PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

Rights of Property Owners During Conservatorship Proceedings – Appeal of Interlocutory Order

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Plaintiff sustained injuries in a trip-and-fall incident on Defendant's premises and was awarded $95,000 at trial. Defendant appealed citing 16 errors. Deponent/Defendant's employee Thomas Stuby repeatedly stated that he was unsure whether Plaintiff was an individual he saw in Defendant's store kicking a floor mat on the day of Plaintiff's accident. The probative value of this testimony was outweighed by the potential prejudice because it had no bearing on negligence but could lead the jury to believe that Plaintiff staged his fall. Pa.R.E. 403. The testimony could be construed as inadmissible speculation. Winschel v. Jain, 925 A.2d 782 (Pa.Super. Ct. 2007). Because Stuby died prior to trial, and his testimony was not recorded, a credibility analysis would be difficult for the jury. Testimony by Stuby's supervisor that he heard Stuby say, upon seeing Plaintiff hours later, that Plaintiff was the person kicking the mat earlier is hearsay. The statement is not an excited utterance because the circumstances did not cause a "startling event" and the statement was not spontaneous. Pa.R.E. 803(1); Commonwealth v. Boczkowski, 846 A.2d 75 (Pa. 2004). The statement was not made "immediately after [Stuby] perceived" the event because it was about a customer he saw hours earlier and so does not qualify under the present sense exception. Pa.R.E. 803(2); Commonwealth v. Coleman, 326 A.2d 387 (Pa. 1974). Defendant's study regarding incidents with the type of mat involved was properly admitted to rebut Defendant's claim that Plaintiff's fall was an isolated incident. A subsequent remedial measures objection was not raised at trial and therefore waived. Defendant's testimony about its safety culture opened the door for cross-examination regarding whether there can be instances when Defendant is negligent as rebuttal. A witness who had not provided an expert report was properly prohibited from giving testimony based on specialized knowledge. Plaintiff's premises safety expert did not misstate the standard of care and so his testimony was not stricken. References to Plaintiff's lawsuits against various retailers for failing to hire him due to a criminal conviction were properly excluded as Defendant was permitted to question Plaintiff regarding his physical condition when applying for these jobs without the jury improperly hearing about the conviction. Pa.R.E. 404, 609. Surveillance video of Plaintiff was properly excluded when not disclosed until the final day of trial. Negative interrogatory answers and failure to disclose on the pre-trial statement would result in "unfair and prejudicial surprise." Such surveillance video is substantive evidence of a disputed injury, not rebuttal or impeachment. Bindschusz v. Phillips, 771 A.2d 803 (Pa.Super.Ct. 2001). The judge did not err by refusing to instruct the Plaintiff to "answer the question" when Plaintiff sought clarification regarding questions and/or gave evasive answers. The judge instructed the jury regarding evaluation of evasive testimony when determining credibility, granted requests to strike evasive testimony, and ordered that documented answers be stipulated to when Plaintiff could not remember facts, thus properly handling Plaintiff's testimony. Jurors who indicated bias towards either party were properly stricken as the judge was satisfied, observing their conduct, that they would be unable to be impartial. Jury instructions based upon the Restatement (Second) of Torts §§343 and 343A and Hyatt v. County of Allegheny, 547 A.2d 1304 (Pa. 1988) accurately instructed the jury concerning Defendant's duty. Defendant's proposed jury instruction incompletely stated the duty and was properly rejected. Delay damages were properly calculated where the delay was caused by Defendant's delay in scheduling its corporate representative's deposition. Motions for directed verdict and nonsuit were properly denied where Defendant alleged Plaintiff had not met his burden regarding notice but several of Defendant's employees testified to seeing the type of mat involved in the same position as it was when it tripped Plaintiff.

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ALLEGHENY COUNTY COURT OF COMMON PLEAS

Nominating Petition Challenge – Notice Requirements

Objectors Rachel James and Jeffrey Dzamko filed a Nominating Petition Challenge to Steven Oberst's Petition for Democrat Candidate for City of Pittsburgh Member of Council District 1 subject to 25 P.S. § 2937. Under 25 P.S. § 2937, any individual may challenge a nominating petition if notice of the challenge is provided to the court and the nomination officer or board within 7 days of the last day for nomination paperwork to be filed. In this matter, the petition challenging the candidacy of Steven Oberst was filed with the Department of Court Records and was left inside the board of elections office after the office was closed for the day on the final day for filing. The Court ruled that placing the petition in an empty office did not constitute notice of the petition until the next day, when the board of elections office would have seen the petition and would have been on actual notice. Additionally, the Court further explains that the Department of Court Records website does not provide notice to any party upon an electronic filing. As such, filing such a petition with the Department of Court Records does not satisfy the presentation requirement of 25 P.S. § 2937. As such, the Court dismissed the Petition as being untimely.

Nominating Petition Challenge – Notice Requirements

Objectors Mitchell Schwartz and Lisa Freeman filed a Nominating Petition Challenge to Tracy Royston's Petition for Democrat Candidate for City of Pittsburgh Controller subject to 25 P.S. § 2937. Under 25 P.S. § 2937, any individual may challenge a nominating petition if notice of the challenge is provided to the court and the nomination officer or board within 7 days of the last day for nomination paperwork to be filed. In this matter, the petition challenging the candidacy of Tracy Royston was filed with the Department of Court Records and was left inside the board of elections office after the office was closed for the day on the final day for filing. The Court ruled that placing the petition in an empty office did not constitute notice of the petition until the next day, when the board of elections office would have seen the petition and would have been on actual notice. Additionally, the Court further explains that the Department of Court Records website does not provide notice to any party upon an electronic filing. As such, filing such a petition with the Department of Court Records does not satisfy the presentation requirement of 25 P.S. § 2937. As such, the Court dismissed the Petition as being untimely.

PLJ

The Pittsburgh Legal Journal Opinions *are published fortnightly by the*
Allegheny County Bar Association
400 Koppers Building
Pittsburgh, Pennsylvania 15219
412-261-6255
www.acba.org

Circulation 5,183

PLJ Editorial Staff

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Opinions

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AUTO SHOWER II, INC., Petitioner vs. MARK DARIUS JUSZCZAK and KATERINA P. JUSZCZAK, Respondents

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Respondents, Mark and Katerina Juszczak, own property subject to a conservatorship under 68 P.S. § 1101 et. seq. by Petitioner Auto Shower, II., Inc. During the course of the conservatorship proceedings, Respondents deeded the property to themselves but added restrictive covenants on land use. Petitioner challenged Respondents' right to do so. The Court ruled that 68 P.S. § 1101 et. seq. places no restrictions on the property owners that would limit their ability to transfer or restrict their property during conservatorship proceedings. However, the Court did allow for an interlocutory appeal of this order under 42 Pa.C.S. § 702(b), as the issue before the Court is a question of law for which there is substantial grounds for difference of opinion, and allowing an immediate appeal of this issue may materially advance the termination of this matter.

Case No.: GD-18-006863. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. McVay, J. April 11, 2023.

