Horst v. Union Carbide

Asbestos litigation — Wrongful death — Time-barred — Failure to amend

In this asbestos litigation, plaintiffs' wrongful death claim was time-barred because they failed to amend the complaint to include such a claim within two years of the date on which one of the plaintiffs was diagnosed with mesothelioma.

I. Robert Horst Jr. and his wife, Diane Horst, filed this tort action against 12 companies that were manufacturers or sellers of boilers, furnaces or joint compound which allegedly contained asbestos that caused Horst to develop mesothelioma. The diagnosis of Horst's condition occurred on Nov. 6, 2014. The lawsuit was filed on March 4, 2015.

Horst died on July 28, 2016, but plaintiffs never amended their complaint to assert a claim for wrongful death, even though 42 Pa.C.S. §5524(8) required all asbestos-exposure actions, including those seeking damages for the death of a person, to be filed within two years of the date that the person was informed by a doctor that the injury was caused by asbestos exposure.

Defendants filed a motion in limine to preclude the assertion of a wrongful death claim in this case because the statute of limitations had expired. Defendants acknowledged that if Horst's estate was properly substituted as the named plaintiff seeking to recover the damages stated in the complaint for past and future medical expenses, and pain and suffering, that such damages were recoverable under the Survival Act. However, defendants maintained in their motion in limine that the verdict slip could not include a separate line for recovery of wrongful death damages, which included funeral, burial and estate administration expenses.

The court found the Horsts had the opportunity to assert a wrongful death claim within two years of Horst's mesothelioma diagnosis by amending the complaint on or before Nov. 6, 2016. Counsel for the Horsts stated that no effort was made to amend the complaint to include a wrongful death claim following the death of Horst because counsel believed such an amendment could only be accomplished with the consent of all defendants. The court noted that counsel was mistaken, because Pa.R.C.P. 1033 permitted such amendments to the complaint to state a new cause of action, either with the consent of the parties or by leave of court. If counsel had sought leave of court in this case, the court stated the request would have been granted.

Because the Horsts did not file a wrongful death claim within two years of Horst's mesothelioma diagnosis, the court held that any wrongful death claim in this case was time-barred by 42 Pa.C.S. §5524(8). The court granted defendants' motion in limine and held that a special damage interrogatory for wrongful death would not be included on the verdict slip.

C.P. of Lackawanna County, No. 15 CV 1903

NEALON, *J.*, June 30, 2017—In this asbestos litigation that plaintiffs commenced during the plaintiff-decedent's lifetime, defendants have filed motions to preclude plaintiffs from asserting a wrongful death claim under 42 Pa.C.S. § 8301, and argue that any such claim is time-barred since following the decedent's death during the pendency of this lawsuit, plaintiffs failed to amend their complaint within two years of the diagnosis of the decedent's mesothelioma to include a claim for wrongful death. It is uncontested that the decedent was diagnosed with mesothelioma on November 6, 2014, that plaintiffs filed this action on March 4, 2015, and that the decedent died on July 28, 2016, but that plaintiffs never amended their complaint by November 6, 2016, to assert a claim for wrongful death. 42 Pa.C.S. § 5524(8) requires all asbestos-exposure actions, including those seeking damages for the death of a person, to be filed within two years from the date that the person is informed by a physician that [s] he has been injured by asbestos exposure. Since plaintiffs did not amend the complaint within two years of the decedent's mesothelioma diagnosis to include a claim for wrongful death, any such claim is time-barred by Section 5524(8), and defendants' motions in limine based upon the expiration of the statute of limitations will, therefore, be granted.

I. FACTUAL BACKGROUND

Plaintiffs, I. Robert Horst, Jr. and Diane Horst ("the Horsts"), have instituted this tort action against twelve manufacturers or sellers of boilers, furnaces or joint compound which allegedly contained asbestos that caused Mr. Horst to develop malignant mesothelioma. *See Horst v. Union Carbide Corporation*, 2016 WL 1670272 (Lacka. Co. 2016). In anticipation of the trial scheduled to commence on October 30, 2017, the parties have filed 147 motions in limine, responses and briefs, (Docket Entry Nos. 179-470), and 142 of those motions have been decided by rulings and orders issued to date. (Docket Entry Nos. 471-612). The remaining five pre-trial motions awaiting disposition concern the motions in limine of defendants, Rheem Manufacturing Company ("Rheem"), Hajoca Corporation ("Hajoca"), Georgia-Pacific, LLC ("Georgia-Pacific"), Union Carbide Corporation ("Union Carbide"), and York International Corporation ("York"), to preclude the Horsts from advancing a wrongful death claim at the time of trial. (Docket Entry Nos. 179, 199, 206, 211, 383).

The salient facts that are relevant to the pending motions are not in dispute. On March 4, 2015, the Horsts filed this personal injury action and averred that Mr. Horst "was diagnosed with malignant mesothelioma on or about November of 2014" and "was unaware of and could not discover the nature and cause of his mesothelioma before November 2014."[1] (Docket Entry No. 1 at ¶¶43-44). The

1. Factual averments made by a party in a pleading are binding judicial admissions that are conclusive in the case in which they are made, and cannot be contradicted by the admitting party. *Estate of Sacchetti v. Sacchetti*, 128 A.3d 273, 283 (Pa. Super. 2015), *app. denied*, 145 A.3d 728 (Pa. 2016); *Coleman v. Wyeth Pharmaceuticals, Inc.*, 6 A.3d 502,

Horsts subsequently produced an affidavit of Mr. Horst's treating oncologist and hematologist, Evan W. Alley, M.D., Ph.D., attesting that "[o]n or about November 6, 2014, Robert Horst was diagnosed with malignant mesothelioma of the right pleura." (Docket Entry No. 206, Exhibit B at ¶4). In the Horsts' complaint, Mr. Horst sought to recover damages for his past and future medical expenses, lost wages, and pain and suffering. (Docket Entry No. 1 at ¶¶45, 49-51). Ms. Horst asserted a derivative claim for the loss of her husband's consortium. (*Id.* at ¶¶98-101, 123-126, 148-151, 173-176, 198-201, 223-226, 248-251, 273-276, 298-301, 323-326, 348-351, 373-376). Additionally, the Horsts demanded the recovery of punitive damages from defendants.[2] (*Id.* at ¶¶95-97, 120-122, 145-147, 170-172, 195-197, 220-222, 245-247, 270-272, 320-322, 345-347, 370-372).

According to his death certificate, Mr. Horst died on July 28, 2016. (Docket Entry No. 211, Exhibit E). However, the Horsts did not seek to amend their complaint by November 6, 2016, (i.e., within two years of Mr. Horst's mesothelioma diagnosis) to include a claim for wrongful death. In fact, the Horsts have yet to amend their complaint to reflect that Mr. Horst's estate is pursuing a survival claim for asbestos-related losses allegedly suffered by him. *See Salvadia v. Ashbrook*, 923 A.2d 436, 439-440 (Pa. Super. 2007); *Clinton v. Giles*, 719 A.2d 314,

524 (Pa. Super. 2010), *app. denied*, 611 Pa. 638, 24 A.3d 361 (2011).

2. The Horsts' punitive damages claims against defendants, Trane US, Inc., f/k/a American Standard, Inc., Burnham, LLC, Carrier Corporation, Peerless Industries, Inc. and Rheem were later dismissed by way of partial summary judgment. *See Horst v. Union Carbide Corporation*, 2016 WL 4005440, at * 2-4 (Lacka. Co. 2016); *Horst v. Union Carbide Corporation*, 2016 WL 1670272, at *26-30 (Lacka. Co. 2016).

317-318 (Pa. Super. 1998), *app. denied*, 559 Pa. 662, 739 A.2d 163 (1999).

The moving defendants have filed motions in limine seeking to bar the Horsts from advancing a wrongful death claim for two reasons. First, citing what they submit is the applicable version of the Wrongful Death Act, 42 Pa.C.S. § 8301(a), Rheem, Georgia-Pacific, Union Carbide and York contend that the Horsts are statutorily precluded from asserting a wrongful death claim since they commenced this asbestos litigation during Mr. Horst's lifetime. (Docket Entry No. 179 at pp. 2-3; Docket Entry No. 206 at ¶7; Docket Entry No. 211 at ¶7; Docket Entry No. 383 at ¶¶6-8). Second, Hajoca, Georgia-Pacific, Union Carbide and York maintain that any wrongful death claim is barred by 42 Pa.C.S. § 5524(8) since the Horsts failed to amend their complaint within two years of Mr. Horst's mesothelioma diagnosis to include a claim for wrongful death. (Docket Entry No. 199 at ¶¶4-5; Docket Entry No. 206 at ¶¶6, 8; Docket Entry No. 211 at ¶¶6, 8; Docket Entry No. 383 at ¶¶3, 9).

In their brief in opposition to those motions in limine, the Horsts respond to the first argument advanced by Rheem, Georgia-Pacific, Union Carbide and York, and posit that "they rely on bad law" and "ignore the current and hence controlling version" of Section 8301(a). (Docket Entry No. 427 at p. 1). The Horsts note that those defendants premise that argument upon language in 42 Pa.C.S. § 8301(a) that was removed and replaced when that statute was amended in 1995. (*Id.* at p. 2). However, the Horsts' brief does not address Hajoca's assertion, or the alternate argument of Georgia-Pacific, Union Carbide and York, that a claim for wrongful death is time-barred

by 42 Pa.C.S. § 5524(8) based upon the Horsts' failure to amend the complaint by November 6, 2016, to include a claim for wrongful death.

II. DISCUSSION

(A) SURVIVAL AND WRONGFUL DEATH DAMAGES

The pending motions in limine concern the damages that may be recoverable in this case following the death of Mr. Horst. Damages available under the Survival Act, 42 Pa.C.S. § 8302 ("All causes of actions or proceedings... shall survive the death of the plaintiff...."), serve to compensate the decedent's estate for losses suffered by the decedent. *Tulewicz v. SEPTA*, 529 Pa. 588, 597, 606 A.2d 427, 431 (1992). In a survival action, damages may be awarded for any conscious pain and suffering that the decedent endured prior this death, *Williams v. SEPTA*, 741 A.2d 841, 859 (Pa. Cmwlth. 1999), *app. denied*, 563 Pa. 680, 759 A.2d 925 (2000), as well as for the gross amount of income and fringe benefits that the decedent would have earned during the decedent's estimated work life expectancy, less the probable cost of his personal maintenance during that same period. *Incollingo v. Ewing*, 444 Pa. 261, 309, 282 A.2d 206, 229 (1971); *Slaseman v. Myers*, 309 Pa. Super. 537, 544, 545, 455 A.2d 1213, 1217-18 (1983). Additionally, the decedent's estate may recover punitive damages under the Survival Act, provided that the decedent could have recovered punitive damages had he lived. *Harvey v. Hassinger*, 315 Pa. Super. 97, 102, 461 A.2d 814, 816 (1983); *Lasavage v. Smith*, 23 Pa. D. & C. 5th 334, 336 n.1 (Lacka. Co. 2011).

In contrast, damages recoverable under the Wrongful

Death Act are designed to compensate the decedent's family members for the loss that they have sustained as a result of the decedent's death. *Gillette v. Wurst*, 594 Pa. 544, 554, 937 A.2d 430, 436 (2007). "Damages for wrongful death are the value of the decedent's life to the family, as well as expenses caused to the family by reason of the death." *Rettger v. UPMC Shadyside*, 991 A.2d 915, 932 (Pa. Super. 2010), *app. denied*, 609 Pa. 698, 15 A.3d 491 (2011). Those damages include reasonable health care, funeral, burial and estate administration expenses necessitated by reason of the death, *Kiser v. Schulte*, 538 Pa. 219, 226, 648 A.2d 1, 4 (1994), and the pecuniary value of the services that the decedent would have rendered to his family, including any contributions or support that the decedent would have provided for shelter, food, clothing, medical care, education, entertainment, gifts and recreation. *Machado v. Kunkel*, 804 A.2d 1238, 1245-46 (Pa. Super. 2002), *app. denied*, 572 Pa. 766, 819 A.2d 547 (2003). A decedent's spouse may also recover in the wrongful death action for the loss of the decedent's society, consortium, affection and assistance. *Spangler v. Helm's New York-Pittsburgh Motor Express*, 396 Pa. 482, 485, 153 A.2d 490, 492 (1959); *Fasula v. Hijazi*, 44 Pa. D. & C. 4th 553, 560 (Lacka. Co. 1999).

As noted above, the Horsts' complaint seeks to recover damages for Mr. Horst's past and future medical expenses, loss of income, and pain and suffering and for Ms. Horst's loss of consortium. Provided that Mr. Horst's estate is properly substituted as the named plaintiff seeking to recover the damages claimed by Mr. Horst in his complaint, *see*, 20 Pa. C.S. § 3372, defendant stipulated at the time of oral argument that those damages would be recoverable

under the Survival Act, as would Ms. Horst's previously asserted claim for loss of consortium. (Transcript of Proceedings ("T.P.") on 3/6/17 at p. 56). However, for the reasons asserted in their motions in limine, defendants maintain that the verdict slip cannot include a separate line for the recovery of wrongful death damages, including the decedent's funeral, burial and estate administration expenses. (*Id.* at p. 54) (arguing that "on the verdict slip, it would be a survival line, a loss of consortium line, but no wrongful death line.").

(B) DECEDENT'S FILING OF TORT ACTION DURING HIS LIFETIME

Rheem, Georgia-Pacific, Union Carbide and York contend that Section 8301(a) of the Wrongful Death Act prohibits any claim for wrongful death since the Horsts filed this suit during Mr. Horst's lifetime. (Docket Entry No. 179 at p. 1; Docket Entry No. 206 at ¶7; Docket Entry No. 211 at ¶7; Docket Entry No. 383 at ¶¶6-8). In support of that claim, they quote 42 Pa.C.S. § 8301(a) as allegedly stating:

> General rule. — An action may be brought, under procedures prescribed by general rules, to recover damages for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another *if no action for damages was brought by the injured individual during his lifetime*.

(Docket Entry No. 179 at p. 2 (emphasis added)). Since this civil action for damages was brought by Mr. Horst during his lifetime, Rheem, Georgia-Pacific, Union Carbide and York assert that this purported statutory language foreclosures any wrongful death claim in this case. (*Id.*

at p. 2 ("Pennsylvania law precludes any claim under the Wrongful Death Statute once a claim is brought during the lifetime of the injured plaintiff."); Docket Entry No. 206 at ¶7 ("Plaintiffs are precluded from recovering damages under the Wrongful Death Statute because they brought an asbestos-related claim during the lifetime of Plaintiff I. Robert Horst."); Docket Entry No. 211 at ¶7 ("Plaintiffs are precluded from recovering damages under the Wrongful Death Statute because they brought an asbestos-related claim during the lifetime of Plaintiff I. Robert Horst."); Docket Entry No. 383 at ¶6 ("Pennsylvania law precludes any claim under the Wrongful Death Statute once a claim is brought during the lifetime of the injured plaintiff.")).

The Horsts are correct that Rheem, Georgia-Pacific, Union Carbide and York have mistakenly relied upon a version of 42 Pa.C.S. § 8301(a) that was effective until 1995. *See, e.g.*, *Baumgart v. Keene Building Products Corp.*, 430 Pa. Super. 162, 167 n.2, 633 A.2d 1189, 1191 n.2 (1993), *aff'd*, 542 Pa. 194, 666 A.2d 238 (1995) (Per Zappala, J., with two Justices concurring). However, Section 8301(a) was amended in 1995, and currently reads:

> General rule. — An action may be brought, under procedures prescribed by general rules, to recover damages for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another *if no recovery for the same damages claimed in the wrongful death action was obtained by the injured individual during his lifetime and any prior actions for the same injuries are consolidated with the wrongful death claim so as to avoid a duplicate recovery*.

42 Pa.C.S. § 8301(a) (emphasis added). The above-quoted version of Section 8301(a) became effective on September 6, 1995, *see Hodge v. Loveland*, 456 Pa. Super. 188, 192-193, 690 A.2d 243, 245 (1997), *app. denied*, 555 Pa. 701, 723 A.2d 672 (1998), and presently remains in effect. *See Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 496 n.3 (Pa. 2016). Since Mr. Horst did not recover any damages for his claimed asbestos injuries during his lifetime, the applicable language of Section 8301(a) does not bar a wrongful death claim in this case, provided that such a claim is otherwise permitted by the statutory law and decisional precedent discussed in Section 11(C) below.

(C) STATUTE OF LIMITATIONS FOR WRONGFUL DEATH CLAIM DUE TO ASBESTOS EXPOSURE

Hajoca, Georgia-Pacific, Union Carbide and York also seek to preclude any wrongful death claim based upon Section 5524(8) of the Judicial Code, 42 Pa.C.S., which requires asbestos-exposure claims, including those involving the death of a person, to be filed within two years from the date that the person is informed by a physician that [s]he has been injured by asbestos exposure.[3] Section 5524(8) provides:

3. In 2004, Section 5524(8) was replaced with 42 Pa.C.S. § 5524.1, *Daley v. A. W. Chesterton. Inc.*, 614 Pa. 335, 37 A.3d 1175, 1182 n.10 (2012), and Section 5524.1(a) contained language that was identical to Section 5524(8). *Johnson v. American Standard*, 607 Pa. 492, 500 n.4, 8 A.3d 318, 323 n.4 (2010). In *Com. v. Neiman*, 624 Pa. 53, 84 A.3d 603 (2013), the Supreme Court of Pennsylvania struck down Act 152, which promulgated 42 Pa.C.S. § 5524.1, as violative of the single subject rule of Article III, Section 3 of the Pennsylvania Constitution. *Id.* at 70-75, 84 A.3d at 613-616. The invalidation of Act 152 also voided that legislation's deletion of § 5524(8), such that "42 Pa.C.S. § 5524(8) remains operative and supplies the applicable statute of limitations in an asbestos case." *Wygant v. General Electric Co.*, 113 A.3d 310, 313 (Pa. Super. 2015), *app. denied*, 633 Pa. 781, 126 A.3d 1286 (2015).

