v. Gamboa-Taylor*, 562 Pa. 70, 753 A.2d 780 (2000). It is only when the petitioner meets one of the statutory exceptions to these limitations that the merits of his claim may be addressed. *Commonwealth v. Murray*, 562 Pa. 1, 753 A.2d 201 (2000).

There are three enumerated exceptions to the mandatory filing requirement and they are: the interference by government officials with the presentation of any claim for post-conviction relief; discovery of facts that could not previously been ascertained by the exercise of due diligence; and, the assertion of a constitutional right now recognized by either the Supreme Court of the United States or the Supreme Court of the Commonwealth of Pennsylvania. Since it is apparent on its face that Adams' petition was untimely filed, it was incumbent upon him not only to plead but also to demonstrate that his petition falls within one of these three enumerated exceptions. *Commonwealth v. Crews*, 581 Pa. 45, 863 A.2d 498 (2004). Even a cursory review of Adams' petition demonstrates that none of these exceptions have been asserted to allow any Court to review his unintelligible claims.

In order to obtain relief under the Post-Conviction Relief Act, Adams was required to file his petition within one year of the date that judgment of his sentence became final. 42 Pa.C.S.A. §9545(b)(1). Adams' judgment of sentence became final on October 27, 1994 and, accordingly, he had until December 27, 1994 to file the instant petition; however, his current petition was not filed until June 8, 2010. In his current petition Adams maintains that he is not bound by this jurisdictional requirement yet he has failed to assert one of the three exceptions to this time restriction. It is abundantly clear that Adams has failed to plead or to prove that his third petition falls within one of the three enumerated exceptions to that time-barring provision. Since this Court did not have jurisdiction to entertain his petition, it did what it was required to do and, that is, to dismiss his petition without a hearing. *Commonwealth v. Peterkin*, 554 Pa. 547, 722 A.2d 638 (1998).

Cashman, J.

Dated: September 1, 2011

¹ 42 Pa.C.S.A. §9543(a).

**Commonwealth of Pennsylvania v.
Robert Lee Allen a/k/a Anthony Flowers a/k/a Anthony Lee Kelly
a/k/a Robert Kelley a/k/a Glenn Brutch a/k/a David Allen**

Criminal Appeal—PCRA—Illegal Sentence—Time Credit

No. CC 200504884; 200600044; 200613382; 200617033; 200712839; 200713205. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

Cashman, J.—September 1, 2011.

OPINION

The sole issue presented in the instant appeal is whether or not the appellant's sentence at Criminal Complaint 200613382 is illegal since the Court, in sentencing the appellant, did not give him credit for the time he allegedly was incarcerated from January 16, 2007 through January 30, 2007. The appellant, Robert Lee Allen, (hereinafter referred to as "Allen"), was charged with three counts of the violation of the Controlled Substance, Drug, Device & Cosmetic Act on September 20, 2006. Allen was charged with: one count of delivery of a controlled substance, an ungraded felony; one count of possession with intent to deliver a controlled substance, also an ungraded felony; and, one count of possession of a controlled substance, an ungraded misdemeanor. On March 26, 2009, Allen plead guilty to these charges in addition to charges filed against him at five other criminal cases. Allen was sentenced to a period of incarceration of not less than four nor more than eight years with an effective date of March 26, 2009 with credit for time served of August 30, 2006; January 13-16, 2007; June 19-27, 2007; and August 2 through November 8, 2007, which period of incarceration was to be followed by a period of probation of three years, with the requirement of random drug screening.

Allen did not file any post-sentence motions nor did he file an appeal to the Superior Court; however, he did file several pro se motions, including a motion for post-conviction relief on March 26, 2010. On April 15, 2010, this Court appointed Charles Pass, III, to represent him in connection with this petition for post-conviction relief and Pass filed an Amended Petition on August 2, 2010. On January 20, 2011, this Court entered an Order denying his petition for post-conviction relief, from which Order Allen filed a timely appeal. Allen's claim that his sentence is illegal is predicated upon his belief that he was not properly credited with time from January 16, 2007 to January 30, 2007, with regard to his sentence of incarceration of four to eight years.