Pa. R.A.P. 1925 STATEMENT

On August 16th, 2022, I denied Petitioner, Auto Shower II, Inc's, ("Auto Shower") Motion to Strike the Restrictive Covenant. Auto Shower then on September 7th, 2022, filed an Application for Certification of Order for Interlocutory Review Pursuant to 42 Pa.C.S. § 702(b) and Pa.R.A.P. 1311(a)(1), which I granted in my amended October 6th, 2022, Order of Court.

Under Pa.R.A.P. 1925(a)(1), if the reasons for denying the Motion to Strike Restrictive Covenant appears on the record, I am not required to file a new opinion, and I am permitted to specify in writing where in the record such reasons may be found. I am specifying that in addition to attaching my filed Order of Court as Exhibit A, the reasons for denying Auto Shower's Petition appear on the record in my amended Order of Court which was filed on October 6th, 2022.

EXHIBIT A

ORDER OF COURT

AND NOW, this 6th day of October, 2022, after argument was held for the Petitioner, Auto Shower, II., Inc.'s ("Auto Shower") Motion to Strike the Restrictive Covenant, it is ORDERED, ADJUDGED, and DECREED, that the Motion is DENIED. Under 68 P.S. § 1101 et. seq., there are no limits placed on the owners that would prohibit them from transferring or restricting their property interest while the property is subject to conservatorship.

Pursuant to 42 Pa.C.S. § 702(b), the undersigned certifies that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this matter.

BY THE COURT:
/s/The Hon. John T. McVay Jr.

SALVATORE CASTELLUCCIO vs. GIANT EAGLE, INC.

Premises Liability – Appeals – Prejudice – Hearsay – Surveillance Evidence

Plaintiff sustained injuries in a trip-and-fall incident on Defendant's premises and was awarded $95,000 at trial. Defendant appealed citing 16 errors. Deponent/Defendant's employee Thomas Stuby repeatedly stated that he was unsure whether Plaintiff was an individual he saw in Defendant's store kicking a floor mat on the day of Plaintiff's accident. The probative value of this testimony was outweighed by the potential prejudice because it had no bearing on negligence but could lead the jury to believe that Plaintiff staged his fall. Pa.R.E. 403. The testimony could be construed as inadmissible speculation. Winschel v. Jain, 925 A.2d 782 (Pa.Super. Ct. 2007). Because Stuby died prior to trial, and his testimony was not recorded, a credibility analysis would be difficult for the jury. Testimony by Stuby's supervisor that he heard Stuby say, upon seeing Plaintiff hours later, that Plaintiff was the person kicking the mat earlier is hearsay. The statement is not an excited utterance because the circumstances did not cause a "startling event" and the statement was not spontaneous. Pa.R.E. 803(1); Commonwealth v. Boczkowski, 846 A.2d 75 (Pa. 2004). The statement was not made "immediately after [Stuby] perceived" the event because it was about a customer he saw hours earlier and so does not qualify under the present sense exception. Pa.R.E. 803(2); Commonwealth v. Coleman, 326 A.2d 387 (Pa. 1974). Defendant's study regarding incidents with the type of mat involved was properly admitted to rebut Defendant's claim that Plaintiff's fall was an isolated incident. A subsequent remedial measures objection was not raised at trial and therefore waived. Defendant's testimony about its safety culture opened the door for cross-examination regarding whether there can be instances when Defendant is negligent as rebuttal. A witness who had not provided an expert report was properly prohibited from giving testimony based on specialized knowledge. Plaintiff's premises safety expert did not misstate the standard of care and so his testimony was not stricken. References to Plaintiff's lawsuits against various retailers for failing to hire him due to a criminal conviction were properly excluded as Defendant was permitted to question Plaintiff regarding his physical condition when applying for these jobs without the jury improperly hearing about the conviction. Pa.R.E. 404, 609. Surveillance video of Plaintiff was properly excluded when not disclosed until the final day of trial. Negative interrogatory answers and failure to disclose on the pre-trial statement would result in "unfair and prejudicial surprise." Such surveillance video is substantive evidence of a disputed injury, not rebuttal or impeachment. Bindschusz v. Phillips, 771 A.2d 803 (Pa.Super.Ct. 2001). The judge did not err by refusing to instruct the Plaintiff to "answer the question" when Plaintiff sought clarification regarding questions and/or gave evasive answers. The judge instructed the jury regarding evaluation of evasive testimony when determining credibility, granted requests to strike evasive testimony, and ordered that documented answers be stipulated to when Plaintiff could not remember facts, thus properly handling Plaintiff's testimony. Jurors who indicated bias towards either party were properly stricken as the judge was satisfied, observing their conduct, that they would be unable to be impartial. Jury instructions based upon the Restatement (Second) of Torts §§343 and 343A and Hyatt v. County of Allegheny, 547 A.2d 1304 (Pa. 1988) accurately instructed the jury concerning Defendant's duty. Defendant's proposed jury instruction incompletely stated the duty and was properly rejected. Delay damages were properly calculated where the delay was caused by Defendant's delay in scheduling its corporate representative's deposition. Motions for directed verdict and nonsuit were

properly denied where Defendant alleged Plaintiff had not met his burden regarding notice but several of Defendant's employees testified to seeing the type of mat involved in the same position as it was when it tripped Plaintiff.

Case No.: GD 16-5861. Superior Court docket no. 1086 WDA 2022. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Hertzberg, J. December 8, 2022.

OPINION

Plaintiff Salvatore Castelluccio tripped and fell on a mat in the produce section of the Moon Township Giant Eagle grocery store. Mr. Castelluccio injured his cervical spine when he fell and needed two surgeries to treat the injuries. I presided over the jury trial in which the jury found Giant Eagle negligent and awarded Mr. Castelluccio $95,000 in damages. Giant Eagle has appealed to the Superior Court of Pennsylvania, claiming in its concise statement of errors complained of on appeal, that this verdict resulted from me committing sixteen different errors beginning with jury selection and continuing to the point after the trial when I calculated delay damages. I will address the errors alleged in the concise statement of errors complained of on appeal in the same order as they are set forth by Giant Eagle. The roman numerals before each topic in Giant Eagle's concise statement will be the same as those below.

I.

Giant Eagle first contends I made an error by excluding the portion of employee Thomas Stuby's deposition testimony where he testified to seeing a customer kicking or shifting a mat in the produce area on the day Mr. Castelluccio was injured, April 4, 2014. Giant Eagle contends Mr. Stuby testified it was Mr. Castelluccio who he saw kicking the mat and Mr. Stuby also testified to seeing Mr. Castelluccio again later that day. Mr. Stuby gave his deposition on November 6, 2017 without video recording and Mr. Stuby died between then and the trial. The transcript of Mr. Stuby's deposition has been docketed (see Document 48 filed 10/6/2021), but I disagree with Giant Eagle's characterization of Mr. Stuby's testimony. From the transcript, it is impossible for me to conclude Mr. Stuby saw Mr. Castelluccio kicking the mat.

During his November 6, 2017 deposition Mr. Stuby testified that he was working as a part-time produce clerk on the day Mr. Castelluccio was injured. Below are relevant portions of the questions asked of Mr. Stuby and his answers:

Q: do you have a recollection of meeting Mr. Castelluccio that day?