> An action to recover damages for injury to a person or for the death of a person caused by exposure to asbestos shall be commenced within two years from the date on which the person is informed by a licensed physician that the person has been injured by such exposure or upon the date on which the person knew or in the exercise of reasonable diligence should have known that the person had an injury which was caused by such exposure, whichever date occurs first.

42 Pa.C.S. § 5524(8). Since Mr. Horst was admittedly diagnosed with mesothelioma on November 6, 2014, but the complaint was never amended on or before November 6, 2016, to include a wrongful death claim, Hajoca, Georgia-Pacific, Union Carbide and York maintain that any such claim is time-barred under Section 5524(8).

In *Wygant*, the Superior Court of Pennsylvania observed that in adopting Section 5524(8), "the legislature has specifically defined the event from which the statute of limitations for asbestos claims is to be computed." *Wygant*, 113 A.3d at 313. "The language of § 5524(8) clearly states, in pertinent part, that the statute of limitations on any asbestos-related claim, including one for death, starts to run from the date the afflicted person is diagnosed with asbestos-related disease." *Id.* at 315. In addressing the plaintiffs argument "that such an interpretation may result in wrongful death actions be time-barred before they can be instituted," *Id.* at 314, *Wygant* acknowledged that although "some of the consequences of applying § 5524(8) to wrongful death actions may seem harsh, ...it is the prerogative of the legislature to set the limitations on actions." *Id.* at 316. The decedent in *Wygant* was diagnosed with mesothelioma on June 17, 2011, and died on July 9,

2012, but the wrongful death suit was not filed by June 17, 2013, and instead was not instituted until January 9, 2014. *Id.* at 311. Since the asbestos suit in *Wygant* was filed within two years of the decedent's death, but more than two years after her mesothelioma diagnosis, the Superior Court concluded that the wrongful death claim was time-barred by 42 Pa.C.S. § 5524(8). *Id.*

Not unlike *Wygant*, the Horsts had the opportunity to assert a wrongful death claim within two years of Mr. Horst's mesothelioma diagnosis by amending the complaint on or before November 6, 2016, to include a cause of action under 42 Pa.C.S. § 8301. Although an "amendment is not permitted to present a new cause of action where the statute of limitations has expired," *Blackwood, Inc. v. Reading Blue Mountain & Northern Railroad Company*, 147 A.3d 594, 598 (Pa. Super. 2016), *app. denied*, 2017 WL 210976 (Pa. 2017), it is well settled that a plaintiff may amend the complaint to add a new cause of action prior to the expiration of the applicable statute of limitations, *Ragnar Benson. Inc. v. Bethel Mart Associates*, 308 Pa. Super. 405, 414, 454 A.2d 599, 603 (1982), including new claims for wrongful death if the plaintiff dies from tortiously caused injuries after [s]he has already filed suit based upon that alleged tort. *See Hudak-Bisset v. County of Lackawanna*, 37 Pa. D. & C. 5th 159, 194 (Lacka. Co. 2014). At the time of oral argument, the Horsts' counsel stated that no effort was made to amend the complaint to include a wrongful death claim following Mr. Horst's death on July 28, 2016, but before November 7, 2016, since the Horsts' counsel believed that such an amendment could be accomplished only with the consent of all defendants. (T. P. 3/6/17 at p. 54). Counsel was mistaken in that belief since Pa.R.C.P.

1033 permits such amendments to the complaint to state "a new cause of action" either with consent of the parties or by leave of court. *Blackwood, Inc.*, *supra*. The Horsts were entitled to amend their complaint by November 6, 2016, to include a wrongful death claim under 42 Pa.C.S. § 8301, and if the Horsts had sought leave of court to do so, their request would have been granted. *See Martin v. Otis Elevator Co.*, 2016 WL 723059, at *7 n.7 (Phila. Co. 2016) (since decedent "was diagnosed with lung cancer on October 7, 2011," the plaintiffs "had until October 7, 2013 to amend their complaint to include a new cause of action or assert new claims against Otis as an employer."), *app. discontinued*, No. 3263 EDA 2015 (Pa. Super. 2016).

Since the Horsts did not file a wrongful death claim within two years of Mr. Horst's mesothelioma diagnosis, any wrongful death claim in this matter is time-barred by 42 Pa.C.S. § 5524(8). Consequently, the motions in limine filed by Hajoca, Georgia-Pacific, Union Carbide and York based upon the governing statute of limitations will be granted, and per their request, a special damage interrogatory for wrongful death will not be included on the verdict slip. *See Bortner v. Gladfelter*, 301 Pa. Super. 492, 499-500, 448 A.2d 1386, 1390 (1982) (wrongful death and survival actions may be enforced in a single action, but "the jury must bring in a separate verdict for each cause of action."). An appropriate Order follows.

ORDER

AND NOW, this 30th day of June, 2017, upon consideration of the motions in limine of defendants, Rheem Manufacturing Company, Union Carbide Corporation, Georgia-Pacific, LLC, Hajoca Corporation,

and York International Corporation, to preclude plaintiffs from asserting a wrongful death claim, the memoranda of law submitted by the parties, and the oral argument of counsel, and based upon the reasoning set forth in the foregoing Memorandum, it is hereby ORDERED and DECREED that:

1. The motions in limine of defendant, Rheem Manufacturing Company, Union Carbide Corporation, Georgia-Pacific, LLC, and York International Corporation, to preclude any wrongful death claim based upon 42 Pa.C.S. § 8301(a) and the decedent's filing of this action during his lifetime are DENIED; and

2 The motions in limine of defendants, Union Carbide Corporation, Georgia-Pacific, LLC, Hajoca Corporation, and York International Corporation, to preclude a claim for wrongful death as time-barred by 42 Pa.C.S. § 5524(8) are GRANTED.

Commonwealth v. Ingram

Post-sentence motion — Substantial question — Discretion — Sentencing factors

The court did not abuse its discretion in sentencing a defendant within the standard range, and defendant failed to raise a substantial question where the court clearly placed its reasoning in support of the sentence on the record.

Defendant was charged with various crimes related to his theft of tax refunds from clients for whom he had prepared tax returns. Defendant entered a guilty plea to one count of receiving stolen property, a felony of the third degree. The state agreed not to pursue the other charges. As part of the plea deal, defendant promised to pay restitution to both victims. The probation department performed a pre-sentence investigation (PSI) and provided a report. The PSI was completed prior to the sentencing

hearing, and counsel for both parties had the opportunity to read the report before sentencing occurred.

A sentencing hearing took place on April 17. Neither side presented any objections or requests for revisions to the PSI report. Defendant's counsel requested a probationary sentence based on defendant's age, education, lack of prior record and agreement to pay restitution. Defendant apologized at the hearing, but the court viewed this apology as merely perfunctory. One of victims testified at the sentencing hearing, explaining that defendant had prepared taxes for her and her husband for the 10 years, that defendant had violated their trust, caused them embarrassment by subjecting them to an investigation into whether the victim and her husband had committed wrongdoing, and tied up their money.

The court sentenced defendant to incarceration of five to 24 months in a county correctional facility, a sentence within the standard range. The court also ordered defendant to pay restitution in accordance with his plea. Before announcing the sentence, the court explained its reasoning, which included the facts related to his plea, the PSI report, the victim's testimony at the sentencing hearing, statements by defendant and his attorney, and the applicable sentencing laws.

Defendant filed a post-sentence motion for reconsideration, contending that the sentence was far greater than the standard range guideline sentence and a deviation from the sentencing guidelines. He sought a substantial reduction of the sentence based on his view that the court failed to properly weigh the facts and apply the sentencing guidelines.

The court rejected defendant's assertion that no nexus existed between the factors considered and the sentence imposed, because the court placed sufficient reasons for the sentence on the record. The sentencing guidelines were instructive and advisory, but the court was not under a duty to sentence a particular defendant within the guidelines or to impose the minimum possible confinement stated under the guidelines. The sentence here was within the standard range and was made with the benefit of a PSI report, so the court did not consider it excessive.

The court concluded the defendant's boilerplate challenge to the discretionary aspects of the sentence did not raise a substantial question. The sentence imposed was not a deviation from the guidelines, but was squarely within the standard range. The court recommended the sentence should be affirmed.

C.P. of Monroe County, No. 1327 CRIMINAL 2015

MARK, *J*., July 7, 2017—Following the denial of his post-sentence motion, Defendant filed this appeal in which he attempts to challenge the discretionary aspects of his sentence.[1] After the appeal was filed, we directed Defendant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Defendant complied, and we now file this opinion in accordance with Pa.R.A.P. 1925(a).

BACKGROUND

Defendant was arrested and charged in this case and in case No. 2046 Criminal 2015 with Unlawful Use of a Computer, Criminal Use of a Communication Facility, Receiving Stolen Property, Theft by Failure to Make Required Disposition, and Theft by Deception, all of which were graded as felonies of the third degree. The charges were based on Defendant stealing tax refunds from clients for whom he had prepared tax returns.

On February 7, 2017, after a long pre-trial period during most of which he represented himself, Defendant entered a counseled plea of guilty in this case to one count of Receiving Stolen Property, a felony of the third degree. In exchange, the Commonwealth agreed to *Nolle Pros* the remaining charges in this case and all charges in case No. 2046. However, as part of the plea agreement, Defendant agreed to pay restitution to the victims in both cases. After accepting the plea, we entered an order scheduling a

1. In his notice of appeal Defendant purports to appeal from *both* the judgment of sentence *and* the order denying his post sentence motions. However, in a criminal context, an appeal properly lies from the judgment of sentence. *See Commonwealth v. Dreves*, 839 A.2d 1122, 1125 n.1 (Pa. Super. 2003) (*en banc*) (in a criminal action, appeal properly lies from the judgment of sentence made final by the denial of a post-sentence motion).

sentencing hearing and directing our Probation Department to perform a Pre-Sentence Investigation ("PSI") and provide a report.

The PSI report was completed in advance of hearing. Counsel for both parties had the opportunity to read the report prior to sentencing.

On April 17, 2017, the sentencing hearing was convened, as scheduled. There were no objections or requests for revisions to the PSI report. (N.T., 4/17/2017, p. 7). Defendant and his attorney addressed the Court. Counsel asked for a probationary sentence based on Defendant's age, education, lack of prior record, and agreement to pay restitution. (*Id.* at 7-9). Defendant perfunctorily apologized to one of the victims who was present and re-affirmed his commitment to pay restitution, but did not truly accept responsibility for his actions. To him, the matter was more of a mistake than a crime. (*Id.* at 9; PSI Report).

The assistant district attorney then presented one of the victims who quietly but eloquently articulated how Defendant, who had been their tax preparer for ten years, had violated their trust, caused she and her husband the embarrassment of an investigation into whether they had committed any wrongdoing, and tied up their money. (*Id.* at 10-11). The assistant district attorney then asked that we imposed a sentence of 6 to 23 months, with a three-year probationary tail, plus restitution. She based her request on a variety of factors, including Defendant's breach of the victims' trust, his testing positive for Oxycodone at the PSI interview and then submitting a script that was dated the day after the drug screen, his failure to take responsibility, and his failure to follow-through on

making payments toward restitution prior to sentencing. She pointed to several of those factors and aggravating factors. (*Id.* at 12-17; PSI).

At the conclusion of the hearing, Defendant was sentenced to incarceration of five to twenty-four months, less one day, in the Monroe County Correctional Facility, a sentence within the standard range. In addition, Defendant was ordered to pay restitution to the victims in both cases in accordance with his plea.

Before announcing the sentence, we explained our reasoning and informed Defendant of the facts, information, and documents on which the sentence is based. Specifically, we advised Defendant that the sentence is based on the record and file in this case, the facts surrounding his plea that we accepted, the PSI report, the statements made during the sentencing hearing by Defendant, his attorney, the assistant district attorney, and the victim, and the applicable sentencing laws, rules, and guidelines. We then stated our reasons on the record. (*Id.* at 17-21; PSI Report).

Subsequently, Defendant filed a post-sentence motion seeking reconsideration of the sentence, mischaracterizing the sentence as one "far greater than the standard range guideline sentence" and "a deviation from the sentencing guidelines." (Defendant's Post Sentence Motion, filed April 26, 2017, ¶3). Defendant sought a "substantial reduction" of the sentence based on his claim that we failed to properly apply the sentencing guidelines and failed to properly weigh the facts and circumstances of this case. (*Id.* at ¶¶5-10).

On April 27, 2017, we issued an order denying

Defendant's motion. Defendant then filed this appeal.

DISCUSSION

Defendant's appeal statement reasserts the allegations of his post-sentence motion. He begins by repeating his mischaracterization of the sentence as one "far greater than the standard range guideline sentence" and "a deviation from the sentencing guidelines." (Defendant's Rule 1925(b) Statement, filed June 15, 2017, ¶¶1 and 3). In laundry list, somewhat boilerplate fashion, Defendant goes on to contend that there was "no nexus between the factors considered and sentence imposed (*Id.* at ¶2)," and that we failed to properly: consider the sentencing guidelines, reference the applicable factors, or weigh the facts and circumstances. (*Id.* at ¶¶3-6).

Having reviewed the record and Defendant's sentencing order in light of this appeal, we remain convinced that the sentence imposed was appropriate under the facts and circumstances of this case, that we placed sufficient reasons for that sentence on the record, and that we neither erred nor abused our discretion in sentencing Defendant.

Sentencing is a matter within the sound discretion of the trial court. *See Commonwealth v. Walls*, 926 A.2d 957 (Pa. 2007). In sentencing each particular defendant, the sentencing court may select one or more options with regard to determining the appropriate sentence to be imposed. *Id.* The court must impose a sentence that is "consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." 42 Pa.C.S. §9721(b). *See Walls*, 926 A.2d at 967-68; *Commonwealth v. Dodge*, 957 A.2d 1198,

1200 (Pa. Super. 2008) ("*Dodge II*"), *appeal denied*, 980 A.2d 605 (Pa. 2009). Additionally, a court should consider the particular circumstance of the offense and the character of the defendant, and should refer to the defendant's prior criminal record, her age, personal characteristics and her potential for rehabilitation. *Commonwealth v. Moury*, 992 A.2d 162, 171 (Pa. Super. 2010) (citing *Commonwealth v. Griffin*, 804 A.2d 1, 10 (Pa. Super. 2002), *appeal denied*, 868 A.2d 1198 (Pa. 2005), *cert. den*, 545 U.S. 1148 (2005)).

The sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing are instructive and advisory, but are not binding on the sentencing court. The court is obligated to consider the guidelines, but is under no duty to sentence a particular defendant within the guidelines or to impose the minimum possible confinement consistent with the guidelines. *Walls*, 926 A.2d at 575; *Dodge II*, 957 A.2d at 1201. Nonetheless, "[w]here a sentence is within the standard range of the guidelines, Pennsylvania law views the sentence as appropriate under the Sentencing Code." *Moury*, 992 A.2d at 171 (citing *Commonwealth v. Cruz-Centeno*, 668 A.2d 536 (Pa. Super. 1995), *appeal denied*, 676 A.2d 1195 (Pa. 1996)).

The court determines whether aggravating circumstances exist. If aggravating circumstances are present, "the court may impose an aggravated sentence ...." 204 Pa. Code. §303.13(a). A sentencing judge "has wide discretion in sentencing and can, on the appropriate record and for the appropriate reasons, consider any legal factor in imposing a sentence in the aggravated range." *Commonwealth v. Stewart*, 867 A.2d 589, 593 (Pa. Super. 2005) (citation

omitted). *See also Commonwealth v. Duffy*, 491 A.2d 230, 233 (Pa. Super. 1985) (holding that a sentencing judge may consider any legal factor in deciding whether a defendant should be sentenced within the aggravated range). A sentencing judge may even consider uncharged criminal conduct for sentencing purposes.

> Not only does the case law authorize a sentencing court to consider unprosecuted criminal conduct, the sentencing guidelines essentially mandate such consideration when a prior record score inadequately reflects a defendant's criminal background.

Commonwealth v. P.L.S., 894 A.2d 120, 131 (Pa. Super. 2006), *appeal denied*, 906 A.2d 542 (Pa. 2006). *See also* 204 Pa. Code §303.5(d).

The sentencing judge must state his or her reasons for the sentence on the record. 42 Pa.C.S.A. §9721(b). The judge may satisfy this requirement by stating or demonstrating at time of sentencing that the judge has been informed of the reasons by the PSI report. *Commonwealth v. Coss*, 695 A.2d 831, 834 (Pa. Super. 1997); 42 Pa.C.S.A. §9721 (b). When, as here, a PSI report exists, the law presumes that

> the sentencing judge was aware of the relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. A pre-sentence report constitutes the record and speaks for itself....[Sentencing courts] are under no compulsion to employ checklists or any extended or systematic definitions of their punishment procedure. Having been fully informed by the pre-sentence report, the sentencing court's discretion should not be disturbed. This is particularly true ... in those

> circumstances where it can be demonstrated that the judge had any degree of awareness of the sentencing considerations, and there we will presume also that the weighing process took place in a meaningful fashion. It would be foolish, indeed, to take the position that if a court is in possession of the facts, it will fail to apply them to the case at hand.

Commonwealth v. Devers, 546 A.2d at 18. *See also Moury*, 992 A.2d at 171; *Commonwealth v. Fowler*, 893 A.2d 758 (Pa. Super. 2006); *Commonwealth v. Tirado*, 870 A.2d 362 (Pa. Super. 2005); *Commonwealth v. Burns*, 765 A.2d 1144, 1150-1151 (Pa. Super. 2000). In this regard, a sentencing judge is not required, when giving the reasons for a particular sentence, to make a specific reference to the factors set forth in the Sentencing Code that were considered in deciding the sentence, but the record as a whole must reflect that the judge in fact considered the sentencing factors. *Commonwealth v. Coulverson*, 34 A.3d 135, 145-146 (Pa. Super. 2011).

