Brown v. Stroud Mall, LLC

Negligence — Duty — Constructive notice — Reasonable care

Defendants were not entitled to summary judgment because genuine issues of material fact existed as to whether defendants had constructive notice of a dangerous condition at a shopping mall such that it could have been discovered and corrected through the exercise of reasonable care.

Plaintiff was employed as an assistant manager at a shoe store in Stroud Mall. After she finished her afternoon shift, plaintiff prepared to leave for the day. She proceeded to walk down a publicly accessible hallway, toward the entrance that led to the parking lot. Plaintiff stepped into the hallway and her foot became entangled in what appeared to be a wire strung across the hall. She later began experiencing pain in her right leg and knee. Plaintiff underwent physical therapy and later surgery. Despite her surgery, plaintiff continued to experience pain and difficulty walking. She eventually had to quit working due to her knee and back pain.

Plaintiff filed a complaint for negligence. Defendants then filed a motion for summary judgment. In support of their motion for summary judgment, defendants argued that plaintiff could not establish the threshold issue of whether defendants owed a duty to plaintiff. Additionally, defendants asserted that plaintiff could not establish defendants had either actual or constructive notice of the wire.

Plaintiff conceded she could not prove that defendants had actual notice of the existence of the wire. On the question of constructive notice, the court found genuine issues of material fact existed. Stroud Mall was large and the hallway was open to the public. Security personnel routinely patrolled the mall, including the hallway at issue. A security guard testified that he patrolled the hallway between 10 and 60 minutes prior to plaintiff using the hallway to reach her vehicle. The record also contained evidence that that mall had previously experienced issues with children causing mischief for the security staff.

Defendants argued the presence of security staff in the area within an hour of plaintiff's encounter with the wire led to the conclusion that the wire did not exist for such a period of time that it could have been discovered and corrected through the exercise of reasonable care. Citing Com. Dept. of Transp. v. Patton, 686 A.2d 1302, 1304, the court noted that only the jury could decide whether a landowner had constructive notice of a dangerous condition, and the court was permitted to decide such an issue only where reasonable minds could not differ as to the

conclusion. The court determined that reasonable minds could differ as to whether defendants had constructive notice, so it denied the motion for summary judgment.

C.P. of Monroe County, No. 7599 CV 2013

SIBUM, *J*., Aug. 23, 2016—This case is before us on Defendants Stroud Mall, LLC, CBL & Associates Properties, Inc., and ERMC's Motion for Summary Judgment. The Motion asks this Court to enter summary judgment in Defendants' favor. For reasons detailed below, we deny Defendants' Motion for Summary Judgment.

FACTS AND PROCEDURAL HISTORY

In September 2011, Plaintiff was employed as an assistant manager at a Shoe Dept. retail store in the Stroud Mall, Stroudsburg, PA. According to Defendant CBL & Associates Properties, Inc., the Stroud Mall has a gross leasable area of 398,146 square feet, and a total acreage of 39.8 acres, or 1,733,688 square feet. On September 8, 2011, Plaintiff finished her afternoon shift at 4:30 pm, and she prepared to leave for the day. She proceeded to walk down a publicly accessible hallway, towards an entrance that led to the parking lot. That day, the hallway was patrolled by an ERMC security guard, Patrick Szarzynski. Mr. Szarzynski had patrolled that hallway between 10 and 60 minutes prior to Plaintiff using the hallway to reach her vehicle.

After opening the doors to the publicly accessible hallway, Plaintiff took two steps into the hallway without incident. However, on her third step with her right foot, her foot became entangled in what appeared to be a wire

strung across the hallway. She tripped on the wire, but did not fall to the ground as a result. She later stated under oath at her deposition that she believed the wire was placed there as a practical joke to trip an innocent person. PL Dep., 79:9-11. She also cannot say how long the wire was present or who placed it there. PL Dep., 75:12-18. Although under "severe pain in her right knee and leg, which was painful to support her weight," Plaintiff left the Stroud Mall under her own power, got into her vehicle, and went home for the evening. Cpl., ¶ 9.

That evening, however, Plaintiff began to experience greater pain in her right leg and knee. The following day, she returned to work at 9:30 am. She informed her manager about the incident with the wire, and that she was having difficulty walking due to the "ongoing severe pain in her right knee." Complaint, ¶ 12. Her manager filled out an incident report with Stroud Mall security. Minutes later, Plaintiff informed her manager that she was in so much pain that she could not continue to work her shift. She was driven to Pocono Medical Center, where she underwent x-ray examination of her knee.

Based upon the x-rays, Plaintiff was diagnosed with a torn medial meniscus in her right knee. She was given prescription pain medication, crutches, and a knee brace, and underwent nearly two months of physical therapy. She later consulted with Dr. Gene Chiavacchi, who advised her that surgery was required to repair her knee. She underwent this surgery on November 7, 2011, which required a tendon to be "shaved," leading to two bones in her knee rubbing against each other. Cpl., ¶ 23. Despite the

surgery, she experienced post-surgery pain and difficulty walking, which led to further physical therapy.

Plaintiff, however, continued to experience pain and difficulty walking, leading her to consult with various doctors, who recommended a total right knee replacement. She eventually was examined by Dr. Thomas Meade in May 2012, who diagnosed Plaintiff with degenerative knee arthritis and reflex sympathy dystrophy (RSD). RSD specifically rendered her ineligible for a total right knee replacement, and therefore meant Plaintiff would likely suffer from pain and difficulty walking indefinitely.

Further, Plaintiff began to suffer pain in her legs and back in July 2012. She was eventually diagnosed with deteriorating discs in her back by Dr. Dean Mozeleski. As a result of her knee and back pain, she was found "totally disabled" by Dr. Robert Frederick. Cpl., ¶ 31. This led her to lose both her job at Shoe Dept. and her second job at Coldwater Creek in Moosic, Pennsylvania, and rendered her unable to work.

Plaintiff filed a Praecipe for a Writ of Summons against Defendants on September 5, 2013. On April 3, 2014, Plaintiff filed her Complaint, alleging only a single count of negligence against all Defendants. Defendants filed an Answer with New Matter on June 5, 2014. Plaintiff closed the pleadings on June 31, 2014 by filing a Reply to New Matter. After discovery, Defendants filed the instant Motion for Summary Judgment on May 9, 2016. This Court issued an Order on May 13, 2016, directing the parties to file briefs and scheduling the matter for argument. Defendants filed a Brief in Support on June 20, 2016. Plaintiff filed

an Answer and a Brief in Opposition on July 26 and 27, 2016, respectively. Thereafter, Defendants filed a Reply Brief in Support on August 1, 2016, and argument on the Motion was held the same day.

After hearing arguments by Plaintiff and Defendants on this matter, and reviewing the briefs submitted by the parties and the pleadings of record, we are now prepared to render this Opinion.

DISCUSSION

Standard of Review

Pennsylvania Rule of Civil Procedure 1035.2 permits the trial court to dismiss an action after the close of pleadings where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 468-69 (Pa. 1979). The — Rules state,

> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law
>
> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the

> cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. 1035.2. Summary judgment may only be entered where the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P.1035(b); *see Brecker v. Cutler*, 578 A.2d 481 (Pa. Super. Ct. 1990).

Summary judgment may be granted only in cases where the right is clear and free from doubt. *Musser v. Vilsmeier Auction Co.*, 562 A.2d 279, 280 (Pa. 1989). Only when the facts are so clear that reasonable minds cannot differ may a trial court properly enter summary judgment. *See Basile v. H&R Block*, 761 A.2d 1115 (Pa. 2000). The trial court must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party. *See Potter v. Herman*, 762 A.2d 1116 (Pa. Super. 2000). The moving party bears the burden of proving that no genuine issue of material fact exists. *Long v. Yingling*, 700 A.2d 508, 512 (Pa. Super. Ct. 1997).

In response to a motion for summary judgment, the non-moving party may not rest upon the pleadings, but must set forth specific facts demonstrating a genuine issue for trial. *See Phaff v. Gerner*, 303 A.2d 826 (Pa. 1973). Failure to allege such specific facts will result in summary judgment, if appropriate, against the non-moving party. Pa.R.C.P. 1035.3; *see Overly v. Kass*, 554 A.2d 970 (Pa. Super. Ct. 1989). The Court must also accept as true all well-pled

facts contained in the non-moving party's pleadings. *See Mattia v. Employers Mat. Cos.*, 440 A.2d 616 (Pa. Super. Ct. 1982). The Court must ignore contested facts contained in the pleadings and restrict its view to allegations in the pleadings that are uncontroverted and to material filed in support of and in opposition to a motion for summary judgment. *Nationwide Mutual Ins. Co. v. Nixon*, 682 A.2d 1310, 1313 (Pa. Super. Ct. 1996), *allocator denied*, 693 A.2d 589 (Pa. 1997) (citation omitted).

In the case *sub judice*, Defendants assert they are entitled to summary judgment on Plaintiff's singular claim of negligence against them in her Complaint. Specifically, Defendants argue that Plaintiff cannot establish the threshold issue for a negligence claim, that Defendants owed a duty to Plaintiff. Plaintiff cannot establish either actual notice or constructive notice of the wire, Defendants argue, and therefore Plaintiff cannot establish Defendants owed her a duty of care. Since Plaintiff cannot establish a duty, Defendants cannot be deemed to have been negligent, and we must issue summary judgment. At argument, Plaintiff conceded she cannot establish actual notice; therefore, the singular issue for our review is whether Plaintiff can establish Defendants had constructive notice of the wire, creating a duty owed to Plaintiff.

A Genuine Issue of Material Fact Exists as to Whether Plaintiff can Establish Defendants Held Constructive Notice

Defendants' Motion argues that Plaintiff cannot establish they had constructive notice of the wire. Since she cannot do so, they argue, Plaintiff cannot establish the

threshold issue for her singular claim of negligence, that Defendants owed her a duty of care. Defendants further argue that because Plaintiff cannot establish this duty of care, Defendants owed her no duty, and therefore cannot be held liable for negligence for Plaintiff's injury. Therefore, they assert that Plaintiff's claim of negligence must fail as a matter of law, and that we must, therefore, grant summary judgment and dismiss Plaintiff's Complaint with prejudice.

In Pennsylvania, a negligence claim requires proof of four elements: 1) *the existence of a duty or obligation recognized by law*, (2) a failure on the part of the defendant to conform to that duty, or a breach thereof; (3) a causal connection between the defendant's breach and the resulting injury; and (4) actual loss or damage suffered by the plaintiff. *Paliometros v. Loyola*, 932 A.2d 128,133 (Pa. Super. 2007) (citation omitted) (emphasis added). In a negligence and premises liability action, the duty of care owed depends upon the plaintiff's status on the landowner's land, whether they are a trespasser, licensee, or invitee. *Carrender v. Fitterer*, 469 A.2d 120,123 (Pa. 1983).

Pennsylvania courts have adopted the Second Restatement of Torts to determine the duty owed by a landowner to a person on the land. *Id.* A business invitee is defined as "a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." Restatement (Second) of Torts § 332 (1965). A landowner is subject to liability for physical harm caused to their

invitees by a condition on the land if, but only if, the landowner

> "a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and c) fails to exercise reasonable care to protect them against the danger."

Restatement (Second) of Torts § 343 (1965). Stated otherwise, a landowner owes "a duty to protect invitees from foreseeable harm." Carrender, 469 A.2d at 123.

However, the existence of a harmful condition in a public business or a mere accident is not evidence of the landowner's breach of duty, nor raises a presumption of negligence. *Moultrey v. Great Atl. & Pac. Tea Co.*, 422 A.2d 593, 596 (Pa. Super. 1980). Rather, in order to show a duty exists, "a plaintiff must prove the defendant had a hand in creating the hazardous condition or had actual or constructive notice of it."[1] *Id.*; *see also Estate of Swift v. Northeast Hospital of Philadelphia*, 690 A.2d 719, 722 (Pa. Super. 1997). Constructive notice occurs when "the condition existed for such a length of time that in the exercise of reasonable care the owner should have known of it." *Moultrey*, 422 A.2d at 496.

Courts rely on several factors to determine constructive notice, such as "the time elapsing between the origin of the

1. Plaintiff does not aver that Defendants "had a hand in creating the hazardous condition...." *Moultrey*, 422 A.2d at 596.

defect and the accident, the size and physical condition of the premises, the nature of the business conducted thereon, the number of persons using the premises and the frequency of such use, the nature of the defect and its location on the premises, its probable cause and the opportunity which defendant, as a reasonably prudent person, had to remedy it." *Henderson v. J.C. Penney Corp., Inc.*, No. 05-177, 2009 WL 426180, at *4 (E.D. Pa. Feb. 20, 2009) (applying Pennsylvania law) (citing *Bremer v. W.W. Smith, Inc.*, 191 A. 395, 397 (Pa. Super. 1937)). However, "one of the most important factors to be taken into consideration is the time elapsing between the origin of the defect or hazardous condition." *Neve v. Insalaco's*, 771 A.2d 786, 791 (Pa. Super. 2001). Therefore, to establish constructive notice, a plaintiff must show "the defect existed for such a period of time that it could have been discovered and corrected through the exercise of reasonable care." *Murray v. Siegal*, 195 A.2d 790, 792 (Pa. 1963) (citations omitted).

Under these established principles, we find that Defendants' Motion for Summary Judgment must fail. As stated, the Stroud Mall is quite large; indeed, the total area is well over 1.7 million square feet. It is undisputed that Plaintiff was a business invitee of Defendants. At the time of Plaintiffs accident, just after 4:30 pm, Stroud Mall and the hallway was open to the public. Mr. Szarzynski testified at his deposition that he patrolled the hallway between 10 and 60 minutes prior to Plaintiffs accident, and that he found no defect in the hallway during his patrol. Based upon these facts, we are left with the conclusion that the wire was placed between Szarzynski's patrol and Plaintiff's accident. Defendants argue this conclusion

leads us to find the wire did not exist for such a period of time that it could have been discovered and corrected through the exercise of reasonable care.

In response to Defendants' argument, Plaintiff invokes our Supreme Court's pronouncement that,

> "The question whether a landowner had constructive notice of a dangerous condition and thus should have known of the defect, i.e., the defect was apparent upon reasonable inspection, is a question of fact. As such, it is a question for the jury, and may be decided by the court only when reasonable minds could not differ as to the conclusion. If there is any dispute created by the evidence, the court is not permitted to decide the issue."

Com. Dept. of Transp. v. Patton, 686 A.2d 1302, 1304 (citing *Carrender*, 469 A.2d at 124). Plaintiff then focuses on Szarzynski's statement that children frequented Stroud Mall and caused mischief for the security staff. PL Br. in Opp., 4. Therefore, Plaintiff argues, because Defendants continued to keep the hallway open to the public "despite the persistence of problems," a jury could reasonably conclude Defendants had constructive notice of the wire. *Id.*

We agree with Plaintiff's argument against Defendants' Motion for Summary Judgment. Based upon the alleged presence of children causing "problems" and mischief for the security staff, as well as the sheer size of Stroud Mall, we find a genuine issue of material fact exists as to whether Defendants' had constructive notice of the wire. It is possible that at trial, Plaintiff is able to establish the

Defendants should have had a larger number of security staff on duty, should have closed the public hallway, or conducted more frequent security patrols. We find that reasonable minds can differ as to whether Defendants held constructive notice of the condition that caused Plaintiffs injury. This conclusion comports with our Supreme Court's pronouncement in *Patton*, that constructive notice is a question of fact and "may be decided by the court only when reasonable minds could not differ." *Patton*, 686 A.2d at 1304.

Accordingly, we enter the following ORDER.

ORDER

AND NOW, this 23rd day of August, 2016, upon consideration of Defendants' Motion for Summary Judgment, Plaintiff's response thereto and proceedings thereon, Defendants' Motion is DENIED.

Commonwealth v. Porambo

Motion to suppress evidence — Probable cause — Traffic stop — Informant — DUI

Defendant filed an omnibus pre-trial motion to suppress evidence in her DUI case. Informant called 911 to report that defendant was driving while drunk. Informant then drove to police station, identified herself and told officer that she saw defendant display signs of intoxication and watched her "stagger" to her vehicle. Officer drove to the location where he had been told that defendant would be. He observed defendant's vehicle and followed it. He noted that defendant was driving ten miles per hour in a posted 25 mph zone and that traffic was backing up behind her. He pulled defendant over, noticed a strong odor of alcohol and that her eyes were bloodshot and glassy. Defendant denied having been

drinking that day but failed a series of sobriety tests. Police then took defendant into custody and transported her to the hospital for a blood test. Defendant had a BAC level of.087 percent and was charged with DUI and driving too slow for conditions.

Defendant moved to suppress evidence obtained as a result of the traffic stop arguing that the officer lacked probable cause to conduct the traffic stop. She contended that the anonymous tip did not come from a known informant and thus, carried a low indicia of reliability and did not constitute reasonable suspicion for the officer to follow and stop her car. The commonwealth argued that the tip contained sufficient indicia of reliability based on the identification of the tipster and the content of the tip. The informant provided defendant's name, a description of her vehicle, and predicted the direction in which defendant would be driving as well as her destination. Moreover, informant drove to police station, identified herself and told officer the same information she had stated on the phone. The officer corroborated the information in the tip by observing defendant's vehicle where informant had said it would be.

The court found that the officer's receipt of the tipster's information from the dispatcher identifying defendant; describing the make, model and color of her vehicle and her destination, coupled with the nature of the offense, created reasonable suspicion warranting the investigative stop.

C.P. of Carbon County, No. 966-CR-2014

Cynthia Dydra-Hatton, Esquire, for Commonwealth
Michael P. Gough, Esquire, for defendant

SERFASS, *J.*, Nov. 10, 2016—

I. Facts and Procedural History

Under Pa.R.A.P. 1911(d), "If the appellant fails to take the action required by these rules and the Pennsylvania Rules of Judicial Administration for the preparation of the transcript, the appellate court may take such action as it deems appropriate, which may include dismissal of the appeal." *See also* Pa.R.A.P. 904 (governing content of notice of appeal; "The request for transcript contemplated

by Pa.R.A.P. 1911 or a statement signed by counsel that either there is no verbatim record of the proceedings or the complete transcript has been lodged of record shall accompany the notice of appeal, but the absence of or defect in the request for transcript shall not affect the validity of the appeal.") As of the date of filing this opinion, the notes of testimony in this matter have not been ordered. The Plaintiff filed a notice of appeal on November 29, 2016. Because the Plaintiff has not ordered the notes of testimony, this Court relies on its own notes and findings of fact in preparing this opinion.