In order to be eligible for post-conviction relief under the Post-Conviction Relief Act, petitioner must be currently serving a sentence of imprisonment, probation or parole for the crimes committed. 42 Pa.C.S.A. §9543(a)(1)(i). Currently, Allen is incarcerated at SCI Chester serving his four to eight year sentence imposed upon him at 200613382. Allen was sentenced on March 26, 2009 and as previously noted, did not file any post-sentence motions or an appeal to the Superior Court. Accordingly, his sentence became final on April 26, 2009. Allen filed a pro se petition for post-conviction relief on March 26, 2010, and accordingly, that petition was timely filed since it was filed within one year of the date from which his conviction became final. 42 Pa.C.S.A. §9545(b)(3). Section 9543(a) of the Post-Conviction Relief Act sets forth the requirements of what a petitioner must plead and prove in order to be entitled to relief under that Act and provides as follows:

(a) General rule.—To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:

(1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:

- (i) currently serving a sentence of imprisonment, probation or parole for the crime;
- (ii) awaiting execution of a sentence of death for the crime; or
- (iii) serving a sentence which must expire before the person may commence serving the disputed sentence.

(2) That the conviction or sentence resulted from one or more of the following:

- (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
- (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
- (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.
- (iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
- (v) Deleted.
- (vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.
- (vii) The imposition of a sentence greater than the lawful maximum.
- (viii) A proceeding in a tribunal without jurisdiction.

(3) That the allegation of error has not been previously litigated or waived.

<Subsec. (a)(4) is permanently suspended insofar as it references "unitary review" by Pennsylvania Supreme Court Order of Aug. 11, 1997, imd. effective.>

(4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

Allen has alleged in his petition and in his current appeal that his sentence was illegal since he was not given all of the appropriate credits to which he was entitled and, in particular, the credit for his period of incarceration from January 16 through January 30, 2007. In alleging that this Court failed to award the proper credit for time spent in custody prior to sentencing, Allen has questioned the legality of his sentence and that claim is cognizable under the Post-Conviction Relief Act. *Commonwealth v. Flowers*, 930 A.2d 586 (Pa. Super. 2007). This challenge to the legality of the sentence cannot be waived. *Commonwealth v. Davis*, 760 A.2d 406 (Pa. Super. 2000).

Allen is entitled to credit against his maximum term and any minimum term for all the time he spent in custody as a result of the criminal charges for which he is in prison. This includes time served in custody prior to trial and pending sentencing. 42 Pa.C.S.A. §9760.¹ Allen was arrested and charged on September 20, 2006 with three counts of the violation of the Controlled Substance, Drug, Device & Cosmetic Act. Allen's six cases were subject to numerous defense postponements including one that occurred as a result of Allen's failure to appear on the date of trial. A bench warrant was issued for his arrest and he was arrested on January 13, 2007. Allen seeks to have additional credit against his sentence for time he was allegedly incarcerated from January 13, 2007 until January 30, 2007. In support of that contention, Allen submitted, in connection with his petition for post-conviction relief, a copy of the defense postponement submitted by his then trial counsel, which indicated that Allen was in jail. The problem with this contention, however, is that Allen was not in jail but out on bail during that period of time.

In reviewing the docket sheet prepared in connection with his case filed at 200613382, it shows that on January 16, 2007, Allen's bond was reinstated and he was released from the Allegheny County Jail. The Allegheny County Jail records also indicate that Allen was released from jail on January 16, 2007, with respect to his case filed at CC No. 200613382. The sentencing order that was filed in connection with that case gave Allen credit for the period of time that he was in the jail, that being from January 13, 2007, the date of his arrest on the bench warrant, through January 16, 2007, the date that bail was posted and he was released from the Allegheny County Jail. With respect to this case it is clear that all of the appropriate time credits to which Allen was entitled were given to him at the time that he was sentenced and, accordingly, his sentence was not illegal and he was not entitled to relief under the Post-Conviction Relief Act.

Cashman, J.