If the sentence is within the guidelines but departs from the standard range, the reasoning must include a statement as to why the sentence is in the aggravated or mitigated range. 204 Pa. Code §303.13. *See Commonwealth v. Garcia-Rivera*, 983 A.2d 777 (Pa. Super. 2009); *Commonwealth v. Hoover*, 492 A.2d 443 (Pa. Super. 1985). Similarly, if the sentencing court imposes a sentence outside of the guidelines, it must provide a sufficient statement of its reasons for the deviation, and its failure to do so may constitute grounds for resentencing. *Walls*, 926 A.2d at 963. *See Commonwealth v. Warren*, 84 A.3d 1092 (Pa Super. 2014); 42 Pa.C.S. §9721; 204 Pa. Code §303.1.

While a sentencing judge may satisfy the requirement to state reasons for the sentence given in a variety of ways, the reasons must be articulated at the time sentence is imposed and may not be supplied later in an appeal opinion issued in accordance with Pa. R.A.P. 1925(a). *See Commonwealth v. Giles*, 449 A.2d 641 (Pa. Super. 1982) (and cases cited therein). Accordingly, the intent of a judge's given sentence is determined at sentencing, rather than after an appeal from the judgment of sentence has been taken. (*Id.*).

In sum, our sentencing laws establish a framework for sentencing. Within the established framework, trial courts have broad discretion in determining the range of permissible confinements that best suits the particular defendant and the circumstances surrounding the event. *See Commonwealth v. Moore*, 617 A.2d 8, 12 (Pa. Super. 1992). In order to constitute an abuse of discretion, a sentence must either exceed the statutory limits or be so manifestly excessive as to constitute an abuse of discretion. *Commonwealth v. Miller*, 965 A.2d 276, 277 (Pa. Super. 2009) (quoting *Commonwealth v. Fish*, 752 A.2d 921, 923 (Pa. Super. 2000)). A sentence should not be disturbed where it is evident that the sentencing court was aware of sentencing considerations and weighed the considerations in a meaningful fashion. Finally, where the sentencing court imposes a standard-range sentence with the benefit of a PSI report, the Superior Court will not consider the sentence excessive. *Commonwealth v. Corley*, 31 A.3d 293, 298 (Pa. Super. 2011) (citing *Commonwealth v. Moury*, *supra*).

The statutory and judicial standards of review are reflective of the type of discretion vested in sentencing

courts. Statutorily, the Sentencing Code prescribes a slightly different standard of appellate review for sentences that are outside the guidelines as opposed to sentences that fall within guideline ranges. Sentences that fall within guideline ranges are subject the "clearly unreasonable" standard of 42 Pa. C.S.A. Section 9781(c)(2), while sentences that fall outside the guidelines are subject to the "unreasonable" standard of Section 9781(c)(3). An "unreasonable" decision from the sentencing court would be one that is "'irrational' or 'not guided by sound judgment.'" *Walls*, 926 A.2d at 963. *See also Dodge II*, 957 A.2d at 1200; 42 Pa. C.S.A. §9781(c)(2) and (3).

Judicially, our Supreme Court has articulated the appellate standard of review as follows:

> [T]he proper standard of review when considering whether to affirm the sentencing court's determination is an abuse of discretion....[A]n abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will. In more expansive terms, our Court recently offered: an abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous.
>
> The rationale behind such broad discretion and the concomitantly deferential standard of appellate review is that the sentencing court is in the best position to

> determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it.

Commonwealth v. Walls, 926 A.2d at 961 (internal citations, quotation marks, and footnote omitted).

Challenges to the discretionary aspects of sentencing do not entitle a defendant to review as of right. In order to establish that review is warranted, the appellant must demonstrate that there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code. A substantial question exists only when the defendant advances a colorable argument that the sentencing judge's actions were either: 1) inconsistent with a specific provision of the Sentencing Code; or 2) contrary to the fundamental norms of the sentencing process. *See Commonwealth v. Mouzon*, 812 A.2d 617, 627-628 (Pa. 2002) (plurality); *Commonwealth v. Crump*, 995 A.2d 1280, 1282 (Pa. Super. 2010), *appeal denied*, 13 A.3d 475 (Pa. 2010); *Moury*, *supra*; *Commonwealth v. Sierra*, 752 A.2d 910 (Pa. Super. 2000). These issues must be examined and determined on a case-by-case basis. *Commonwealth v. Marts*, 889 A.2d 608, 613 (Pa. Super. 2005).

Before reviewing the discretionary aspects of a sentencing claim, the Superior Court conducts:

> a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, *see* Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, *see* Pa.R.Crim.P. [720]; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f);

> and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. §9781(b).... Objections to the discretionary aspects of a sentence are generally waived if they are not raised at the sentencing hearing or raised in a motion to modify the sentence imposed at that hearing.

Commonwealth v. Evans, 901 A.2d 528, 533 (Pa. Super. 2006), *appeal denied*, 909 A.2d 303 (Pa. 2006) (citations and quotation marks omitted).

The Superior Court has repeatedly held that allegations the trial court failed to consider particular circumstances or factors in an appellant's case do not raise a substantial question as they go to the weight accorded to various sentencing factors. *Commonwealth v. Griffin*, 65 A.3d 932, 936 (Pa. Super. 2013); *accord Commonwealth v. Cannon*, 954 A.2d 1222, 1228-29 (Pa. Super. 2008). Similarly, the Superior Court has held that an argument that the trial court failed to consider certain mitigating factors in favor of a lesser sentence does not present a substantial question appropriate for review. *Commonwealth v. Ratushny*, 17 A.3d 1269, 1273 (Pa. Super. 2011); *accord Commonwealth v. Moury*, *supra*. *See also Commonwealth v. Downing*, 990 A.2d 788 (Pa. Super. 2010); *Commonwealth v. Matrioni*, 923 A.2d 444 (Pa. Super. 2007); *Commonwealth v. Pass*, 914 A.2d 442 (Pa. Super. 2006).

Application of these rules, standards, and guidelines to the facts of this case demonstrates that Defendant's sentencing challenge is meritless.

Initially, we do not believe that Defendant will be able to demonstrate the requisite substantial question. First

and foremost, the sentence imposed is a mid-standard range sentence, not a sentence that is "far greater than the standard range guideline sentence" or one that is "a deviation from the sentencing guidelines." (Defendant's Rule 1925(b) Statement, filed June 15, 2017, ¶¶1 and 3). Further, the Superior Court has routinely and consistently held that boilerplate allegations of sentencing error of the type Defendant shotgunned in his Rule 1925(b) statement do not raise a substantial question, especially where, as here, the sentencing court has and considers a PSI report. This is especially true with respect to the assertions that we did not properly weigh or consider factors or did not view them in the manner that Defendant would have liked us to view them. Finally, and critically, Defendant has not advanced a colorable claim that our imposition of a mid-standard range sentence, imposed even though there are aggravating factors, is inconsistent with a specific provision of the Sentencing Code or contrary to the fundamental norms of the sentencing process. Simply, Defendant's bald challenge to the discretionary aspects of his sentence does not raise a substantial question. In fact, given the circumstances of this case, the presence of multiple mitigating factors, the breached trust, and the lack of contrition, the challenge is frivolous.

In the alternative, if Defendant is deemed to have raised the requisite substantial question, his sentencing claim is bootless.

Before imposing sentence, we identified the facts, information, documents, and reports, including the PSI, that we considered. We also explained our reasons for imposing the sentence that Defendant now seeks to challenge. (NT., 4/17/2017, pp. 17-21; PSI Report). Our

on-record statements, coupled with the PSI report that we considered and incorporated, are more than sufficient to explain the reasons for the sentence we imposed, to demonstrate that we complied with applicable sentencing laws and regulations, to show that in sentencing Defendant we acted well within our discretion, and to adequately, properly, and fully address any sentencing issue that Defendant is deemed to have properly raised and preserved for appellate review.

For the reasons stated during the sentencing hearing and highlighted or amplified in this opinion, as well as those set forth in the PSI report, we believe that the individualized sentence we imposed was proper under the facts of this case and the relevant law. The judgment of sentence should be affirmed.

Commonwealth v. Girardi

Search and seizure — Telephone records — Requisite probable cause

Police demonstrated the requisite probable cause to support a search warrant for the review and seizure of defendant's telephone records where the evidence indicated that defendant used his phone to contact another individual to report stealing a gun and to involve the individual in selling the stolen gun. The court denied defendant's motion to suppress.

Defendant was charged with burglary, criminal trespass, receiving stolen property, firearms not to be carried without a license and other crimes. The charges stemmed from an incident that allegedly occurred sometime between Jan. 26 and Feb. 6, 2016. The commonwealth alleged that during this timeframe, defendant entered the residence of his neighbor, victim William Brezina, on Linda Lane and stole a .40 caliber Smith & Wesson pistol and $5,000. He then used a telephone to contact his niece, Aja Weller, and ask her to help dispose of the firearm. The commonwealth offered Weller's testimony that at defendant's request

and in his presence, she sold the gun to a drug dealer who paid for the gun with $450, some cocaine and some Percocet pills. Here, the court considered defendant's omnibus pretrial motion to suppress certain telephone records, among other things. Defendant argued that the commonwealth seized the phone records pursuant to a search warrant issued without the requisite probable cause in violation of both the Fourth Amendment of the U.S. Constitution and Article 1, Section 8 of the Pennsylvania Constitution. The court noted that police interviewed defendant regarding the burglary April 12, 2016, when he provided police with his cellular telephone number and indicated that Weller had stolen a credit card from him. Defendant also indicated that he recently saw Weller with an individual described in an affidavit as Confidential Source 1 (CS1) and said they were capable of burglary. Police interviewed CS1, who was known to them to be a credible source of information. CS1 said defendant abused prescription pills and cocaine. He also said Weller had received a phone call some five or six months earlier in which she was told that defendant was coming over for a large amount of drugs. According to CS1, Weller told him that defendant obtained the gun and money by burglarizing his neighbor's house. This information gave police probable cause to believe defendant and Weller committed violations of the Criminal Code and the Controlled Substance Act, the court observed. Police obtained the warrant to examine and seize phone subscriber billing and account information, including incoming and outgoing call information from the timeframe relevant to the burglary. Therefore, the search warrant issued with the requisite probable cause, the court concluded. Additionally, the court was satisfied that the scope of the warrant was sufficiently narrow to exclude evidence of non-criminal behavior, as it was limited to only phone call records which police believed would corroborate the statements of CS1. As such, defendant was not entitled to the relief sought in his motion to suppress.

C.P. of Lycoming County, No. CR-1960-2016

BUTTS, *J*., July 13, 2017—Defense Counsel filed an Omnibus Pretrial Motion on February 9, 2017. The Court heard argument and testimony on March 23, 2017. Following argument, the parties submitted briefs at the request of Defense Counsel.

Factual Background

Frank Girardi (Defendant) is charged in a criminal information filed November 18, 2016, with Burglary-Overnight Accommodation, No Person Present[1], a felony of the first degree; two counts of Receiving Stolen Property[2], a felony two and a felony three; two counts of Theft by Unlawful Taking or Disposition[3], a felony two and a felony three; one count of Criminal Trespass[4], a third degree felony; Criminal Use of a Communication Facility[5], a third degree felony; Sale of Transfer of Firearms[6], a third degree felony; and Firearms Not to be Carried without a License[7], a third degree felony.

The charges against the Defendant stem from an incident that allegedly occurred sometime between January 26, 2016, and February 6, 2016. The Commonwealth charges that sometime during that period the Defendant entered the residence located at 11 Linda Lane knowing that he was not licensed or privileged to do so with the intent to commit the crimes of Theft by Unlawful Taking and Receiving Stolen Property. More specifically, the Commonwealth charges that the Defendant entered the residence and stole a .40 caliber Smith & Wesson semi-automatic pistol and $5,000.00 US Currency. The Commonwealth charges that the Defendant used a telephone to contact another individual to help him dispose of the firearm and such disposal of the firearm and the carrying of the firearm violated the Uniform Firearms Act.

1. 18 Pa.C.S. § 3502(a)(2).
2. 18 Pa.C.S. § 3925(a).
3. 18 Pa.C.S. § 3921(a).
4. 18 Pa.C.S. § 3503(a)(1)(i).
5. 18 Pa.C.S. § 7512.
6. 18 Pa.C.S. § 6111(c)
7. 18 Pa.C.S. § 6106.

Testimony of William Brezina, Occupant 11 Linda Lane

Brezina testified on behalf of the Commonwealth. He testified that his residence is 11 Linda Lane where he lives alone. He stated that Defendant was his neighbor. He stated that at the time of the alleged incident he was inpatient at White Deer Rehab. When his girlfriend came to pick him up from rehab, she told him that he had been robbed. Brezina testified that a .40 caliber Smith and Wesson was missing from his dresser drawer. He testified that he kept a key to a safe in that same drawer. The safe was under his bed and contained $5,000.00 He reported to police that the money, gun and gold necklaces were missing.

Brezina testified that Kathy Spotts (Brezina's girlfriend) told him that prior to his being taken to the hospital, Defendant "came in there and smelled the gun or something to see if I had fired it, that maybe I tried to — suicide". Preliminary Hearing, 11/2/2016, at 7.

Brezina testified that he had never fired the gun and did not know if the gun was operable.

Brezina testified that though he had asked Defendant, a neighbor, to keep an eye on his residence when he was away (he travels for work), Defendant did not have license to enter his residence.

Testimony of Kathy Spotts, Girlfriend of William Brezina

Spotts testified that she had discovered Brezina in his bedroom and that the bedroom was covered in blood. She stated that Defendant came to the house to check on things when he saw the ambulance was outside. Spotts testified

that Defendant asked her whether Brezina had a gun so maybe he had shot himself. Spotts and Defendant checked for the gun, which they found in the dresser drawer. They smelled it to see if it had recently discharged. They believed that no one had fired the gun.

While Brezina was convalescing, Spotts testified that Defendant would text message her regarding Brezina's health. She also stated that she went to Brezina's home every day around 4 pm. She stated that she shut every bedroom door when she was there but when she would return the following day the doors would be open. She testified that on February 6, 2016, she went to pay Brezina's bills by using the cash stored in the safe and that the cash was missing. That is when she reported the burglary to the police. She also called Brezina's mother to tell her about the burglary. Brezina's mother suggested she check for the gun. When Spotts checked, she realized that the gun was missing.

Spotts also testified that the basement door and side door had been jimmied open and that there were wood shavings by the doors.

Testimony of Aja Weller, CS2

Preliminary Hearing

Weller testified that Defendant is her Uncle. She testified that Defendant called her and said "if I had a gun would you be able to get rid of it". She said "yes". He told her to unlock the back of her apartment building and that he would come over. He did come over and gave her the gun. She proceeded to call a drug dealer to see if he would be interested in purchasing the firearm. Preliminary

Hearing, 11/2/2016, at 47. After she sent him a photo of the handgun he was interested, and came over to purchase the gun. Weller testified that Defendant waited in her apartment during the sale of the firearm. The drug dealer purchased the firearm with two grams of cocaine, twenty (20) Percocet 10 milligram pills, and $450. Preliminary Hearing, 11/2/2016, at 40.

In August of 2016, Police detained Weller regarding the burglary at 11 Linda Lane. She told them that she had sold the firearm to Mark Billups aka Cheekie. *Id.* at 47. She called Defendant on August 23, 2016, to tell him that she was a suspect in the burglary. She testified that Defendant told her not to worry about it because there was nothing to connect her to Brezina i.e. they had never met; she had never been to his home. She described the firearm as a "black handgun". *Id.* at 55.

Suppression Hearing

Weller testified that in June of 2016, she was subject to a motor vehicle stop by Officer Kriner. Jason Shifflett (CS1) was in the vehicle with her and they had heroin in the vehicle. Kriner did not question her about the burglary at the time of the motor vehicle stop, however, she offered him information about the burglary.

She testified regarding her conversation with the First Assistant District Attorney included her telling him what she knew about the events of the burglary i.e. what Defendant had told her. She testified that she did not feel compelled to cooperate.

Testimony of Officer Michael Engel

Preliminary Hearing

Engel was the responding officer to Spotts's call. He is an officer with Old Lycoming Township. He testified that when he came to the home there were gouge marks on the basement door and the kitchen door. *Id.* at 66. He testified that the gun, currency, and gold cross were reported stolen to him by Spotts.

Suppression Hearing

When Engel picked Defendant up and took him to the police station for an interview, he did not tell Defendant that he had a warrant for his arrest relating to the burglary of Brezina's home. He explained to Defendant that he would audio record the interview and read Defendant his *Miranda* rights. Engel testified that Defendant was not under arrest during the interview but had he walked out, Engel would have served him the arrest warrant.

Testimony of Sgt. Chris Kriner

Kriner, of Old Lycoming Township, testified at the suppression hearing. He investigated the burglary of Brezina's residence. He assisted Engel with the investigation and he applied for the search warrant and the wire that are subjects of the motion for suppression. The request for an interception of a conversation was made so that Weller could meet Defendant and have a conversation with him that would corroborate her information to police.

Testimony of Ken Osokow, First Assistant District Attorney

Osokow testified to the procedure when a law enforcement officer seeks to intercept communications. The officer brings the individual to speak with the First Assistant District Attorney (Osokow). Osokow speaks

to the individual alone, outside the presence of police. Osokow interviews the individual to make sure the consent to wear a wire is freely and voluntarily given. Osokow asks the individual why they are there and why the individual believes that the target (Defendant) would speak to her. Osokow asks the informant if they would like an attorney and explains to them that no matter what the police may have indicated, there is no guarantee that the individual will not be charged. If charged and found guilty, however, the District Attorney would inform the Judge of the cooperation and that in his experience the Courts consider cooperation in fashioning a sentence.

Testimony of Frank Girardi, Jr., Defendant

Defendant testified that on the date of his 9/27/2017[8], Engel arrived at his home in uniform and in a marked police car. Engel asked him if he could talk to him about the burglary at his neighbor's house. Defendant indicated "yes" but that he had to be back in time to pick up his sons from school. Engel said that he would ride Girardi back. Defendant testified that one point he stopped answering questions and that if he had known he were under arrest, he would have asked for a lawyer.