This partition matter arises from a family dispute over a house, 4628 Decatur Street, Philadelphia PA 19136 ("the Property"). Minh Truong has owned a half interest of the Property since 2002, when she bought it with her brother, Long Truong, who is now deceased. The deed recording their ownership was recorded with the Philadelphia Recorder of Deeds as Document Identification Number 50484623. They held the property as tenants in common. The Plaintiff, Lehang Nguyen, is Long Truong's widow. According to the Plaintiff, who brings this appeal, upon Long Truong's death, the entire house was to go to her. She alleges that her now-deceased husband promised her that it was his intention and the family's intention that she receive the entire house. However, at the time of Long Truong's death, he held a half-interest with his sister, Minh Truong, as tenants in common, and he did not have the power to convey any greater interest in the house to Lehang Nguyen than the one he held.

In accordance with Long Truong's will, the Executor

of his estate, Joseph V. Pinto, executed a deed on March 15, 2011, conveying the decedent's "fifty percent (50%) portion" of the Property to the Plaintiff, Lehang Nguyen. That deed states that "... said Grantor(s) pursuant for and in consideration of... grants, bargains and sells to Grantee(s) all his right, title, and interest a to a fifty percent (50%) portion of the premises herein conveyed holding title as tenants in common with Minh Truong."

Testimony and evidence admitted during trial established that the Plaintiff had stopped living in or contributing to the upkeep of the property a few years ago, whereas the Defendant continued to make necessary payments and improvements, as well as managing it as a rental property.

The parties agreed in post-trial filings that the value of the Property is $87,500. Half of that is $43,750. This Court ordered partition, allowing the Defendant to keep the property into which she had invested so much. This Court also ordered the reduction of the amount owed to the Plaintiff as follows:

> It shall be reduced by half of $13,425.11 ($6712.55), where such amount constitutes mortgage payments made between 2010 and 2014, in satisfaction of the original mortgage by which the purchase of the Property was financed. It shall further be reduced by half of insurance and real estate taxes paid between 2011 and 2015, in the amount of $2513 and $5360.60, respectively ($3936.80). It shall further be reduced by the amount of rental and property improvement

expenses that Defendant Truong has extended, minus the amount of rents she has collected, divided by two. She has spent $64,685.81 and received rents totaling $33,400. The difference between her outlay and her received rents is $31,285.81. Half of that number is $15,642.90. The amount to be paid to Plaintiff is thus $17,457.75, and upon receiving such payment, Plaintiff shall convey her half interest in the subject Property to Defendant Truong.

The Plaintiff brings three claims of error:

1. The trial court committed an error of fact and/ or law and or abused its discretion by entering judgment in favor of defendant Truong vesting title in her favor when the relief granted was not pled by defendant Truong or litigated during trial.

2. The trial court committed an error of fact and/ or law and or abused its discretion considering defendant Truong's evidence as to the expenses.

3. The trial court committed an error of fact and/ or law and or abused its discretion in vacating the settlement between plaintiff and defendant.

II. Discussion

The scope of appellate review of a ruling in equity is particularly limited, and such a ruling will not be disturbed unless it is unsupported by the evidence or demonstrably capricious. *Daley v. Hornbaker*, 472 A.2d 703 (Pa. Super. 1984); *Lynch v. Hook*, 444 A.2d 157 (Pa. Super. 1982).

The test is not whether the reviewing court would have reached the same result on the evidence presented, but whether the trial judge's conclusion can reasonably be drawn from the evidence. *In re Estate of Tippins*, 408 A.2d 1377 (Pa. 1979); *Hoffman v. Gekoski*, 378 A.2d 447 (Pa. Super. 1977). Where a reading of the record can reasonably be said to reflect the conclusions reached by a trial court sitting in equity, an appellate court will not substitute its judgment for that of the trial court. *Frowen v. Blank*, 425 A.2d 412 (Pa. 1981).

"Partition is a possessory action; its purpose and effect being to give to each of a number of joint owners the possession he is entitled to of his share in severalty." *Fry v. Stetson*, 87 A.2d 305, 307 (Pa. 1952), *quoting Johnson v. Gaul*, 77 A. 399 (Pa. 1910). The rule is that the right to partition is an incident of a tenancy in common, and an absolute right. *Shoup v. Shoup*, 364 A.2d 1319 (Pa. 1976); *Caldwell v. Snyder*, 35 A. 996 (Pa. 1896); *see also Lykiardopoulos v. Lykiardopoulos*, 309 A.2d 548 (Pa. 1973) (partition is normally a matter of right); *Hyatt v. Hyatt*, 417 A.2d 726 (Pa. Super. 1979) (appellant had an absolute right to seek partition).

Plaintiff claims that because the Defendant did not seek partition (although the Plaintiff did), it was error for the Court to order partition. Essentially, when Plaintiff said "partition" in her pleadings, she meant "partition on *my* terms." What she meant was, "I want the entire house, and I want to establish a low value in order to make it easier for me to buy the Defendant out if I must, although I believe I am entitled to the house *in toto*." Well, no. The

Plaintiff's deceased husband conveyed to the Plaintiff the only interest he had in the house, which was a tenancy in common with his sister, the Defendant.

He did not own the entire property, and therefore could not, even if he had wanted to, convey any greater interest than the one he held. The evidence amply established that the Defendant had been keeping the Property up and keeping it working as a rental property, making mortgage payments and paying property insurance. The Plaintiff submitted evidence that she had once bought an area rug for the Property. She did not have much other evidence to offer. It is important, especially in acrimonious litigation, to take a step back and try to be as reasonable as possible, and to seek a neutral perspective: how would the average complete stranger see this dispute? From the perspective of an absolute stranger, if two people own a house and they cannot get along, and one sues the other for partition, in order to decide who buys who out and who keeps the house, you would want to look at who has been taking care of the house, investing in its upkeep and maintaining its value. This is a tale as old as the Judgment of Solomon.[1] Who keeps the house? The one who *cares more* for it. In this case, it was not a close call.

The Plaintiff also makes an exceedingly vague and sweeping complaint about the Court's "consideration" (by which this Court assumes the Plaintiff to mean *admission*) of the Defendant's evidence as to expenses. Plainly, the

1. *See, e.g.*, *Walter Int'l Prods., Inc. v. Salinas*, 650 F.3d 1402, 1417-18 (11th Cir. 2011) (discussing the meaning of the "split the baby" parable of 1 Kings 3:16-28).

evidence was relevant to show the Defendant's investment in the Property and to reach a fair number for partition. "[R]eview of the trial court's evidentiary decisions is limited to determining whether the trial court abused its discretion. The trial court abuse[s] its discretion only if the court's ruling reflects manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support to be clearly erroneous."

Commonwealth v. Foley, 38 A.3d 882, 886 (Pa. Super.2012), *alloc. denied*, 619 Pa. 671, 60 A.3d 535 (2013) (quotations and citations omitted); *see also Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1046 (Pa.2003) ("An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous.").

"Where the discretion exercised by the trial court is challenged on appeal, the party bringing the challenge bears a heavy burden." *Paden v. Baker Concrete Const., Inc.*, 658 A.2d 341, 343 (Pa. 1995).

Here, consideration of the evidence of reasonable upkeep expenses (and of rental income, which worked to the Plaintiff's advantage, to an extent) was necessary in order to make a fair calculation for partition. Exclusion of the evidence, for whatever reason the Plaintiff should decide to argue, would have been manifestly unfair. Some of the evidence was necessary to establish such fundamental expenses as mortgage payments in satisfaction of the

mortgage by which the Property was originally purchased, and insurance for the Property. How could such amounts be excluded from any appropriate partition calculation? Because this claim of error lacks any specific argument as to why the evidence was objectionable, it is waived, as well as being meritless.

Finally, the Plaintiff claims that this Court erred in vacating a prior order of settlement between the parties. On March 22, 2016 (prior to this case's assignment to the undersigned for trial), another Judge of this Court entered an order vacating the prior order of settlement because the settlement agreement did not sufficiently address the issues between the parties, and by agreement of the parties, placed the matter back into a trial pool so that it could proceed to trial.

Again, because there is no indication in the 1925(b) statement as to why entry of this order was error, this claim is waived. Further, it appears that the parties agreed that the case should be listed for trial. The record does not indicate that the Plaintiff had any objection to entry of the March 22, 2016 order. Perhaps there is some indication in the notes of testimony, but alas, the Plaintiff has yet to order the notes of testimony. For this reason alone, this allegation of error is waived.

III. Conclusion

For the foregoing reasons, the Court's verdict should be affirmed.

Coley v. Keystone Turf Club, Inc.

Post-trial motions — Waiver — Failure to preserve issue for appeal

Defendant's post-trial motion did not preserve any issues for appeal because it did not specify the grounds for relief. The filing of a statement under Pa.R.A.P. 1925(b) did not serve to revive or cure issues defendant had waived.

This case arose from an incident where plaintiff sustained bodily injury when he was attacked at defendant's off-track betting establishment. The jury arrived at a verdict in favor of plaintiff. Defendant filed a motion for post-trial relief, but the motion contained only boilerplate language and did not specifically identify the grounds for relief in the motion itself. Instead, the motion incorporated by reference matters contained in defendant's prior motions for compulsory non-suit and for a directed verdict. Defendant did not even attach copies of the prior motions to the post-trial motion, nor did defendant cite to particular pages of the motion or transcript that it relied upon in its post-trial motion. The court held that simply incorporating matters by reference was not sufficient to state the grounds for relief sought in the post-trial motion. Because defendant did not properly present its post-trial motion, the objections it sought to incorporate were waived.

Defendant later filed a statement under Pa.R.A.P. 1925(b). In that statement, defendant attempted to articulate specific grounds for relief. The court held that the failure to file a post-trial motion was not excused or replaced by the filing of a statement under this rule. Issues that were not preserved by the filing of a proper post-trial motion were waived, and could not be revived or saved by simply raising those issues in a 1925(b) statement. The court held the appeal should be quashed.

C.P. of Philadelphia County, December Term, 2014, No. 1773

LACHMAN, *J.*, March 17, 2017—The appellant's post-trial motion did not preserve any issues for review or for appeal, and the appellant's Pa.R.A.P. 1925(b) Statement cannot revive waived issues. Therefore, this court respectively suggests that the Superior Court quash this appeal.

On July 31, 2014, at approximately 9:30 p.m., Plaintiff James Coley was a customer in the Turf Club, a business for off track betting located at 1635 Market Street in Philadelphia. Plaintiff's Amended Complaint alleged that each of the corporate defendants owned, possessed, maintained, controlled, and operated the Turf Club.

While Mr. Coley was at a betting machine, he was verbally threatened and physically beaten and robbed by additional defendants John Gleason Jr. and John Gleason Sr. The Plaintiff sustained injuries to his head, eye, leg, ankle, and foot. Before the altercation, John Gleason Jr. had been drinking and had threatened another patron.

Mr. Coley sued the corporate defendants for negligently failing to have proper or adequate security in the Turf Club, failing to come to his aid when he was attacked by the Gleasons, failing to remove John Gleason Jr. from the premises after his earlier altercation with a patron, failing to monitor John Gleason Jr.'s later activities in the Turf Club, and continuing to serve the Gleasons alcohol after they became visibly intoxicated. The corporate defendants joined John Gleason Jr. and John Gleason Sr. as additional defendants.

At trial, nonsuits were granted to John Gleason Jr.; John Gleason Sr.; Bensalem Racing Association, Inc.; Greenwood Gaming and Entertainment, Inc., d/b/a Parx Casino; Turf Club Services, Inc.; Keystone Park Services Co.; and Parx Casino Design, Inc. Trial proceeded against Keystone Turf Club, Inc., and Greenwood Racing, Inc.

The jury found in favor of the Plaintiff and against

Keystone Turf Club and Greenwood Racing and awarded compensatory damages in the total amount of $300,000. Liability was apportioned 50 percent for each defendant. The jury separately awarded the Plaintiff $200,000 in punitive damages against Greenwood Racing only.

Greenwood Racing filed a timely motion for post-trial relief; Keystone Turf Club did not seek post-trial relief. The post-trial motion failed to preserve any issues for review or appeal. It violated Pa.R.C.P. 227.1(b)(2) by failing to specify in the motion itself the grounds for relief. The motion improperly attempted to incorporate by reference the entirety of Greenwood's "Motions for Compulsory Non-suit and for Directed Verdict, and the related briefing and argument," without citing any specific reasons or grounds for relief. Greenwood also did not cite to any pages in the record where the motions and argument could be found, and did not attach copies of the briefing or the transcripts to its post-trial motion.

On November 17, 2016, the trial court issued a memorandum order denying Greenwood's post-trial motion and explaining its reasoning. The trial court hereby adopts its memorandum order as its opinion for purposes of Pa.R.A.P. 1925. Copies of the memorandum order and Greenwood's post-trial motion are attached hereto,

The trial court ordered Greenwood to file a Pa.R.A.P. 1925(b) Statement and it was timely filed by Greenwood. For the first time, the 1925(b) Statement purports to identify specific grounds for relief and the pages in the transcript that Greenwood asserts support those issues. Even if Greenwood's 1925(b) Statement were sufficient,

it is clear that a 1925(b) Statement cannot revive issues that were waived in post-trial motions.

"The importance of filing post-trial motions cannot be overemphasized." *Diamond Reo Truck Co. v. Mid-Pacific Industries Inc.*, 2002 PA Super 272, 806 A.2d 423, 428. "Post-trial motions and 1925(b) statements serve different functions and are not synonymous with each other. The failure to file post-trial motions cannot be excused or replaced by the filing of a 1925(b) statement. Thus, *issues that are waived for failure to file post-trial motions or for other reasons cannot be revived or saved simply by raising those issues in a 1925(b) statement*." *Id.* at 430 (emphasis added).

> In addition, the filing of a 1925(b) statement raising the issue is not an adequate substitute for the raising of the issue in post-trial motions. A 1925(b) statement is filed after an appeal is filed, when the court no longer has jurisdiction over the matter. Because [appellant] failed to properly raise this issue in a post-trial motion, this issue has not been preserved and we may not review it.

Diener Brick Co. v. Mastro Masonry Contractor, 2005 PA Super 355, 885 A.2d 1034, 1039 (citations omitted).

> In general, a Rule 1925(b) statement cannot resurrect an otherwise untimely claim or objection. Because issues not raised in the lower court are waived and cannot be raised for the first time on appeal, a 1925(b) statement can therefore never be used to raise a claim in the first instance. Pa.R.A.P. 302. Pennsylvania law is clear that claims and objections that are not timely made are waived.

Steiner v. Market, 968 A.2d 1253, 1257 (Pa. 2009). Accord *Irwin Union Nat Bank & Trust Co. v. Famous*, 2010 PA Super 145, 4 A.3d 1099, 1104 ("It is well settled that issues not raised below cannot be advanced for the first time in a 1925(b) statement or on appeal.").

> "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). Raising the issue in her 1925(b) statement does not cure that defect. "A party cannot rectify the failure to preserve an issue by proffering it in response to a Rule 1925(b) order. A Rule 1925(b) statement of matters complained of on appeal is not a vehicle in which issues not previously asserted may be raised for the first time." *Glenbrook Leasing Co. v. Beausang*, 839 A.2d 437, 444 (Pa. Super. 2003) (internal citations omitted).

Hinkal v. Pardoe, 2016 PA Super 11, 133 A.3d 738, 746 (*en banc*).

For the foregoing reasons, the Superior Court should quash this appeal.

MEMORANDUM ORDER

AND NOW, this 17th day of November, 2016, upon consideration of the motion for post-trial relief filed by Defendant Greenwood Racing, Inc., and the response of the Plaintiff thereto, it is hereby ORDERED that the motion is DENIED. The motion did not preserve any issue for review. Judgment is hereby entered on the jury's verdict in favor of Plaintiff James Coley and against Defendant Keystone Turf Club Inc., and against Defendant

Greenwood Racing Inc., for compensatory damages in the amount of $150,000 against each defendant. Judgment is hereby entered on the jury's verdict in favor of Plaintiff James Coley and against Defendant Greenwood Racing Inc., for punitive damages in the amount of $200,000.[1]

Greenwood's post-trial motion did not set forth the specific grounds for the motion as required by Pa.R.C.P. 227.1(b)(2) ("post-trial relief may not be granted unless the grounds therefor ... are specified in the motion. ... Grounds not specified are deemed waived unless leave is granted upon cause shown to specify additional grounds."). The motion merely states "boilerplate" claims that "the Court erred and abused its discretion in denying Greenwood Racing, Inc.'s Motions for Compulsory Non-suit and for Directed Verdict, and should now grant JNOV in favor of Greenwood Racing, Inc." Instead of specifying the facts and legal basis for such relief, the motion merely incorporates by reference Greenwood's "Motions for Compulsory Non-suit and for Directed Verdict, and the related briefing and argument."

Rule 227.1(b)(2) requires that all grounds for post-trial relief must be set forth in the post-trial motion itself. "Grounds not specified by post-trial motion are ... waived on appeal." *Chalkey v. Roush*, 757 A.2d 972, 975 (Pa. Super. 2000) (*en banc*), *affirmed*, 569 Pa. 462, 805 A.2d 491 (2002). "In requiring the motion to state the

1. Plaintiff did not object to the non-suit granted to Additional Defendants John Gleason and John Gleason Sr.

Defendant Keystone Turf Club Inc., did not file a motion for post-trial relief. Only Defendant Greenwood Racing Inc. filed a motion for post-trial relief.

specific grounds therefor, motions which set forth mere 'boilerplate' language are specifically disapproved. A post-trial motion must set forth the theories in support thereof 'so that the lower court will know what it is being asked to decide.'" *Siculiento v. K & B Amusements Corp.*, 2006 PA Super 380, 915 A.2d 130, 133, *quoting* the 1983 *Explanatory Comment* to Pa.R.C.P. 227.1(b)(2). Accord, *Hinkson v. Com., Dep't of Transp.*, 871 A.2d 301, 303 (Pa. Cmwlth 2005) (same).