Dated: September 1, 2011

¹ That Section of the Sentencing Code provides as follows:

§ 9760. Credit for time served

After reviewing the information submitted under section 9737 (relating to report of outstanding charges and sentences) the court shall give credit as follows:

(1) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. Credit shall include credit for time spent in custody prior to trial, during trial, pending sentence, and pending the resolution of an appeal.

(2) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody under a prior sentence if he is later re-prosecuted and resented for the same offense or for another offense based on the same act or acts. This shall include credit in accordance with paragraph (1) of this section for all time spent in custody as a result of both the original charge and any subsequent charge for the same offense or for another offense based on the same act or acts.

(3) If the defendant is serving multiple sentences, and if one of the sentences is set aside as the result of direct or collateral attack, credit against the maximum and any minimum term of the remaining sentences shall be given for all time served in relation to the sentence set aside since the commission of the offenses on which the sentences were based.

(4) If the defendant is arrested on one charge and later prosecuted on another charge growing out of an act or acts that occurred prior to his arrest, credit against the maximum term and any minimum term of any sentence resulting from such prosecution shall be given for all time spent in custody under the former charge that has not been credited against another sentence.

Commonwealth of Pennsylvania v. Maurice Edward Williamson

Criminal Appeal—PCRA—Conflict of Interest by Appellate Counsel—Time Barred Petition

No. CC 9512777; 9609343. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

Cashman, J.—September 2, 2011.

OPINION

The appellant, Maurice Williamson, (hereinafter referred to as "Williamson"), has filed the instant appeal as a result of the denial without a hearing of his second petition for post-conviction relief. In his statement of matters complained of on appeal, Williamson maintains that this Court erred in denying him a hearing on his claim that his appellate counsel had a conflict of interest. Williamson further maintains that this Court abused its discretion when it appointed his appellate counsel when it knew or should have known that his appellate counsel had a conflict of interest. Finally, Williamson maintains that his appellate counsel was ineffective when that appellate counsel had a conflict of interest with Williamson's former counsel in that at one time Williamson's appellate counsel was employed by Williamson's former counsel.

On October 2, 1996, Williamson was convicted of the crimes of aggravated assault, robbery, possession of a firearm, possession of a firearm without a license. On December 2, 1996, Williamson was sentenced to an aggregate period of incarceration of not less than twenty-three and one-half nor more than forty-five years. His sentence was affirmed by the Superior Court on April 3, 1998, and on September 8, 1998, the Pennsylvania Supreme Court denied his request for allowance to file an appeal.

On July 16, 1999, Williamson filed a pro se petition for post-conviction relief and counsel was appointed for him and that counsel subsequently filed a *Turner/Finley* letter indicating that the claims that Williamson sought to raise in his petition for post-conviction relief had no merit. A brief was filed in support of the *Turner/Finley* letter and his counsel also filed a request to be permitted to withdraw as counsel, which request was granted. On February 26, 2003, Williamson's petition for post-conviction relief was denied. Williamson filed a pro se appeal from the dismissal of his petition and the Superior Court on April 14, 2004, finding

that Williamson's post-conviction counsel had been improperly permitted to withdraw, vacated this Court's order dismissing his petition for post-conviction relief and remanded the record back to this Court so that new counsel could be appointed. New counsel was appointed and on March 20, 2006, an amended petition for post-conviction relief was filed. Williamson apparently was unhappy with his new counsel's representation and filed a motion for the change or "withdrawal" of counsel. On June 13, 2006, this Court dismissed his amended petition for post-conviction relief. Williamson then filed another pro se appeal to the Superior Court and the Superior Court remanded the record to this Court, while retaining jurisdiction, so that a hearing could be held pursuant to *Commonwealth v. Grazier*, 552 Pa. 9, 713 A.2d 81 (1998), to make a determination as to whether or not Williamson's waiver of counsel was knowingly, intelligently and voluntarily made. The hearing was held on December 21, 2007, at which point this Court determined that Williamson wanted to be represented and this Court appointed his appellate counsel, Matthew Debbis, to represent him. On August 13, 2008, the Superior Court filed its Opinion affirming this Court's Order dismissing Williamson's petition for post-conviction relief.