Testimony of Leo Diggs, Friend of Defendant

Diggs has been friends with Defendant for over 30 years. He is also Weller's biological uncle. Diggs knew that Weller was Confidential Source 2, as Girardi had indicated that this was the information he received in discovery. Diggs testified that when he questioned Weller

8. Defendant has also been interviewed by police on April 21. 2016. He also volunteered statements to police when they were at 11 Linda Lane investigating the burglary. *See* page 12 below.

as to why she informed against Defendant she said was being made to but she did not tell him who was forcing her to cooperate.

Discussion

I. HABEAS CORPUS

At the preliminary hearing stage of a criminal prosecution, the Commonwealth need not prove the defendant's guilt beyond a reasonable doubt, but rather, must merely put forth sufficient evidence to establish a *prima facie* case of guilt. A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused committed the offense. Furthermore, the evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to be decided by the jury. *Commonwealth v. Karetny*, 880 A.2d 505 (Pa. 2005). *Prima facie* case in the criminal realm is the measure of evidence, which if accepted as true, would warrant the conclusion that the crime charged was committed.

The Commonwealth must present evidence of each element of each crime charged in order to show a *prima facie* case at the preliminary hearing. The evidentiary sufficiency, or lack thereof, of the Commonwealth's *prima facie* case for a charged crime is a question of law as to which an appellate court's review is plenary. *Karetny* at 513. The *prima facie* standard requires that the Commonwealth's evidence must establish that the crime has been committed and to satisfy this requirement the evidence must show that the existence of each of the material elements of the charge is present. *Commonwealth*

v. Wodjak, 446 A.2d 991, 996 (Pa. 1983). While the weight and credibility of the evidence are not factors at this stage, and the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense, the absence of evidence as to the existence of a material element is fatal. *Id.* at 997.

Defense Counsel challenges Counts 1 and 4 of the Criminal Information (Burglary and Criminal Trespass) stating that the Commonwealth has presented no evidence that the entering of the residence was without the permission of the owner and furthermore that the Defendant entered the residence with the intent to commit a crime therein. The Court disagrees. A person commits burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. 18 Pa.C.S. § 3502(a). Spotts testified to the burglary and the missing items. The owner of the items testified that the gun, currency, a gold cross and a Nokia watch were missing from his home. Spotts testified to her belief that there someone had entered the home without her or the owner's permission and that wood shavings were present at the kitchen door and basement door where the doors had been jimmied open. Engel corroborated the report of the burglary and the presence of the gouge marks and wood shavings. Weller testified that Defendant asked her to get rid of the gun that was allegedly stolen. *Id.* at 60. The testimony is *prima facie* evidence, i.e. based on the first impression; accepted as correct until proved otherwise: that Defendant had committed a burglary and criminal trespass.

Defense Counsel argues that Count 2 and Count 3 of the Criminal Information, Theft by Unlawful Taking and Receiving Stolen Property cannot stand because the alleged stolen item, the .40 caliber Smith & Wesson pistol described above, has not been recovered. Defense Counsel submits that in order for the item to be proven a firearm it must be proven operable, which the Commonwealth cannot do without recovering the item. To establish theft by unlawful taking, the Commonwealth must show that an individual unlawfully took, or exercised unlawful control over, the movable property of another with the intent to deprive him of the property. 18 Pa.C.S. § 3921(a). Additionally, to demonstrate the corpus delicti of the crime of receiving stolen property, the Commonwealth must establish that a person intentionally received, retained or disposed of the movable property of another knowing that it has been stolen, unless the property is received, retained, or disposed with the intent to restore the property to the owner. 18 Pa.C.S. § 3925. At the preliminary hearing, it is not necessary for the Commonwealth to prove these elements beyond a reasonable doubt. The statements of the Commonwealth's witnesses are sufficient to establish prima facie evidence of these crimes as charged and the issues that Defense Counsel complains i.e. operability are properly argued at trial.

Defense Counsel challenges Counts 5 and 6 of the criminal information arguing that the Commonwealth has not presented evidence that Defendant neither stole nor received illegally the sum of $5,000.00 US Currency. Defense seeks a level of evidence that is not required at the preliminary hearing. Hearsay statements alone are sufficient to establish a *prima facie* case. *Commonwealth*

v. Ricker, 120 A.3d 349 (Pa. Super. 2015) (petition for allowance of appeal granted to consider *inter alia* whether a *prima facie* case may be proven by the Commonwealth through hearsay evidence alone).

Defense Counsel challenges the charge of Criminal Use of a Communication Facility, as it believes no evidence has been presented that Defendant used a telephone in commission of a crime as defined in the Controlled Substance, Drug, Device and Cosmetic Act. In order to be found guilty of Criminal Use of Communication Facility, the Commonwealth must show that a person used a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under this title [Title 18] or under The Controlled Substance, Drug, Device and Cosmetic Act. Every instance where the communication facility is utilized constitutes a separate offense under this section. Weller testified that Defendant arranged the sale of a firearm that was determined to be stolen by contacting her via cellular phone. That is a *prima facie* case for Criminal Use of a Communication Facility and thus the charge was properly held for court.

Lastly, Defense Counsel argues that even if the Commonwealth's evidence shows that Defendant possessed the firearm in question, which it submits it did not, the Commonwealth cannot prove that the firearm was operable that charge must be dismissed. Defense Counsel cites no statute nor case law for this position nor does the Commonwealth respond in its brief, relying upon the preliminary hearing transcript. If indeed the firearm must be presented in Court, as well as proven operable, as Defense Counsel suggests, this is a trial issue. Under current

Pennsylvania law, the Court finds the Commonwealth has established its prima facie case.

II. MOTION TO SUPPRESS TELEPHONE RECORDS

Defense Counsel argues that the Commonwealth seized phone records pursuant to a search warrant[9] issued without the requisite probable cause, a violation of both the Fourth Amendment of the United States Constitution and Article 1 Section 8 of the Pennsylvania Constitution. Moreover, even if probable cause were established, Defense argues that the search warrant was overbroad as it was not limited to recovering conversation with the Commonwealth's confidential informant but rather allowed the seizure of all phone records.

"[N]o Warrants shall issue, but upon probable cause... and particularly describing the place to be searched, and the persons or things to be seized." U.S.Const. Amend. IV. "[N]o warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause..." Pa. Const. Art. I § 8. In *Orie*, the Pennsylvania Supreme Court explained the "as nearly as may be" requirement of Article I, Section 8:

> It is a fundamental rule of law that a warrant must name or describe with particularity the property to be seized and the person or place to be searched...the particularity requirement prohibits a warrant that is not particular enough and a warrant that is overbroad. A warrant unconstitutional for its overbreadth authorizes in clear or specific terms the seizure of an entire set of items,

9. Commonwealth's Exhibit 2. Application for Search Warrant and Authorization. 7/28/2016.

> or documents, many of which will prove unrelated to the crime under investigation. An overbroad warrant is unconstitutional because it authorizes a general search and seizure. Consequently, in any assessment of the validity of the description contained in a warrant, a court must initially determine for what items probable cause existed. The sufficiency of the description must then be measured against those items for which there was probable cause. Any unreasonable discrepancy between the items for which there was probable cause and the description in the warrant requires suppression. An unreasonable discrepancy reveals that the description was not as specific as was reasonably possible.

88 A.3d at 1002-03 (quoting *Commonwealth v. Rivera*, 816 A.2d 282, 290-291 (Pa. Super. 2003)).

Sergeant Kriner of Old Lycoming Township Police sought the telephone records for the above named Defendant. Upon responding to the report of burglary at 11 Linda Lane, police were flagged down by Defendant who told them he had reported a burglary at the residence prior. Affidavit in support of the application for a search warrant for cellular telephone records, 7/28/2016, at 3. Police interviewed Defendant regarding burglary on April 21, 2016, where he provided police with his cellular telephone number and indicated that Weller had stolen a credit card from him. He also had indicated that he recently saw Weller with what an individual indicated in the affidavit as Confidential Source 1 (CS1)[10] and that they would be capable of committing the burglary. *Id.*

On July 26, 2016, CS1 was interviewed. He was

10. CS1 is Jason Shifflett.

known to be a credible source as information he provided in the past led to the arrest of wanted persons. *Id.* at 4. CS1 indicated that Defendant abused prescription pills and cocaine. He also indicated that Weller had received a telephone call five or six months prior saying that Defendant was coming over for a large amount of drugs. CS1 indicated that Weller had told him the Defendant had gotten money and a gun from burglarizing a neighbor's house. CS1 was aware that the burglary victim was an individual that worked for the gas company and was an alcoholic. *Id.* at 4. This information gave Kriner probable cause to believe Defendant and Weller had committed violations of the Criminal Code as well as The Controlled Substance Act and as such the search warrant issued with the requisite probable cause.

The search warrant was to obtain, examine and seize Verizon Wireless and Sprint PCS subscriber billing and account information to include account notes, incoming and outgoing cell tower records and incoming and outgoing call detail records for subscriber telephone numbers 570-560-3448 [Defendant's number] and 717-592-1193 [Weller's number] for the time period of January 26, 2016 through February 28, 2016. Upon review, the Court is satisfied that the scope of the warrant was sufficiently narrow as to exclude evidence of non-criminal behavior. It is limited in scope only to phone call records, no other evidence capable of being collected was sought. Its purpose was to corroborate the statements of the CS1, was restricted to the one month time period when he estimated that call between Defendant and Weller took place, and includes the discrete period of time when the burglary would have occurred.

As explained in *Commonwealth v. Clark*, 28 A.3d 1285, 1286 (Pa. 2011) the information from the confidential informant cannot be held to a strict legal test such as the affiant must set forth specifically 1) the basis of the informant's knowledge; and 2) facts sufficient to establish the informant's veracity or reliability. Rather the MDJ looks to the totality of the circumstances to determine whether probable cause has been established. In this instance, Defendant himself implicated CS1 and CS2 to police. In turn, CS1 and CS2 gave information to the police that implicated Defendant and CS2. The officer was investigating the sale of a stolen firearm. He had received information from two sources plus Defendant himself that all three were involved in this crime somehow. The toll records were necessary as the investigation progressed in order to further establish a link between the information that police received from CS1 and CS2 that Defendant was involved in the burglary of his neighbor's home.

III. MOTION TO SUPPRESS INTERCEPTED CONVERSATIONS

Defense Counsel submits that the Order issued by this Court allowing the interception of conversations between Weller and Defendant was issued without probable cause and was overbroad in that it did not limit the amount of visits that could be recorded, a violation of 18 Pa.C.S. §5704(2)(iv)[11] and the Pennsylvania Constitution.

11. 18 Pa.C.S. §5702(2)(iv)...If an oral interception otherwise authorized under this paragraph will take place in the home of a nonconsenting party, then, in addition to the requirements of subparagraph (ii), the interception shall not be conducted until an order is first obtained from the president judge, or his designee who shall also be a judge, of a court of common pleas, authorizing such in-home interception, based upon an affidavit by an investigative or law enforcement officer that establishes probable cause for the issuance

Moreover, Defense Counsel argues that Weller did not truly consent to the wearing of the wire as her cooperation was given pursuant to coercion and undue influence.

The Court will begin with the second issue. Having the opportunity to observe Weller's demeanor and testimony at the suppression hearing, the Court finds that she did not appear to have been compelled or coerced into wearing a wire. Though Defense Counsel brought to light Weller's extensive criminal history as well as her motivation to lie in this instant matter i.e. she could be charged with various felonies and misdemeanors related to her participating in the sale of the firearm and the possession and delivery of controlled substances, the Court believes that Weller was not coerced. Her courtroom demeanor indicated that quite frankly no one could compel her to cooperate with police. Her decision to wear a wire to see if she could elicit inculpatory statements from Defendant was entirely voluntary. If her motivation was the hope that the Commonwealth would not then seek charges against her, that is a hope that she can possess but the Court does not believe having hope is coercive. Osokow made it clear to her that her decision to wear a wire was not in exchange for an agreement that the Commonwealth would not prosecute her for involvement in these crimes. She appeared to understand this and the Court believes she did.

Given the investigation history in the affidavit supporting the application for an Order authorizing the consensual interceptions of oral and/or wire communications in

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of such an order. No such order or affidavit shall be required where probable cause and exigent circumstances exist. For the purposes of this paragraph, an oral interception shall be deemed to take place in the home of a nonconsenting party only if both the consenting and nonconsenting parties are physically present in the home at the time of the interception.

a home[12], the Court initially found the probable cause required to authorize the interception and that remains the decision of this Court. Kriner had probable cause to believe that Weller was capable of having conversation with the Defendant in which he would reveal information relating to the burglary at 11 Linda Lane. Weller was interviewed by Kriner on August 10, 2016, at which time she indicated that Defendant had admitting to committing the burglary at 11 Linda Lane, and that he had given her some of the money he acquired as a result of that burglary. She stated that she exchanged a .40 caliber Smith and Wesson semiautomatic with Mark Billups in exchange for prescription pills. She stated that it was at Defendant's request that she arrange the sale of firearm. She observed the firearm and Defendant told her he stole it from his neighbor's house. Comm. Ex. 3 at 5. She further stated that the Defendant was continuing to talk to her about the burglary when they occasionally met at Defendant's 12 Linda Lane residence in Old Lycoming Township or other locations. *Id.*

IV. MOTION TO SUPPRESS EVIDENCE OF DEFENDANT'S STATEMENTS

Defense Counsel submits that because the police did not advise the Defendant that they were in possession of a warrant for his arrest, that his waiver of his Miranda rights was not knowing or intelligent. Though the statements were given voluntarily it was not knowing because Engel had failed to tell Defendant that he was in possession of a warrant for his arrest. Defendant signed a form waiving his rights to have an attorney present. Comm Ex. 4. The

12. Commonwealth's Exhibit 2.

form advised Defendant that he

> had an absolute right to remain silent; that anything you say can and will be used against you in a court of law; that you have a right to talk to an attorney before and have an attorney present with you during questioning; that if you cannot afford to hire an attorney, one will be appointed to represent you, without charge if you so desire; and if you decline to answer any question, you may stop at any time if you wish.

Defendant was aware that he was being questioned regarding the Burglary. He agreed to do so. A waiver of *Miranda* rights is valid where the suspect is aware of the general nature of the transaction giving rise to the investigation. *Commonwealth v. Johnson*, No. 711 CAP, 2017 Pa. LEXIS 1198, at *14 (May 25, 2017) (citing *Commonwealth v. Dixon*, 475 Pa. 17, 379 A.2d 553, 556 (Pa. 1977). The Court finds the fact that police additionally had an arrest warrant in their possession for the crime for which Defendant knew he was being interrogated is of no moment. In *Dixon*, the police had in their possession an arrest warrant for a restitution delinquency matter, which they did not tell Defendant about; however, the error in *Dixon* was not telling her the purpose of the interrogation i.e. questioning regarding the death of her children. Here there was absolutely no ambiguity as to the nature of the interrogation. Both Engel and Defendant testified to having that conversation on Defendant's front porch. After riding in the police car with Engel, Defendant signed a Miranda waiver that says "nature of the complaint — burglary". Therefore the Court finds His statements were given knowing and voluntarily to police.

ORDER

AND NOW, this 13th day of July, 2017, based upon the foregoing Opinion, the Omnibus Pretrial Motion is DENIED.

Haviland v. Kline & Specter

Arbitration — Impartiality — Disqualification of arbitrator

A neutral arbitrator was capable of being impartial and disinterested, so plaintiff's petition to remove the arbitrator was properly denied.

Plaintiff filed this action to recover attorney fees and cost reimbursements in class action cases in which fees and costs had been paid to defendant. Plaintiff claimed he was entitled to a portion of the fees and costs based on an employment agreement between the parties. The employment agreement contained an arbitration provision, so the court remanded the matter to arbitration. The order required each party to appoint an arbitrator, and then the arbitrators designated by the parties were to confer and select a neutral arbitrator. In the event that the two-party designated arbitrators were unable to agree upon a neutral third arbitrator, the court would designate the third arbitrator.

Plaintiff and his counsel sought the recusal or one neutral arbitrator and filed two motions to disqualify two other neutral arbitrators. The court then appointed Mark I. Bernstein, a retired judge, to act as the neutral arbitrator. Bernstein requested information from the parties regarding the dispute. Plaintiff responded by requesting that Bernstein provide a disclosure of conflicts of interest before taking any action in the matter. Bernstein sent correspondence to counsel indicating that had retired from the Philadelphia Court of Common Pleas in October 2016, and that he had presided over trials and other matters where the defendant law firm had appeared in his courtroom, but he had not been involved in any prior mediations or arbitrations with any of the parties. Bernstein stated he did not believe any conflict existed that would prevent him from serving as an arbitrator in this case.

Bernstein was an adjunct professor at Drexel University's Thomas R. Kline School of Law. Thomas R. Kline was one of the partners of the defendant law firm. The director of trial advocacy at the law school, Gwen Roseman Stern, was the wife of an attorney at the defendant law

firm. According to plaintiff, Kline's financial gift to the law school and his ongoing involvement with the university, and Stern's supervision of Bernstein at the law school, created a disqualifying conflict for Bernstein. After Bernstein refused to recuse himself, plaintiff filed a petition for a preliminary or special injunction to enjoin and disqualify Bernstein from acting as the neutral arbitrator. The court denied that request and plaintiff appealed.

The court held plaintiff's petition was properly denied. As a former judge, Bernstein was well aware of his duty to be impartial. The courses Bernstein taught at the law school were the same courses he had taught for many years, and they were developed at the request of a third party. Kline had nothing to do with Bernstein's position at the law school and was not involved with the courses Bernstein taught. Plaintiff provided no evidence Bernstein was actually supervised by Stern, or that they even had any contact with one another at the law school. Under the circumstances, the court held that it could not reasonably conclude that Bernstein would be influenced in favor of defendant.

C.P. of Philadelphia County, September Term, 2008, No. 1791 EDA 2017

MCINERNEY, *S.J.*, July 14, 2017—This opinion is submitted relative to the appeal of this court's order dated May 12, 2017[1] denying plaintiff's petition for a preliminary or special injunction to enjoin and disqualify former Judge Mark I. Bernstein ("Bernstein")[2] as the fourth court appointed neutral. This appeal comes after plaintiff Donald Haviland, Jr. and his counsel sought the recusal of one neutral arbitrator and filed two motions to disqualify two neutral arbitrators, one after testimony was received and rulings made by the panel. For the reasons discussed below, this court's order should be affirmed.