A: Inadvertently, yes. I was sort of taking care of the non-organic section, and to me, I don't know, he's – I sort of can judge a little bit how people are, but I didn't see the guy with a buggy or a basket or anything, and he was coming through the produce area. And he was, like, sort of, like, kicking or shifting the rug a little bit, and I said, you've got to be careful; these rugs do move. He said, okay. So he left and I went in, and my manager, which is Adam, I said, you know, we got a guy out there, I don't know what he's up to, but he sort of – he doesn't have a buggy. He wasn't asking me any questions about food or produce, and he's out there, like, kicking the carpet or shifting the carpet a little bit, like, kicking on it. So from that point on, Adam said he'll check it out, and other than that, I didn't see him. I usually work 9:00 until 3:00, 2:00 or 3:00. And approximately around noon, after lunch or before lunch, I see a guy, not knowing it's this guy, with a sling. He's taking pictures. Then I go report to Adam again, and I says, there's a guy out there taking pictures; I don't know why he's doing that. Adam said he would check that out. So I think Adam came out and must have – I don't know what happened after that. I don't know if he fell or whatever happened, but that was the guy in a sling taking pictures of everything, and I said, that's really unusual. I went and told Adam again. I said, this guy is out here with a sling. I didn't know it was the same guy. Sort of looked like him, you know, dress-wise, but I think he had his – I think he might have had a hood up the second time when he was taking photographs, but I've never seen anybody – because we're always on the alert looking for people coming in and stealing our ideas. I thought he was another guy coming in trying to steal our ideas. That's the last I've seen of him.

Q: When you talk about people stealing your ideas, you mean like corporate espionage?

A: That, that type of thing. Like, you know, merchandising ideas and how we have things set up, that type of thing.

Q: Like someone from another competitive—

A: Yes.

Q: -- store?

A: Yeah.

Q: Okay. So you mentioned Adam several times. What's Adam's full name?

A: Adam Pennick. I don't know what his middle name is.

Q: And Mr. Pennick is one of the gentlemen that's here for the deposition today?

A: Yes.

Q: Okay. And what time was this initial encounter that you described?

A: Approximately 9:30 to 10:30, in there, because I start at 9:00, so it had to have happened between 9:30 and 10:30.

Q: Did you work the same hours every day?

A: Yes.

Q: What were those hours?

A: 9:00 to 2:00. Sometimes it's 9:00 to 3:00, but the majority of the time it's 9:00 to 2:00.

Q: Okay. So you believe you were there at least a half an hour?

A: Where?

Q: When you first encountered the gentleman that you believe –

A: Yeah. I believe I was there at least a half an hour, minimum.

Q: You said that the gentleman that you saw taking the pictures, you did not know that he was the same guy?

A: I did not know.

Q: But today you seem to believe it was the same guy?

A: How did I do that?

Q: You don't – so you're not sure if the guy you saw the first time –

A: Well, I couldn't see. He had a hood up the second time with pictures, so I couldn't tell if it was the same guy or not, but I thought it was peculiar, two things in a row, and one guy doing that up front, and the second time the guy had a hood up and was taking pictures in a sling. So it's very peculiar.

Q: Did the guy you saw the first time have a hood on?

A: He didn't have it up. I think he had it down. I'm not thinking – I know he had it down, but I'm – I wasn't sure on the color.

Q: Is it possible he didn't have a hood?

A: I'm going to be – yeah, he may not have had a hood.

Q: Okay. So – but you can say for sure that you do not know as a fact that the gentleman you saw the first time was the same gentleman you saw the second time?

A: I couldn't see. I was at a distance, and I did see him at a distance probably – approximately 20 to 30 feet, a guy with a sling and a hood taking pictures. I didn't see a direct look at his face. I had a profile view of him because I was standing back, and he was taking pictures this way, down, and up, and he was taking them all different ways. And I went and reported to Adam again, there's a guy out there taking pictures with a sling on.

Q: What was this guy using to take pictures?

A: I'm not sure it was a – it wasn't a Polaroid camera. Probably a cell phone. I couldn't distinguish what it was, but it wasn't anything like a Hasselblad or anything like that.

Q: But you can't tell if it was a phone or a camera?

A: I couldn't tell at that distance, no.

Q: Okay. So how far away do you think the – how close do you think you came to this gentleman the second time?

A: 20 to 30 feet.

Q: Did you say anything to the guy the second time?

A: I did not.

Q: Did you hear him say anything the second time?

A: I did not.

Q: How close were you to the gentleman you saw during the first encounter that –

A: Approximately 3 to 5 feet.

Q: Are you able to tell me if the gentleman sitting next to me was the person you saw on either occasion?

A: This guy here (indicating)?

Q: Yes.

A: I can't tell. I think he had dark hair. He was sort of tall, but I can't – his facial – it's hard to distinguish exactly.

Q: But, see, you cannot tell me definitively that the gentleman seated to my left was the gentleman you saw in the store on April 4th?

A: Definitively, actually, no. I mean, I just – you know, you see thousands of faces over the years. As a matter of fact, he looks like one of my cousins, so –

Q: You mean the gentleman sitting next to me looks like one of your cousins?

A: Yes.

Q: So if he looked like one of your cousins, you would have remembered that fact at the time; correct?

A: Well, as they grow – I don't remember. I don't remember. It's just I know he had dark hair, and I'm not sure about the nose, but he was sort of tall. And other than that, it's hard. Sorry.

Q: You would agree that over the course of a day that you're working, hundreds of men that are tall with dark hair pass through that Giant Eagle; correct?

A: You sort of know the taller guys versus the shorter ones, you know, on a weekly basis, but not over years. We've got our regulars that are tall. So many people.

MR. MILSOP: The record should reflect that Salvatore Castelluccio is seated to my left.

Q: Okay. Were you involved in preparing the incident report for Mr. Catelluccio's fall?

A: No. No, I was not.

Q: I'm going to show you a document that's been marked as Exhibit 5.

A: Okay.

Q: This one appears to be a chain of emails.

A: Okay.

Q: Were you involved in typing anything on this document?

A: Absolutely not.

Q: Okay. And Adam Pennick is the Adam that you previously –

A: Yes.

Q: -- referred to; is that correct?

A: Yes.

Q: And was Adam Pennick, at the time, the produce team leader?

A: Yes, he was.

Q: Okay. So the first paragraph says, today, after a customer was injured tripping over a rug in the produce near the organics, I discussed with all team members to monitor the rugs closely so we can prevent this from happening again. Do you see that?

A: Yes.

Q: Were you aware of an individual being injured in the produce section near the organics?

A: Let me see – was I aware of it? What was your question again? I'm sorry.

Q: Yes, were you aware of that?

A: No, I don't think. I don't think so.

Q: Okay. Now, the next paragraph says, when I talk to Tom Stuby – you are Tom Stuby; correct?

A: Yes.

Q: Tom mentioned that earlier in the day before this incident, he seen a customer in the greens section reaching for something. Do you recall that?

A: I don't remember him reaching for anything. I don't know. I just – I don't remember that part.

Q: So you don't remember the reaching?