Because the specific grounds must be set forth in the motion itself, it is not sufficient to attempt to incorporate by reference matters appearing in documents previously filed in the same case. *E.g.*, *Hall v. Jackson*, 2001 PA Super 334, 788 A.2d 390, 401 (issue of hearsay testimony was waived by defendant-physician because it was not raised in his post-trial motion, even though the motion attempted to incorporate by reference the post-trial motion filed by the defendant-hospital which did raise the issue).[2]

The attempts by Greenwood to incorporate by reference "its Motions for Compulsory Non-suit and for Directed Verdict, and the related briefing and argument" are a legal

2. An analogous situation arose in *Therres v. Zoning Hearing Bd. of Borough of Rose Valley*, 947 A.2d 226 (Pa. Cmwlth 2008). Similar to Rule 227.1(b)(2), the statute authorizing appeals from zoning boards to the court of common pleas requires the notice of appeal to "concisely set[] forth the grounds on which the appellant relies." 947 A.2d at 231. The court of common pleas quashed an appeal because the notice of appeal failed to identify the specific grounds for the appeal, although it purportedly incorporated by reference the zoning hearing board's findings and conclusions. The Commonwealth Court affirmed because "to hold otherwise would result in this Court failing to give any effect to the statutory language ... requiring a 'land use appeal notice which concisely sets forth the grounds on which the appellant relies.'" 947 A.2d at 233 (emphasis in the original).

nullity. Neither Rule 227.1 nor any other Rule of Civil Procedure permit a post-trial motion to incorporate by reference the issues and arguments made in prior oral arguments or in previously-filed motions and briefs, and thereby ignore Rule 227.1(b)(2)'s requirement that the grounds for the motion be set forth with specificity in the motion itself. *Cf.*, *Moses Taylor Hosp. v. White*, 2002 PA Super 143, 799 A.2d 802, 805 ("The Rules of Appellate procedure do not authorize the adoption by reference of arguments introduced on prior appeal. Attempts to employ such unorthodox practices result in waiver of the claims thereby identified.").[3]

A post-trial motion that incorporates by reference issues and arguments set forth in other motions forces the court to guess which precise issues and arguments the party wants to advance in that post-trial motion. *Cf.*, *Pines v. Farrell*, 577 Pa. 564, 570 n.3, 848 A.2d 94, 97 n.3 (2004) (incorporation by reference of the "briefs and pleadings already filed in this case" is "not a recommended form of advocacy" because the "Court is not obliged to root through the record and determine what arguments, if any, [the party] forwarded below, nor are we obliged to fashion an argument on his behalf). That fundamental problem is made worse when, as here, the party fails to attach copies of the previous motions it seeks to incorporate and fails

3. Although Pa.R.C.P. 1019(g) permits *pleadings* to incorporate by reference other materials, a post-trial motion is not included in the definition of "pleadings" in Rule 1017(a). *Cf.*, *Equibank v. Duboy*, 367 Pa. Super. 261, 264-65, 532 A.2d 889, 890 (1987) ("A petition is not included in the pleadings listed in Rule 1017(a), and the courts have consistently held/that papers not listed in Rule 1017 are not 'pleadings' within the meaning of the Pennsylvania Rules of Civil Procedure.").

to specifically cite the pages of the motion or transcript it seeks to incorporate.

Our appellate courts have held that incorporation by reference is an unacceptable manner for the proper presentation of a claim for relief, and results in waiver of the issue sought to be incorporated by reference. *Upper Moreland Twp. Sch. Dist. v. Crisafi*, 86 A.3d 950, 954 (Pa. Cmwlth 2014), *citing Commonwealth v. Briggs*, 608 Pa. 430, 515, 12 A.3d 291, 342-43 (2011). *See Pennsylvania Medical Society v. Department of Public Welfare*, 614 Pa. 574, 590 n.12, 39 A.3d 267,277 n.12 (2012) (the Supreme Court will decline to consider claims that a party purports to incorporate by reference from other documents); *Franciscus v. Sevdik*, 2016 PA Super 52, 135 A.3d 1092, 1097 n.6 ("We do not permit parties to incorporate by reference arguments made in other briefs or pleadings.").

MOTIONS FOR POST TRIAL RELIEF OF DEFENDANT GREENWOOD RACING, INC.

On August 9, 2016, a jury returned a verdict in favor of Plaintiff and against Defendants Keystone Turf Club, Inc., and Greenwood Racing, Inc., and awarded compensatory damages. The jury also found that each of those defendants acted with reckless indifference. The trial proceeded to a punitive damages phase on October 5, 2016. On that date, the jury returned a verdict in favor of Plaintiff and against Greenwood Racing, Inc., on Plaintiffs' claim for punitive damages. On October 6, 2016, this Court filed the trial worksheets. Greenwood Racing, Inc., now moves for post-trial relief pursuant to Rule of Civil Procedure 227.1, as follows:

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Pursuant to Rule 227.1(a)(2), Greenwood Racing, Inc., hereby moves for judgment notwithstanding the verdict ("JNOV") on the following grounds:

1. The Court erred and abused its discretion in denying Greenwood Racing, Inc.'s Motions for Compulsory Non-suit and for Directed Verdict, and should now grant JNOV in favor of Greenwood Racing, Inc., because the evidence taken as a whole, and viewed in the light most favorable to Plaintiff as the verdict winner, was insufficient as a matter of law to make out a claim that Greenwood Racing, Inc. owed or breached any duty to Plaintiff. Greenwood Racing, Inc., incorporates herein by reference its Motions for Compulsory Non-suit and for Directed Verdict, and the related briefing and argument.

2. The Court erred and abused its discretion in denying Greenwood Racing, Inc.'s Motions for Compulsory Non-suit and for Directed Verdict, and should now grant JNOV in favor of Greenwood Racing, Inc., because the evidence taken as a whole, and viewed in the light most favorable to Plaintiff as the verdict winner, was insufficient as a matter of law for the jury to find that any alleged breach on the part of Greenwood Racing, Inc. (any such breach being denied) was a legal cause of the harm to Plaintiff. Greenwood Racing, Inc., incorporates herein by reference its Motions for Compulsory Non-suit and for Directed Verdict, and the related briefing and argument.

3. The Court erred and abused its discretion in denying

Greenwood Racing, Inc.'s Motions for Compulsory Nonsuit and for Directed Verdict on Plaintiff's claim for punitive damages against Greenwood Racing, Inc., and should now grant JNOV in favor of Greenwood Racing, Inc., on that claim. The evidence, considered in the light most favorable to Plaintiff, was insufficient as a matter of law for a jury to hold Greenwood Racing, Inc., liable for punitive damages. Greenwood Racing, Inc., incorporates herein by reference its Motions for Compulsory Nonsuit and for Directed Verdict, and the related briefing and argument.

MOTION FOR RELATED PROCEDURAL RELIEF

4. Pursuant to Local Rule *227, which provides that "The court may require the parties to submit a brief in support of, or contra, the post-verdict motion," Greenwood Racing, Inc., respectfully requests the opportunity to submit a supporting brief within 30 days after execution of an appropriate Order by this Court.

WHEREFORE, Defendant Greenwood Racing, Inc., requests JNOV in its favor on all claims against it. In the alternative, Greenwood Racing, Inc., requests JNOV in its favor on Plaintiff's claim for punitive damages.

REQUEST FOR TRANSCRIPTION OF TESTIMONY

In accordance with Pennsylvania Rule of Civil Procedure 227.3, Defendant Greenwood Racing, Inc., hereby requests the transcription and certification of the entire notes of testimony and the record for the entire trial proceedings that took place before the Honorable Marlene

F. Lachman from July 29, 2016 to August 10, 2016, and on October 5, 2016. Counsel for Defendant Greenwood Racing, Inc., has made the necessary arrangements with the court reporter to obtain a certified copy of the trial transcripts.

Baboolal v. Bracey's Mount Pocono, Inc.

Premises liability — Slip and fall — Actual or constructive notice

Plaintiff could not sustain her slip-and-fall lawsuit against the defendant supermarket where she failed to establish defendant's actual or constructive notice of a grape on the floor or an alleged condition involving water from a produce misting system. The court granted defendant's motion for summary judgment.

Plaintiff filed this lawsuit seeking to recover damages for injuries she allegedly suffered on Nov. 8, 2013, while at the ShopRite Supermarket in Mount Pocono. According to plaintiff, she fell and suffered injuries when her shopping cart slid due to moisture on the floor.

The complaint claimed the incident was caused by a single grape that had fallen on the supermarket floor. Plaintiff also alleged that the incident was caused by moisture from the store's produce sprinkler system combined with a lack of floor mats.

Here, the defendant moved for summary judgment, asserting that plaintiff failed to establish the notice requirement essential to a premises liability action. According to defendant, plaintiff failed to prove that defendant had actual or constructive notice of any danger on the floor.

Plaintiff argued in response that summary judgment was not appropriate because, while defendant may have addressed notice with regard to the spilled grape, the matter of the alleged water from the misting system remained an issue.

The court found that plaintiff failed to establish the length of time the grape was on the floor or whether produce falling onto the ground was an ongoing issue in that part of the store. She did not know how long the grape had been on the floor or if the grape had been smashed or caused her to fall. Plaintiff said only that the grape was near the front wheel of her shopping cart.

Plaintiff failed to advance a theory of how or when the grape came

to be on the supermarket floor, the court reasoned. As such, she did not satisfy her burden of demonstrating that defendant had actual or constructive knowledge of any danger regarding the grape. The court agreed with defendant's assertion that the mere presence of a grape when plaintiff fell was not enough to sustain her action.

Plaintiff also claimed that the store's floor became wet due to a combination of water from a misting system for produce and a lack of floor mats. However, she was unable to establish that defendant had either actual or constructive notice of any such condition. Accordingly, the court granted defendant's motion for summary judgment.

C.P. of Monroe County, No. 8464 CIVIL 2015

WILLIAMSON, *J*., Feb. 27, 2017—This matter comes before the Court on Bracey's Mount Pocono, Inc.'s (hereinafter "Defendant's") Motion for Summary Judgment. This case involves an alleged slip and fall accident at the Defendant's ShopRite Supermarket in Mount Pocono on November 8, 2013. Chandanie Baboolal (hereinafter "Plaintiff") claims that while shopping at Defendant's store her shopping cart slid due to moisture on the floor causing her to fall forward onto her knees. The Complaint in this matter cites moisture from the store's produce sprinkler system combined with a lack of floor mats as having caused the alleged accident. It has also been alleged that the incident was caused by a single grape that had fallen on the floor.

A Complaint in this matter was filed on February 5, 2016. Defendant filed the current Motion for Summary Judgment on January 9, 2017. Plaintiff's request for oral argument was denied and this matter will be decided upon the parties' briefs.

Discussion

The purpose of summary judgment is to resolve matters based upon pleadings when a trial would be unnecessary because "a party lacks the beginnings of evidence to establish or contest a material issue." *Ertel v. Patriot-News Co.*, 544 Pa. 93, 674 A.2d 1038, 1042 (1996). Summary judgment is appropriate when, at the closing of pleadings there is 1) no genuine issue as to material fact or 2) when the party bearing the burden of proof has failed to prove sufficient evidence to prove the facts of the case. Pa.R.C.P. No. 1035.2. A material fact is one which affects the outcome of the case. *Beach v. Burns Int'l Security Services*, 593 A.2d 1285, 1286 (Pa. Super. 1991). The moving party has the burden of proving no issue of merit exists. *Kafando v. Erie Ceramic Arts Co.*, 764 A.2d 59, 61 (Pa. Super. 2000). Evidence is viewed in the light most favorable to the non-moving party. *Grandelli v. Methodist Hosp.*, 2001 PA Super 155, ¶ 10, 777 A.2d 1138, 1144 (2001). In order to grant summary judgment, the non-moving party must have failed "to adduce sufficient evidence on an issue essential to his case upon which he bears the burden of proof such that no jury could return a verdict in his favor." *Grandelli* at 1143. Summary judgment is only proper when after pleadings have closed there remains no question that a jury would return a verdict contrary to the moving party.

Defendant asserts that summary judgment is appropriate at this time because Plaintiff has failed to establish the notice requirement essential to a premises liability action. Specifically, Defendant argues Plaintiff has failed to prove Defendant had actual or constructive notice of any

danger on the floor. In response, Plaintiff argues summary judgment is not appropriate at this time because, although the Defendant may have addressed notice in regards to the spilled grape, the issue of water from the misting system remains at issue.

To successfully establish a negligence claim, the plaintiff must prove the defendant "1) owed a duty or obligation recognized by law, 2) breached said duty, 3) that there exists a causal connection between the breach and resulting injury, and 4) actual damages have occurred. *Estate of Swift v. NE. Hosp. of Philadelphia*, 456 Pa. Super. 330, 690 A.2d 719, 721 (1997). The law surrounding slip and fall cases involving business invitees is well established in Pennsylvania. In order for a plaintiff to be successful in such a claim they must prove that the store owner deviated from the duty of reasonable care and that deviation caused their fall. *Zito v. Merit Outlet Stores*, 436 Pa. Super. 213, 647 A.2d 573, 575 (1994). The evidence "must show that the proprietor know, or in the exercise of reasonable care should have known, of the existence of the harmful condition." *Id.* A proprietor has actual notice of a harmful condition when it is one which frequently occurs. *Myers v. Penn Traffic Co.*, 414 Pa. Super. 181, 606 A.2d 926, 929 (1992) *quoting Moultrey v. Great A & P Tea Co.*, 281 Pa. Super. 525, 422 A.2d 593 (1980). A proprietor has constructive notice of a dangerous condition when it is one which exists "for such a length of time that in the exercise of reasonable care the owner should have known of it." *Id.* Defendant argues there has been no evidence of actual or constructive notice regarding the loose grape on

the store's floor.

We note that the mere presence of [loose grapes], as described, does not in itself show negligence, for this condition may temporarily arise in any store of this character, though the proprietor has exercised due care; and, if it appears that proper efforts are made to keep clean the passageways so they may be safely traversed, he is not to be held responsible if someone accidently slips and falls. *Martino v. Great Atl. & Pac. Tea Co.*, 419 Pa. 229, 213 A.2d 608, 610 (1965). The *Martino* Court held that the plaintiff had failed to meet her burden of proof even though the defendant was aware grapes typically fell onto the floor, causing the defendant to start a policy to regularly clean and mop the area for that reason. Here, the Plaintiff has failed to establish the length of time the grape was on the floor or whether produce falling onto the ground was an ongoing issue in that part of the store. Plaintiff herself admits that she did not know how long the grape had been on the floor. (Plaintiff's Deposition, p. 54. L. 5.) Plaintiff also noted that she was not sure if the single grape had been smashed or if it caused her to fall; only that it was near the front wheel of her shopping cart afterwards. (Plaintiff's Deposition, p. 51-52. L. 15-1.) Plaintiff has failed to advance a theory of how or when the grape came to be on the floor. Therefore, Plaintiff has not met her burden of establishing Defendant has actual or constructive knowledge of any danger regarding the grape. Given the high standard set by previous case law, we agree that the mere presence of the grape when Plaintiff fell is not enough to sustain this action.

In opposition to Defendant's motion, Plaintiff cites other depositional testimony that alludes to additional water being on the floor at the time of the incident. Plaintiff asserts that the floor itself in the area was wet. Plaintiff has alleged this was due to a mist or spray/sprinkler type system in the produce section and lack of a floor mat. The burden for establishing notice in wet floor cases is high. Plaintiffs must show both how the water ended up on the floor and prove how long the condition existed. *Estate of Swift* at 723. Establishing a time period is particularly difficult. The Superior Court has previously ruled that without some guidance of how a liquid was spilled, the fact that it had remained on the floor long enough to begin to dry and become sticky was not dispositive of establishing notice. *Rodriguez v. Kravco Simon Co.*, 2015 PA Super 41, 111 A.3d 1191, 1194 (2015). Here, the Complaint alleges the store's floor became wet because of a combination of the produce misting system and a lack of floor mats. Although Plaintiff asserts that the water "looked sprayed on," she did not know where it came from, how long the floor had been wet, or how much water was actually on the floor. (Plaintiff's Deposition, p. 52. L. 5-23 and p.54. L. 6-11.) Again, although Plaintiff argues a theory of where the water originated from, she is unable to establish that Defendant had either actual or constructive notice of the condition. Plaintiff states the Defendant has failed to contravene Plaintiff's testimony, however, the content of her testimony, even if true, does not meet the burden of establishing notice. Summary judgment is appropriate in this matter.

ORDER

AND NOW, this 24th day of February, 2017, Defendant's Motion for Summary Judgment is GRANTED.

Dungan Heights Assoc., LLP v. Sweeney

Lease — Judgment by confession — Petition to open — Modification of judgment

Plaintiff properly obtained a judgment by confession following defendants' default under a lease, and defendants were not entitled to open or strike the judgment because they failed to timely file their petition. The court did reduce the amount of the judgment due to a partial payment.

Plaintiff leased property to defendants for use as a day care center. The lease was for a period of five years. It provided that in the event of default, plaintiff had the right to a confession of judgment in ejectment and for damages. Each page of the lease was initialed by defendants.

Defendants stopped paying rent prior to the end of the lease. Plaintiff obtained a judgment by confession against defendants in the amount of $107,604. In July 2016, one of the defendants sold her real property and the settlement sheet indicated $19,139 was directed toward payment of plaintiff's lien.

In January 2017, plaintiff issued a writ of execution. Defendants filed a petition to open or strike the confessed judgment. Defendants argued plaintiff failed to comply with the procedural rules, but the court found the notice provisions cited by defendants did not apply to the facts of this proceeding. Plaintiff provided all necessary documentation for his claim, including a copy of the lease and an itemized computation of the amount due.

Defendants' petition to open the judgment was not timely filed. The record showed they received notice of judgment at the time it was entered, but failed to file their petition to open or strike within 30 days.

The partial payment of the judgment shown in the closing statement from the sale of the property belonging to one of the defendants warranted adjustment of the judgment in this case. Accordingly, the court reduced the judgment to reflect the $19,139 payment. In all other respects, the court denied the petition to open or strike the confession of judgment.