The dispute between plaintiff Donald Haviland, Jr.

1. The order appealed from incorrectly identifies the date as "2016" instead of "2017".

2. Former Judge Mark I. Bernstein retired from the bench of the Court of Common Pleas of Philadelphia County in October 2016.

("Plaintiff") and Kline & Specter, P.C. ("Defendant") has a very long and acrimonious history. The action was commenced by writ of summons in September 2008. On November 13, 2008, before a complaint was filed, the court stayed the action pending the outcome of an arbitration. On March 17, 2015, after the arbitration was completed, the action was removed from deferred status.

On January 22, 2016, plaintiff filed his complaint. The complaint sought to recover attorneys' fees and cost reimbursements in class action cases in which fees and costs have been paid to defendant. Plaintiff alleged that a portion of these fees and costs should have been paid to him pursuant to an Employment Agreement between the parties.[3] Defendant filed preliminary objections to the complaint and on April 17, 2016 the court sustained in part and overruled in part the preliminary objections. Specifically, in accordance with the Employment Agreement, the court remanded the matter to arbitration. The order required plaintiff and defendant to each appoint an Arbitrator and provide notice to all parties of their selection within twenty (20) days from the order. The court further ordered that the designated arbitrators for each party confer and select a neutral arbitrator within forty-five (45) days. The court noted that in the event the designated party arbitrators were unable to agree upon

3. In another action filed with this court, *Kline & Specter v. Haviland*, July Term 2007 No. 1922, Kline & Specter sought to recover from Haviland fees received from class actions. Those claims were also arbitrated and an award in favor of Haviland was made. That award was the subject of a motion to confirm filed by Kline & Specter and motion to vacate filed by Haviland. This court granted the motion to confirm and denied the motion to vacate. After an appeal, the Superior Court reversed and remanded for further proceedings. Plaintiff alleged in this complaint that this action was not to re-litigate any claim already arbitrated between the parties.

a neutral arbitrator, the court would designate the third neutral arbitrator.

Thereafter, defendant appointed Ralph Wellington, Esquire as its arbitrator. Plaintiff moved to strike defendant's appointment of Wellington since he was appointed by defendant and served as an arbitrator in the matter previously arbitrated. On April 28, 2016, the court struck the appointment of Wellington and ordered defendant to appoint a new arbitrator, one who had not previously served as an arbitrator in the disputes between the parties. After each side designated their arbitrators, the parties' arbitrators were unable to agree on a neutral. As a result, defendant filed a motion to flip a coin to select a Neutral Arbitrator. On June 17, 2016, the court denied the motion and per its order dated March 17, 2016, the court appointed G. Craig Lord, Esquire as a neutral arbitrator. Mr. Lord was unable to serve and recused himself. On June 27, 2017, the court appointed Jerry P. Roscoe, Esquire as the neutral arbitrator and was directed to convene the panel. After Roscoe's appointment, Haviland and his counsel sought his recusal on the basis that he and JAMS were retained by defendant as neutrals to assist in resolving their client's claims. The court accepted Mr. Roscoe's recusal and on July 26, 2016 appointed Francine Friedman Griesing, Esquire as the neutral arbitrator. Upon Griesing's appointment, the arbitration panel issued an agreed upon scheduling order providing for discovery and motion practice and set aside three days for the hearing, November 28, 29 and December 1, 2016. Prior to the hearing, defendant submitted three amended answers that included additional new matter. Haviland filed preliminary objections to the new matter and asked that the new matter

be stricken. On November 28, 2016, the first day of the arbitration, Griesing explained that the panel would not hear oral argument or rule on Haviland's preliminary objections but would consider the points raised in the proceedings. The panel then began to hear testimony.[4]

On November 29, 2016, Haviland and his counsel argued that the preliminary objections should be decided since the arbitration was "spiraling out of control" based on the recently filed new matter and defendant emails and witness list. After the panel rejected Haviland and his counsel's argument, Haviland and his counsel "adjourned" the arbitration and left.[5] Thereafter, Haviland filed a motion for preliminary injunction seeking to enjoin and disqualify Griesing and her firm from acting as the court appointed neutral in *Haviland v. Kline & Specter*. The motion alleged potential bias and conflicts of interest between Haviland's counsel and Griesing.[6] On or about the same time plaintiff filed the motion to enjoin and disqualify, Griesing filed a motion seeking to be relieved of her duties as the neutral arbitrator in *Haviland v. Kline & Specter*.

On December 21, 2016, the court struck the motion for preliminary injunction and granted Griesing's motion vacating the order appointing her as neutral arbitrator. The

4. *See* transcript of November 28, 2016 arbitration hearing attached as Exhibit "L" to defendant's response to plaintiff's motion for special and preliminary injunction to disqualify Bernstein.

5. While Haviland and his counsel adjourned the arbitration, the panel did not. *See* transcript of November 29, 2016 arbitration hearing attached as Exhibit "M" to defendant's response to plaintiff's motion for special and preliminary injunction to disqualify Bernstein.

6. Haviland's grounds seeking to enjoin and disqualify Griesing from acting as the neutral arbitrator were known to Haviland's counsel at the time she was court appointed. Plaintiff did not seek her enjoinment or disqualification until after the panel made a decision that plaintiff and his counsel did not agree with.

court then appointed Bernstein as the neutral arbitrator replacing Ms. Griesing. Plaintiff filed a motion for reconsideration of this court's order granting Ms. Griesing's motion to withdraw as neutral arbitrator and order striking his motion for preliminary or special injunction to enjoin and disqualify Francine Greising from acting as neutral arbitrator. The motions were denied on January 6, 2017 and January 12, 2017, respectively.

Thereafter, in response to Bernstein's request for information regarding the dispute, plaintiff, on January 13 and 19, 2017, requested that Bernstein provide a disclosure of conflicts of interest before taking any action in the matter. On January 20, 2017, Bernstein sent correspondence to counsel advising, that he had retired from the Philadelphia Court of Common Pleas in October 2016, that he had presided over trials and other matters involving the Elliot Greenleaf and Kline & Specter firms, that Mr. Honik and Mr. Rassias both had appeared in his courtrooms and that since his retirement he has not had any mediations or arbitrations with any of the participants. Bernstein stated that he did not believe any conflict existed that would prevent him from being involved in the litigation.

On February 18, 2017, Bernstein wrote the following:

> By email dated January 20, 2017, a copy of which is below, I advised that there are no conflicts that would prohibit my participation in this matter. I can only imagine that your client is concerned because I am adjunct professor at the Thomas R. Kline School of law(sic). I believe that fact is commonly known and is contained on my C.V. which can be publicly found on

> my website www.judgebernstein.org. What may not be common knowledge is I have been teaching at Drexel School of Law before its name was changed and when it was known as the Earle Mack school of law(sic). Please advise your clients that there are no conflicts that would prohibit my participation as an arbitrator in this matter.

On March 9, 2017, Haviland's counsel wrote Bernstein and formally requested his recusal based on his employment as an adjunct professor at the Thomas R. Kline School of Law at Drexel University. According to plaintiff, Mr. Kline's financial gift to the law school, his ongoing involvement with the law school and Drexel University, and the alleged supervision of Bernstein by Gwen Roseman Stern, director of trial advocacy at the law school, and the wife of an attorney at Kline & Specter, created a disqualifying conflict for Bernstein.

On April 3, 2017, Bernstein denied Haviland's motion for recusal. He wrote that "I have no doubt of my ability to participate as a neutral on this panel of arbitrators to decide the issues presented solely on the basis of the law and evidence." Bernstein scheduled a hearing in his office for June 1, 2017. On this same date, Bernstein provided the court with an update stating the following:

> Following my appointment, I requested counsel send me whatever materials they wished me to review to familiarize myself with the case. Although I received a box of materials from the defense I received only correspondence from plaintiff concerning "conflicts". Following additional correspondence, the plaintiff had made a motion for my recusal.

> This motion according to plaintiff "arise from your current employment at the Thomas R. Kline school (sic) of Law and your relationship with Mr. Kline". I do teach two courses at what is now known as the "Thomas R. Kline School of Law." I have taught the same two courses for years. I taught at the Earle Macke School of Law, as it was then known, before it was renamed. Mr. Kline had nothing to do with my position and continues to have no involvement whatsoever in continuing to teach Advanced Evidence and Pennsylvania Practice. I designed these two courses at the request of then Dean Roger Dennis. I have no doubt of my ability to rule fairly in this matter based solely on the law and the evidence as presented.
>
> In order to move this matter ahead I have this date denied the request for recusal and reaffirmed June 1, 2017 as the date for the start of this arbitration. I have arranged to meet with my fellow arbitrators in hopes of understanding the issues presented. I have provided plaintiff with another opportunity to submit materials concerning the matter. Within the next two weeks I will review the materials provided by plaintiff.
>
> Unless I hear from you to the contrary I will be proceeding in the manner described above.

In response to this email, the court advised Bernstein to proceed accordingly. On April 20, 2017, plaintiff filed a petition for preliminary or special injunction to enjoin and disqualify Bernstein from acting as the neutral arbitrator for failing to make full and timely disclosures of his alleged disqualifying conflicts of interest. Upon review of the papers and the response in opposition, the court denied

plaintiff's request. This appeal followed.

DISCUSSION

The crux of this appeal is Bernstein's alleged failure to make full and timely disclosures of disqualifying conflicts of interest, i.e. his employment at Drexel University's Thomas R. Kline School of Law and his alleged supervision by Gwen Roseman Stern, the wife of a Kline & Specter partner, and whether as a result of these alleged conflicts he should be disqualified as a neutral arbitrator. This court's order denying plaintiff's motion to recuse was properly denied.

A hearing which comports with procedural due process must be full and fair and must be held before impartial and disinterested arbitrators. Since arbitrators are generally selected to act in a quasi-judicial capacity in place of a court, they must ordinarily be impartial and nonpartisan.[7] An arbitrator does take on the role of judge in determining the merits of a case and upon motion the arbitrator is the one to initially determine if a recusal request has merit. A party seeking to challenge the arbitrator's refusal to recuse must establish substantial doubt about the arbitrator's ability to act impartially.[8] The question, therefore, is not how the judge appraises the situation but how a detached observer — the common law's "reasonable man" — would appraise it. If a reasonable observer would conclude that the situation is such that the judge's "impartiality might reasonably be questioned," the judge should recuse

7. *Donegal Ins. Co. v. Longo*, 610 A.2d 466, 468, 415 Pa. Super. 628, 632-33 (Pa. Super. 1992).

8. *Commonwealth v. White*, 557 Pa. 408, 734 A.2d 374 (1999), citing *Rizzo v. Haines*, 520 Pa. 484, 555 A.2d 58, 72 (1989) and *Sheehan v. Nationwide Ins. Co.*, 779 A.2d 582, 585 (Pa. Super.2001)

himself. The party claiming that the judge should have recused himself is therefore under no obligation to show any actual prejudice — to show, that is, that subjectively, or in fact, the judge was not impartial; it is enough to show that a reasonable observer might have questioned the judge's impartiality.[9]

In the case *sub judice*, Bernstein is recently retired from sitting on the bench for the Court of Common Pleas of Philadelphia and is familiar and aware of his duty to be impartial. He was appointed by this court for his experience and reputation for integrity and fairness. Bernstein is an adjunct professor and does teach two courses at the Thomas R. Kline School of Law, Advanced Evidence and Pennsylvania Practice. The courses were designed by Bernstein at the request of the then Dean Roger Denis. These courses are the same two courses he taught when the law school was known as Earle Macke School of Law. Kline had nothing to do with Bernstein's position at the law school and continues to have no involvement in Bernstein's teaching of these courses.[10] Similarly, as for the allegations that Bernstein is supervised by the wife of an attorney employed by defendant, there is no evidence that Bernstein and Ms. Stern have any contact with one another at the law school. Based on the foregoing, one may not reasonably conclude that Bernstein will be influenced in favor of defendant. Bernstein informed the parties that

9. *Commonwealth v. Boyle*, 498 Pa. 486, 490 n. 4, 447 A.2d 250, 252 n. 4 (1982) citing, *Reilly by Reilly v. Southeastern Pennsylvania Transp. Authority*, 479 A.2d 973, 980-81, 330 Pa. Super. 420, 435 (Pa. Super. 1984).

10. Email to Judge McInerney from Bernstein dated April 3, 2017 attached hereto as Exhibit "N" to defendant's response in opposition to plaintiff's motion.

he could be impartial.[11] A reasonable person would not question Bernstein's ability to be impartial especially in light of the fact he recently retired from the bench. In an arbitration proceeding a party is entitled to a "full and fair" hearing. Because Bernstein, the neutral arbitrator, is capable of being impartial and disinterested, this court's order should be affirmed.

Guiffrida v. City of Scranton

Pleadings — Motion to amend complaint — Prejudice to adverse party

The court granted plaintiffs' request to amend their pleading in this class action suit challenging the City of Scranton's rental registration fees since the amendment raised the same legal issue prompted by the original complaint and defendant failed to identify any prejudice it would suffer if the request was granted. The court granted plaintiffs' motion to amend.

Plaintiffs, owners of multiple residential properties in the city of Scranton, filed a class action suit against the city challenging rental registration fees established by a 2014 municipal ordinance. The 2014 ordinance increased the annual rental registration fee from $15 per rental unit to $50 per rental unit and raised the annual permit fee from $50 per site to $150 per site. According to plaintiffs, the fees constituted impermissible revenue producing measures since the amounts charged and collected were grossly disproportionate to the costs incurred by the city through the rental registration program. In March 2016, the parties agreed to the certification of a class action "for those property owners who paid residential and rental registration and permit fees in 2014 and

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11. Contrast *Donegal Ins. Co. v. Longo*, 415 Pa. Super. 628, 610 A.2d 466 (1992) (where ongoing and undisclosed attorney-client relationship with insured rendered arbitrator unfit to serve on the panel because of his fiduciary duty of loyalty to his client). *Bole v. Nationwide*, 475 Pa. 187, 379 A.2d 1346 (1977)(we hold that when a contract calls for 'disinterested' arbitrators, prior representation of one of the parties by a designated arbitrator will disqualify that arbitrator upon objection of the opposing party.).

2015 pursuant to the fee schedule set forth in File of the Council No. 7 of 2014." While the action was pending, the city enacted a 2016 ordinance which revised the rental registration fees. Thereafter, plaintiffs sought to amend their class action complaint to include a request for declaratory judgment and injunctive relief regarding the 2016 rental registration fees. Plaintiffs maintained that the city's attempt to collect fees in 2017 under the 2016 ordinance brought into question the same issues that were the subject of the pending class action. The court noted that while the grant or denial of a motion for leave to amend a pleading is committed to the sound discretion of the trial court, the right to amend should be liberally granted at any stage of the proceeding unless there is an error or law or resulting prejudice to an adverse party. The "resulting prejudice" that may warrant the denial of a request to amend must be something more than a detriment to the other party since any amendment almost certainly will be designed to strengthen the legal position of the amending party and weaken the position of the adverse party. The court agreed with plaintiffs that the legal issue pending in this class action was identical to the question plaintiffs sought to raise in their amended pleading, i.e., whether the existing rental registration fees were permissible revenue producing measures. While the city filed a response to the motion to amend generally denying that plaintiffs were entitled to relief, the city's answer did not identify any specific prejudice it would allegedly suffer if plaintiffs were permitted to amend their complaint. As such, the court decided to grant plaintiffs' motion to amend.

C.P. of Lackawanna County, No 15 CV 3499

Paul G. Batyko, III, for plaintiff
Jessica Boyles, for defendant

NEALON, *J*., Aug. 18, 2017—Property owners have instituted this class action proceeding challenging rental registration fees established by a municipal ordinance in 2014, and assert that those fees constitute impermissible revenue producing measures since the amounts charged and collected are allegedly grossly disproportionate to the costs incurred by the City of Scranton in connection with its rental registration program. While this action was pending, the City enacted an ordinance in 2016 which

revised the rental registration fees, and since plaintiffs maintain that the current fees likewise are unlawful revenue raising measures, they seek to amend their complaint to include requests for declaratory judgment and injunctive relief regarding the existing rental registration fees. Since the legal issues raised in the original complaint and proposed amended complaint are identical, and the City has not identified any prejudice that it would suffer from the proffered amendment, plaintiffs' motion to amend the complaint will be granted.

I. FACTUAL BACKGROUND

Plaintiffs, who own multiple residential rental properties in the City of Scranton, have filed this class action challenging File of the Council No. 7, 2014, which amended File of the Council No. 17, 2012, that created a registration program for residential rental properties and established annual registration fees and permit fees "for the costs associated with the registration of rental property" within the City of Scranton. (Docket Entry No. 1, Exhibit A). The 2014 ordinance increased the annual rental registration fee from $15.00/rental unit to $50.00/rental unit and the annual permit fee from $50.00/site to $150.00/site. (*Id.*, Exhibit B). Plaintiffs contend that the fees charged under the 2014 ordinance "constitute illegal revenue-raising measures" since the increased fees collected "are well in excess of the actual costs associated with the rental registration process and the inspection of rental units by the Department of Licensing, Inspection and Permits for the City of Scranton." (*Id.* at ¶¶ 64-72). In their class action complaint, plaintiffs originally sought: (1) a declaratory judgment that the 2014 ordinance charges fees which are "unlawful in their current form as

illegal revenue-raising measures beyond the scope of the City's sovereign authority;" (2) recovery of compensatory damages for "the excess revenue and income derived" from those fees; and (3) an injunction enjoining the City of Scranton from collecting those increased fees. (*Id.* at ¶¶ 86-96).