A: No.
Q: Okay. The customer was moving his foot, moving a rug at the same time.
Do you recall that?
A: Yes.
Q: And do you know what foot he was moving?
A: I'd say probably – I'm not – I'm not going to guess. I really don't know.
Q: And so Tom told him to be careful of the rug.
A: Yes. I tell everyone that.
Q: Okay. Do you – do you sometimes see customers as they're reaching for grocery items moving the rugs?
A: Not really, other than if they hit it with their cart and I'm present. I'll just slide it back, you know, but you really got to hit it pretty hard to hit it because that rubber bonds, unless it was slick. On that side, I seldomly (sic) – the rugs get moved.
Q: Okay. The next paragraph says, later in this day, the customer came back into the store to talk to Dan. Do you know who Dan was?
A: Probably the store manager. I'm not sure.
Q: Okay. And then it says, I mentioned and pointed out to Tom that he was the one who fell earlier. When Tom was going out the door through the café, he got a better look at this person who was now sitting in the café.
A: I don't recall that.
Q: Okay. You don't recall seeing that gentleman sitting in the café at all?
A: No, I don't.
Q: Okay. Then it says, Tom came back and told me this was the same customer he had seen earlier and told to be careful of the rug.
A: The second time I saw him is when he's taking pictures. I did not see him in the café.
Q: Did you ever report to Mr. Pennick that you saw that gentleman a second time?
A: No. I just made the comment that this is – there's a guy out there with no – initially, he was out there with no cart or buggy or basket and he's walking around, and I said, something's up when he was, like, sort of shifting the rug. And then the second time I saw him taking – I saw someone taking pictures with a sling, and that was at a distance. And I went in and told Adam again about it. He said he would check it out, and that's the last I heard.
Q: Now, did you ever tell Tom that the gentleman you saw that you warned about the rug was the same person that you saw taking pictures?
A: No, I didn't – I didn't know if it was the same person.
Q: Okay. Thank you.
Transcript of Thomas Stuby deposition, p. 24-34.
Q: Now, other than Adam Pennick, have you talked to anyone at Giant Eagle about these two gentlemen that you saw that you've described to me during your deposition here?
A: Could you repeat that again?
Q: Sure. Other than Adam Pennick –
A: Yes.
Q: -- did you discuss your encounter with these two gentlemen with anyone educational?
A: What two gentlemen?
Q: The gentleman with the rug and the gentleman with the sling?
MR. ROSENBERG: He's attempting to presume that it's two different people, so it's objectionable for that reason, which is why I'm going to object, but you can answer the question if you can.
THE WITNESS: As best I can – I can't actually remember his exact fact. I just said something's up here, and I told him and said check into it. And then later on in the day, I saw a guy – I've never seen anybody taking pictures in the store before. This guy was taking pictures with an arm sling, and I'm not sure which arm it was in, and I'm not sure if it was the same guy.
Transcript of Thomas Stuby deposition, pp. 36-37
Q: Okay. Mr. Castelluccio, who is seated to my left –
A: Yes.
Q: -- do you remember ever seeing him in the store?
A: I don't – it's hard to tell. You know, he may have. He could have had a hat on. He could have had a winter coat over the years. It's hard to tell.
Q: But there's some customers you know on sight; correct?
A: Absolutely. They're there every day or every other day. You know them by name.
Q: Is Mr. Catelluccio anyone you recognize in that manner?
A: No.
Q: Okay. It's not to say that you didn't see him –
A: We're –
Q: -- before, it's just he didn't stand out to you?
A: Usually we're on a first-name basis with the regulars, you know, probably 20 or 30 of them.
Q: And you don't know Mr. Castelluccio personally, do you?
A: No.
Q: And you've not had any encounters with him between April 4th, 2014, and today; correct?
A: No.
Q: You are still employed at Giant Eagle –
A: Yes, I am.
Q: --correct? And you had some responsibility for the care and maintenance of the mats in the store; is that correct?
A: Yes.
Q: If a supervisor learned someone – and when I say supervisor, I mean anyone above you in the chain of command –
A: Yes.
Q: -- learned that one of these mats were out of place, would you potentially be in trouble?

A: I could be. I could be if it happened on different occasions. That first time, it may be a warning, you know. Why didn't you take care of it? You know – but we're constantly – we get videos every year about safety: mopping the floors, wet floors, blocking the door ways, picking stuff up, wiping stuff up. I mean, it's an indoctrination they pump in your head, so you're always on guard for that stuff.

Transcript of Thomas Stuby deposition, pp. 39-41.

My analysis of this testimony discloses Mr. Stuby first saying he inadvertently met Mr. Castelluccio on the date of injury and then repeating seven or more times that he was not sure Mr. Castelluccio was the same guy he saw kicking or shifting a mat. Hence, I surmise that what he meant when he testified he inadvertently met Mr. Castelluccio is that the meeting did not occur until after Mr. Castellucio returned to the store in a sling and took photographs. I determined the probative value of the evidence of an unidentified customer kicking or shifting a mat earlier that day is outweighed by the danger of unfair prejudice to Mr. Castelluccio. See Pennsylvania Rule of Evidence 403. There is little, if any, probative value because the testimony has no bearing on whether Giant Eagle or Mr. Castelluccio was negligent. However, the danger of unfair prejudice is readily apparent. The testimony is confusing and could have led the jury to think Mr. Castelluccio staged his fall, which would have been improper.

Mr. Stuby's testimony also could be interpreted as speculation by him that Mr. Castelluccio was the same person he saw kicking or shifting a mat. Speculation is not admissible evidence. See Winschel v. Jain, 2007 PASuper 121, 925 A.2d 782 at 797 and Eichman v. McKeon, 2003 PASuper 185, 824 A.2d 305 at 320, footnote 8.

Additionally, the probative value of the testimony is outweighed by the danger of confusing the issues. See Pennsylvania Rule of Evidence 403. The jury would have to determine the credibility of Mr. Stuby's testimony that a customer was kicking or shifting a mat. But, after Mr. Castelluccio was injured, Mr. Stuby's supervisor warned team members to watch the mats closely, Mr. Stuby's sole employment at the time of his deposition was Giant Eagle and Mr. Stuby knew he could be in trouble with Giant Eagle for not properly maintaining the mat. Thus, the jury would have to assess Mr. Stuby's credibility to determine if he contrived the story to avoid the impact on his employment for improper maintenance of the mat. The jury also would have to assess Mr. Stuby's credibility on his interactions with Adam Pennick since there are multiple inconsistencies between Mr. Stuby's version of them and the version in Mr. Pennick's email. However, the jury would be confused because its ability to assess Mr. Stuby's credibility is impaired by the lack of video recording of the deposition and his death prior to trial.

Therefore, I correctly decided to exclude the portions of Mr. Stuby's deposition where he testified to seeing a customer kicking or shifting a mat.

II.