C.P. of Philadelphia County, May Term, 2016, No. 3771

MCINERNEY, *S.J.*, Mar. 21, 2017—Presently pending before the court is Petitioners Colleen Sweeney and Thomas Remick's petition to open/strike confessed judgment. For the reasons set forth below, the petition to strike/open is granted in part and the judgment shall be reduced by $19,139.92 and modified to $88,464.08. All other aspects of the Petition are denied.

BACKGROUND

On February 20, 2015, Dungan Heights Associates (hereinafter "Landlord") leased the property known as 7770 Dungan Road, Store Number 07, Philadelphia, Pa. to Colleen Sweeney and Thomas Remick (hereinafter "Tenants"). The Lease was for a period of five years beginning March 1, 2015 and ending February 28, 2020. The leased premises were to be used solely as a day care. The Lease, in section 13.2 entitled Remedies, provides that in the event of default by the tenant, the landlord shall have the right to a confession of judgment in ejectment and for damages. Each page of the Lease, including the section setting forth the confession of judgment provisions, is initialed by the tenant.

Tenants stopped paying rent and on June 1, 2014, landlord confessed judgment against tenants in the amount of $107,604.06. In or about July 6, 2016, tenant Colleen Sweeney sold property located at 2532 Coral Street, Philadelphia, Pa. The HUD 1 settlement sheet earmarked $19,139.92 as "PAYOFF LIEN 16

03771 to Dungan Heights Assoc." In January 2017, landlord issued a writ of execution. On February 13, 2017, tenants filed the instant petition to open/strike the confessed judgment. Additionally, tenants requested a stay of execution proceedings. On March 13, 2017, the court entered an order staying all execution proceedings pending disposition of the petition to open/strike confessed judgment. The petition is now ripe for consideration.

DISCUSSION

A petition to strike a judgment is a common law proceeding which operates as a demurrer to the record.[1] A petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record. In considering the merits of a petition to strike, the court will be limited to a review of only the record *as filed by the party in whose favor the warrant is given*, i.e., the complaint and the documents which contain confession of judgment clauses. Matters *dehors* the record filed by the party in whose favor the warrant is given will not be considered. If the record is self-sustaining, the judgment will not be stricken.[2]

In support of their petition to strike, tenants argue that landlord failed to comply with Pa. R. Civ. P. 2952 (a)(3),(6),(7) and (10). These alleged deficiencies lack merit. Landlord fully complied with Pa. R. Civ. P. 2952

1. *Bethlehem Steel Corporation v. Tri State Industries, Inc.*, 290 Pa. Super. 461, 434 A.2d 1236 (1981).

2. *Franklin Interiors v. Wall of Fame Management Company, Inc.*, 510 Pa. 597, 511 A.2d 761 (1986).

(a)(3), (6), (7) and (10). While tenants are correct that any amendment to the lease should acknowledge specifically the existence of warrants of attorney, no amendment is at issue here since the only document attached to the complaint in confession of judgment is the February 20, 2015 Lease, the original Lease. Landlord did allege per Pa. R. Civ. P. 2952 (a)(3) that "judgment was not being entered by confession against a natural person in connection with a consumer credit transaction." Additionally, landlord is not required to provide notice of default in order to exercise the warrants of attorney[3] and a verification as required by Pa. R. Civ. P. 2952 (a)(10) was attached to the complaint in confession of judgment. Landlord fully complied with Pa. R. Civ. P. 2952(a)(7) by including in the complaint an itemized computation of the amounts due.[4] Since, landlord complied with the technical requirements to confess judgment, the petition to strike is denied.

The petition to open suffers a similar fate. A party is entitled to have a judgment entered by confession opened if evidence is produced which in a jury trial would require the issues to be submitted to the jury.[5] When determining

3. In support of this argument, tenants rely upon Pa. R. Civ. P. 2952(6) to support its notion that landlord failed to provide proper notice of the occurrence of an event of default. Pa. R. Civ. P. 2952 (a) sets forth the requirements necessary to file a complaint in confession of judgment. Subsection (6) requires that if the judgment may be entered only after a default or the occurrence of condition precedent an averment of the default or of the corpulence of the condition precedent is required. This subsection has nothing to do with notice as argued by tenants.

4. *See* complaint in confession of judgment paragraph 14. Landlord need only aver a default and allege the amounts due. *Davis v. Woxall Hotel, Inc.*, 395 Pa. Super. 465, 469, 577 A.2d 636, 638 (1990).

5. Pa.R.C.P. 2959(e).

a petition to open a judgment, matters *dehors* the record filed by the party in whose favor the warrant is given, i.e., testimony, depositions, admissions, and other evidence, may be considered by the court.[6] A petition to open a confessed judgment is an appeal to the equitable powers of the court.[7] A petitioner must offer clear, direct, precise and believable evidence of a meritorious defense, sufficient to raise a jury question.[8]

In regards to the instant petition to open, it is clear that the petition was not timely filed. Pursuant to Pa. R. Civ. P. 2959 (a)(3), a petition to open "shall be filed within thirty days after such service". Here, the complaint in confession of judgment was filed on June 1, 2016 and tenants were provided with notice of the judgment.[9] Tenants did not file the petition to open/strike confession of judgment until February 13, 2017, more than thirty days after service. As such, the petition to open was not timely filed. Notwithstanding the timeliness of the filing, tenants failed to offer clear, direct, precise and believable evidence of a meritorious defense sufficient to raise a jury question. The only evidence produced by tenants is the HUD 1 settlement sheet which indicates "PAYOFF LIEN 16 03771 to Dungan Heights Assoc." Based on this submission, tenants expect the court to

6. *Resolution Trust Corp. v. Copley Qu-Wayne Assocs.*, 546 Pa. 98, 106-07, 683 A.2d 269, 273-74 (1996).

7. *PNC Bank v. Kerr*, 802 A.2d 634, 638 (Pa. Super. 2002), *appeal denied*, 572 Pa. 735, 815 A.2d 634 (2002).

8. *Iron Worker's S. & L. v. IWS, Inc.*, 424 Pa. Super. 255, 622 A.2d 367, 370 (1993).

9. The docket shows that tenants' counsel entered an appearance on June 29, 2016.

draw the inference that the judgment for $107, 604.06 should have been marked satisfied with the payment of $19, 139.92. The HUD 1 does not support this defense. While the HUD 1 shows that monies were earmarked to the landlord for the judgment in question, there is no evidence to suggest that the earmarked amounts were in full satisfaction of the judgment. At best, the HUD 1 only shows that a partial payment was made and that the judgment should be reduced by $19,139.92. Based on the foregoing, the judgment amount shall be modified to reflect the $19,139.92 payment.

CONCLUSION

Based on the foregoing, tenants' petition to open/strike the judgment is granted in part and the judgment shall be reduced by $19,139.92 and modified to $88,464.18. All other aspects of the petition are denied.

ORDER

AND NOW, this 21st day of March 2017, upon consideration of Colleen Sweeney and Thomas Remick's Petition to Strike or, in the alternative, Open Confessed Judgment and Dungan Heights Associates, LLP's response in opposition, it hereby is ORDERED that the Petition to Strike/Open is Granted in part and the Judgment shall be reduced by $19,139.92 and modified to $88,464.14.

All other aspects of the Petition are Denied.

Commonwealth v. Pi Delta Psi

Murder — Fraternity — Corporate criminal liability

Fraternity was subject to criminal liability in connection with the death of a new member during initiation activities where fraternity provided mandatory training regarding initiation rituals. Defendant's pre-trial motions denied.

Defendant, a fraternity and non-profit corporation, was charged in connection in the death of a pledge which occurred during initiation. The charges against defendant included murder, aggravated assault, conspiracy, hindering prosecution and hazing.

In its omnibus pre-trial motion, Defendant sought habeas corpus relief. The commonwealth responded that it had presented a prima facie case for every charge.

Defendant argued that that there was no authorized person from the national fraternity present at the scene or participating in the events that led to the initiate's death. The commonwealth responded that the national fraternity owed a duty to the initiate and was bound by its own anti-hazing police to protect new members from hazing. The court found that the chapter president, a pledge educator and pledge assistant were all present the night of the initiate's death, and that these individuals all qualified as high managerial agents of defendant. These positions were designed by defendant to perpetuate initiation practices that had been ingrained in the fraternity since its inception and were mandated for every chapter. The fraternity's initiation practices were discussed and promulgated at its annual conference, and pledge educators and assistants were required to undergo training by defendant.

Even if the leadership positions at this particular chapter were not considered high managerial agents, the court held defendant could still be liable for the conduct on the night in question, because it recklessly tolerated hazing rituals. Such rituals were routinely discussed at the national conference. Defendant was aware that hazing had taken place and it published information on specific rituals in its pledge education manual and listed them among the fraternity's core functions. The national fraternity president attended at least one such ritual at the chapter involved in this proceeding.

According to defendant, its promulgation of anti-hazing policies constituted a complete defense under 18 Pa.C.S.A. §307. However, the court indicated there was no legal burden on the commonwealth to establish the absence of an affirmative defense unless the defense was raised at trial. The question was one for the jury and was improper for a

habeas corpus motion.

Next, defendant requested the commonwealth to clarify its theory of homicide and how it related to defendant. The commonwealth argued this was tantamount to a discovery request. The court agreed that a bill of particulars was not appropriate here, because there was no indication the commonwealth had withheld exculpatory evidence or other evidence favorable to the defense. Furthermore, the commonwealth had already provided voluminous discovery to defendant, so defendant could not claim it was surprised by the charges.

Defendant claimed that it had a first amendment right of association, and the imposition of criminal liability on a national organization for the acts or failure of individuals defied fundamental fairness. The court held that the first amendment right to association did not protect violence. Additionally, defendant was not be prosecuted for the actions of its members alone, but also for its authorization and requirement of participation in hazing practices.

The court also concluded no due process violation existed.

C.P. of Monroe County, No. 2578 CR 2015

PATTI-WORTHINGTON, *J*., March 24, 2017—This matter comes before the Court on Pi Delta Psi's ("Defendant") Omnibus Pre-Trial Motions. Defendant has been charged by Criminal Information with the following crimes: Murder in the Third Degree,[1] Aggravated Assault,[2] Simple Assault,[3] three counts of Criminal Conspiracy,[4] Hindering Apprehension/Prosecution—Conceal/Destroy Evidence,[5] Hindering Apprehension/Prosecution—False Information to Law Enforcement,[6] and Hazing.[7] All of Defendant's charges arise from the death of Chun Hsien "Michael" Deng (hereinafter "Deng") and the surrounding

1. 18 Pa. C.S.A. § 2502(c).
2. § 2702(a)(1).
3. § 2701(a)(1).
4. § 903.
5. § 5105(a)(3).
6. § 5105(a)(5).
7. 24 Pa. C.S.A. §5353.

circumstances. Defendant is joined for trial with Raymond Lam (docket number 2562 CR 2015), Charles Lai (docket number 2560 CR 2015), Kenny Kwan (docket number 2561 CR 2015) and Sheldon Wong (docket number 2571 CR 2015). We held a hearing on Defendant's motions in conjunction with similar motions by Co-Defendants Lam, Kwan, and Wong[8] on July 25, 2016. At the hearing, the Commonwealth, through testimony and exhibits, presented the following evidence:[9]

Defendant is a New York, non-profit corporation, duly organized as of April 14, 1995 under the laws of that state. The initial Board of Directors consisted of Damien Lee, John Lin, and David Wong. Damien Lee serves as the process designee and Andy Meng served as the national president during the time at issue in this case. Defendant has chapters, associate chapters, and colonies (hereinafter, collectively "chapters")[10] throughout the world. Each chapter has its own President, Pledge Educator ("PE"), and Pledge Assistant ("PA") per rules promulgated, distributed and enforced by Defendant. One set of rules pertains to the initiation of new members and the pledging process.

8. Co-Defendant Lai had filed omnibus motions that were to be addressed at this hearing, however, he withdrew the same prior to the hearing. *Com. v. Lai*, 2560 CR 2015, Amended Order, 7/15/16.

9. We note that the Commonwealth presented proffers, transcripts, and testimony at Defendant's Hearing but also moved in the evidentiary record from Co-Defendant Lai's *habeas* hearing. *Commonwealth v. Lai*, 2560 CR 2015, *Habeas* Hearing Exhibits, 2/16/16.

10. Colonies differ from chapters and associate chapters in limited ways. First, colonies are monitored by a pre-existing chapter during certain portions of the pledging process. Ex. 8. Second, per Defendant's own Exhibit, "[t]here is no significant difference in any designation, except for voting rights and rights to host a new charter." Def.'s Ex. C, Omnibus Mot., 5/24/16, p. 1 (citations omitted).

The pledging process is overseen on the local level by a chapter's PE and PA. Local PEs and PAs have the final say on pledging issues within the chapter, but also report to the national PE if problems arise.

The pledging process is substantially uniform throughout Defendant's organization. All chapters are expected to follow the guidelines set forth in the Pledge Education Manual and any additions or changes made by Defendant and distributed to the chapters via email by the national PE. Within the Pledge Education Manual are rules and instructions regarding how existing members are to pledge and initiate new members. Among the processes are "rituals," such as "Three Rooms,"[11] and "functions," such as the "Glass Ceiling."[12] Functions are meant to teach pledges about the fraternity and tend to be more physically demanding, while rituals are less physically demanding and are meant to teach pledges about brotherhood. The Pledge Education Manual warns that "[p]ledges are not to do any physical pledging activities in the public" and "all serious pledge-related accidents and injuries" are to be reported directly to the national PE "so that National [(i.e., Defendant)] has enough time to prepare in case any action is taken against us." Com.'s Ex. 8, Preliminary Hr'g, 11/30/15, pp. 5, 10.

One of the functions required by Defendant for the

11. This ritual has been described as a process where a brother helps a pledge cheat on a test and when the pledge is confronted, he is supposed to refrain, at any cost, from "ratting out" his brother.

12. The Glass Ceiling function is at issue in this case and we subsequently explain this process in detail.

initiation of new members is the Glas Ceiling.[13] This process involves three phases that pledges have to move through while blindfolded. During phase 1, fraternity members form a line and block the pledges' movement. During phase 2, fraternity members continue to block the pledges but also begin to push the pledges back. If the pledges fall down, they are "reset" before the phase continues. During phase 3, fraternity members tackle the pledges to the ground. Tackles during this Phase include "wrapping" tackles, where a tackier wraps his arms around the pledge's legs and brings the pledge to the ground, and "spearing" tackles where a tackler's shoulder makes contact with the pledge's torso, causing both tackier and pledge to hit the ground with added force. N.T., Preliminary Hearing, 11/30/15, p. 116-17.

During the weekend of December 8, 2013, Co-Defendant Wong rented a house on Candlewood Drive in Tunkhannock Township, Monroe County, Pennsylvania, where he, Deng, and other fraternity members were to conduct various initiation functions and rituals for Deng's pledge class. The weekend was held to officially initiate the new pledges into the Baruch College colony, however, the weekend was attended by both Baruch College and St. John's University students, per Defendant's rules regarding the monitoring of colonies during certain portions of the pledging process. The Glass Ceiling function, which was ultimately fatal to Deng, was held outside on frozen ground, directed and managed by Co-Defendants Wong and Kwan, as PE and PA, respectively, for the Baruch

13. This function is also referred to as the "Gauntlet" or "G."

College colony of Defendant's organization.

At the direction of Co-Defendant Wong, Deng was tackled approximately three to six times during phase 3, which was typical for all pledges. However, as some of the fraternity members related to police, the tackles Deng received were more forceful than those received by other pledges because Deng was not following the directions of fraternity brothers. Moreover, Deng was observed by Daniel Li to be disoriented and unable to follow directions during phase 3. *Id.* at 141-42. After a particularly rough tackle by Co-Defendant Kwan, which was not stopped or objected to by Co-Defendant Wong, Deng fell, unconscious, and did not get up. *Id.* 142-43. Some of the fraternity members took Deng inside the house, changed his clothes, and laid him on a couch near the fireplace. *Id.* at 145. While on the couch, Deng's body was rigid and he was making gurgling or snoring sounds. *Id.* at 148.

A period of time, possibly as long as an hour, passed before Co-Defendants Wong, Lai and a third fraternity member put Deng in a vehicle and drove him to Geisinger Wyoming Valley Hospital ("Geisinger") in Luzurne County. During the time period before Deng was brought to Geisinger, several fraternity members conducted internet searches on their phones, including terms such as "conscious" and "unconscious." *Id.* One fraternity member texted a friend to ask about his grandfather's death after falling down stairs. Yet another member called his girlfriend, a nurse, to ask about Deng's condition. *Id.* No one, however, called 911 and Co-Defendant Wong dialed Geisinger's switchboard less than one hour

before he arrived at the hospital with Deng. While at the hospital, Co-Defendant Lai contacted Andy Meng seeking guidance and direction. Meng related that the fraternity memorabilia must be hidden and the fraternity protected when talking to police.

Deng was unconscious and non-responsive upon arrival at Geisinger. Soon thereafter, Deng was put on a breathing machine and fitted with a neck collar. Deng never regained consciousness and was pronounced dead on December 9, 2013 at approximately 10:51 a.m. An autopsy revealed Deng had suffered blunt force trauma to his chest and head which caused multiple traumatic injuries resulting in multi-system organ failure. The official cause of death was "blunt head trauma from being tackled and knocked to [the] ground;" the manner of death was ruled a homicide.

Over the course of the day on December 8, 2013, police conducted multiple interviews with the fraternity members at the house and the hospital. The fraternity members insisted that Deng was injured while playing a game outside so police initially were unaware that Deng's injuries were related to fraternity hazing.

Defendant's Omnibus Pre-Trial Motions include three motions for habeas corpus relief, a motion to compel a bill of particulars, and a motion for discovery.[14] After the hearing on Defendant's motions, we directed counsel to file briefs, which were timely received. After thorough review of the evidence and filings, we are now ready to

14. Defendant also filed a motion to continue the hearing in this matter which was granted by Order dated May 27, 2016, and we held said hearing on July 25, 2016.

dispose of this matter.

Discussion

Petition for Habeas Corpus Relief

We will first address Defendant's Petition for *Habeas Corpus* Relief. In Defendant's Motion, Defendant filed a *habeas* challenge to all of the crimes charged. The Commonwealth responds that it has presented a *prima facie* case for every charge.