On August 28, 2008, Williamson filed his second pro se petition for post-conviction relief. The basis for this petition was that his appellate counsel, Matthew Debbis, had a conflict of interest since at one time he was employed by Williamson's former counsel in the Allegheny County Office of Conflict Counsel. After reviewing Williamson's pro se petition for post-conviction relief, this Court on May 17, 2010, sent out its notice of intention to dismiss his petition without a hearing on the basis that there were no claims that had not been previously litigated and that there were no meritorious issues raised in his petition. On February 14, 2011, this Court dismissed Williamson's petition for post-conviction relief and he filed a timely appeal to the Superior Court. Williamson was directed pursuant to Pennsylvania Rule of Appellate Procedure 1925(b) to file a concise statement of matters complained of on appeal. In that statement Williamson makes three bald assertions of a conflict of interest of his appellate counsel, in one of which he maintains demonstrates the fact that his appellate counsel could not have been effective since a conflict of interest existed.

In order to be entitled to relief under the Post-Conviction Relief Act, a petitioner must meet the eligibility requirements set forth in 9543(a) of the Post-Conviction Relief Act.¹ In order to avail himself of the benefits of the Post-Conviction Relief Act, Williamson has maintained in one of his claims of error that his appellant counsel was ineffective as a result of the conflict of interest he had with Williamson's prior appellate counsel. The mere fact that Williamson has alleged the ineffectiveness of his appellate counsel is insufficient to establish his entitlement under the Post-Conviction Relief Act since he is required to plead and prove how his counsel was ineffective and how he was prejudiced by that ineffectiveness. In *Commonwealth v. Rivers*, 567 Pa. 239, 786 A.2d 923, 927-929 (2001), the Pennsylvania Supreme Court explained the reasoning why a petitioner is required not only to plead but also to prove the manner in which counsel was ineffective and how that ineffectiveness prejudiced the petitioner.

Also misplaced is Rivers' belief that because she has "asserted below and in this Court" the ineffectiveness of counsel, violations of the constitution, and that such violations undermined the truth determining process, her guilt phase claims are not waived.

A cursory reading of the PCRA reveals that PCRA petitioners, to be eligible for relief, must, inter alia, plead and prove their assertions by a preponderance of the evidence. Section 9543(a). Inherent in this pleading and proof requirement is that the petitioner must not only state what his issues are, but also he must demonstrate in his pleadings and briefs how the issues will be proved. Moreover, allegations of constitutional violation or of ineffectiveness of counsel must be discussed "in the circumstances of the case." Section 9543(a)(2)(i-ii). Additionally, the petitioner must establish by a preponderance of evidence that because of the alleged constitutional violation or ineffectiveness, "no reliable adjudication of guilt or innocence could have taken place." Section 9543(a)(2)(i-ii). Finally, petitioner must plead and prove that the issue has not been waived or finally litigated, § 9543(a)(3), and if the issue has not been litigated earlier, the petitioner must plead and prove that the failure to litigate "could not have been the result of any rational, strategic or tactical decision by counsel." Section 9543(a)(4).

In *Commonwealth v. Collins*, 598 Pa. 397, 957 A.2d 237, 251 (2008), the Pennsylvania Supreme Court defined what a conflict of interest was and what a petitioner's burden was in establishing how that conflict prejudiced him.

An appellant cannot prevail on a preserved conflict of interest claim absent a showing of actual prejudice. *Commonwealth v. Karenbauer*, 552 Pa. 420, 715 A.2d 1086, 1094 (1998). Nevertheless, we presume prejudice when the appellant shows that trial counsel was burdened by an "actual"—rather than mere "potential"—conflict of interest. *Commonwealth v. (Thomas) Hawkins*, 567 Pa. 310, 787 A.2d 292, 297 (2001). To show an actual conflict of interest, the appellant must demonstrate that: (1) counsel "actively represented conflicting interests"; and (2) those conflicting interests "adversely affected his lawyer's performance." *Id.* at 297-98 (quoting *Commonwealth v. Buehl*, 510 Pa. 363, 508 A.2d 1167, 1175 (1986) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) and holding that "[a]ppellant's defense was not prejudiced by the fact that, at a prior time, his counsel had represented a Commonwealth witness"). Clients' interests actually conflict when "during the course of representation" they "diverge with respect to a material factual or legal issue or to a course of action." *Commonwealth v. Padden*, 783 A.2d 299, 310 (Pa.Super.2001); *Commonwealth v. Toro*, 432 Pa.Super. 383, 638 A.2d 991, 996 (1994); In Interest of Saladin, 359 Pa.Super. 326, 518 A.2d 1258, 1261 (1986).