Giant Eagle next contends I made an error by not allowing Mr. Stuby's supervisor, Adam Pennick, to testify he heard Mr. Stuby say he saw Mr. Castelluccio kicking or shifting a mat, or I made an error by refusing to admit into evidence an email in which Mr. Pennick sets forth what Mr. Stuby said. This email is dated April 4, 2014, the date Mr. Castelluccio was injured, and it has been docketed (see Document 45 filed 10/6/2021). What Mr. Pennick heard Mr. Stuby say is hearsay since it was offered to prove the truth of what Mr. Stuby said. See Pennsylvania Rule of Evidence 801. Hearsay is not admissible unless it falls within an exception (see Pennsylvania Rule of Evidence 802). In Giant Eagle's brief in support of post-trial motions, it argues Mr. Pennick's testimony and email of what Mr. Stuby said falls under the excited utterance or present sense "expression" hearsay exceptions. See Pennsylvania Rules of Evidence 803(1) and 803(2).

To fall within the excited utterance hearsay exception, it must be hearsay "relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Pennsylvania Rule of Evidence 803(2). Seeing a person from a distance seated in the café that Mr. Stuby saw earlier in the day moving a rug is not a "startling event." If somehow this were a startling event, Mr. Stuby's statement to Mr. Pennick that this was the same customer still is not an excited utterance because it was not made "spontaneously and without opportunity for reflection." Commonwealth v. Boczkowski, 577 Pa. 421, 455, 846 A.2d 75, 95 (2004). Mr. Pennick's April 4, 2014 email says "when [Mr. Stuby] was going out the door through the café, he got a better look at this person who was now sitting in the café. [Mr. Stuby] came back and told me this was the same person he had seen earlier…." Clearly Mr. Stuby was not speaking spontaneously and had an opportunity for reflection between when he saw the customer in the café and when he "came back" and told Mr. Pennick he saw him earlier.

To fall within the present sense impression hearsay exception, the hearsay must describe or explain an event or condition, "made while or immediately after the declarant perceived it." Pennsylvania Rule of Evidence 803(1). Since Mr. Stuby's statement is about a customer he saw two or three hours earlier moving a rug, it is not sufficiently contemporaneous with the observation to be a present sense impression. Even if the statement were construed to be only about the customer he saw in the café, the present sense impression hearsay exception, like the excited utterance exception, is inapplicable when there has been an opportunity for reflection (see Commonwealth v. Coleman, 458 Pa. 112 at 117, 326 A.2d 387 at 389 (1974). In September of 2021, immediately before the trial began, Giant Eagle's counsel described Mr. Stuby's statement as "immediately in response" to Mr. Pennick (transcript of jury trial, September 24, 2021-September 29, 2021 ("T" hereafter), p. 8) and in Giant Eagle's motion for post-trial relief as something he "immediately exclaimed." However, I do not accept these creative arguments by Giant Eagle's advocate over the description in Mr. Pennick's email from the date of injury that Mr. Stuby "came back" to speak to Mr. Pennick after seeing the person in the cafe.

Therefore, I correctly decided not to admit Mr. Pennick's testimony or email concerning Mr. Stuby's statement to him.

III.

Giant Eagle next contends I made an error by allowing Mr. Castelluccio to admit into evidence a Giant Eagle study on incidents involving the type of mat Mr. Castelluccio tripped on. Giant Eagle argues the study was irrelevant because it was conducted after Mr. Castelluccio's fall, during the 2015 and 2016 fiscal years. The study actually began on July 1, 2014 (see T, p. 490), and I determined it could be inferred from the incidents after Mr. Castelluccio's fall that there were also incidents before it. See T. pp. 350-354. Giant Eagle also argues the study was irrelevant because there was no evidence the incidents in the study were similar to Mr. Castelluccio's fall. If the study were being offered to prove Giant Eagle had notice of the danger encountered by Mr. Castelluccio, I would agree there would need to be proof the other incidents were similar. However, the study was offered to challenge or rebut Giant Eagle's argument that it was an isolated incident and that the mats did not pose any danger to customers. See T. pp. 81, 238, 291, 311-312 and 321. This "opened the door" to the study that Giant Eagle conducted on the mats. See Tillery v. Children's Hospital of Philadelphia, 2017 PASuper 50, 156 A.3d 1233 at 1243. Giant Eagle also argues admission of its study is prohibited as a subsequent remedial measure. See Pennsylvania Rule of Evidence 407. However, in objecting during the trial, the subsequent remedial measures rule was not cited as a basis by Giant Eagle (see T, pp. 349-354), and it was not Mr. Castelluccio

that raised the topic of Giant Eagle's decision to change the type of mats it used. It was Giant Eagle that raised this topic. See T, p. 367. Therefore, Giant Eagle waived this objection, and I was correct to admit testimony on Giant Eagle's study.

IV.

Giant Eagle next contends I made an error by permitting its director of claims and insurance programs to be cross examined as to whether there can be instances when Giant Eagle is negligent. Giant Eagle had presented extensive testimony and argument that boasted of a culture of safety with a "see it, own it" policy (see, e.g., T, pp. 358-359) that implied there could be no unsafe conditions in Giant Eagle stores. I believe this cross examination is a proper way to challenge this type of broad-brush picture on safety that Giant Eagle created. Therefore, I correctly allowed cross examination on whether there can be instances where Giant Eagle is negligent.

V.

Giant Eagle next contends I made an error by permitting its senior manager of safety to be cross examined on whether Giant Eagle is ever negligent. For the reason set forth in IV above, I was correct to allow this cross examination.

VI.

Giant Eagle next contends I made an error by preventing its senior manager of safety from testifying about industry standards. Giant Eagle concedes that this witness, Robert Losekamp, had not provided any expert report and was not testifying as an expert witness. It argues Mr. Losekamp's opinion on industry standards is admissible as a "lay opinion." See Pennsylvania Rule of Evidence 701. Mr. Losekamp acquired the information on industry standards through his job as Giant Eagle's senior manager of safety, which makes it "specialized skill, experience, training or education." See Pennsylvania Rule of Evidence 701(c) and 702. Lay witnesses are prohibited from giving testimony that is based on specialized knowledge. Id. Therefore, I was correct in preventing the witness from testifying about industry standards.

VII.

Giant Eagle next contends I made an error by not striking the testimony of Mr. Castelluccio's premises safety expert. It argues the testimony set forth a standard of care that did not account for notice, in direct contradiction to Pennsylvania law. This description of the testimony is a distortion of the actual trial testimony.

Mr. Castelluccio's premises safety expert, Anthony Shinsky, has 30 years of experience as an architect and serves on the committee of the ASTM (American Society of Testing and Materials) that promulgated the standard of care for safe walkways. See T, pp. 188, 196 and 208. In his direct examination Mr. Shinsky testified, consistent with his 2/17/2020 report provided to Giant Eagle on 2/19/2020, that the standard of care for maintaining mats in the environment of a grocery store is they should not be able to be moved, the edges should not be able to be rippled and they should not roll up upon themselves. See T, p. 208. Mr. Shinsky also testified during direct examination that Giant Eagle employees gave depositions in which they acknowledged knowing, before the incident with Mr. Castelluccio, that there was a tendency for these mats to move and become a tripping hazard. See T, pp. 202-203. Counsel for Giant Eagle's cross examination delved into the nuance of how many times employees had seen the mats move and become tripping hazards, focusing on Mr. Shinsky's testimony "it wasn't unusual" to see this when the store manager said "he had occasionally seen" this. T, pp. 228-231. During either cross examination or direct examination Mr. Shinsky was not asked if Giant Eagle had to be on notice of this tripping hazard to violate the standard of care. Mr. Shinsky did not, at anytime, testify that notice by Giant Eagle of this tripping hazard is unneeded for the standard of care to be violated. Hence, I was correct in refusing to strike Mr. Shinsky's testimony.