Plaintiffs filed a petition seeking a preliminary injunction barring the City from collecting any rental registration fees under the 2014 ordinance pending the conclusion of this litigation, and further requiring the City "to account for all fees collected" under that rental registration ordinance. (Docket Entry No. 2). On May 29, 2015, Senior Judge John Braxton issued an Order directing the City to: (1) "deposit into a separate escrow account fifty percent (50%) of any and all registration fees it receives by May 31, 2015;" (2) "extend indefinitely the May 31, 2015 deadline for the payment of the 2015 rental registration fees for all of the named Plaintiffs;" and (3) refrain from "any actions or measures to enforce or collect the 2015 rental registration fees that the named Plaintiffs do not pay by the May 31, 2015 deadline." (Docket Entry No. 4 at ¶¶ 1-3). Following a subsequent hearing on June 8, 2015, Judge Braxton entered another Order continuing the directives that the City (a) deposit fifty percent (50%) of the "rental registration fees it receives in, for, and/after 2015" into a separate escrow account and (b) indefinitely extend "the May 31, 2015 deadline for the payment of the 2015 rental registration fees." (Docket Entry No. 9 at ¶¶ 1-2). Additionally, he ordered that the City "forego and hold in abeyance the collection of any and all rental registration fees beginning in 2016 and thereafter, under the current ordinances (File of the Council 17, 2012 and

File of Council 7 of 2014), pending the outcome of the underlying lawsuit filed to No. 3499 of 2015." (*Id.* at ¶ 3).

On February 17, 2016, the City filed a motion seeking to dismiss plaintiffs' claims for compensatory damages and requests for declaratory judgment and injunctive relief. (Docket Entry No. 26). The City sought to strike any claims for compensatory damages in this class action litigation based upon appellate case law recognizing that claims for refunds from municipalities under Section 1 of the Refund Act, Act of May 21, 1943, P.L. 349, *as amended*, 72 P.S. § 5566b, may only be pursued personally by an individual "and may not be transferred by way of a class action." (*Id.* at ¶ 6 (quoting *Aronson v. City of Pittsburgh*, 98 Pa. Cmwlth. 1, 6, 510 A.2d 871, 873 (1986)). Plaintiffs conceded "that the foregoing decisional precedent bars plaintiffs from seeking rental registration fee refunds by way of a class action," but nevertheless argued "that their separate requests for declaratory judgment and injunctive relief may be certified for a class proceeding." *Guiffrida v. City of Scranton*, 2016 WL 808684, at *3 (Lacka. Co. 2016). Relying upon *Israelit v. Montgomery County*, 703 A.2d 722 (Pa. Cmwlth. 1997), *app. denied*, 555 Pa. 735, 725 A.2d 184 (1998), which recognized that "taxpayers cannot pursue their requests for tax refunds through a class action" but may nonetheless pursue their "claims for declaratory and injunctive relief" in a class action, *Id.* at 724-725, we denied the City's motion to dismiss plaintiffs' class action requests for the issuance of a declaratory judgment and a permanent injunction. *Guiffrida*, *supra*, at *4.

Plaintiffs filed a motion pursuant to Pa.R.C.P. 1707 requesting certification of this proceeding as a class action,

and at the time of the class certification hearing on March 2, 2016, the parties agreed to the certification of a class action "for those property owners who paid residential rental registration and permit fees in 2014 or 2015 pursuant to the fee schedule set forth in File of the Council No. 7 of 2014." (Docket Entry No. 34 at ¶ 2). The issues certified for class action consideration were expressly "limited to the claims for declaratory judgment and injunctive relief that are set forth in the 'class action complaint' filed in this matter," and in accordance with Pa.R.C.P. 1711(b), the class was "certified on an 'opt-in' basis pursuant to which a prospective member of the class must file a timely written election to be included in the class after receiving proper notice of the class action." (*Id.* at ¶¶ 3, 5). After the City produced an accounting of property owners who paid rental registration and permit fees in 2014 or 2015 under the fee schedule established by the 2014 ordinance, and those individuals and entities were duly notified of the class action in compliance with Pa.R.C.P. 1712, hundreds of property owners opted to become members of the class by filing opt-in elections between March 9, 2017, and May 23, 2017. (Docket Entry Nos. 37-320).

Following the City's enactment of a new rental registration ordinance, plaintiffs presented a "Petition to Enjoin the City From Collecting Rental Registration and Permit Fees Under File of Council No. 58 of 2016 Pending Final Resolution of the Class Action Case Pending at No. 3499 of 2015," and "[s]ince the relief requested in that petition involves the interpretation and enforcement of paragraphs 1 and 3 of the Order of Judge John Braxton dated June 8, 2015," a hearing on that petition

was conducted before Judge Braxton on July 12, 2017.[1] (Docket Entry No. 321). By Order dated July 19, 2017, Judge Braxton denied plaintiffs' petition to enjoin, stating that "it is premature to apply this Court's June 8, 2015, Order to the subsequently enacted Ordinance at File of Council No. 58 of 2016 until and if such time that Plaintiffs amend the Complaint to Include File of Council No. 58 of 2016." (Docket Entry No. 323). Consequently, on July 27, 2017, plaintiffs filed the instant motion requesting leave to amend their class action complaint to include claims for declaratory judgment and injunctive relief relative to the rental registration fees that the City collects pursuant to the 2016 rental registration ordinance. (Docket Entry No. 324).

In seeking to amend their complaint, plaintiffs assert that "[t]he City's attempt to collect fees in 2017 under File of Council No. 58 of 2016 brings into question the exact same issues that are the subject of the pending Class Action case, which issues have yet to be resolved." (*Id.* at ¶ 6). They maintain that "the fees mandated by File of Council No. 58 of 2016 are unnecessarily high in relation to the actual costs to administer the Rental Registration Program, which fees provide significant excess revenue to the City." (*Id.* at ¶ 7). Noting the long-established judicial policy of liberally allowing amendments to pleadings, plaintiffs request leave of court to amend their complaint to include claims for declaratory judgment and injunctive

1. On November 23, 2016, the City enacted File of Council No. 58 of 2016 repealing the prior rental registration ordinance and corresponding amendment, and requiring the annual payment of rental registration fees of $50.00 per rental unit (if paid by April 1 of the calendar year), $75.00 per unit (if paid after April 1 but by June 30 of the calendar year), and $100.00 per rental unit (if paid after June 30 of the calendar year.) (Docket Entry No. 324 at ¶ 5).

relief relative to the 2016 rental registration ordinance. (*Id.* at ¶ 14).

The City has filed a response to plaintiffs' motion to amend in which it generally denies that plaintiffs are entitled to amend their complaint as requested. (Docket Entry No. 325). The City's answer does not identify any specific prejudice that it will allegedly suffer if plaintiffs are permitted to amend their complaint as requested. Following the completion of oral argument on August 17, 2017, the motion to amend was submitted for a decision.

II. DISCUSSION

The amendment of pleadings is governed by Pa.R.C.P. 1033 which "allows a party to amend his or her pleadings with either the consent of the adverse party or leave of the court." *Hill v. Ofalt*, 85 A.3d 540, 557 (Pa. Super. 2014) (quoting *Werner v. Zazyczny*, 545 Pa. 570, 583-584, 681 A.2d 1331, 1338 (1996)). Although the grant or denial of leave to amend a pleading is committed to the sound discretion of the trial court, "the right to amend should be liberally granted at any stage of the proceedings unless there is an error of law or resulting prejudice to an adverse party." *Blackwood, Inc. v. Reading Blue Mountain & Northern R. Co.*, 147 A.3d 594, 598 (Pa. Super. 2016), *app. denied*, 2017 WL 210976 (Pa. 2017); *Cosklo v. Moses Taylor Hospital*, 2016 WL 5372573, at *3 (Lacka. Co. 2016). "The policy underlying this rule of liberal leave to amend is to insure that parties get to have their cases decided on the substantive case presented, and not on legal formalities." *Hill*, *supra* (quoting *Chaney v. Meadville Med. Ctr.*, 912 A.2d 300, 303 (Pa. Super. 2006)); *Ford v. Lehigh Valley Restaurant Group, Inc.*, 2015 WL 2150237,

at *2 (Lacka. Co. 2015). The "resulting prejudice" that may warrant the denial of a request to amend a pleading "must be something more than a detriment to the other party since any amendment almost certainly will be designed to strengthen the legal position of the amending party and correspondingly to weaken the position of the adverse party." *Rettger v. UPMC Shadvside*, 991 A.2d 915, 928 (Pa. Super. 2010), *app. denied*, 609 Pa. 698, 15 A.3d 491 (2011). "Thus, an allegation of prejudice will be sufficient to deprive another party of the right to amend only if the detriment suffered 'would go beyond that which would normally flow from the allowance of an amendment.'" *Id.* at 929 (quoting *Sands v. Forrest*, 290 Pa. Super. 48, 53, 434 A.2d 122, 125 (1981)).

Rule 1033 expressly states that "[t]he amended pleading may aver...occurrences which have happened... after the filing of the original pleading, even though they give rise to a new cause of action or defense."2[2] Pa.R.C.P. 1033. In the case *sub judice*, the City enacted the 2016 rental registration ordinance eighteen months after plaintiff filed their class action complaint in this case and more than eight months after this matter was certified as a class action pursuant to Pa.R.C.P. 1710. Plaintiffs contend that the revised rental registration fees contained in the 2016 ordinance have the same legal infirmity as the fees set forth in the 2014 ordinance in that the current rental registration fees are likewise excessive and grossly disproportionate to the cost of administering the rental registration program. (Docket Entry No. 324 at ¶¶ 7-8).

2. However, amendment is not permitted to present a new cause of action after the statute of limitations governing that claim has already expired. *Ash v. Continental Insurance Company*, 593 Pa. 523, 525, 932 A.2d 877, 879 (2007); *Blackwood, Inc.*, *supra*.

Plaintiffs seek to amend their class action complaint to include claims for declaratory judgment and injunctive relief regarding the fees charged under the 2016 ordinance since "File of Council No. 58 of 2016 brings into question the exact same issues that are the subject of the pending Class Action case, which issues have yet to be resolved." (*Id.* at ¶ 6).

The issue to be decided in this case, based upon the evidence presented by the parties, is whether the rental registration fees are commensurate with the expenses incurred by the City in administering its rental registration program, or should be stricken as "grossly disproportionate to the sum required to pay the cost of the due regulation" of that activity. *Costa v. City of Allentown*, 153 A.3d 1159, 1165-1167 (Pa. Cmwlth. 2017) (trial court acted within its discretion in rejecting expert opinion "that the costs attributable to the Rental Program include only those direct costs related to the registration and licensure of residential rental units that would disappear if the Rental Program was terminated," and considering "[i]ndirect costs that are properly attributable to a governmental program for the purpose of determining whether a license fee is grossly disproportionate...."). Plaintiffs correctly note that the legal issue pending in this class action is identical to the question it seeks to raise in its amended pleading, that is, whether the existing rental registration fees are impermissible revenue producing measures. The City simply has not identified any prejudice that it will suffer from the proffered amended complaint so as to justify the denial of plaintiffs' motion to amend. Accordingly, "Plaintiffs' Motion for Leave to Amend the Class Action Complaint" will be granted.

ORDER

AND NOW, this 18th day of August, 2017, upon consideration of "Plaintiffs' Motion for Leave to Amend Class Action Complaint," defendant's response thereto, and the oral argument of counsel on August 17, 2017, and based upon the reasoning set forth in the foregoing Memorandum, it is hereby ORDERED and DECREED that:

1. Plaintiffs' Motion for Leave to Amend the Class Action Complaint pursuant to Pa.R.C.P. 1033 is GRANTED; and

2. Within the next thirty (30) days, plaintiffs shall file an amended complaint to include claims for declaratory judgment and injunctive relief with respect to File of Council No. 58 of 2016.

Fennick v. BNM Auto Sales

Used motor vehicle purchase — Personal use — Deceptive practices — Undisclosed damage

Plaintiff's purchase of a used vehicle qualified as a consumer transaction even though a small percentage of his mileage was for commercial purposes. Defendant violated consumer protection law by failing to disclose problems with the vehicle.

Plaintiff sought to purchase a used vehicle, primarily for personal use, but he also intended to become a driver for Lyft, an internet-based company which provided ride-share services. Plaintiff found defendant's website, which advertised several vehicles that met plaintiff's preferences. Defendant stated on its website that its vehicles were sold "as-is," but that defendant inspected all of their vehicles before purchasing them for resale, and that the descriptions of the vehicles were made to the best of defendant's knowledge.

At defendant's lot, plaintiff found a used 2003 Honda Pilot. Yigit

Yelsin was a general sales manager for defendant. Yelsin told plaintiff that the Pilot was purchased recently, that defendant checked all the vehicles it acquired for damage, that this Pilot vehicle had been checked, that there was nothing materially wrong with the Pilot, that the vehicle passed all inspections in New York where it had been previously registered, and that it was safe. Plaintiff testified that Yelsin also stated that the Pilot would pass inspection in Pennsylvania, but Yelsin denied this. Yelsin did not make any mention of rust or frame damage to the Pilot.

Plaintiff purchased the Pilot for $6,098 on December 12, 2014. He promptly scheduled an appointment to have the vehicle inspected. The vehicle did not pass inspection because of undercarriage issues. Plaintiff took the vehicle to another shop in March 2015, to perform an inspection and to repair some damage that occurred when he was rear-ended. The shop repaired some of the damage, but did not pass the vehicle for inspection due to significant undercarriage rust. In April 2015, another mechanic put the Pilot on a lift and clearly observed the presence of rust in the undercarriage.

In June 2015, plaintiff filed suit following an unsuccessful attempt to rescind the sale and return the vehicle to defendant. Plaintiff had driven the Pilot 8,957 miles. The miles driven for Lyft represented 7.83 percent of the total miles plaintiff drove the vehicle. Plaintiff leased a substitute vehicle in July 2015. Plaintiff sought actual damages, lost wages, costs of a replacement vehicle, noneconomic damages, treble damages and attorney fees.

Because plaintiff's usage of the Pilot as a Lyft driver only account for 7.83 percent of his total miles, the court concluded plaintiff purchased the vehicle for primarily personal purposes. This qualified the purchase of the Pilot as a "consumer transaction." The court found defendant knowingly made misleading statements about the vehicle upon which plaintiff relied.

The court awarded plaintiff economic damages of $5,098 based on testimony that the Pilot was worth $1,000 as of the date of purchase. Under state consumer protection law, the court also awarded treble damages. However, the court rejected plaintiff's claim for wage loss, replacement vehicle expenses, and noneconomic damages. Plaintiff continued using the Pilot after the discovery of the rust issues.

Plaintiff was entitled to his attorney fees, but the court reserved judgment on the amount pending a hearing on that issue.

C.P. of Lawrence County, No. 10954 of 2015

Daniel T. Godinich, for plaintiff

Scott C. Essad, for defendant

HODGE, *J*., Aug. 9, 2017—This case is before the Court on Plaintiff's Civil Complaint for counts of Breach of Contract, Violation of the Ohio Consumer Sales Practices Act ("OCSPA") and Fraud. A non-jury bench trial was conducted before this Court on May 22, 2017.

Findings of Fact

The Plaintiff, Andrew S. Fennick, is a resident of Pittsburgh, Pennsylvania. He desired to purchase a motor vehicle to be used by him primarily for personal use, but also because he was interested in becoming a Lyft driver.[1] Due to his preferences in and intended uses for a vehicle for him, the Plaintiff sought a larger sized Honda motor vehicle. Plaintiff began shopping for an appropriate vehicle by conducting internet searches. In conducting the searches, Plaintiff happened upon the website for Defendant BNM Auto Sales, Inc., (hereinafter, "BNM"), a Pennsylvania Corporation, with a sales lot located in Girard, Ohio. BNM's website advertised a number of vehicles which could meet Defendant's preferences. In addition to listing vehicles for sale, BNM's website advertised that although BNM sells vehicles "as-is" with no warranties, BNM inspects all of their vehicles before purchasing them for resale and posted that BNM vehicles are described to the best of BNM's knowledge.

Because the Plaintiff found a number of vehicles at BNM that matched the type of vehicle he was seeking to purchase, he asked his father, Daniel M. Fennick, Esquire, an attorney from the York, Pennsylvania area, to go to

1. Lyft is an internet-based company which provides ride-share services for a fee.

the BNM's Girard, Ohio sales lot with him to shop for an automobile. Plaintiff's father agreed, and the Plaintiff and his father traveled from Pittsburgh, Pennsylvania to Girard, Ohio on November 14, 2014 to purchase a vehicle from BNM.

Upon arrival at the BNM lot, the Plaintiff and his father looked at a used 2003 Honda Pilot which was in the Plaintiff's price range. The Pilot was previously registered in New York state and had 132,000 miles on it. As the Plaintiff was browsing, he was met by Defendant Yigit Yalcin (hereinafter, "Yalcin"). Yalcin is a general sales manager for BNM. Yalcin primarily dealt with the Plaintiff and the Plaintiff's father regarding the sale of the Pilot. Yalcin explained the following to the Plaintiff: BNM recently purchased the Pilot; BNM checks all vehicles they acquire for damage; this Pilot was checked; BNM found nothing materially wrong with the vehicle; the Pilot passed a number of previous inspections in New York state; the Pilot was safe; BNM is reputable; the Plaintiff could take the vehicle offsite to have it inspected further; the Plaintiff could have the vehicle checked out after the purchase if the Plaintiff purchased the vehicle; the Pilot could be transferred to Pennsylvania and the vehicle could then be inspected in Pennsylvania once Plaintiff receives a title to the Pilot; if an issue was found with the Pilot within thirty (30) days of purchase, BNM would address any problems; and, that although no warranties come with the vehicle, a warranty could be purchased for the vehicle if the Plaintiff desired. Plaintiff and Plaintiff's father testified that Yalcin indicated to the Plaintiff and Plaintiff's father that the Pilot would pass inspection in Pennsylvania. However, Yalcin denies ever making such

a statement. Yalcin made no mention of rusting or frame damage to the Pilot.

Plaintiff took the Pilot for a test drive on November 14, 2014. Although the Plaintiff was afforded the opportunity to take the Pilot away from the BNM lot to have it inspected by a mechanic of Plaintiff's choosing, this scenario would have been logistically very difficult to coordinate given Plaintiff's situation. BNM did not offer to put the Pilot on one of its lifts on the day of purchase.