It is well-settled that the method for testing a pretrial finding of a *prima facie* case is by writ of *habeas corpus*. *Com. v. Carroll*, 936 A.2d 1148, 1152 (Pa. Super. Ct. 2007). To demonstrate that a *prima facie* case exists, the Commonwealth must "present evidence with regard to each of the material elements of the charge and ... establish sufficient probable cause to warrant the belief that the accused committed the offense." *Com. v. McBride*, 595 A.2d 589, 591 (Pa. 1991) (citations omitted); *Com. v. Fountain*, 811 A.2d 24, 25 (Pa. Super. 2002). In an effort to meet its burden, the Commonwealth may utilize the evidence presented at the preliminary hearing and also may submit additional proof. *Id.* Proof beyond a reasonable doubt is not required at the *habeas* stage, but the Commonwealth's evidence must be such that, if accepted as true, it would justify a trial court in submitting the case to a jury. *Id.* Additionally, in the course of deciding a *habeas* petition, a court must view the evidence and its reasonable inferences in the light most favorable to the Commonwealth. *Id.* "A *prima facie* case consists of evidence, read in the light most favorable to the Commonwealth, that sufficiently

establishes both the commission of a crime and that the accused is probably the perpetrator of that crime." *Fountain*, 811 A.2d at 25 (citations omitted); *see also Com. v. Huggins*, 836 A.2d 862, 866 (Pa. 2003). If the Commonwealth "produces evidence that, if accepted as true, would warrant the trial judge to allow the case to go to a jury," then the Commonwealth has established a *prima facie* case. *Com. v. Marti*, 779 A.2d 1177, 1180 (Pa. Super. 2001). Suspicion and conjecture, however, are unacceptable. *Id.* Thus, our purpose is not to determine the accused's guilt, but to evaluate if sufficient probable cause exists to require the accused to stand trial.

We must preliminarily note that Defendant has been charged as a principal and an accomplice for each of these crimes. Under 18 Pa. C.S.A § 306, "[a] person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both." § 306(a). A person can be legally accountable for another person's actions by way of accomplice liability. § 306(b)(3). "A person is an accomplice of another person in the commission of an offense if[,]... with the intent of promoting or facilitating the commission of the offense, he ... aids or agrees or attempts to aid such other person in planning or committing it." § 306(c)(l)(ii). Most importantly to the present case, "[w]hen causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense." § 306(d).

"Thus, to be convicted as an accomplice, a person must act with the requisite *mens rea*, for example, in the case of third-degree murder, with malice." *Com. v. Flanagan*, 854 A.2d 489, 501 (Pa. 2004). Moreover, criminal intent can be proven from circumstantial evidence. *See Com. v. Lewis*, 911 A.2d 558, 564 (Pa. Super. 2006).

However, unlike most *habeas* petitions, Defendant does not challenge any specific element of any specific charge. Rather, Defendant makes two overarching legal arguments that will each be addressed in turn.

National Fraternity Involvement

Defendant first argues it is not criminally responsible for the death of Michael Deng. Defendant states that "no authorized person acting on behalf of the national fraternity was present at the scene, participated in the planning for the event, exhibited intent to cause the death, or participated in any material way to any material extent. The only people present were members of or aspirants to become a member of the Baruch College colony" Pi Delta Psi Br. in Support of Omnibus Pretrial Motion, pp. 15 (hereinafter "Def.'s Br., p. ____."). The Commonwealth responds they have "clearly established the Defendant national fraternity owed a duty to Michael and ... Pi Delta Psi, Inc. was bound by its own Anti-Hazing Policy to protect Michael from hazing." Com. Br. in Opp. To Def. Omnibus Pre-Trial Motion, pp.19 (hereinafter " Com.'s Br., p. ____.").

A corporation is an entity distinct and separate from the individual stockholders who own it. The corporation,

therefore, has rights and liabilities which are separate and apart from those belonging to the individual stockholders. *Barium Steel Corp. v. Wiley*, 108 A.2d 336, 341 (1954). The corporation is severally liable with its officers for crimes committed by such officers in behalf of the corporation. *See*, *United States v. Knox Coal Co.*, 347 F.2d 33 (3rd Cir. 1965), Cert. denied, 382 U.S. 904 (1965). In this respect, the liabilities of the corporation and its officers are comparable to those of a principal and agent who participate in the same criminal activity. *Com. v. J. P. Mascaro & Sons. Inc.*, 402 A.2d 1050, 1052 (Pa. 1979).

In Pennsylvania the circumstances under which corporations may be criminally liable are set forth in 18 Pa.C.S. § 307. It provides in pertinent part as follows:

> (A) Corporations Generally. - A corporation may be convicted of the commission of an offense if:
>
> (1) the offense is a summary offense or the offense is defined by a statute other than this title in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply;
>
> (2) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on

corporations by law; or

(3) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.

18 Pa.C.S.A. § 307. The title goes on to define "high managerial agent" as "An officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association." *Id.*

A corporation can be held criminally liable for crimes involving specific intent like homicide. *Com. v. Mcllwain School Bus Lines, Inc.*, 423 A.2d 413 (Pa. Super. Ct. 1980). Although knowledge possessed by employees is aggregated so that a corporate defendant is considered to have acquired the collective knowledge of its employees, the prosecution cannot aggregate the states of mind of a corporation's agents in order to meet its burden of proving that the corporation had the specific intent to violate the law. *U.S. v. LBS Bank-New York. Inc.*, 757 F. Supp. 496 (E.D. Pa. 1990). Thus, in order for a verdict against a corporate defendant to stand, there must be evidence from which a jury could reasonably determine that at least one agent of the corporation has the specific intent to commit the crime being tried. *Id.*

In the present case, the Defendant argues no "high

managerial agent" authorized, requested, commanded, or performed the above offenses. We disagree. In fact, it is clear from the testimony of Daniel Li, the Baruch Colony Pi Delta Psi chapter president, that the national fraternity was intimately involved in all aspects of the colony's actions on the night in question. Further, contrary to the Defendant's argument, a high managerial agent acting on behalf of the national fraternity was present at the scene. Mr. Li testified at the preliminary hearing as follows:

> Q. And, sir, in the fall of 2013 in addition to being an active dues-paying member of the fraternity, Pi Delta Psi, did you also hold any leadership position in that Baruch College?
>
> A. Yes.
>
> Q. What position.
>
> A. I held the president position.
>
> Q. And, sir, where you new to that position in the fall of 2013?
>
> A. Yes.
>
> Q. As a prerequisite of holding that position did you ever have to attend any events with the national fraternity?
>
> A. Yes.
>
> Q. And, sir, what event was that?
>
> A. It was the summer convention held in Orlando, Florida in the summer of 2013.

Q. And you were required to take part in that?

A. Yes.

Q. And is this an event fort the national fraternity of just for Baruch?

A. This event is for all the chapters in the fraternity.

Q. And does the national fraternity host this event?

A. Yes.

Q. You said it was in Orland, Florida?

A. Yes.

Q. And you attended that event?

A. Yes.

Q. And, sir, what are some of you roles or responsibilities as the president as you were in the fall of 2013?

A. As president of the fraternity in the fall of 2013 some of the roles that I did was I served as the liaison or intermediary between Baruch College between the national fraternity and between other organizations such as sororities. I also presided at meeting, I served as the moderator under Roberts Rule of Orders, and I also held fraternity documents.

Q. And, sir, is it fair to say there's a handful of fraternity documents that you've been responsible for keeping?

A. Yes.

Q. Can you give us an idea of what some of those documents are?

A. Some of the documents were, for example, the Baruch College constitution for the fraternity. Also, documents such as booking rooms or documents for the club such as registering for events, registering for student life in Baruch College, and other fraternity-related documents received from nationals such as e-mails.

Q. And, sir, additionally, would you also be aware of or be required to keep documents such as the pledge handbook?

A. No.

Q. Who's responsibility would that be?

A. The responsibility of keeping the pledge education manual would be the pledge educator and the pledge assistant.

Q. And you said manual. What I'm asking about is the pledge handbook, the handbook that's provided to the pledges at the time that they show interest in joining the fraternity. Do you understand the difference between those two?

A. May I make a clarification?

Q. Sure. So, you had referred to the pledge educator manual, right? That's one document.

A. Correct.

Q. Let's talk just generally about that document. Who creates that document?

A. The document is provided by the national fraternity.

Q. And that's something that's provided to the pledge educator?

A. Correct.

Q. And the pledge assistant?

A. Correct.

Q. And when we talk about the pledge handbook, when you pledged the Pi Delta Psi fraternity were you also provided a pledge handbook?

A. Correct

Q. And what is the contents of the pledge handbook?

A. The contents of the pledge handbook contain information about the fraternity such as the forward, the history chapters, anti-hazing agreement, and other fraternity-related matters.

Q. And let's talk about the anti-hazing agreement. Are you aware that Pi Delta Psi fraternity has such a statement on -excuse me, a prohibition against hazing activities?

A. Yes.

Q. And this is a written statement?

A. Yes.

Q. And is it provided to the pledges at the time that they pledge the process?

A. Yes.

Q. And, now, sir, is this — in your experience is this statement followed by fraternity chapters?

A. No,

Q. And, sir, if you could elaborate on that. Could you describe for the Court the difference between what is written in the statement and what happens in actuality?

A. Sure. In the black manual or the black book there's and anti-hazing agreement written by the national fraternity and it states that the fraternity prohibits hazing, but, in actuality, the national fraternity knows very well that — what they're doing and —

(Objections)

Q. Mr. Li, if we could step back. You had just described there is a statement, a black and white statement, written statement by the fraternity on hazing.

A. Correct.

Q. And that prohibits hazing, if you will.

A. Correct.

Q. And does it describe what constitutes hazing?

A. Yes.

Q. And just generally in your terms what is hazing?

A. Hazing is the unlawful activity of making another person do activities against their will or activities that will degrade them or — and degrade them and make them — does not attribute to making them a better person.

Q. And they're a prerequisite to the fraternity.

A. Yes.

Q. Now, in your experience despite this black and white statement, did you experience yourself when you were a pledge to this fraternity events and activities that went against that written policy?

A. Yes.

Q. And, sir, from your personal experience from speaking with other members of the fraternity, your personal experiences, as well as attending the national convention, based on that, sir, does the fraternity have hazing as part of their pledge process?

(Objections)

Q. Mr. Li, if you would answer my question.

A. Can you just reclarify the question?

Q. Sure. From your personal experience as well as your experience in speaking with other members of the fraternity, as well as what you gained, the knowledge

you gained at the time of the national convention, do you know whether hazing is a part of the Pi Delta Psi fraternity's pledging process?

A. Yes.

Q. Is it expected that there are physical aspects of this pledging process that all pledges must undergo?

A. Yes.

N.T., Preliminary hearing, 11/30/15 p. 86-93. Mr. Li would go on to discuss the roles and responsibilities of the pledge educator, co-defendant Wong, and pledge assistant, co-defendant Kwan. *Id.* at 94-5

Mr. Li's testimony makes clear that a "high managerial agent" participated in the commission of the above offenses. As previously stated a "high managerial agent" is "any agent of the corporation or association having duties of such responsibility that his conduct may fairly be assumed to present the policy of the corporation." 18 Pa.C.S.A. § 307. At all times during the night of Deng's death, the chapter president,[15] pledge educator,[16] and pledge assistant,[17] positions mandated by the national organization, were present at the house. The positions of pledge educator and pledge assistant were designed to perpetuate the hazing practices that had been ingrained in the fraternity since its inception and were mandated for every chapter and colony by the national fraternity.

15. Li.
16. Wong.
17. Kwan.

Specifically, the pledge educator and pledge assistant role was to oversee, organize, and control the entire pledge process. *Id.* at 112. Additionally, the pledge educator and pledge assistant were responsible for running the ritual and determining the length of each phase; each phase lasting between ten (10) and (30) minutes and proceeding based on the pledge's physical ability and performance during the ritual, at the discretion of the Pledge Educator and Pledge Assistant. *Id.* at 114. These practices were discussed and promulgated at the fraternity's annual conference where the pledge educator and pledge assistant are required to undergo training. *Id.* at 93-95.

The roles of President, Pledge Educator, and Pledge Assistant were positions mandated by the National Fraternity. They were trained by the National Fraternity at the national conference in how to conduct the initiation rituals and were given the authority and discretion in instituting those rituals at their individual schools. As such the President, Pledge Educator, and Pledge Assistant are high managerial agents of a corporation having duties of such responsibility that their conduct may fairly be assumed to represent the policy of the corporation and thus, the National Fraternity can be held criminally liable for their actions.

However, even if the leadership positions of the Baruch Colony are not to be considered "high managerial agents," the National Fraternity is still liable for the conduct of the Baruch colony on the night in question. The Defendant's argument ignores the fact that 18 Pa.C.S.A. §307 imposes liability on the Corporation when the board or

high managerial agent recklessly tolerates the conduct in question. As discussed herein, Li testified at the preliminary hearing that the hazing rituals were discussed freely at the national conference. Li further testified on cross examination as follows:

> Q. My question to you now is with respect to your testimony here today, specifically the answers that you gave now regarding the fraternity's knowledge of hazing, your answer was that they had a policy of anti-hazing, but that they were — they were aware of they knew that hazing went on. Can you tell us why you testified that way?
>
> A. Yes. The national fraternity had a policy written down in paper which they put in the black book which states that they are strictly against hazing, but, in reality, the fraternity knew that this was going on and that I — I know that Andy Meng (the national fraternity president) has been present at pledging night of the fraternity, of the Baruch Colony...
>
> Q. And what I'm asking you is did you believe it was part of the pledging process because the people in the fraternity, Mr. Meng, for example, was aware of it and, essentially, permitted it?
>
> A. Yes
>
> Q. I want to ask you about one of the Commonwealth's exhibits, C-8, okay? That is the pledge education manual and you're familiar with that document?

A. Yes.

Q. And in that test are there direct questions about crossing over?

A. I don't recall direct questions about crossing over, but there are questions about the rituals and the ritual that took place that weekend.

Q. Specifically, there are question about — and I'm reading from c-8 which is in evidence which says gauntlet. Yes?

A. Can you please clarify?

Q. Sure. I'm reading from the document, the test that's contained within that document in evidence, and within the test there is a section which describes the gauntlet.

A. Correct.

Q. There's also a section which describes the Bataan Death March.

A. Correct....

Q. And that section of the pledge education manual, is it fair to say that that came from the national fraternity?

A. Yes.

Q. And within that section, Mr. Li, is there a discussion and, actually, a — the actual name, the gauntlet, from the middle to the right in that column?

A. Yes.

Q. Where it says Core Functions. Yes?

A. Yes.

Q. Also, the Bataan Death March?

A. Yes.

Q. And, so, those are — you tell me if I'm correct. That is what the national fraternity is telling you as a brother at Baruch that the core functions of the fraternity are the gauntlet? Yes?

A. Yes.

Q. And the Bataan Death March, for example. There are other, but is that correct?

A. Yes, these were on of the core functions that the national fraternity provided.

Q. So, the fact that your chapter at Baruch engaged in these rituals was not your idea. Right? ...

A. Yes, it's correct that it's not my idea, it's the idea and traditions of the national fraternity for — its entire existence.

N.T., Preliminary hearing, 11/30/15 p. 177-85.

Thus, the National Fraternity president was not only aware that the hazing was taking place, but had actually attended at least one Baruch colony crossing-over ritual. Furthermore, the National Fraternity president was aware of these rituals and the National Fraternity published the specific hazing rituals in its pledge education manual and

listed them among the fraternity's "core functions." A copy of a Pledge Educator Manual was admitted in evidence as Commonwealth Exhibit 8. The manual instructs the possessor to delete it after reading.[18] *Id.* at 97. Section 3 of the Manual known as "Functions and Rituals" provides the ritual and functions that are a required as part of the pledge initiation. This includes the "Gauntlet" which was the ritual at issue in Deng's death.[19] Com. Exhibit 8, p. 10. With respect to accidents and injuries, the members are told to report all serious pledge related accidents and injuries to Pi Delta Psi so that "national has enough time to prepare in case any action is taken against us." *Id.* at 8; Cho Proffer 119.

The highest managerial agents of the National Fraternity at the very least recklessly tolerated the actions of it chapters. The National Fraternity provided training to the officers of the Baruch Colony, published documents containing the hazing rituals, and required testing of the officer's knowledge of these rituals. Further, the National Fraternity president attended at least one such ritual with the Baruch Colony. The Defendant's high managerial agents recklessly tolerated the hazing rituals of their chapters and colonies and the Defendants Motion is

18. The Manual also instructs that no one should "write out the logistics of any functions and rituals anywhere."

19. The Pledge Education Manual describes the lesson of the Gauntlet as "There is a glass ceiling (racism/discrimination) preventing us form obtaining things in life, and that we must fight to break through this ceiling. Also that the brothers will always be there to help on break through." It describes the lesson of the Bataan Death March as "To help us relieve some of the actual experience and hardships of the Bataan Death March. It is meant to be difficult and open the pledges eyes to just how difficult the journey for freedom was for those who came before us." Com. Exhibit 8, p. 18. The book also lists only one banned ritual "water."

therefore denied.

Complete Defense

Defendant next argues that "the national board of Pi Delta Psi promulgated anti-hazing policies, as did Baruch College.... The development and promulgation by the national board of the above policies for guidance of affiliates constitutes a complete defense as a matter of law pursuant to 18 Pa.C.S.A. § 307." Def.'s Br., p. 20.

§ 307 states in relevant parts:

> (d) Defenses. — In any prosecution of a corporation or an unincorporated association for the commission of an offense included within the terms of paragraph (a)(1) or paragraph (c)(1) of this section, other than an offense for which absolute liability has been imposed, it shall be a defense if the defendant proves by a preponderance of the evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission. This subsection shall not apply if it is plainly inconsistent with the legislative purpose in defining the particular offense.