VIII.

Giant Eagle next claims I committed an error by ruling against the admission of six lawsuits field by Mr. Castelluccio against "big box retailers" for refusing to hire him due to his criminal conviction in 2009 for indecent assault and stalking. Giant Eagle argues the lawsuits are relevant to Mr. Castelluccio's physical condition when he applied for the jobs. However, I permitted Giant Eagle to cross examine Mr. Castelluccio concerning his applications for the six different positions and the physical demands of each. See T, pp . 168, 164-166, 172-174, 175-178, 178-181 and 181-182. This allowed Giant Eagle to explore Mr. Castelluccio's physical condition without the jury improperly hearing of his conviction (see Pennsylvania Rules of Evidence 404 and 609) and collateral issues relative to the lawsuits. Giant Eagle also argues the lawsuits are relevant because Mr. Castelluccio sought the same damages in them as he sought against Giant Eagle. But, this is untrue since the damages in the lawsuits against the big box retailers arose from discrimination while the damages against Giant Eagle arose from physical injuries. See T, p. 23. Therefore, I correctly decided against admitting Mr. Castelluccio's six lawsuits against big box retailers.

IX.

Giant Eagle next claims I committed an error by excluding store surveillance video of Mr. Castelluccio from August of 2021 and September of 2021. The surveillance video undoubtedly surprised Mr. Castelluccio's counsel as Giant Eagle's counsel did not disclose the video until the morning of the last day of the trial. See T, pp. 467-468. Giant Eagle argued that I should admit the evidence as rebuttal to Mr. Castelluccio's testimony of having limited range of motion in his neck. Giant Eagle, however, was aware since at least 2017 that Mr. Castelluccio was claiming this limited range of motion because Mr. Castelluccio said so during his deposition. See T, pp. 472-473. In answers to interrogatories Giant Eagle stated it "does not have any photographs, films, videotapes or digital images related to the claim in this case." Plaintiff's interrogatories directed to Defendant attached to Plaintiff's brief in opposition to motion for post-trial relief filed 12/10/2021 as Document 59. But, when Giant Eagle's trial counsel asked his client to look for video of Mr. Castelluccio after he testified at the trial, Giant Eagle was able to use its loyalty program records to pinpoint recent dates he was in one of its facilities and find him on the facilities' surveillance videotapes. See T, pp. 138, 469 and 472. Giant Eagle, therefore could have used this same method to obtain surveillance video of Mr. Castelluccio at any time during the six years that his lawsuit was pending but instead did not do so until it surprised Mr. Castelluccio's counsel on the morning of the last day of trial.

Even though Pennsylvania Rule of Civil Procedure 212.2 mandates "a list of all exhibits a party intends to use at trial" be in pre-trial statements, the video surveillance was not included in Giant Eagle's pre-trial statement. A note in the Rule states that a list of exhibits for use in rebuttal or for impeachment is not contemplated, as "[t]hese matters are governed by case law." Bindschusz v. Phillips (2001 PA Super 93, 771 A.2d 803) is such case law, with the circumstances that led the trial judge to exclude a surveillance video being nearly identical to the surveillance video that surprised Mr. Castelluccio's counsel in this proceeding. The Superior Court upheld exclusion of the surveillance video because the negative interrogatory answer and nondisclosure in the pre-trial statement "resulted in unfair and prejudicial surprise to appellee midway through the trial…." Id., 771 A.2d 803, 811. In a footnote, the Superior Court invalidated the argument that such surveillance video is for rebuttal or impeachment, holding that

it is substantive evidence of the extent of a disputed injury. Id., footnote 6. Thus, I correctly excluded the surveillance video of Mr. Castelluccio.

X.

Giant Eagle next claims I committed an error by denying its motion for a nonsuit. Giant Eagle argued, after Mr. Castelluccio rested his case, that he had not met his burden of proving Giant Eagle knew, or should have known, of the condition of the mat that tripped him. The record from the trial demonstrates the lack of merit of this argument. Jason Pace, the front end team leader at the Moon Township Giant Eagle, had observed the corners of the mats up "every couple months…." T., p . 279. Adam Pennick, the produce team leader at the Moon Township Giant Eagle, "probably" had observed the mat in the same position it was in when it tripped Mr. Castelluccio. T., p. 306. Daniel Mulkeen, the store leader at the Moon Township Giant Eagle, had "occasionally" observed the mats in the position they were in when Mr. Castelluccio tripped. T, p. 318. Thomas Stuby, a part-time produce clerk at the Moon Township Giant Eagle, had "on several occasions" observed the mat in the same position that tripped Mr. Castelluccio and management "sort of know that it did that…." T, pp. 334 and 336. Therefore, my decision to deny the motion for nonsuit was correct.

XI.

Giant Eagle also claims I committed an error by denying its motion for a directed verdict. Since it was based on the same argument as the motion for a nonsuit, I correctly denied the motion for a directed verdict.

XII.

Giant Eagle next claims I committed an error by allowing Mr. Castelluccio to object and to refuse to answer questions during his cross examination. While Mr. Castelluccio did answer questions on cross examination by saying he was being asked two questions, Mr. Castelluccio, in fact, was being asked two questions. See T, pp. 146 and 149. When rephrased to ask only one question, he answered the questions. Mr. Castelluccio's insistence, in the absence of an objection by his attorney, that he not be asked two questions at once may relate to his severe obsessive compulsive disorder that is manifested by "irrational counting." T, p. 91. In any event, no objection was made by Giant Eagle. Mr. Castelluccio did not ever say "I will not answer that question," but instead asked that questions be repeated or clarified and gave answers that were evasive. See T, pp. 138-156. I did refuse Giant Eagle's counsel's request to instruct him to "answer the question," but Mr. Castelluccio ultimately answered the question after counsel rephrased it to be more specific. See T, p. 157, l.5-l.9. There is no authority I am aware of that requires a trial judge, upon request of counsel, to instruct a witness to "answer the question." It is for the jury to evaluate whether a witness has answered a question, and the jury in this case was instructed twice to consider if a witness presents testimony "in an evasive manner" in evaluating the witness's credibility. T, pp. 55 and 580. I explained this during an objection by Mr. Castelluccio's counsel to Giant Eagle's expert witness (see T, p. 460) and similarly refused to strike the witness's answers that Mr. Castelluccio's counsel argued did not answer his questions. See T, pp. 460-462. On at least three occasions I granted Giant Eagle's requests to strike Mr. Castelluccio's inappropriate testimony (see T, pp. 95, 119 and 167) and on three additional occasions I ordered that statements in documents prepared by him or his attorneys be stipulated as answers to questions Mr. Castelluccio said he could not remember (see T, pp. 174, 176 and 18). Rather than prejudicing Giant Eagle, this accentuated the inappropriateness of some of Mr. Castelluccio's testimony. I showed Mr. Castelluccio no favoritism and treated him in the same even handed manner as I treated all the witnesses (I also instructed the jury not to be influenced by any remarks I make (T, p. 54)). Therefore, I properly dealt with Mr. Castelluccio's testimony during cross examination.