Similarly, in *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1 (2008), the Court acknowledged the burden imposed upon petitioner when he alleges that a conflict of interest exists and the obligation of the petitioner to demonstrate that the conflict undermined petitioner's counsel's ability to effectively represent him.

An attorney owes his client a duty of loyalty, including a duty to avoid conflicts of interest. *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. The attorney's duty of loyalty "is the obligation of counsel to avoid actual conflicts of interest that would adversely affect his ability to perform on behalf of his client." *Commonwealth v. Washington*, 583 Pa. 566, 880 A.2d 536, 543 (2005). To establish a breach of that duty, the client must show the existence of an actual conflict of interest that adversely affected the outcome of the case. *Id.* An actual conflict of interest "is evidenced whenever during the course of representation, the interests of appellant—and the interests of another client towards whom counsel bears obligations—diverge with respect to a material factual or legal issue or to a course of action." In Interest of Saladin, 359 Pa.Super. 326, 518 A.2d 1258, 1261 (1986) (discussing *Commonwealth v. Breaker*, 456 Pa. 341, 318 A.2d 354, 356 (1974)).

In Williamson's petition for post-conviction relief, the conflict of interest that he alleges is that at one time his appellate counsel, Matthew Debbis, was employed by the Allegheny County Office of Conflict Counsel and the managing attorney was his former counsel, J. Richard Narvin. Williamson fails to disclose what the conflict was and how that conflict in any way prejudiced him. Williamson was unable to disclose that there was a competing interest, which prevented his appellate counsel from effectively representing him in connection with the appeal that he had filed on his first petition for post-conviction relief. Since Williamson was unable to plead or to prove what the conflict of interest was, there was no reason to have a hearing on the boilerplate assertion. However, Williamson's petition for post-conviction relief was fatally defective since it was time-barred.

A petition for post-conviction relief must be filed within one year of the date that the judgment of sentence becomes final. This jurisdictional requirement is set forth in Section 9545(b) of the Post-Conviction Relief Act as follows:

(b) Time for filing petition.—

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.

(4) For purposes of this subchapter, "government officials" shall not include defense counsel, whether appointed or retained.

The timeliness of a petition under the Post-Conviction Relief Act is jurisdictional. *Commonwealth v. Murray*, 562 Pa. 1, 753 A.2d 201 (2000). A petition for relief under the Post-Conviction Relief Act, including a second or subsequent petition, must be filed within one year of the date that the judgment of sentence is final unless the petition alleges and the petitioner proves an exception to the time filing requirement of the Act. *Commonwealth v. Gamboa-Taylor*, 560 Pa. 70, 753 A.2d 780 (2000). The three exceptions to this time requirement are set forth in Section 9545(b)(1)(i)(ii)(iii) as follows:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

Williamson was sentenced on December 2, 1996, and his judgment of his sentence was affirmed by the Superior Court on April 3, 1998. On September 8, 1998, the Pennsylvania Supreme Court denied his request for an allowance to take an appeal. Williamson did not file a request for a writ of certiorari to the United States Supreme Court and, accordingly, his judgment of sentence became final on November 8, 1998.² The current petition for post-conviction relief was filed on August 28, 2010; almost twelve years after his judgment of sentence had become final.³ The grace provisions within the Post-Conviction Relief Act which allows an otherwise untimely filed petition to be filed within one year following the effective date of the 1995 amendments to the Post-Conviction Relief Act do not apply here since this is Williamson's second petition. *Commonwealth v. Thomas*, 718 A.2d 326 (Pa. Super. 1999). The only way to avoid this jurisdictional time bar would have been for him to have plead and then proven that he met one or more of the time-barring exceptions. Nowhere in his petition had he plead or proven any one of those exceptions.