18 Pa. C.S.A. § 307(d).

It is clear from the language of the statute that the legislature intended an affirmative defense be created. Except for the notice requirement for an alibi or an insanity or mental infirmity defense, no notice or pleading is a prerequisite to raising an affirmative defense at trial. *See* Pa.R.Crim.P.Rule 567, 568. There is no legal

burden on the Commonwealth to establish the absence of an affirmative defense unless the defense is raised during trial. In other words, for purposes of persuasion and burden of proof, the absence of a defense is not an element of any offense unless the issue is raised at some point during trial. *Com. v. Rose*, 321 A.2d 880 (Pa. 1974). At trial once evidence from any source exists to raise an issue relating to an affirmative defense, the burden falls on the Commonwealth to disprove the defense. *See Com. v. McClendon*, 874 A.2d 1223, 1230 (Pa. Super. Ct. 2005) (The determination of whether a defendant has acted within the scope of the defense rests squarely with the jury.) Thus, as due diligence by a high managerial agent would be an affirmative defense, it is a question of fact for the jury and improper for a *habeas* motion.

Bill of particulars

Defendant's Omnibus requests this Court order the Commonwealth clarify their theory of the homicide and how it relates to Defendant. Defendant argues that the requested information is necessary to adequately prepare a defense. The Commonwealth asserts that the Defendant's request is tantamount to a discovery request.

In order to reach a decision on Defendant's Motion for a Bill of Particulars, we must begin by examining the relevant language of the Pennsylvania Rules of Criminal Procedure. Rule 572 states, in relevant parts, as follows:

> (B) The request shall set forth the specific particulars sought by the defendant, and the reasons why the particulars are requested.

(C) Upon failure or refusal of the attorney for the Commonwealth to furnish a bill of particulars after service of a request, the defendant may make written motion for relief to the court within 7 days after such failure or refusal. If further particulars are desired after an original bill of particulars has been furnished, a motion therefore may be made to the court within 5 days after the original bill is furnished.

(D) When a motion for relief is made, the court may make such order as it deems necessary in the interests of justice.

Comment: The traditional function of a bill of particulars is to clarify the pleadings and to limit the evidence which can be offered to support the information.

Pa.R.Crim.P. Rule 572.

A bill of particulars is intended to give notice to the accused of the offenses charged in the indictment so that he may prepare a defense, avoid surprise, or intelligently raise pleas of double jeopardy and the statute of limitations. *Com. v. Chambers*, 599 A.2d 630, 40 (Pa. 1992). A bill of particulars is not a substitute for discovery and the evidence of the Commonwealth is thus not a subject to which a bill of particulars may be directed. *Id.* A petition requesting the court to order the Commonwealth to provide a bill of particulars is addressed to the trial court's discretion. *Com. v. Hassine*, 490 A.2d 438, 461 (Pa. Super. Ct. 1985). A trial court does not abuse its discretion in denying a request for a bill of particulars if there is no indication that the Commonwealth has withheld exculpatory evidence

or other evidence favorable to the defense, the defendant received information resulting from the Commonwealth's compliance with other rules of procedure, and the defendant has adequate information with which to prepare a defense. *See Com. v. Montalvo*, 641 A.2d 1176, 1183-84 (Pa. Super. Ct. 1994).

For a Criminal Information to be valid, Pa.Crim.P. Rule 560 states:

> (B) The information shall be signed by the attorney for the Commonwealth and shall be valid and sufficient in law if it contains:
>
> (1) A caption showing that the prosecution is carried on in the name of and by the authority of the Commonwealth of Pennsylvania;
>
> (2) The name of the defendant, or if the defendant is unknown, a description of the defendant as nearly as may be;
>
> (3) the date when the offense is alleged to have been committed if the precise date is known, and the day of the week if it is an essential element of the offense charged, provided that if the precise date is not known or if the offense is a continuing one, an allegation that it was committed on or about any date within the period fixed by the statute of limitations shall be sufficient;
>
> (4) The county where the offense is alleged to have been committed;
>
> (5) A plain and concise statement of the essential

> elements of the offense substantially the same as or cognate to the offense alleged in the complaint.

Id. at 1373; Pa.Crim.P. Rule 560.

Here, the Criminal Information and the Affidavit of Probable Cause provided the Defendant with the elements of the crimes charged, dates when the offenses allegedly took place, and pertinent facts. The Defendant in this case has had more than adequate notice of the nature and extent of the charges against it. There was also a full preliminary hearing at which time the Commonwealth presented testimony and documentary evidence. In addition, the Commonwealth has provided voluminous discovery to the Defendant. With all of this information right at its fingertips, the Defendant cannot claim that it was surprised by the charges or that it cannot prepare an adequate defense to them. We find that the Commonwealth has provided adequate information to the Defendant. Thus, Defendant's motion is DENIED.

Freedom of association

Next Defendant argues that the National Fraternity is protected by the First Amendment Right of Association and by Article One, Section Twenty of the Pennsylvania Constitution. Specifically Defendant cites to *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). The Defendant goes on to argue that the imposition of criminal liability on the national organization for the acts or failure to act of individual members defies fundamental fairness. The Commonwealth counters the Defendant's argument claiming the cases cited are clearly distinguishable and the

argument raised is not fitting given the present facts.

The right to association is constitutionally protected because it serves as a means of preserving other First Amendment activities, such as free speech, petition for redress of grievances, and the exercise of religion. *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). In fact, the First Amendment protects the right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. *National Ass'n for the Advancement of Multijurisdictional Practice v. Berch*, 773 F.3d 1037 (9th Cir. 2014). The right to associate is recognized due to the inextricable link between association and the enumerated rights of the First Amendment and the role of association in facilitating self-governance. The constitutional freedom of association guarantees an opportunity for people to express ideas and beliefs through membership or group affiliation. However, the First Amendment right to associate is not absolute. The First Amendment does not protect violence. "Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of advocacy." *Samuels v. Mackell*, 401 U.S. 66, 77(1971).

We must agree with the Commonwealth that the Defendant's argument fails given the facts of this case. The Defendant claims "without evidence of actual participation in, authorization of, or ratification of the conduct, there can be no "agency" liability of international organizations for acts of members of local chapters." Def.'s Br., p. 22. However, as discussed above and established by the

evidence offered by the Commonwealth, the Defendant is not being prosecuted for the actions of its members alone, but for its authorization, ratification, and direction to its members that their traditional use of hazing practices must be completed before a pledge is admitted to the fraternity. Accordingly, a criminal prosecution against Defendant does not unconstitutionally infringe upon the freedom of association. Thus, Defendant's Motion is DENIED.

Due Process

Defendant's final issue centers on the belief that only hearsay testimony was presented against it at the preliminary hearing and *habeas* proceeding, thus violating its rights under Pennsylvania Rule of Criminal Procedure 542(C)(2) and raising an issue under the Confrontation Clause of the Pennsylvania and U.S. Constitution. Def.'s Br., pp. 17. While Defendant agrees that *Com. v. Ricker*, 120 A.3d 349 (Pa. Super. 2015) *appeal granted*, 135 A.3d 175 (Pa. 2016), held that Rule 542(E) allows hearsay to establish all elements of the crime(s) at the preliminary hearing and *habeas* stages, it also opines that the *Ricker* court did not specifically address the issue of confrontation under Rule 542(C)(2). *Id.* Thus, Defendant asks that we find that his right to cross-examine witnesses against it has been violated and that we dismiss all charges. *Id.* at 7.

The Commonwealth avers that, pursuant to *Ricker*, it may present hearsay evidence alone to establish a *prima facie* case against Defendant. The Commonwealth interprets Defendant's "due process" argument, as arguing a right to confront the witnesses against him. *Id.* at 29.

The Commonwealth again relies on *Ricker*, stating that "an accused does not have the right confront the witnesses against him at his preliminary hearing[.]" *Ricker*, 120 A.3d at 362.

In *Ricker*, the Superior Court held that hearsay evidence alone may establish a *prima facie* case. 120 A.3d. at 357. In reaching its decision, the Court reasoned that, because hearsay evidence is sufficient to establish one or more elements of a crime pursuant to Rule 543(E), hearsay evidence is sufficient to meet all of the elements. *Id.* The Court also stated, "After review of the historical underpinnings of the preliminary hearing, the reasons for the creation of the Pennsylvania and Federal Confrontation clauses, and the original public meaning of the respective confrontation clauses, we find that an accused does not have the right to confront the witnesses against him at his preliminary hearing under those provisions." *Id.* at 362; *See also Ritchie*, 480 U.S. at 52 (the right to confrontation is a trial right).

In a footnote, the *Ricker* Court states, "Since the [a] ppellant does not argue the [due process rights] position, we do not decide the distinct question of whether there exists a constitutional due process right to confront witnesses because Rule 542(C) authorizes limited confrontation rights." *Id.* at 362 n.7. Defendant here relies upon said footnote. We will now address same.

The Fourteenth Amendment to the United States Constitution states, in relevant part, "No state shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. *See Spencer v. State of Tex.*, 385 U.S. 554, 563-64 (1967) (citations omitted). Similarly, Article I, Section 1 of the Pennsylvania Constitution states that "[a]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Pa. Const. art. I, § 1.

As discussed above, Defendant avers that his inability to confront and cross-examine several Commonwealth witnesses violated his right to due process. Article 1, Section 9 of the Pennsylvania Constitution and the Sixth Amendment to the United States Constitution guarantee a criminal defendant the right to confront and cross-examine the witnesses against him. *Com. v. Franklin*, 580 A.2d 25, 32-33 (Pa. 1990) (citations omitted). The Sixth Amendment of the United States Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall... be informed of the nature and cause of the accusation [and] be confronted with the witnesses against him[.]" U.S. Const. amend. VI. Similarly, Article 1 section 9 of the Pennsylvania Constitution provides, in relevant part, "In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to

demand the nature and cause of the accusation against him, [and] to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor[.]" Pa. Const. art. I, § 9.

It is well-settled that the preliminary hearing serves a limited function. *Com. v. Fox*, 619 A.2d 327, 332 (Pa. Super. 1993). "The purpose of a preliminary hearing is to avoid the incarceration or trial of a defendant unless there is sufficient evidence to establish a crime was committed and the probability the defendant could be connected with the crime. Its purpose is *not* to prove defendant's guilt." *Com. v. Tyler*, 587 A.2d 326, 328 (Pa. Super. 1991) (emphasis in original) (citations omitted). Instead, the Commonwealth only "bears the burden of establishing at least a *prima facie* case that a crime has been committed and that the accused is probably the one who committed it." *McBride*, 595 A.2d at 591.

At the preliminary hearing, a defendant may:

(1) be represented by counsel;

(2) *cross-examine witnesses and inspect physical evidence offered against the defendant*;

(3) call witnesses on the defendant's behalf, other than witnesses to the defendant's good reputation only;

(4) offer evidence on the defendant's own behalf, and testify; and

(5) make written notes of the proceedings, or have counsel do so, or make a stenographic, mechanical, or

electronic record of the proceedings.

Pa.R.Crim.P. 542(C) (emphasis added). Rule 542 also states:

> (E) Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established. Hearsay evidence shall be sufficient to establish any element of an offense, including, but not limited to, those requiring proof of the ownership of, non-permitted use of, damage to, or value of property.

Pa.R.Crim.P. 542(E). The Comment to Rule 542 provides in pertinent part,

> Paragraph (E) was amended in 2013 to reiterate that traditionally our courts have not applied the law of evidence in its full rigor in proceedings such as preliminary hearings, especially with regard to the use of hearsay to establish the elements of a *prima facie* case. *See* the Pennsylvania Rules of Evidence generally, but in particular, Article VIII. Accordingly, hearsay, whether written or oral, may establish the elements of any offense. *The presence of witnesses to establish these elements is not required at the preliminary hearing*.

Pa.R.Crim.P. 542 Cmt. (emphasis added) (internal citations omitted).

In *Fox*, the appellant contended he was denied his "right" of cross-examination of Masi, the sole eye-witness, at the preliminary hearing. 619 A.2d at 332. More specifically, he alleged that the district justice erred

in sustaining the objections of the Commonwealth to several of defense counsel's questions. *Id.* In reaching its decision, the Superior Court noted that the appellant was not precluded from cross-examining Masi at the preliminary hearing. *Id.* To the contrary, defense counsel questioned Masi at length. *Id.* The fact that several of the appellant's questions during cross were objected to, and such objections were sustained, did not deny him the right of cross-examination at the preliminary hearing stage. *Id.* The court stated, "The purpose of a preliminary hearing is to avoid the incarceration or trial of a defendant unless there is sufficient evidence to establish a crime was committed and the probability the defendant could be connected with the crime." *Id.* (citations omitted). Since the Commonwealth merely bears the burden of establishing a *prima facie* case at the preliminary hearing, credibility is not an issue. *Id.* (citations omitted). In light of the clear purpose of a preliminary hearing, the court held that the appellant's claim of denial of effective cross-examination was without merit. *Id.*[20]

In *Franklin*, the appellant attempted at trial to introduce one of the victim's hearsay statements, but the judge excluded the statement. 580 A.2d at 32. On his PCRA appeal, the appellant argued, like Defendant in the instant case, that he was deprived of his due process right to effectively cross-examine adverse witnesses. Id More specifically, the appellant stated that the trial court's

20. While the appellant in *Fox* did not argue that his right to cross-examination was violated specifically under the due process clause, his argument is substantially similar to that of Defendant and we find its holding persuasive.

ruling to exclude the victim's hearsay statement deprived him of the opportunity to effectively cross examine the Commonwealth's lead witness. *Id.* at 32-33. The Superior Court noted that, while the right of confrontation is a fundamental right, it is not absolute. *Id.* at 33 (citations omitted). Further, the right to confrontation extends only to witnesses whose testimony is presented. *Id.* (citing *Com. v. Paskings*, 290 A.2d 82, 84 (Pa. 1972)); *See also Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987) (Per Justice Powell, joined by the Chief Justice and two Justices, and with one Justice concurring in the result) (the confrontation clause only guarantees the opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense might wish). As the appellant did not allege that he was precluded from asking the witnesses presented at trial any particular question on any particular issue, the court denied his due process argument. *Id.* While *Franklin* is distinguishable from the instant case,[21] it supports the notion that the "limited confrontation rights" afforded to Defendant at the preliminary hearing and *habeas* stages only pertains to those witnesses the Commonwealth presents.

Other jurisdictions have held that a defendant's due process rights are not violated when he is unable to confront a witness at the preliminary hearing. In *Trujillo v. State*,

21. *Franklin* dealt with a due process argument regarding effectively cross-examining witnesses presented at the trial stage of the proceedings. In the instant case, Defendant argues a due process argument regarding confronting and cross-examining Commonwealth witnesses not presented at the preliminary hearing stage.

the appellant contended that the county court violated his due process rights when it quashed his subpoena requiring the complaining witness to testify at the preliminary hearing. 880 P.2d 575, 581 (Wyo. 1994). In reaching its determination, the Supreme Court of Wyoming stated that the purpose of a preliminary hearing is to obtain a neutral, detached fact finder's determination that there is probable cause to believe that a crime has been committed and that the defendant committed it. *Id.* (citations omitted). Further, the court found that, while the preliminary hearing may provide some opportunity for discovery, a constitutional due process does not mandate that opportunity. *Id.* Thus, the court held that the purpose of the preliminary hearing is to determine whether probable cause exists, not to provide an opportunity for discovery. *Id.* at 582. Consequently, the appellant was not entitled to confront the complaining witness at the preliminary hearing stage and his due process rights were not violated. *See id.*

We are persuaded by the reasoning in *Minneman* and find that Defendant's due process rights were not violated. At Defendant's preliminary hearing, the Commonwealth presented testimony from Detective Miller and Daniel Li. Defendant does not allege that his due process rights were violated because he was unable to effectively cross-examine either of these witnesses. Instead, he only argues that he is entitled to confront and cross-examine everyone whose hearsay statements were admitted at his preliminary hearing. It is well-settled that hearsay is permitted at the preliminary hearing stage. *See* Pa.R.Crim.P. 542(E); *See also Ricker*, 120 A.3d at 357. Because credibility is not at

issue at the preliminary hearing, presentation of a witness is not required purely to establish his credibility as tested by cross-examination. *Com. v. Tyler*, 587 A.2d 326, 328 (Pa. Super. 1991).

While Rule 542(C)(2) affords a defendant limited confrontation rights, these rights only apply to those witnesses the Commonwealth presents, just as it does at the trial stage. *See Franklin*, 580 A.2d at 33. If this Court were to accept Defendant's argument, we would need to completely disregard Rule 542(E) and relevant case law to find that any hearsay declarant must be present for cross-examination purposes at the preliminary hearing or their statements must be excluded. We decline to do so. Defendant will be given the opportunity to confront and cross-examine any witnesses against him at trial, as well as object to any hearsay evidence that the Commonwealth may attempt to introduce. For these reasons, Defendant's Motion is DENIED.

Having decided all matters before us, we enter the following Order:

ORDER

AND NOW, this 24th day of March, 2017, upon review of Defendant's Omnibus Pre-Trial Motions, and in consideration of the evidence presented at the hearing and the briefs and arguments of counsel, it is hereby ordered that said motions are DENIED.

Counsel for the Commonwealth and Defense counsel shall appear for a pre-trial conference in this matter, on

May 1, 2017 at 10:30 a.m., Courtroom No. 1, Monroe County Courthouse, Stroudsburg, Pennsylvania.

Berkley Assurance Co. v. Campbell

Void ab initio — Misrepresentation — Palpably and manifestly material

The court granted insurance company's motion for summary judgment based on the insured's material misrepresentations regarding the nature of his construction business and its safety procedure, which rendered the contract of insurance void ab initio.

This declaratory judgment action arose out of the collapse of a thrift store during the demolition of an adjacent building. Six people were instantly crushed to death, one more died later, and several others suffered serious bodily injuries. At issue in this proceeding was whether the general contractor for the demolition job made material misrepresentations to the insurer.

Defendant Griffin Campbell operated a business known as Campbell Construction LLC. Campbell did demolition work. He hired a third party to demolish the building at issue in this proceeding. Prior to that job, Campbell had sought insurance coverage from Berkley Assurance Co. In the application, Campbell stated that he documented the conditions of nearby structures before demolition began, that he had a formal loss control or safety program, that he had a risk manager or safety director, and that he did not use subcontractors. All of those representations were untrue.

Berkley moved for summary judgment, asserting the insurance policy was void ab initio due to Campbell's misrepresentations on the application, and that Berkley had no duty to defend or indemnify.