XIII.

Giant Eagle next claims I committed an error during the jury selection process by sustaining Mr. Castelluccio's challenges for cause to "multiple prospective jurors" based on bias. Giant Eagle argues I should not have stricken these prospective jurors because they indicated they would be fair and impartial. "The trial judge must determine whether the juror is able to put aside any biases….and is able to form his opinion as much from the proposed juror's conduct as from the words which he utters, printed in the record. Hesitation, doubt, and nervousness indicating an unsettled frame of mind, with other matters, within the judge's view and hearing, but which it is impossible to place in the record, must be considered….." Shinal v. Toms, 640 Pa. 295, 313 and 316, 162 A.3d 429, 440 and 442 (2017). I sustained Mr. Castelluccio's challenges for cause to prospective juror numbers 11 (see transcript of jury selection, September 23, 2021 ("TJS" hereafter), pp. 52-58), 12 (see TJS, pp. 58-66), 26 (see TJS, pp. 116-123) and 41 (see TJS, pp. 155-162). Each indicated a bias in favor of Giant Eagle or against Mr. Castelluccio. I observed the conduct of each of them, and based on that conduct determined they would be unlikely to be able to put aside their biases. Therefore, my decisions to sustain Mr. Castelluccio's challenges for cause to prospective jurors was correct.

XIV.

Giant Eagle next claims I committed an error by providing the jury an inaccurate instruction on the law of the duty it owed to Mr. Castelluccio. However, the instructions that I provided the jury simply set forth longstanding Pennsylvania law on the obligations of an owner or occupier of land. See T, pp. 572-573. The first part of my instruction on this topic comes from Pennsylvania Suggested Standard Civil Jury Instruction 18.40, which describes the actual or constructive notice necessary for liability. This jury instruction is derived from the Restatement (Second) of Torts §§343 and 343A, which have been adopted by the Pennsylvania Supreme Court. The second part of my instruction is explained in Hyatt v. County of Allegheny (120 Pa. Cmwlth. 161, 547 A.2d 1304 (1988), which involved circumstances similar to those encountered by Mr. Castelluccio in the Moon Township Giant Eagle. In Hyatt, the Commonwealth Court relied on Pennsylvania Supreme Court precedent for there being an exception to the actual or constructive notice necessary for liability when the owner or occupier is the one who created the dangerous condition. Id. at 120 Pa. Cmwlth. 169-170 and 547 A.2d 1308. Therefore, I provided the jury with an accurate instruction on the law concerning Giant Eagle's duty to Mr. Castelluccio.

XV.

Giant Eagle next claims I committed an error by rejecting its proposed jury instruction on the duty it owed to Mr. Castelluccio. During the charging conference Giant Eagle requested that I not charge the jury with Pennsylvania Suggest Standard Civil Jury Instruction 18.40, but instead charge the jury:

To establish that Giant Eagle was negligent, Plaintiff must first prove that Giant Eagle knew, or in the exercise of reasonable care, should have known of the existence of the carpet in a dangerous condition immediately prior to plaintiff falling.

See T, p. 436; Proposed jury instructions filed 10/5/2021 as Document 41, p. 5. This is not a complete statement of Giant Eagle's duty to Mr. Castelluccio since it omits the requirement that Giant Eagle inspect the premises to discover dangerous conditions and other concepts set forth in Standard Instruction 18.40. Also, Giant Eagle's requested instruction cites Moultrey v.

Great A&P Tea Co. (281 Pa. Super 525, 422 A.2d 593 (1980)), but omits this statement of the law applicable to the circumstances encountered by Mr. Castelluccio: "where the condition is one which the owner knows has frequently recurred, the jury may properly find that the owner had actual notice of the condition, thereby obviating additional proof by the invitee that the owner had constructive notice of it." Id., 281 Pa. Super. 525, 530-531, 422 A.2d 593, 596. Therefore, I correctly rejected Giant Eagle's proposed jury instruction on the duty it owed to Mr. Castelluccio.

XVI.

Giant Eagle's final claim is that I committed an error in calculating delay damages that included a period of time "during which the plaintiff caused delay of the trial." Pennsylvania Rule of Civil Procedure 238 b(1)(ii). Giant Eagle argues my calculation included delay damages incurred during a Plaintiff-requested continuance of the trial, but that argument is inaccurate. Plaintiff's sur reply in support of delay damages (filed 11/18/2021 as Document 52) accurately details what happened. A delay by Giant Eagle in scheduling its corporate representative's deposition delayed the production of Mr. Castelluccio's premises safety expert report. When Mr. Castelluccio served his pre-trial statement on January 21, 2020, it reserved the right to produce a liability report within a reasonable time after the deposition of Giant Eagle's corporate representative. See Document 21, filed 1/28/2020, "IV Expert Witnesses and Reports." Mr. Shinsky's report dated February 17, 2020 was received by Giant Eagle on February 19, 2020. With trial scheduled for March 11, 2020 Giant Eagle filed a motion to strike Mr. Shinsky's report, indicating it needed to retain an expert witness to consult with and/or testify at trial but had insufficient time to do so. See Document 33 filed 2/224/2020. Rather than striking Mr. Shinksy's report, I postponed the trial to May 7, 2020, but Giant Eagle did not retain an expert for the trial ultimately held in September of 2021 (due to additional pandemic related delay). The cause of the delay of the trial scheduled for March 11, 2020 was Giant Eagle's delay in scheduling the deposition of its corporate representative. It was not caused by Mr. Castelluccio. Therefore, I correctly included delay damages from March 11,2020 to May 7, 2020.

BY THE COURT:
/s/The Hon. Alan Hertzberg

IN RE NOMINATING PETITION OF STEVEN OBERST DEMOCRAT CANDIDATE FOR CITY OF PITTSBURGH MEMBER OF COUNCIL DISTRICT 1, OBJECTORS RACHEL JAMES and JEFFREY DZAMKO

Nominating Petition Challenge – Notice Requirements

Objectors Rachel James and Jeffrey Dzamko filed a Nominating Petition Challenge to Steven Oberst's Petition for Democrat Candidate for City of Pittsburgh Member of Council District 1 subject to 25 P.S. § 2937. Under 25 P.S. § 2937, any individual may challenge a nominating petition if notice of the challenge is provided to the court and the nomination officer or board within 7 days of the last day for nomination paperwork to be filed. In this matter, the petition challenging the candidacy of Steven Oberst was filed with the Department of Court Records and was left inside the board of elections office after the office was closed for the day on the final day for filing. The Court ruled that placing the petition in an empty office did not constitute notice of the petition until the next day, when the board of elections office would have seen the petition and would have been on actual notice. Additionally, the Court further explains that the Department of Court Records website does not provide notice to any party upon an electronic filing. As such, filing such a petition with the Department of Court Records does not satisfy the presentation requirement of 25 P.S. § 2937. As such, the Court dismissed the Petition as being untimely.

Case No.: GD-23-3496. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. McVay, J. April 5, 2023.