Since it is clear on the face of the record that Williamson's petition was untimely filed, it was his burden to prove and to demonstrate that his petition fell within one of those three exceptions to the jurisdictional requirement. *Commonwealth v. Cruse*, 581 Pa. 45, 863 A.2d 498 (2004). When a petition is untimely filed, there is no jurisdiction vested in the Court to entertain any of the claims on their merits. *Commonwealth v. Morris*, 573 Pa. 157, 822 A.2d 684 (2003). In reviewing Williamson's second petition for post-conviction relief, it is clear that he does not meet the enumerated exceptions set forth in the Act nor has he ever attempted to plead or to prove those exceptions. Since this Court had no jurisdiction to entertain his petition, it was accordingly dismissed without a hearing. *Commonwealth v. Lambert*, 584 Pa. 461, 884 A.2d 848 (2005).

Cashman, J.

Dated: September 2, 2011

¹ 42 Pa.C.S.A. §9543(a).

§ 9543. Eligibility for relief

(a) **General rule.**—To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:

- (1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:
 - (i) currently serving a sentence of imprisonment, probation or parole for the crime;
 - (ii) awaiting execution of a sentence of death for the crime; or
 - (iii) serving a sentence which must expire before the person may commence serving the disputed sentence.
- (2) That the conviction or sentence resulted from one or more of the following:
 - (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
 - (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
 - (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.
 - (iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
 - (v) Deleted.
 - (vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.
 - (vii) The imposition of a sentence greater than the lawful maximum.
 - (viii) A proceeding in a tribunal without jurisdiction.
- (3) That the allegation of error has not been previously litigated or waived.

<Subsec. (a)(4) is permanently suspended insofar as it references "unitary review" by Pennsylvania Supreme Court Order of Aug. 11, 1997, imd. effective.>
- (4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

² 42 Pa.C.S.A. §9545(b)(3); former United States Supreme Court Rule 20.1.

³ In his brief in support of his petition for post-conviction relief, Williamson maintains that his current petition is timely filed since he believes that by filing his second petition for post-conviction relief within one year of the date of the decision by the Pennsylvania Superior Court on his first petition, that that satisfied the one year time requirement. What Williamson misconstrues is the date from when his sentence became final and that was on November 8, 1998.

**Commonwealth of Pennsylvania v.
Alex Lee Barton**

Criminal Appeal—Sufficiency—Lesser Included Offenses—Harassment—Indecent Assault

No. CC 201001013. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Cashman, J.—September 29, 2011.

OPINION

The appellant, Alex Lee Barton, (hereinafter referred to as "Barton"), was charged with two counts of indecent assault and elected to proceed with a non-jury trial. Following that trial, this Court found him not guilty of the two counts of indecent assault; however, it did find him guilty of two counts of harassment, summary offenses, as lesser-included offenses of the charges of indecent assault. In light of the facts of Barton's case, this Court chose not to impose any further penalty on him at the time of sentencing. Barton did not file a post-sentencing motion but, rather, filed a direct appeal to the Superior Court and in his statement of matters complained of on appeal, has suggested that the evidence was insufficient to sustain his convictions for the summary offenses of harassment; that harassment is not a lesser included offense of indecent assault; and, that his right to due process was violated since he was convicted of a crime for which he had never been charged.

On August 5, 2009, Barton and Deena Clark, (hereinafter referred to as "Clark"), were employed as hairstylists at the Daquila Salon in the City of Pittsburgh. Barton and Clark had adjoining workstations and at approximately 2:00 p.m. on August 5, 2009, Clark was waxing a customer when Barton stuck a finger down her pants and touched her buttocks. Clark immediately turned around and yelled at Barton, demanding to know what he was doing but Barton only laughed. Approximately one hour later, Clark was tending to another customer when Barton put the comb handle he was using on his customer once again down Clark's pants. Barton testified that he did not stick his hand or the comb handle down Clark's pants but, rather, as she was working on her customers, her underwear became exposed and he snapped her underwear in an effort to let her know that her underwear was visible.