Based on Campbell's admissions at his deposition, the court found Campbell knew he was lying in his application for insurance coverage. The court found all of the representations were material, because each one would have influenced Berkley's judgment in issuing the policy, estimating the degree and character of risk, or in fixing a premium rate.

The court rejected the argument that the element of bad faith was a question of fact for the jury to determine. Prior Pennsylvania case law held that a showing of bad faith was unnecessary where the misrepresentations contained in an insurance application were palpably

and manifestly material to the risk assumed by the insurer. Campbell's blatant misstatements were palpably and manifestly material to the risk here. The court held that the misrepresentations in this case were incapable of any other conclusion, so there was no need to subject the jurors and the parties to the expense of a trial to find the obvious. Therefore, the court granted the motion for summary judgment and declared the policy void ab initio.

C.P. of Philadelphia County, August Term, 2013, No. 00129

DJERASSI, *J*., Apr. 18, 2017—This motion for summary judgment turns on whether an insurance policy is void *ab initio*, where misrepresentations knowingly made on an application for insurance were material to the risk and the insurer relied on the misrepresentations when it issued its policy. Because the misrepresentations in this case are palpably and manifestly material to the insurance company's decision to take on a risk, plaintiff Berkley Assurance Company's policy covering defendant Griffin T. Campbell is void *ab initio*, and summary judgment is granted in favor of plaintiff.

BACKGROUND

This is a declaratory judgment action arising out of the June 5, 2013 collapse of a wall between a vacant four-story building at 2138 Market Street, in Philadelphia, Pennsylvania, and an adjacent, one-story Salvation Army thrift store located at 2140 Market Street. The wall collapsed in the course of demolition work and crashed upon the adjacent thrift store below. As the thrift store crumbled under the weight of the collapsing wall, six people within were instantly crushed to death, one died some time later,

and others suffered horrific bodily injuries.

At all times relevant to this action, plaintiff, Berkley Insurance Company ("Berkley"), an entity based in Richmond, Virginia, was in the business of providing commercial liability insurance to businesses.

At all times relevant to this action, defendant STB Investments, Corp. ("STB"), owned the building located at 2138 Market Street, in Philadelphia, Pennsylvania. Defendant Richard Basciano is an individual who owns shares in defendant STB. Defendants 2100 West Market Street Corp. ("West Corp") and 2132 West Market Realty Corp. ("Realty Corp"), are entities affiliated with defendant STB. Whenever required hereinafter, STB, Basciano, West Corp and Realty Corp shall be identified as the "STB Defendants."

At all times relevant to this action, defendant, "The Salvation Army," owned and operated the one-story thrift-store at 2140 Market Street.

Defendant Griffin Campbell, also trading as Campbell Construction, LLC, ("Campbell"), is an individual who was engaged in the construction trade. At all times relevant to this action, Campbell was contracted to perform demolition work at a number of properties located on the 2100 block of Market Street, in Philadelphia Pennsylvania. Pursuant to the terms of a "Demolition Agreement" executed by Campbell as the contractor, and by STB and other entities identified as "Owners," Campbell agreed to demolish the building located at 2138 Market Street among others

owned by STB.[1]

Defendant Sean Benschop ("Benschop"), an individual, was engaged by Campbell to demolish the buildings identified in the Demolition Agreement, including 2138 Market Street, which shared a common wall with the Salvation Army's thrift shop.

Campbell needed insurance coverage to lawfully perform his obligations under the Demolition Agreement. To obtain insurance, Campbell completed and executed an insurance application (the "Application"), dated March 6, 2013.[2] The Application stated as follows:

> [t]his application does not bind the applicant nor the company to complete the insurance, but it is agreed that the information contained herein shall be the basis of the contract should a policy be issued.[3]

The Application required Campbell to answer all questions therein, unless any specific question did not apply. Below are a few questions formulated in the Application, and the respective answers provided by Campbell:

> Q. Are the conditions of nearby structures documented before demolition begins?

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1. Demolition Agreement (properly titled STANDARD FORM AGREEMENT BETWEEN OWNER AND CONTRACTOR FOR A PROJECT OF LIMITED SCOPE), Exhibit 2 to plaintiff Berkley's Second Amended Complaint.

2. Demolition Contractors — Annual Policy — General Liability Application, Exhibit 17 attached to the affidavit of Gail White, Esquire, counsel for plaintiff Berkley, motion for summary judgment, control No. 16072892.

3. *Id.*, p. 6 of 7.

A. Yes.[4]

Q. Does the applicant have a formal loss control or safety program?

A. Yes.[5]

Q. Does the applicant have a risk manager and/or safety director who is responsible for safety activities?

A. Yes.[6]

Q. Does applicant use subcontractors?

A. No.[7]

After receiving this Application, Berkley issued a policy to Griffin Campbell, d/b/a/ Campbell Construction, LLC, No. VUMC0029300 (the "Policy"). The Policy stated that "[i]n return for the payment of premium, and subject to all the terms of this policy, we [Berkley] agree with you to provide the insurance as stated in this policy."[8] The Policy ran for the one year period, March 6, 2013 through March 6, 2014.[9]

On June 5, 2013, the common wall between 2138 Market Street and the thrift shop collapsed in the course of demolition work performed by Benschop on behalf of Campbell. Defendant STB and its affiliates, including

4. *Id.*, p. 2 of 7, no. 12(d).
5. *Id.*, p. 2 of 7, no. 19.
6. *Id.*
7. *Id.*, p. 3 of 7, no. 20.
8. General Commercial Liability Declarations, Exhibit 1 to the Second Amended Complaint, p. 1 of 3.
9. *Id.*

shareholder Basciano and others, tendered to Berkley their claims for defense and indemnification in the underlying personal injury actions which had been filed in Philadelphia County by the victims of the accident.

Between January 11 and February 2, 2016, defendant Campbell was deposed several times in the course of the underlying personal injury actions. During his depositions, Campbell was questioned about statements that he had made in his insurance Application. As noted above, Campbell answered "No" to the question asking him whether he had documented the conditions of the nearby buildings prior to demolition. On this topic, the following exchanges took place during his deposition:

> Q. I want to talk a little ... about the Market Street demolition project. Can you tell me, before you first did any work on the project, did you do anything to go out and look through the buildings or walk through the buildings at all?
>
> A. I went with Mr. Marinakos [the project's Architect] once or twice.
>
> Q. And this was before you started any work?
>
> A. Yes.
>
> ***
>
> Q. Did you take any notes about any of the buildings that you walked through?
>
> A. No.

Q. Did Mr. Marinakos take any notes of the buildings you walked through?

A. I can't recall....[10]

In the Application, Campbell had answered "Yes" to two distinct-yet-related questions -namely, whether he had a risk manager/safety director, and whether he had a safety program in place. The following exchange took place in the course of Campbell's deposition:

Q. And Griffin Campbell doing business as Campbell Construction did not have a risk manager, correct?

A. No, I didn't.

Q. Did you have a safety director?

A. No.

Q. Did you have anybody who was in charge of safety on the job?

A. No.

Q. Did you have any formal safety procedures or policies in place for Griffin Campbell doing business as Campbell Construction?

A. No. We just took safety procedures on our own.

***

10. Deposition of Campbell dated January at 1193:25-1195:7, Exhibit A-22 to Berkley's motion for summary judgment, control no. 16072892.

Q. But you didn't have any written documentation —

A. No.

Q. — that would discuss what those safety procedures were or how they should be implemented, did you?

A. No.

Q. And you didn't have any sort of written safety manual, did you?

A. No.

Q. Did you have any documentation that you would provide to employees that described safety and [the] safety measures they should take?

A. No.[11]

In the Application, Campbell had also answered "No" to the question asking him whether he used subcontractors. On this topic, the following exchange took place during Campbell's deposition:

Q. And you consider Mr. Benschop your employee or subcontractor?

A. I considered Mr. Benschop as a subcontractor.

Q. And that's how you considered him on other jobs, too; correct?

A. Yes.

11. *Id.*, at 1200:23 — 1202:6.

Q. Why did you consider him a subcontractor?

A. Because that's his equipment. I have no idea how to operate the equipment. He's a subcontractor. That's his equipment. Darryl was his employee. Eric was his employee. If they're his employees and that's his equipment, he's a subcontractor.[12]

On August 5, 2015, Berkley commenced this declaratory judgment action. Berkley asks *inter alia* for a declaration that the Policy is void *ab initio* because it was issued to Campbell after he had made certain material misrepresentations in the insurance Application. Stated another way, Berkley seeks a declaration that it owes no duty to defend or indemnify any insured under the Policy because the Policy is void *ab initio*.

Between July 25, 2016 and September 19, 2016, Berkley filed four distinct motions for summary judgment. One of the four motions, under control No. 16072892, seeks a declaration that there is no coverage under the Berkley policy due to material misrepresentations made by Campbell in his Application for insurance. On August 25, various defendants filed responses in opposition to this specific motion for declaratory relief. The respondents include the administrators of the victims who died, the victims who survived, and the

12. *Id.* at 797:7 — 21. BLACK'S LAW DICTIONARY, 7th ed., p. 1437 defines the term sub-contractor as "[o]ne who is awarded a portion of an existing contract by a contractor, esp. a general contractor. For example, a contractor who builds houses typically retains subcontractors to perform specialty work such as installing plumbing, laying carpet, making cabinetry and landscaping -each subcontractor is paid a somewhat lesser sum than the contractor receives for the work."

Salvation Army of Greater Philadelphia, its affiliates or associates. On September 9, 2016, Berkley filed a reply in support of its motion for summary judgment. This *Memorandum* Opinion shall discuss only the motion seeking a declaration that the Policy is void *ab initio*, found at motion control No. 16072892.[13]

DISCUSSION

The law on summary judgment is well-settled:

> Summary judgment is appropriate only in those cases where the record clearly demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.... When considering a motion for summary judgment, the trial court must take all facts of record and reasonable inferences therefrom in a light most favorable to the non-moving party.... In so doing, the trial court must resolve all doubts as to the existence of a genuine issue of material fact against the moving party, and, thus, may only grant summary judgment where the right to such judgment is clear and free from all doubt.[14]

I. Pennsylvania permits an insurer to rescind a policy obtained through material misrepresentations in the insurance application.

Berkley asserts that a policy of insurance is voidable

13. The other three motions for summary judgment, also filed by plaintiff Berkley, are found respectively under control Nos. 16072854, 16092517 and 16092540. These three motions for summary judgment have been fully briefed.

14. *Summers v. Certainteed Corp.*, 997 A.2d 1152, 1159 (Pa. 2010).

where such a policy was issued as a result of material misrepresentations contained in the application. Citing *Metropolitan Property and Liability Insurance Co. v. Insurance Commissioner of Pa.*, Berkley persuasively argues that insurers have a right under common law to rescind a policy obtained by means of material misrepresentations.[15]/[16] In *Metropolitan*, a homeowner applied for insurance in 1984 under the Pennsylvania Unfair Insurance Practices Act, 40 P.S. § 1171.5, ("UIPA"). In the application, the homeowner answered "No" to questions regarding any incidents or losses during the prior five years.[17] Afterwards, in 1985, the homeowner tendered to the insurer a claim for loss of property caused by fire. The insurer investigated the claim and discovered that the homeowner had tendered three similar claims within the past five years. Based on discovery that the homeowner had made material misrepresentations in the application, the insurer rescinded the policy and the homeowner challenged the rescission by filing a complaint with the Office of the Pennsylvania Insurance Commissioner. The Insurance Commissioner ruled that the insurer was prohibited from rescinding the policy under the UIPA statute and the Commonwealth Court affirmed the Commissioner. On further appeal to the Supreme Court, the issue was whether the UIPA precluded the insurer from rescinding

15. *Memorandum* of law in support of its motion for summary judgment, control no. 16072892 at IV. C, p. 23.

16. *Metropolitan Property and Liability Insurance Co. v. Insurance Commissioner of the Commonwealth of Pennsylvania.*, 580 A.2d 300, 301 (Pa. 1990).

17. *Metropolitan Property and Liability Insurance Co. v. Insurance Commissioner of the Commonwealth of Pennsylvania.*, 580 A.2d 300, 301 (Pa. 1990).

the policy notwithstanding the misrepresentations made by the homeowner in the insurance application.

Reversing, the Supreme Court explained that UIPA had been enacted in part to prevent unfair insurance trade practices such as the arbitrary "cancellation or refusal to renew a policy '*unless the policy was obtained through material misrepresentation*.'"[18] (Emphasis added)

Common law principles of rescission were at the heart of the Court's holding as applied specifically to insurance contracts under the UIPA. *Metropolitan* explained that an insurance policy was voidable by an insurer "upon a finding that an insured had... misrepresented material information."[19] This is because insurance contracts are "viewed as an ordinary contract.... subject to the laws that traditionally governed contractual relationships."[20]

Applying similar traditional contract principles to this case, we find Berkeley's insurance policy covering Campbell is an ordinary contract "subject to the laws that traditionally govern[] contractual relationships."[21] In this case, the deposition testimony of Campbell shows that he not only made misrepresentations in his Application for demolition insurance, but was also aware that he was lying.[22] Specifically, Campbell knew that he had not

18. *Id.* at 303 (emphasis added).
19. *Id.*
20. *Id.* at 302.
21. *Id.*
22. *See also Kearns v. Philadelphia Life Insurance Co.*, 585 A.2d 53, 55 (Pa. Super. 1991) (stating that "where it affirmatively appears, from sufficient documentary evidence, that the policy was issued in reliance on false and fraudulent statements ... [and] where ... [the applicant] must have been aware of their falsity ... the court may ... enter judgment for

documented the conditions of nearby buildings prior to demolition, yet answered "Yes" --- that he had. He knew that he had no risk manager/safety director, nor any safety measures in place, yet he answered "Yes". And he wrote "Yes" to two related questions asking whether he had such personnel and safety plans. He also knew that he used a subcontractor to demolish 2138 Market Street, yet answered "No" to the question asking him whether he indeed had such a subcontractor. Indeed, Campbell not only knowingly misstated this fact, but his deposition transcripts show he thoroughly understood the difference between an employee and a subcontractor.[23]

II. The misrepresentations made by Campbell in the Application were material.

The next step in the analysis requires a ruling whether these specific Application misrepresentations by Campbell are material.

In *Rohm & Haas Co. v. Cont'l Cas. Co.*, plaintiff "Rohm & Haas" purchased and operated a pharmaceutical company in Pennsylvania.[24] In 1964, Rohm & Haas discovered that the plant and surrounding land were heavily polluted with arsenic. Tests showed that nearby privately-owned water wells were also contaminated. Rohm & Haas began to provide bottled water to the families that owned such wells. In December 1964, Rohm & Haas

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the insurer.") (Citing *Evans v. Penn Mutual Life Ins. Co.*, 186 A.2d 133 (Pa. 1936)).

23. Deposition of Campbell dated January at 797: 7-21, Exhibit A-22 to Berkley's motion for summary judgment, control no. 16072892.

24. *Rohm & Haas Co. v. Cont'l Cas. Co.*, 732 A.2d 1236 (Pa. Super. 1999), *aff'd*, 781 A.2d 1172 (Pa. 2001).

added the plant and land to its excess liability insurance, and continued to purchase excess liability insurance over years without informing the excess insurance carriers that the property was contaminated.[25] After Congress passed an environmental law imposing strict liability upon land owners of polluted sites, Rohm & Haas tendered a claim for excess insurance to the "Insurers."[26] The claim was denied and Rohm & Haas brought suit for coverage. At trial, the jury determined that Rohm & Haas had "failed to disclose material facts about the arsenic pollution ... when it purchased the excess policies."[27] The trial judge entered judgment in favor of Rohm & Haas notwithstanding the jury's verdict, and the Insurers appealed.

Tackling whether Rohm & Haas had failed to disclose a material fact, the Pennsylvania Superior Court explained that —

> [i]nformation withheld is material for purposes of allowing an insurer to rescind a policy if the information, if given, would have influenced the judgment of the insurer in issuing the policy, in estimating the degree and character of the risk, or in fixing a premium rate.[28]

The Superior Court went on to note that —

> Evidence was presented at trial regarding the ... pervasive nature of the contamination. It was uncontroverted that Rohm & Haas was aware of the problem within weeks

25. *Id.*
26. *Id.*, at 1244. The U.S. Congress enacted the Comprehensive Response and Liability Act (CERCLA), also known as Superfund.
27. *Id.* at 1245.
28. *Id.* at 1250.

> of the purchase of the site. Evidence was also presented which showed that Rohm & Haas failed to disclose the pollution problem to ... [the excess insurers].... Moreover, evidence was presented that the undisclosed information was material to the risk for which coverage was sought.[29]

Based on the foregoing, the Superior Court agreed with the jury that Rohm & Haas had failed to disclose material information to the excess insurers.[30]

Similarly, Griffin Campbell misrepresented that he had documented the condition of nearby structures before undertaking the demolition work, and he knew his statement was a lie. He similarly lied when claiming he had a safety program in place. He lied when he told insurance companies that he had a risk manager or safety director assess the demolition job on Market Street. And he lied when he said he was not using a subcontractor when in fact Sean Benschop was his subcontractor.

All of these falsehoods are material misrepresentations since each one, "if given, would have influenced the judgment of... [Berkley] in issuing the policy, in estimating the degree and character of the risk, or in fixing a premium rate."[31]

III. The misrepresentations of Campbell are palpably and manifestly material and the Court may enter judgment

29. *Id.* at 1251.
30. *Id.*
31. *Rohm & Haas Co. v. Cont'l Cas. Co.*, 732 A.2d 1236, 1250 (Pa. Super. 1999), *aff'd*, 781 A.2d 1172 (Pa. 2001).

accordingly without a jury finding on bad faith or fraud.

In its opposition to Berkley's motion for summary judgment, the STB asserts that Berkley has failed to meet its burden of proof. According to STB, Berkley has failed to show that the statements made by Campbell in the Application were material, false, and in bad faith.[32] As to bad faith, STB argues that this element is a "question of fact [which] ... must be decided by a jury in all but the most clear cut and egregious cases."[33] Stated another way, STB argues that bad faith may not be determined at summary judgment but only at trial. In support of this argument, STB relies on *Karcher v. Security Mutual Life Insurance Co.*[34] *Karcher* actually holds, however, that a showing of bad faith is unnecessary where the misrepresentations contained in an insurance application were palpably and manifestly material to the risk assumed by the insurer.