Pa. R.A.P. 1925 STATEMENT

On April 3rd, 2023, Petitioners, Rachel James and Jeffrey Dzamko, ("Objectors") filed an appeal of my March 28th, 2023, Order of Court that dismissed their Nominating Petition Challenge to Steven Oberst's Petition for Democrat Candidate for City of Pittsburgh Member of Council District 1. Under Pa.R.A.P. 1925(a)(1), if the reasons for denying the Nominating Petition Challenge to Steven Oberst's Petition for Democrat Candidate for City of Pittsburgh Member of Council District 1 appears on the record, I am not required to file a new opinion, and I am permitted to specify in writing where in the record such reasons may be found. I am specifying that in addition to attaching my filed Order of Court as Exhibit A, the reasons for denying the Objectors' Petition appear on the record in my Order of Court which was filed on March 29th, 2023.

EXHIBIT A
ORDER OF COURT

AND NOW, this 28th day of March 2023, after argument on March 22nd and March 27th, and a review of the briefs, it is ORDERED, ADJUDGED, and DECREED, that the Nominating Petition Challenge to Steven Oberst's Petition for Democrat Candidate for City of Pittsburgh Member of Council District 1 is DENIED as untimely filed under 25 P.S. § 2937.

Pursuant to 25 P.S. § 2937, "[a] copy of said petition shall, within said period, be served on the officer or board with whom said nomination petition or paper was filed." Petition of Acosta, 578 A.2d 407, 408 (1990). The parties stipulated that the petition challenging the candidacy of Steven Oberst was placed inside an empty office after the board of elections office had closed on the final day for filing a challenging petition under § 2937.

The requirement that the official with whom the nomination petition was filed receive timely notice that a petition to set aside has been filed is not just excess statutory verbiage. Service of a petition to set aside a nomination petition upon the officer or board with whom a nomination petition has been filed within the time limit prescribed … is mandatory.

Id. at 409 (emphasis added).

The Pennsylvania Supreme Court went on to state in Acosta that the Secretary of the Commonwealth needed to, "receive a copy of the petition to set aside within the time limits set forth in [§ 2937]". Id.

Here, I conclude that under Acosta, service was not completed because no one was present to receive the copy of the challenging petition within the time limit prescribed. No one at the Board of Elections office had received the challenging petition

until the next day which was after the deadline for challenges had passed. Therefore, I find that the nominating petition challenge was not timely filed.

It must be emphasized that filing a document with the Department of Court Records ("DCR") is NOT notice to anyone. All filings should be docketed with the DCR, and then served on the opposing party, AND emailed to the judicial staff at cfejko@alleghenycourts.us and amcvay@alleghenycourts.us. The DCR does NOT independently notice judges or parties when something is filed. Please do not mail anything to Judge McVay's chambers unless it is the only means of providing Judge McVay with a copy.

Additionally, all parties are to review Judge McVay's Operating Procedures that are located on the Fifth Judicial District's Website.

BY THE COURT:
/s/The Hon. John T. McVay Jr.

IN RE NOMINATING PETITION OF TRACY ROYSTON DEMOCRAT CANDIDATE FOR CITY OF PITTSBURGH CONTROLLER, OBJECTORS MITCHELL SCHWARTZ and LISA FREEMAN

Nominating Petition Challenge – Notice Requirements

Objectors Mitchell Schwartz and Lisa Freeman filed a Nominating Petition Challenge to Tracy Royston's Petition for Democrat Candidate for City of Pittsburgh Controller subject to 25 P.S. § 2937. Under 25 P.S. § 2937, any individual may challenge a nominating petition if notice of the challenge is provided to the court and the nomination officer or board within 7 days of the last day for nomination paperwork to be filed. In this matter, the petition challenging the candidacy of Tracy Royston was filed with the Department of Court Records and was left inside the board of elections office after the office was closed for the day on the final day for filing. The Court ruled that placing the petition in an empty office did not constitute notice of the petition until the next day, when the board of elections office would have seen the petition and would have been on actual notice. Additionally, the Court further explains that the Department of Court Records website does not provide notice to any party upon an electronic filing. As such, filing such a petition with the Department of Court Records does not satisfy the presentation requirement of 25 P.S. § 2937. As such, the Court dismissed the Petition as being untimely.

Case No.: GD-23-3495. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. McVay, J. April 5, 2023.

Pa. R.A.P. 1925 STATEMENT

On April 3rd, 2023, Petitioners, Mitchell Schwartz and Lisa Freeman, ("Objectors") filed an appeal of my March 28th, 2023, Order of Court that dismissed their Petition to Set Aside Nomination Petition of Tracy Royston. Under Pa.R.A.P. 1925(a)(1), if the reasons for denying the Petition to Set Aside Nomination Petition of Tracy Royston appears on the record, I am not required to file a new opinion, and I am permitted to specify in writing where in the record such reasons may be found. I am specifying that in addition to attaching my filed Order of Court as Exhibit A, the reasons for denying the Objectors' Petition appear on the record in my Order of Court which was filed on March 29th, 2023.

EXHIBIT A
ORDER OF COURT

AND NOW, this 28th day of March 2023, after argument on March 22nd and March 27th, and a review of the briefs, it is ORDERED, ADJUDGED, and DECREED, that the Nominating Petition Challenge to Tracy Royston's Petition for Democrat Candidate for City of Pittsburgh is DENIED as untimely filed under 25 P.S. § 2937.

Pursuant to 25 P.S. § 2937, "[a] copy of said petition shall, within said period, be served on the officer or board with whom said nomination petition or paper was filed." Petition of Acosta, 578 A.2d 407, 408 (1990). The parties stipulated that the petition challenging the candidacy of Tracy Royston was placed inside an empty office after the board of elections office had closed on the final day for filing a challenging petition under § 2937.

The requirement that the official with whom the nomination petition was filed receive timely notice that a petition to set aside has been filed is not just excess statutory verbiage. Service of a petition to set aside a nomination petition upon the officer or board with whom a nomination petition has been filed within the time limit prescribed … is mandatory.

Id. at 409 (emphasis added).

The Pennsylvania Supreme Court went on to state in Acosta that the Secretary of the Commonwealth needed to, "receive a copy of the petition to set aside within the time limits set forth in [§ 2937]". Id.

Here, I conclude that under Acosta, service was not completed because no one was present to receive the copy of the challenging petition within the time limit prescribed. No one at the Board of Elections office had received the challenging petition until the next day which was after the deadline for challenges had passed. Therefore, I find that the nominating petition challenge was not timely filed.

It must be emphasized that filing a document with the Department of Court Records ("DCR") is NOT notice to anyone. All filings should be docketed with the DCR, and then served on the opposing party, AND emailed to the judicial staff at cfejko@alleghenycourts.us and amcvay@alleghenycourts.us. The DCR does NOT independently notice judges or parties when something is filed. Please do not mail anything to Judge McVay's chambers unless it is the only means of providing Judge McVay with a copy.

Additionally, all parties are to review Judge McVay's Operating Procedures that are located on the Fifth Judicial District's Website.

BY THE COURT:
/s/The Hon. John T. McVay Jr.