Plaintiff was provided with a CARFAX report by BNM on November 14, 2014.[2] The report is generally satisfactory regarding the Pilot and in part indicates that the vehicle passed New York state safety inspections in both April and August of 2014.

Plaintiff was also able to review a Buyers Guide for the vehicle. The Buyers Guide is a document affixed to the window of vehicles for sale at BNM. Page two of the Buyers Guide for the Pilot references "Frame-cracks, corrective welds, or being rusted through" and "Dog tracks-bent or twisted frame" as major defects that may occur in a used motor vehicle, albeit, the Buyers Guide does not necessarily indicate that such defects were present on the Pilot at issue.

BNM purchased the Pilot for $3,155.00 from Manheim auctions. When Manheim was auctioning the Pilot, Manheim had indicated that the Pilot was being sold under a "red light" designation. Yalcin explained that a red light means that the vehicle was being sold "as is". Yalcin further explained that if rust damage or safety

2. CARFAX is an internet-based company which compiles history reports for vehicles.

issues existed with the Pilot, such defects would have been disclosed by Manheim to the buyer, and that if such issues existed and were not disclosed by Manheim, then a purchaser could arbitrate the issue with Manheim.

The Plaintiff purchased the vehicle from BNM on November 14, 2014 for $6,098.50. The Bill of Sale for the Pilot executed by Plaintiff indicates that the Pilot was sold "AS IS-WITH ALL FAULTS."

Plaintiff received title to the vehicle on December 12, 2014. After receiving the title, Plaintiff promptly scheduled an appointment with a service station to have the vehicle inspected in Pennsylvania. The appointment was set for December 23, 2014. On December 21, 2014, while Plaintiff was driving the Pilot, he was struck from behind by another vehicle in a hit and run accident. The Pilot's tail gate was damaged in the incident. During the inspection of December 23, 2014, the Plaintiff was informed by a station mechanic that the Pilot would not pass inspection because of undercarriage issues, and the Plaintiff was referred to the body shop section of the station. Given these circumstances, the Plaintiff decided to not have the Pilot formally inspected at this station at that time.

Due to delays in obtaining insurance coverage for the Pilot with respect to damages sustained in the accident of December 21, 2014, Plaintiff did not bring the Pilot in for repairs until March 2, 2015 when he brought the Pilot to Penn Automotive. Plaintiff desired to have Penn Automotive address the damages which occurred to the Pilot in the accident as well as to have the vehicle inspected. Penn Automotive repaired some of the damages to the

Pilot. However, other items, such as a dent to the Pilot's tail gate and damage to the vehicle's side mirror, were not repaired. With respect to the inspection, Penn Automotive did not pass the vehicle for inspection due to significant undercarriage rust issues.

Steven Joel Feldman, president of Penn Automotive, testified during the trial. Mr. Feldman is involved in the diagnosing, inspection, sales, estimating, repairing and towing of motor vehicles as part of his family business, which he has controlled for fifteen years. Mr. Feldman has worked with automobiles since 1983 and possesses a degree from Penn State University in mechanical engineering technology. He is licensed in Pennsylvania for vehicle Inspections and Emissions and as a Dealer, Salesperson and Appraiser. He continues to attend training seminars for his business and is knowledgeable regarding the repair of rust damage to vehicles.

Mr. Feldman inspected the Pilot on March 3, 2015. Mr. Feldman indicated that the Pilot's frame and floor were rusted, that the frame rail was deteriorated, spot welds were falling apart, a bushing was worn, the bottom of the vehicle was corroded, the exhaust was leaking and the emergency brake cables were rusty. Mr. Feldman opined that these defects existed in November of 2014 when the Plaintiff purchased the vehicle. Mr. Feldman testified that the damage would be easily detectable provided a person could view the underside of the Pilot. Mr. Feldman concluded that as a result of the issues, the Pilot could not pass a Pennsylvania inspection when the vehicle was purchased in November of 2014. Mr. Feldman believes that the motor vehicle accident of December 21, 2014 did not cause any the undercarriage rust issues.

Mr. Feldman values the Pilot at between $100.00 and $300.00. He believes the vehicle had a value of $1,000.00 on the date of purchase. Mr. Feldman also explained that approximately $3,000.00 in repairs would need to be performed for the vehicle to simply pass an inspection. Mr. Feldman expressed, however, that even if the repairs were made, problems with the vehicle could nevertheless occur later.

In April of 2015, Plaintiff's father brought the Pilot to North End Services in Red Lion, Pennsylvania. Robert Wilburt is a mechanic there who is trusted by Plaintiff and his father. Mr. Wilburt put the Pilot on a lift and clearly observed the presence of rust to the undercarriage. Mr. Wilburt also concluded that the Pilot would not pass a Pennsylvania inspection due to corroded essential components of the vehicle.

Plaintiff's father initially served as the Plaintiff's attorney in this matter. He wrote to BNM on April 8, 2015 that the Pilot was not as represented by BNM and that repairs are expensive. Plaintiff's Father also drafted a notice of Rescission indicating that Plaintiff intended to return the vehicle and obtain a full refund.

Also in April of 2015, approximately five months after purchasing the Pilot, the Plaintiff first contacted BNM to discuss the Pilot undercarriage issues with BNM. Plaintiff brought the Pilot back to BNM on May 2, 2015 for BNM to inspect it and in an attempt to return the vehicle. Following this inspection, Plaintiff drove the vehicle back to Pittsburgh, Pennsylvania. BNM later sent a letter to Plaintiff indicating in part that Plaintiff could trade the Pilot back to BNM, but BNM would not accept a return

of the Pilot for a full refund. Plaintiff subsequently filed a lawsuit against BNM and Yalcin on June 16, 2015.

Plaintiff drove the Pilot for a total of 8,957 miles after he purchased it. Of these miles, 701.5 of them were driven by Plaintiff in his capacity as a Lyft driver. The miles driven for Lyft represent 7.83% of the total miles Plaintiff drove the vehicle. Plaintiff drove for Lyft mainly in January and February of 2015. He did not drive for Lyft after March 1, 2015 as Lyft then began requiring that vehicles used by Lyft drivers be registered and inspected. Because Plaintiff could not verify proof of registration and inspection, he was no longer able to be eligible to drive for Lyft. Plaintiff believes he lost $797.00 per month in income with Lyft for four months since he was unable to use the Pilot to drive for Lyft.

In July of 2015, Plaintiff obtained a substitute vehicle which he leased for the sum of $279.91 per month. This lease shall cost Plaintiff a total of $6,437.93. The Pilot is currently sitting in the yard of Plaintiff's residence. Of note, the Pilot has not broken down as a result of any frame damage.

The Plaintiff testified that this matter has impacted him emotionally. He is embarrassed and felt helpless because he did not have reliable transportation. Moreover, Plaintiff's father initially loaned Plaintiff the money to purchase the Pilot. Now, because of the added expense of leasing a different vehicle, Plaintiff does not have sufficient funds to pay his father back for the money lent to Plaintiff to purchase the Pilot.

The Plaintiff would not have purchased the Pilot had he known that the vehicle had undercarriage issues and

would not pass a Pennsylvania inspection. He believes that the Pilot is worth between $100.00 and $300.00. Plaintiff spent $450.00 in an attempt to get the vehicle registered in Pennsylvania. Additionally, North End Services charged the Plaintiff $27.56. Based on the foregoing, the Plaintiff seeks actual damages, lost wages, costs for a replacement vehicle, other costs, noneconomic damages, treble damages, rescission and counsel fees.

The December 21, 2016 Order of Court issued in this matter in relation to Defendants' Motion for Summary Judgment provides the following: 1) an issue of fact exists as to whether the Plaintiff purchased the Pilot for purposes that are "primarily personal"; 2) the "AS-IS-NO WARRANTY" clause in the written agreement does not bar a claim brought pursuant to OCSPA based upon a failure to disclose defects and misrepresentations made as to the condition of an item; and, 3) Plaintiff's claim is not barred by the parol evidence rule as evidence of fraud or mistake in the inducement to enter into a fully integrated contract as this evidence relates to a claim made pursuant to the OCSPA.

Conclusions of Law and Discussion

The state of Ohio forbids a supplier to commit an unconscionable act or practice in connection with a consumer transaction. O.R.C. §1345.03(A). By definition, a "consumer transaction" means a sale ... of an item ... to an individual for purposes that are primarily personal.... O.R.C. §1345.01 (A).

Here, the Plaintiff purchased the Pilot from BNM, a supplier. However, an issue exists as to whether this purchase comprises a consumer transaction in that the

Plaintiff used the Pilot as a Lyft vehicle for a commercial or business use. The evidence is clear in this matter that of the 8,957 miles the Plaintiff drove the Pilot after purchasing it, only 701.5 miles were driven by Plaintiff as a Lyft driver. This Lyft usage accounts for only 7.83% of the miles Plaintiff drove the vehicle. Based upon the foregoing, the Court concludes that Plaintiff purchased the vehicle for purposes that were primarily personal. As such, a "consumer transaction" occurred in this case, and the Court can continue analyzing this matter.

Section 1345.02(A) of the Ohio Revised Code provides that no supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. O.R.C. §1345.02(A). Section 1345(B)(2) provides that it is a deceptive act if a supplier represents that the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not. O.R.C. §1345.02(B)(2). Section 1345.03(A) provides that no supplier shall commit an unconscionable act or practice in connection with a consumer transaction. O.R.C. §1345.03(A). Section 1345.03(B)(6) provides that in determining whether an act or practice is unconscionable, the Court shall consider whether the supplier knowingly made a misleading statement of opinion on which the consumer was likely to rely to the consumer's detriment. O.R.C. §1345.03(B)(6).

In regard to damages, section 1345.09(A) of the Ohio Revised Code provides that where the violation was an act prohibited by section 1345.02,1345.03 or 1345.031, the consumer may recover his/her actual economic damages plus an amount not exceeding five thousand dollars in noneconomic damages. O.R.C. §1345.09(A). Section

1345.09(B) materially provides that where an act or practice determined by a court of this state to violate section 1345.02, 1345.03 or 1345.031 of the Revised Code and committed after the decision containing the determination has been made available for public inspection under section 1345.05(A)(3), the consumer can rescind the transaction or shall recover three times the amount of his/her actual economic damages plus an amount not exceeding five thousand dollars in noneconomic damages. O.R.C. §1345.09(B).

Section 1345.05(A)(3) of the Ohio Revised Code provides that the Ohio attorney general shall make available for public inspection all rules and all other written statements of policy or interpretations adopted or used by the attorney general in the discharge of the attorney general's functions, together with all judgments, including supporting opinions by courts of Ohio that determine the rights of the parties and concerning which appellate remedies have been exhausted, or lost by the expiration of the time for appeal, determining that specific acts or practices violate sections 1345.02, 1345.03 or 1345.031 of the Revised Code. O.R.C. §1345.05(A)(3). The case of *Hamilton v. Ball*, 2014-Ohio-1118, is a 2014 decision which was made a part of the public inspection file of the State of Ohio Office of The Attorney General pursuant to O.R.C. §1345.05(A)(3) since March 25, 2014. *Hamilton*, *supra*, is very relevant to analysis of the matter *sub judice*.

In *Hamilton*, the supplier purchased a 2006 Pontiac Torrent from Manheim Auto Auction for $7,880.00 with the purpose of reselling the vehicle. The consumers in *Hamilton* were seeking to purchase a safe vehicle to transport their infant son at the supplier's auto sales

business. The supplier told the consumers that the Torrent "was a good vehicle and that it would be a great family car." The consumers inspected, test-drove and purchased the Torrent "as is" — without warranty for $9,500.00 in January of 2011. After purchasing the vehicle, they drove it for several months. Then, in the summer of 2011, the consumers took the Torrent to another automobile dealership seeking a trade-in for a larger vehicle. This dealership informed the consumers that Manheim had previously determined that the vehicle had unibody damage. The supplier did not disclose any such unibody damage to the consumers at the time they purchased the Torrent. The consumers felt the vehicle was unsafe and stopped driving it. *Hamilton*, *supra*.

It was testified to before the trial court by a Manheim representative that when selling a vehicle having a yellow light designation, Manheim makes an announcement by displaying a yellow caution light while the car is on the auction block. Procedurally, the auctioneer is to orally announce the condition during the auction of the vehicle, and a television screen at the auction lists any frame or unibody damage. The supplier testified at trial that he must have missed the announcement at the auction and was unaware of the unibody damage when the vehicle was sold to the consumers. Nevertheless, the evidence at trial reflected that the supplier signed a sales receipt with Manheim which indicated that the vehicle had unibody damage. *Hamilton*, *supra*.

The *Hamilton*, *supra*, opinion, concludes that the trial court correctly determined that a violation of the OCSPA occurred given the facts of the case and that enhanced damages pursuant to O.R.C. §1345.09(B) were appropriate.

The *Hamilton* opinion reasoned that the failure to disclose damage to a vehicle is a deceptive act, and that the supplier should have been on notice of such a fact. As such, under the express terms of section 1345.09(B) of the OCSPA, the trial court was required to triple the actual economic damages awarded. *Hamilton*, *supra*.

Here, initially, the Court finds, based upon the testimony of the Plaintiff, plaintiff's Father and Mr. Feldman, photographs admitted into evidence and the report issued by Mr. Feldman, that the Pilot had undercarriage rust issues as of the date of purchase by Plaintiff. Yalcin clearly indicated to the Plaintiff prior to purchase that BNM checked out the vehicle and nothing was materially wrong with it; that the Pilot recently passed a number of New York state safety inspections; and, that the Pilot was safe. No mention was made by Yalcin of undercarriage rust issues. The Plaintiff relied upon Yalcin's representations in deciding to purchase the vehicle. Had Yalcin described the undercarriage rust issues, the Plaintiff would not have purchased the Pilot. Based on these findings, the Court concludes that BNM violated section 1345.03(B)(2) because Yalcin misrepresented the Pilot's quality.

Next, it is significant to the Court that BNM purchased the vehicle from Manheim under a red light designation. In *Hamilton*, *supra*, the supplier there purchased the vehicle from Manheim under a yellow light designation. Manheim takes such a warning seriously, requiring illuminating a yellow light when the car is on the auction block, orally announcing the condition of the vehicle, televising the warning and listing the yellow light on the sales documents. The Court can only conclude that a red light designation would likewise be announced by Manheim.

BNM certainly knew that the vehicle was purchased from Manheim with such a red light designation, and was, at best, being sold to BNM, as-is.

Also, the Court notes that the *Hamilton*, *supra*, decision was made a part of the public inspection file of the State of Ohio Office of The Attorney General as of March 25, 2014. The transaction in the case here occurred in November of 2014. As such, BNM should have been on notice that not disclosing unibody damage could lead to a violation of the OCSPA. The Court does not draw a great distinction between unibody damage as described in *Hamilton* and the type of undercarriage damage present in the Pilot as testified to by Mr. Feldman here in regard to an analysis of the OCSPA.

Given all the findings set forth above, the Court determines that BNM knowingly made misleading statements of opinion about the vehicle upon which Plaintiff relied and that BNM's conduct results in the application of Section 1345.09(B) of the OCSPA as the conduct was unfair, deceptive and unconscionable.

Decision

Economic Damages

The Plaintiff purchased the Pilot for $6,098.50. The Court finds the testimony of Mr. Feldman to be persuasive. Mr. Feldman valued the Pilot at $1,000.00 as of date of purchase. The Court agrees with this assessment. Based upon these figures, the Court calculates that Plaintiff's economic damages relative to the purchase price of the vehicle are $5,098.50 ($6,098.50 — $1,000.00). Next, in purchasing the Pilot, the Plaintiff incurred certain

expenses including fees relative to attempting to obtain a registration in Pennsylvania in the sum of $450.00 and an inspection fee of $27.56, a total of an additional $477.56 ($450.00 + $27.56). The Court concludes that Plaintiff should be compensated for these costs as well. Additionally, the Court finds that because BNM's conduct violated Ohio Revised Code section 1345.09(B), triple damages are required. As such, Plaintiff's award with respect to damages totals $16,728.18 (($5,098.50 + $477.56) x 3).

The Court determines the sum of $16,728.18 should be paid to the Plaintiff by BNM, rather than by Yalcin because Yalcin is simply an employee of BNM, a corporation, it was BNM who purchased the Pilot from Manheim under a red light designation, advertised the vehicle as being checked over by BNM, presumably inspected it, and then failed to appropriately inform Yalcin so as to prepare him to accurately describe the vehicle to a potential buyer; in this case, the Plaintiff.

Wage Loss and Replacement Vehicle

Plaintiff did not drive the Pilot for Lyft following March 1, 2015 because the vehicle could not pass an inspection as required by Lyft. Plaintiff claims damages resulting from loss of income regarding driving for Lyft in the sum of $797.00 per month for the following four months. The Court notes, however, that Plaintiff first knew he would have an issue getting the Pilot inspected in December of 2014. Nevertheless, Plaintiff continued driving the Pilot for Lyft well into February of 2015. Plaintiff then waited until July of 2015 to obtain a substitute vehicle which he could use for Lyft. Given these findings, the Court

declines to award damages for wage loss as a Lyft driver to Plaintiff.

Plaintiff also seeks damages for him leasing a replacement vehicle in the sum of $6,437.93. The Court again declines to award Plaintiff for any alleged damage as a result of Plaintiff leasing another vehicle. The Court reasons that Plaintiff has been enjoying the benefit of the leased vehicle, and the Court simply does not view the obtaining of such lease as a "damage". Moreover, Plaintiff should be made whole by the award set forth above without the need to further compensate Plaintiff for charges he has incurred for leasing another vehicle.

Noneconomic Damages

With respect to noneconomic damages, although the Plaintiff testified that he was embarrassed, impacted emotionally and felt helpless as a result of him purchasing the Pilot, the Plaintiff did not contact BNM until four months after he first discovered that the vehicle had undercarriage rust issues, a total of five months following the purchase of the Pilot. The Plaintiff then continued using the Pilot after he discovered the rust issues and even drove for Lyft using the Pilot for a period of time, enabling him to earn certain sums of money.