Initially, Barton maintains that the evidence was insufficient to sustain his convictions for the lesser-included offenses of harassment. In *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745, 751 (2000), the Pennsylvania Supreme Court set forth the standard to be employed when an appellant asserts the claim of the insufficiency of the evidence as follows:

A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. *Commonwealth v. Karkaria*, 533 Pa. 412, 625 A.2d 1167 (1993). Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. *Commonwealth v. Santana*, 460 Pa. 482, 333 A.2d 876 (1975). When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. *Commonwealth v. Chambers*, 528 Pa. 558, 599 A.2d 630 (1991).

The crime of harassment is set forth in **18 Pa.C.S.A. §2709** as follows:

- (a) **Offense defined.**—A person commits the crime of harassment when, with intent to harass, annoy or alarm another, the person:
- (1) strikes, shoves, kicks or otherwise subjects the other person to physical contact, or attempts or threatens to do the same;
 - (2) follows the other person in or about a public place or places;
 - (3) engages in a course of conduct or repeatedly commits acts which serve no legitimate purpose;
 - (4) communicates to or about such other person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures;
 - (5) communicates repeatedly in an anonymous manner;
 - (6) communicates repeatedly at extremely inconvenient hours; or
 - (7) communicates repeatedly in a manner other than specified in paragraphs (4), (5) and (6).

The Commonwealth established through the testimony of the victim that she was alarmed and annoyed by the fact that Barton put both his finger and a comb handle down her slacks. She demanded to know why Barton had done this and he only laughed, demonstrating his intent to harass and/or annoy the victim. Her annoyance and alarm was demonstrated by the fact that she was yelling at him not only for the first incident but, also, the second. When the record in this case is reviewed it is clear that Barton's actions were designed to annoy and harass the victim and those actions constituted the offense of harassment.

Barton's second claim of error is that harassment is not a lesser-included offense of indecent assault. The crime of indecent assault is defined in **18 Pa.C.S.A. §3126** as follows:

- (a) **Offense defined.**—A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact with the person or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant and:
- (1) the person does so without the complainant's consent;
 - (2) the person does so by forcible compulsion;
 - (3) the person does so by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
 - (4) the complainant is unconscious or the person knows that the complainant is unaware that the indecent contact is occurring;
 - (5) the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance;
 - (6) the complainant suffers from a mental disability which renders the complainant incapable of consent;
 - (7) the complainant is less than 13 years of age; or
 - (8) the complainant is less than 16 years of age and the person is four or more years older than the complainant and the complainant and the person are not married to each other.

In determining whether or not offenses are greater and lesser-included offenses, it is necessary to compare the elements of those offenses. If the elements of the lesser offense are all included in the elements of the greater offense and the greater offense has one additional element which is different from the lesser offense, then that lesser offense is, in fact, a lesser included offense. *Commonwealth v. Anderson*, 538 Pa. 574, 650 A.2d 20 (1994). In addition to looking at the elements of each offense, a factual analysis must be undertaken. If the two offenses are mutually exclusive and the same evidence could not possibly have satisfied the 4 distinct elements of the two crimes, then they cannot become lesser-included offenses. *Commonwealth v. Collins*, 564 Pa. 144, 764 A.2d 1056 (2001). Using these standards it is clear that harassment is a lesser-included offense of indecent assault since the crime of indecent assault has a different and distinct element and, that is, indecent contact for the purpose of arousing sexual gratification in either the victim or the defendant. The facts of this case obviously demonstrate what Barton's activities were and they satisfy the elements of the offense of harassment.

Since harassment is a lesser-included offense there was no requirement for it to be charged as an indictable offense. When the Commonwealth charged Barton with the crime of indecent assault, it placed him on notice of the nature of his offensive conduct and he was fully apprised of the elements of both indecent assault and harassment.

Cashman, J.