Attorney's Fees

Section 1345.09(F)(2) of the OCSPA essentially provides that the court may award to the prevailing party reasonable attorney's fees if the supplier has knowingly committed an act or practice that violates this chapter. O.R.C. §1345.09(F)(2). Here, the facts of the case as set forth above are sufficient to find that BNM has knowingly

committed an act that violates the OCSPA. The Plaintiff's father testified at trial regarding the legal services he performed as attorney for the Plaintiff. Moreover, Plaintiff's current counsel has submitted fee costs in the total of $22,173.76. Counsel for Defendants, however, has not been given an opportunity to present evidence regarding attorney's fees. As such, the Court shall reserve judgment regarding attorney's fees at this time and schedule a hearing on the issue of attorney's fees.

ORDER

AND NOW, this 9th day of August, 2017, this matter being before the Court on May 22, 2017 for a non-jury bench trial regarding Plaintiff's Complaint on counts of Breach of Contract, Violation of the Ohio Consumer Sales Practices Act and Fraud, with the Plaintiff, Andrew S. Fennick, represented by Daniel T. Godinich, Esquire, and with the Defendants, BNM Auto Sales, Inc. and Yigit Yalcin, represented by Scott C. Essad, Esquire, and upon review and consideration of the applicable record, and in accordance with the Findings of Fact and Conclusions of Law made within the Opinion attached hereto, it is hereby ORDERED and DECREED as follows:

1. Defendant BNM Auto Sales, Inc. has violated the Ohio Consumer Sales Practices Act with reference to the November 14, 2014 sale of a 2003 Honda Pilot to the Plaintiff, Andrew S. Fennick. As a result, the Court AWARDS judgment in favor of the Plaintiff in the sum of $16,728.18 against Defendant BNM Auto Sales, Inc. No judgment is awarded against Defendant Yigit Yalcin.

2. A hearing is scheduled for the 10th day of October, 2017 at 11:30 o'clock a.m. in Courtroom No. 3 of the

Lawrence County Government Center for purposes of addressing the issue of attorney's fees in this matter.

3. The Prothonotary shall properly serve notice of this Order and attached Opinion upon counsel of record, or to a party directly, if unrepresented by counsel.

In the Interest of M.L.

Termination of parental rights — Parental instability — Best interests of child

Termination of a father's parental rights was proper where he failed in multiple respects to abide by the court's reunification plan, and where he posed a serious safety risk to the child.

The child, M.L. was taken into custody at her birth in August 2015, by county social services. M.L. had been in kinship foster care continuously since that time. At a dispositional review hearing in November, 2015, the court established reunification as a goal, setting forth a reunification plan. The plan called for the parents to attend regular visitation and well as medical appointments. The plan also required the parents to participate in intensive parenting services, including a requirement that the father, D.L., was to address anger management issues and attend outpatient mental health counseling. Both parents were required under the plan to verify employment and provide stable and safe housing for the child.

D.L. was sporadic at best in his visitation with M.L., and he did not attend her medical appointments. He was unwilling to provide verification of his employment. Although D.L. claimed to have participated in mental health treatment, he never provided independent confirmation of this. D.L. was evicted from his home and could not provide proof of any residence. When D.L. was allowed unsupervised contact with M.L., he transported her while driving with a suspended operator's license. The record indicated that D.L. had a history of depression and suicidal ideations. A psychiatric evaluation in November 2014, stated that his personality traits presented a high risk of future child abuse. D.L. was also charged with crimes including burglary and impersonating a public servant. At the time of his arrest on the burglary charges, D.L. was in possession of a firearm, despite a prior court order prohibiting this.

The court found that for at least the statutory period of six months

D.L. refused or failed to perform his parental duties. He blatantly ignored the requirements of the court's reunification plan and refused to meaningfully address his mental health issues. The court held it was appropriate to terminate parental rights under these facts.

Termination was in the best interests of M.L. She had been doing well in her foster home and had formed significant bonds with the foster-parents and foster-siblings. The court concluded that the child's well-being would only be jeopardized by delay in permanent arrangements.

D.L. argued that the action against him was punitive, but the court disagreed. The record indicated the agency made efforts toward reunification, but D.L. chose to only attend visitations occasionally, and sometimes he did not attend scheduled court proceedings. D.L. consistently failed to provide verification of his employment, housing, and mental health treatment. Given the demeanor of D.L., his serious and untreated mental health issues, and the safety threat he posed to the child and to social service providers, the court concluded termination should be affirmed.

C.P. of Adams County, No. RT-16-2016

GEORGE, *J.*, May 24, 2017—This Children's Fast Track appeal challenges the trial court's Order dated March 28, 2017 terminating the parental rights of the Father of the child, Appellant, D.L. As this Court has entered extensive findings of fact by Order dated March 28, 2017, the factual history will not be repeated. Currently, D.L. alleges an abuse of discretion by the trial court in finding clear and convincing evidence supporting termination of his rights pursuant to 23 Pa. C.S.A. § 2511(a) (2), (5), (8), and § 2511(b). For the reasons set forth below, it is respectfully requested that the trial court's decision be affirmed.

In *Re Adoption of G.L.L.*, 124 A.3d 344 (Pa. Super. 2015), the Superior Court reiterated the burden and standard of proof necessary to terminate parental rights:

> In a proceeding to terminate parental rights involuntarily, the burden of proof is on the party seeking termination

> to establish by clear and convincing evidence the existence of grounds for doing so. The standard of clear and convincing evidence is defined as testimony that is so "clear, direct, weighty and convincing as to enable the trier of fact to come to a clear conviction, without hesitance, of the truth of the precise facts in issue." It is well established that a court must examine the individual circumstances of each and every case and consider all explanations offered by the parent to determine if the evidence in light of the totality of the circumstances clearly warrants termination.

Id. at 346 (quoting *In Re Adoption of S.M.*, 816 A.2d 1117, 1122 (Pa. Super. 2003)).

Initially, the focus of the proceeding is on the conduct of the parent. The party seeking termination must present clear and convincing evidence the parents' conduct establishes a statutory ground for termination under Section 2511(a) of the Adoption Act, 23 Pa. C.S.A. § 2101-2938; *In Re Adoption of C.J.P.*, 114 A.3d 1046, 1049 (Pa. Super. 2015). Only if the court makes such a finding does the court engage in determining the needs and welfare of the child under the standard of best interests of the child. *Id.* A major aspect of this latter determination is the nature and status of the emotional bond between the parent and the child with close attention given to the effect on the child of permanently severing any such bond. *Id.* at 1050.

The rights of a parent in regard to a child may be terminated where the parent, by conduct continuing for a period of at least six months immediately preceding the filing of a termination petition, has evidenced a settled purpose of relinquishing parental claims to the child or

has refused or failed to perform parental duties. 23 Pa. C.S.A. § 2511(a)(1). Although the six-month period immediately preceding the filing of the petition is most critical to the analysis, the court must consider the entire history of the case and not mechanically apply the six-month statutory provision. *In Re I.J.*, 972 A.2d 5, 10 (Pa. Super. 2009). In determining whether a parent has refused to perform parental duties, appellate courts have instructed that "[a] parent must utilize all available resources to preserve the parental relationship, and must exercise reasonable firmness in resisting obstacles placed in the path of maintaining the parent-child relationship." *In Re B., N.M.*, 856 A.2d 847, 855 (Pa. Super. 2004). Thus, the performance of parental duties is a positive duty which requires affirmative performance. *In Re C.M.S.*, 832 A.2d 457, 462 (Pa. Super. 2003). It is a duty that requires continuing interest in the child and a genuine effort to maintain communication and association with the child. *Id.* The performance of parental duties is best understood in relation to the needs of the child and requires that a parent exert himself or herself to take and maintain a place of importance in the child's life. *Id.*

Instantly, the child, M.L., was taken into custody at her birth on August 13, 2015 by Dauphin County Social Services. At the time, Dauphin County Social Services had been working with D.L. and the child's Mother in regard to another child and were aware of a significant history of unsuccessfully working with the family. Although jurisdiction of this matter ultimately transferred to Adams County, M.L. has constantly remained in kinship foster care placement since birth.

At the November 9, 2015 dispositional review hearing, the Court established reunification as a goal and clearly identified a reunification plan. The plan called for the parents to attend regular visitation with the child including medical appointments. It also directed the parents to participate in intensive parenting services and D.L. to address anger management issues and participate in outpatient mental health counseling. Finally, it called for the parents to verify employment and provide stable and safe housing for the child.

Unfortunately, issues arose shortly thereafter. D.L. was sporadic in his visitation with M.L. and unwilling to provide verification of his employment. Neither parent attended the child's medical appointments and although D.L. claimed to have been participating in mental health treatment, he was unable to provide proof of the same. The in-home service provider also terminated their services due to non-cooperation by the parents. D.L., who had been living with his mother, was evicted and unable to provide any proof of residence. Due to the hardships resulting to the kinship foster parents in making the child available for visitations which never occurred, and in order to address Father's claims that his work schedule caused him difficulty in appearing, the Court identified a schedule with notice requirements which was acceptable to all parties.

Nevertheless, at the permanency review hearing on April 12, 2016, visitation remained sporadic, and neither parent attended the child's medical appointments. Father once again claimed to be attending mental health counseling but had yet to produce verification. The parents had located to

a new apartment but had not yet provided any verification of financial stability.

At an emergency hearing on May 24, 2016, it was discovered that Father, while exercising unsupervised visitation, had been transporting the child with a suspended operator's license. Additionally, the Adams County Children and Youth Agency ("Agency") remained concerned over Father's anger management and mental health. At this time, Father still had not provided the Agency or the Court with verification that he was attending treatment.

At the permanency review hearing on July 20, 2016, neither Father nor Mother had attended any medical appointments with the child during the relevant reporting period. Although Father provided mental health records, the records pre-dated the finding of dependency and failed to verify he had been undergoing treatment as initially directed by the Court and as previously represented by him. Alarmingly, the records provided by Father indicated a history of depression and suicidal ideations. Additionally, Father had been charged with numerous Vehicle Code offenses, which included inter alia, the possession of non-authorized emergency vehicle devices. Father's cooperation with service providers was essentially nonexistent resulting in a termination of services. A reunification plan had not yet been submitted by Father. Essentially, Father had made no effort toward reunification. Due to increasing concerns over the safety of the child in the presence of the parents, the Court directed supervised visitation until verification of mental health evaluation and treatment compliance was presented.

At permanency review hearing on September 27, 2016, it was discovered that the parents had been evicted from their residence and were currently homeless. Additionally, Father had received criminal charges including burglary (18 Pa. C.S.A. § 3502(a)(1)) and impersonating a public servant (18 Pa. C.S.A. § 4912). It was alleged that Father had been impersonating a constable as part of a scheme to commit burglaries. Moreover, the parents failed to appear at supervised visits or, when they did appear, were habitually late. Neither attended any medical appointments of the child during the reporting period. Although Father claimed he was consulting with a mental health provider, he remained unwilling or unable to produce verification of the same. Alarmingly, at the time of his arrest on the burglary charges, a search of the Father's residence revealed that he was in the possession of a firearm despite a previous order prohibiting the same entered separately by Dauphin County Judge John Cherry and Adams County Judge John Kuhn as part of the dependency proceeding[1].

From November 21, 2016 through January 5, 2017, Father was incarcerated at the Adams County Prison as a result of convictions resulting from the charges contained in the burglary complaint referenced above. Mother's whereabouts were unknown to the Agency during this period of time. Despite Father being represented by counsel, there was essentially no communication between Father and the Agency since the prior September 27, 2016 permanency review hearing.

1. Apparently, Judge Cherry originally entered the order when a service provider providing in-home services observed a firearm fall from the couch upon which parents were seated while the service provider was at the residence.

At a permanency review hearing on January 11, 2017, Father still had not provided a reunification plan nor any verification of a mental health evaluation and treatment compliance. Indeed, the only mental health information available to the Agency was a psychiatric evaluation of Father conducted on November 22, 2014, which indicated that Father's personality traits presented a high risk of future child abuse and that Father was defiant to authority, angry, impulsive, and reckless.

This history reflects Father made absolutely no effort towards reunification other than exceedingly sporadic visitation. His employment and housing stability was either unverifiable or in constant fluctuation. Most alarmingly, he failed to address potentially dangerous mental health issues which apparently were diagnosed as early as 2014 and observed independently by both Dauphin County Social Services and Adams County Children and Youth Agency. The possession of a firearm and nature of criminal charges instituted against Father, as well as his flagrant disregard for the safety of the child by transporting her while on a suspended license, evidenced the potential risk to the child. As this history was consistent since the child was taken into custody at her birth in August of 2015, there can be no doubt that Father, by conduct continuing for a period of at least six months, has refused or failed to perform parental duties. Indeed, Father does not contest this finding in his Concise Statement of Matters Complained of on Appeal.

Additionally, this record supports a finding of the repeated and continued refusal of Father to take steps to provide the child the essential parental care necessary to her physical and mental well-being which Father will

not remedy. 23 Pa. C.S.A. § 2511(a)(2). Father's blatant disregard, after numerous unequivocal requests, to comply with reasonable safeguards aimed at establishing a reunification plan for a period in excess of 12 months is indicative of Father's unwillingness to remedy the situation which caused initial placement. Undoubtedly, the record also supports a finding that M.L. was in the care of the Agency for at least six months and that services or assistance reasonably available is not likely to remedy the conditions which led to the placement as Father has refused to meaningfully participate in any programming addressing the concerns initially raised. 23 Pa. C.S.A. § 2511(a)(5).

Finally, termination is appropriate under 23 Pa. C.S.A. § 2511(a) (8) as the record confirms that 12 months or more have elapsed from the date of the original placement of M.L. and that the conditions which led to the original placement continue to exist. The termination best serves the needs and welfare of the child as, at the time of this writing, there remains significant concerns over Father's mental stability and history of depression and suicidal ideation which includes a high likelihood of future perpetration as a child abuser. Importantly, under Section 2511(a)(8), termination does not require an evaluation of a parent's willingness or ability to remedy the conditions that led to the placement of the child. *In Re Adoption of R.J.S.*, 901 A.2d 502, 511 (Pa. Super. 2006).

Having found the existence of statutory requirements for involuntary termination of Father's rights, consideration must also be given to whether the child's needs and welfare will be met by the termination. Section 2511(b); *In Re*

T.S.M., 71 A.3d 251, 267 (Pa. 2013). This consideration includes consideration of "[i]ntangibles such as love, comfort, security, and stability." *In Re K.M.*, 53 A.3d 781, 791 (Pa. Super. 2012). In doing so, the "utmost attention" should be paid to the emotional bonds between the parent and child and the effect on the child of permanently severing the parental bond. *Id.*

Throughout the history of this proceeding, the record is unequivocal that the Kinship of foster parents has essentially filled the void created by the natural parents' unwillingness to provide parental care. While in Kinship Foster Care, the child's overall well-being has been positive. M.L. perceives the Kinship foster family as family and refers to the foster parents as "Mom" and "Dad." While with the Kinship foster family, she has become attached to three quasi-sib-lings who she treats as sisters. In contrast, the only bond between D.L. and M.L. which developed during sporadic visitations has been described as one of "playmates." There is no other evidence of record. As Father has essentially not been actively involved in the 21 month old child's life since her birth, this Court shares in the opinion of the kinship foster providers that the child's well-being will only be jeopardized by delay in arranging permanency for the child. The child's guardian ad litem concurs in this conclusion.

Although the foregoing is sufficient to support the finding for termination, this writer feels compelled to address a reference in Appellant's Concise Statement of Matters Complained of on Appeal which raises an implication of punitive suspension of visitation between Father and child. This implication is simply contrary

to the record. Throughout the history of this matter, the Agency made significant effort to increase Father's visitation with the child towards the goal of reunification. The Agency's effort however was met by an attitude of inconsistency, concealment, and defiance. For instance, Father was excessively sporadic in exercising visitation at great inconvenience to the kinship foster parents. Indeed, on occasion, Father did not even attend court proceedings. In explaining these lapses, Father regularly alluded to work obligations yet adamantly refused to provide employment documentation for the Agency to confirm his representations or to permit accommodation. When initially provided opportunity for unsupervised visitation, Father illegally transported the child with a suspended license and failed to disclose the same to the Agency. While he has consistently represented to the Agency and Court that his significant mental health issues were being addressed, as of this writing, there is no verification for the same. His interaction with service providers was terminated by the providers due to non-cooperation. Finally, he was regularly secretive about his living arrangements and information relevant to his ability to care for the child. All these actions were consistently repetitive under the umbrella of a history of dangerous mental instability including: (1) a depressive and suicidal psychiatric diagnosis; (2) possession of a concealed firearm while interacting with in-home service providers; (3) blatant disregard of court directives by two prior judges prohibiting his possession of firearms; (4) operating a motor vehicle while under suspension and in possession of emergency lighting devices which he was not qualified to use; (5) conviction of criminal charges wherein it is alleged he impersonated a constable

to assist in his commission of burglary; (6) consistent misrepresentation to the Agency and Court concerning his attendance at anger management and mental health counseling; and (7) an attitude evidencing a clearly open defiance to authority which was apparent at numerous court proceedings. Despite this umbrella of concern, the Agency continued to make efforts and accommodations to arrange visitation until it became clear that the Father simply had no intention of addressing the issues which caused the original placement. Indeed, this Court observed Father's demeanor at various proceedings and, in light of the history and record, has no hesitancy in concluding that left untreated, Father presents a grave threat to both the child and social service providers[2].

For the foregoing reasons, it is respectfully requested that this Court's order of termination be affirmed.

2. While it is true the Agency did not arrange visitation between the Father and child while incarcerated, for some period of time the Agency was unaware of Father's residence or incarceration. On the other hand, Father was continuously represented by counsel and obviously aware of Agency involvement however failed to take any act to alert the Agency of his location or request visitation contrary to his obligation of affirmative performance in exercising parental duties. *In Re C.M.S.*, 832 A.2d 457, 462 (Pa. Super. 2003).