In *Karcher*, a doctor applied for life insurance under a policy that would be voided if the doctor consulted with any physician between the date of his application for insurance, and the date by which he received the policy. The doctor consulted with a specialist the day following his application, and was diagnosed with cancer of the stomach before receiving the insurance policy. After receiving the policy, the doctor underwent exploratory surgery and died shortly thereafter. His widow tendered

32. *Memorandum* of law in support to the response in opposition to the motion for summary judgment of Berkley, control no. 16072892, at IV — B.

33. *Id.*

34. *Karcher v. Security Mutual Life Insurance Co.*, 186 Pa. Super. 580 (1958).

claims under the policy, and the insurer denied. After trial, the jury returned a verdict which entitled the widow to recover the amount of premium paid by the doctor but not the actual life insurance proceeds. Upon the widow's motion, the trial court granted a new trial on grounds that no credible testimony supported the jury's inference that the doctor had used bad faith or fraud when he executed the application for insurance.[35] The insurance company appealed.

On review, the Superior Court found that the trial court had erred. The Court relied on long settled precedent to hold that the statements made by Dr. Karcher were not only "far from true" but were also "material to the risk assumed [by the insurer]."[36] The *Karcher* Court stated that "[i]f these statements influenced the judgment of the insurer in selling the policy and in accepting the risk, then they were material."[37] Thus, the Superior Court reversed the trial court's grant of a new trial, and reinstated the jury's original verdict awarding recovery only recovery of the amount of premium paid by the doctor, but not the life insurance proceeds themselves. In voiding the life insurance policy without a jury finding of bad faith or fraud, the Court held:

> [w]here it appears that an insured has made false statements in an application for ... insurance ... the question of the materiality of such statements must be

35. *Id.*,
36. *Id.* at 584.
37. *Id.*, (relying on *Evans v. Penn Mutual Life Insurance Co.*, 186 A. 133 (Pa. 1936)).

> submitted to the jury if they are doubtful. If, however, the statements are *palpably and manifestly material to the risk*, it is the duty of the court to rule as a matter of law that they are material.[38] (Emphasis added).

In this case, Campbell's blatant misstatements are similarly palpably and manifestly material to risk, specifically, Berkley's calculation of the its risk to insure Campbell.

In conclusion, intentional misrepresentations are material when they mislead an insurer in its determination of risk. When these intentional misrepresentations are palpably and manifestly material, in other words incapable of any other conclusion, a court may declare an insurance policy void ad initio without subjecting jurors and parties to the expense of a trial just to find the obvious.

This is the case here and the demolition insurance contract obtained by Campbell, policy No. VUMC0029300, is declared void *ab initio*.

The remaining three motions for summary judgment are therefore denied as Moot.

ORDER

AND NOW, this 18th day of April, 2017, upon consideration of the motion for summary judgment of plaintiff Berkley Assurance company, motion control No. 16072892, the two Responses in opposition of defendants, the respective *memoranda* of law, and the reply brief of

38. *Id.* at 584-585.

plaintiff Berkley, it is ORDERED that the motion for summary judgment is GRANTED as to Counts II and III of plaintiff's Third Amended Complaint because the insurance policy issued by plaintiff Berkley, No. VUMC0029300, is VOID *AB INITIO*. Berkley has no duty to defend and/or indemnify any party in the underlying tort lawsuits. Summary Judgment as to Count 1 is DENIED as MOOT.

All remaining motions for summary judgment, at control Nos. 16072854, 16092517 and 16092540 are DENIED as MOOT.

In re Estate of Miscella

Fiduciary — Accounting — Surcharge — Decedent's estate — Insurance proceeds

Deceased's estate objected to the accounting filed by defendant, who acted as a fiduciary and power of attorney for the decedent, and to the distribution of insurance proceeds from a home owned by defendant and decedent which was destroyed by fire. Decedent and her family agreed that a home would be purchased for decedent and defendant to live in while defendant, a niece of decedent, acted as decedent's full time caregiver. The home was titled in both names as joint tenants with right of survivorship as compensation for defendant's services. Other family members of decedent later petitioned for the appointment of a guardian and defendant was named as the guardian. Defendant became unhappy with intrusion by various relatives and petitioned the court to remove her as a guardian of the person of decedent. The court appointed other guardians and defendant moved out of the house. The house burned down the next day and decedent died several weeks later. Decedent's estate requested an accounting from defendant and alleged that defendant mismanaged decedent's money. Defendant filed an accounting and the estate submitted exceptions. Defendant filed a declaratory judgment motion to determine who was entitled to the insurance proceeds of the

burned house.

The court found that the incompleteness of the financial records maintained by defendant complicated the issue of the accounting. Defendant argued that the exceptions to the accounting were inappropriate because the financial relationship between defendant and decedent was that of family members sharing a home. She alleged that all of the disputed monies were used for the care and support of decedent and the maintenance of the house. The court found that defendant failed to keep decedent's assets separate from her own, failed to keep appropriate records and ordered a surcharge for the funds not adequately accounted for. The court found that defendant was entitled to a credit for the house electric bill and repairs and that estate was entitled to a credit for unexplained petty cash, overpaid real estate taxes and other amounts.

Defendant argued that since decedent's estate did not come into existence until several weeks after the house burned, the estate never had an insurable interest in the property and the total insurance proceeds had to be paid to defendant. The fire occurred before decedent died, she had a right to the insurance proceeds before she died and her estate had the right to claim it. The insurance proceeds were separate from the real estate itself and did not pass to directly to defendant. The court held that the proceeds were jointly owned by defendant and the estate.

C.P. of Monroe County, No. 193 O.C. 2013

WILLIAMSON, *J*., March 23, 2017—This matter comes before the Court on two separate issues. The first matter is the Estate of Anna Miscella's (hereinafter "Plaintiff's) objections to the accounting filed by Susan L. Buzzuro (hereinafter "Defendant") who acted as a fiduciary and a Power of Attorney for the late Anna Miscella. The second matter involves a Petition for Declaratory Judgment regarding insurance proceeds from a home owned by both Defendant and Anna Miscella (hereinafter "Decedent") which was destroyed by fire.

The underlying facts in these matters are well known to this Court. Sometime in June 2010, the extended family of Decedent and the Decedent came to an arrangement

wherein a home would be purchased for Defendant and Decedent to live in while Defendant acted as Decedent's full time caregiver. The Defendant was one of the Decedent's nieces. In compensation for the Defendant's services, the home was titled in both names as joint tenants with a right of survivorship. Defendant lived with and provided care for the Decedent in Monroe County, Pennsylvania from September 2010 through March 2014, the time periods relevant to these proceedings. Testimony established that the parties had agreed to split the living and home expenses equally with the exception of food costs. The Decedent was only liable for one-third of the food expenses due to Defendant's son also residing in the home. On February 16, 2012, Decedent signed a document naming Defendant her Power of Attorney. By Defendant's own testimony she had begun signing Decedent's checks and acting as a fiduciary for the Decedent before this date and sought the Power of Attorney to "make things legal."

The parties originally came before the Orphan's Court on a Petition for the Appointment of a Guardian for the Decedent. On October 28, 2013, Roberta Guardo and Andrea Guardo Green, also nieces of Decedent, filed a Petition to have the Decedent declared an incapacitated person. By Decree of this Court on January 6, 2014, Defendant was named the Guardian of the Person of Anna Miscella, while Richard and Robert Mayer were named Co-Guardians of the Decedent's Estate. Richard and Robert Mayer were also relatives of the Decedent. Prior to the formal guardianship, the Defendant had been exercising control of the Decedent's daily finances.

Citing unhappiness with the situation, and the intrusion by her various relatives, Defendant filed a Petition with this Court to remove herself as guardian of the person of Decedent. On March 14, 2014, following a hearing, other guardians were appointed to protect Decedent's person. Defendant then removed herself from the home she shared with Decedent the next day. On June 21, 2014, the home was destroyed by fire. Decedent later passed away on July 6, 2014.

On May 20, 2015, the Plaintiff Estate, through Marisa Guardo as Executrix, filed a Petition for Citation Requesting An Accounting by the Defendant and for Declaratory Relief. Plaintiff alleges Defendant mismanaged Decedent's money during the period of June 15, 2010 through March 15, 2014. Plaintiff claims that $66,767.68 of Decedent's money is unaccounted for during the time Defendant controlled Decedent's finances and/or is due the Estate. Three hearings were held in this matter, taking place on October 2, 2015; October 30, 2015; and May 11, 2016. On August 4, 2016, Defendant was ordered to file an Accounting. Defendant then filed two Accountings; the first on November 4, 2016, and an Amended/Supplemental Accounting on December 23, 2016. Plaintiff submitted Exceptions to the Accounting on February 18, 2017. Oral argument was not held in this matter and the issues are being decided upon the briefs of the parties.

The second issue before the Court at this time is the matter of dividing insurance proceeds from the home Decedent and Defendant shared. There is approximately

$278,300 being held in escrow that was paid out of the insurance proceeds from the fire. Defendant filed a Petition for Declaratory Judgment to determine who was entitled to the insurance monies on October 24, 2015. This Court issued an Opinion and Order granting the funds to Defendant and Plaintiff in equal amounts. On February 5, 2016, the Court granted Defendant's Motion for Reconsideration or to Amend Order and vacated that prior Order. A final determination on the insurance proceeds ownership was deferred pending resolution of other matters before the Court to then be decided together. As a decision on Defendant's accounting and Plaintiff's exceptions is now before the Court, the issue of the insurance proceeds is appropriate to be discussed for final resolution at this time.

I. Exceptions to Accounting

Plaintiff raised multiple exceptions to Defendant's accounting. A recurring issue in this matter has always been the incompleteness of financial records maintained by the Defendant. This continues to complicate matters and is even acknowledged by Defendant's accountant. Plaintiff initiated this accounting action based upon poor records hindering Decedent's Executrix and relatives from reconstructing the Decedent's finances. Plaintiff believes the accounting has incorrectly credited the Defendant with various expenses which are actually due back to Decedent's estate. In response, Defendant argues a surcharge is inappropriate because she always acted in the best interest of the Decedent and ordering such relief would essentially be punishing her for doing so. Our review

of the accounting reveals a very difficult task, in trying to separate what was paid, who actually paid, and trying to determine the proper credit due for shared expenses. We will do the best we can since the Defendant has failed to provide something easy to follow.

An agent under a power of attorney has a fiduciary duty to her principal. In accepting to be a power of attorney, the agent agrees to keep her own funds separate from that of the principal and to keep "a record of all receipts, disbursements and transactions made on behalf of the principal," amongst other duties. 20 Pa. C.S.A. §5601.3(b). When money is unaccounted for in an estate, the court can order the funds to be repaid by the decedent's fiduciary in the form of a surcharge. A "surcharge is the penalty for failure to exercise common prudence, common skill and common caution in the performance of the fiduciary's duty and is imposed to compensate beneficiaries for loss caused by the fiduciary's want of care." *In re Estate of Betchel*, 92 A.3d 833 (2014) *quoting In re Miller's Estate*, 345 Pa. 91, 26 A.2d 320, 321 (1942). If there is no breach of duty by the fiduciary, then a surcharge is unnecessary. 20 Pa. C.S.A. §5601.3(c)(4). An agent need not perform her duties perfectly, but most act "with care, competence and diligence for the best interest of the principal." 20 Pa. C.S.A. §5601.3(c)(2). "When seeking to impose a surcharge against an executor [or fiduciary] for the mismanagement of an estate, those who seek the surcharge bear the burden of proving the [fiduciary's] wrongdoing." *Estate of Geniviva*, 450 Pa. Super. 54, 675 A.2d 306, 311 (1996). "Where a significant discrepancy

appears on the face of the record, the burden shifts to the [fiduciary] to present exculpatory evidence and thereby avoid the surcharge." *Id.* "When a fiduciary claims credit for disbursements made by him, the burden rests upon the fiduciary to justify them. Proper vouchers or equivalent proof must be produced in support of such credits." *In re Strickler's Estate*, 354 Pa. 276, 47 A.2d 134, 135 (1946).

Defendant argues that the exceptions to the accounting are inappropriate as the financial relationship between Defendant and Decedent was that of family members sharing a home. Defendant alleges that all of the disputed monies were used for the care and support of the Decedent and the maintenance of the real property. In support thereof, Defendant cites case law involving breaches by fiduciaries. It is Defendant's assertion that courts look primarily towards "unauthorized gifts, asserted loans or advances and payment of services to the agent" in imposing surcharges, and that none of these things have been claimed in the present case. *See* Defendant's Brief Sur Exceptions at p. 8. This argument ignores this Court's previous reasoning when it ordered the Defendant to complete an accounting. Due to the Defendant's failure to keep financial records and her co-mingling funds, both of which were a breach of her duty as fiduciary, there are now great holes in tracing the Decedent's finances, and large sums of money are unaccounted for that belonged to the Decedent. In the final page of the Power of Attorney, Defendant signed and promised that she would "keep the assets of [the Decedent] separate from [her] own" and to "exercise reasonable caution and prudence." Defendant

has failed to do so. She has also failed to show that she split all costs with the Decedent as agreed, and as was her responsibility as fiduciary. She claims she did her best, but the fact remains she should not have acted as a fiduciary if she could not keep accurate records and show caution with Decedent's money. Otherwise, the unaccounted for funds would be unauthorized gifts to the Defendant and/or unauthorized payments for services. She had a duty to account for and safeguard Decedent's monies, and only use it for Decedent's expenses, including those expenses that were to be evenly divided with the Defendant. Therefore, a surcharge is appropriate in this case for funds not adequately accounted for by the Defendant.

Plaintiff's exceptions to Defendant's accounting for which a surcharge is sought are as follows:

1. PP&L

Both parties agree Defendant is owed money from the Plaintiff for the payment of PP&L electric bills. According to her accounting, Defendant paid $7,027.63 to the power company during the relevant time period, while Decedent paid $5,836.87. The total amount paid to PP&L was $12,864.50. As the parties had agreed to split household expenses equally, each share would have totaled $6,432.25. Based upon this, the Defendant is entitled to a credit of $595.38 against any surcharge.

2. Repairs/Garbage/Lawn

a. "Authorized" Repairs -

Plaintiff argues money is due to the Estate for certain

"authorized repairs." Plaintiff defines this category as general repairs, trash removal, septic repairs and lawn service which were costs agreed to be split. Plaintiff's accounting shows that the Decedent paid $5,462.12 towards these costs. Defendant's accounting shows that she paid $731.25 for undefined maintenance, $762.10 for landscaping, and $1,549.25 for trash removal. There are no specific expenses listed for septic repairs. According to Plaintiff's accounting, two Allstate Septic bills from 2013 were accounted for and appropriately reimbursed by the parties. The total amount spent by both parties in this category is $8,504.72. Each party should have paid $4,252.36. Plaintiff is owed $1,209.70, representing the difference between what she should have paid ($4,252.36) and what she did pay ($5,462.12). This amount will be surcharged against the Defendant.

b. "Unauthorized" Maintenance and Repairs -

The next category is described by Plaintiff as "unauthorized" maintenance and repairs. These were expenses the Defendant paid, but which the Plaintiff alleges the Decedent did not agree to pay. This includes the installation of new windows at the subject home in 2012. At the time these repairs were made, Decedent had not yet been declared an incapacitated person. The Defendant had Power of Attorney during the relevant time period. Although Decedent was suffering with dementia, there has been no evidence that she did not or was unable to consent to installing new windows at the time such work was done. Plaintiff also argues that Decedent was not benefitted by the new windows in any way and that

Roberta Guardo did not approve of the expense. However, the Defendant did reside in the house and was a half owner with a right of survivorship. While the Defendant and the Decedent were living in the home, they both had an interest in maintaining and/or improving the home. Had the Defendant predeceased her aunt, Decedent would have become the home's sole owner and therefore, she had an interest in maintaining it. Furthermore, there was no convincing testimony that Decedent failed to consent to the work, or that Roberta Guardo, or anyone else, was authorized to approve or decline work on the house on behalf of the Decedent. Because Plaintiff has failed to show Decedent did not consent to these repairs, and Defendant proved the work was done, no surcharge will be assessed against Defendant.

3. Petty Cash

The next category of expenses at issue is Defendant's system of petty cash. Defendant claims she would cash Decedent's checks and put them into an envelope on her desk to pay Decedent's share of various expenses in cash. Checks were also frequently written out directly to the Defendant. The records kept by Defendant in Decedent's ledger regarding petty cash are minimal with no correlation to actual expenses paid. Plaintiff has proven Defendant failed to keep a record of how and why the petty cash was dispersed. In response, Defendant has been unable to provide any proof of what happened to the money other than to say she used it to pay Decedent's personal expenses, including shared expenses. We are not convinced the Defendant did so. Defendant's own

accountant admits he was unable to ascertain where the monies went. A fiduciary has a duty to account for funds spent and the failure to carefully track cash transactions is a severe breach of that duty. As such, a surcharge of $8,100.00 against Defendant is appropriate as claimed by the Plaintiff.

4. Checks Made Payable to Defendant Prior to her Residing with Decedent

The next issue concerns monies paid by check to the Defendant from June 2010 to September 2010. Plaintiff has been able to trace $190.00 worth of these checks to payment for Defendant to act as Decedent's caregiver while living in LaBar Village. The remainder of the unknown expenses covered by these checks to Defendant equals $4,582.00. Defendant admits that she had already started handling Decedent's finances by 2010, but she was unable to account for why these checks were being made out to her and why they were in such large sums over a three month period. There was no convincing proof the monies were used solely for Decedent's benefit or care. Therefore, Defendant will be surcharged the amount of $4,582.00, which was not adequately accounted for and explained by the Defendant.

5. Additional Checks Made Payable to Defendant

a. Cable -

Plaintiff believes Decedent should have only been responsible for $32.94 a month or $1,635.27 for the period of forty-two months she lived with Defendant which would

have constituted one-half of the cable bill. This sum was determined by dividing in half the Decedent's cable bill from before she lived with the Defendant. Plaintiff claims that because later bills were not itemized, it is impossible to determine if the costs were actually for Decedent's benefit or if the Defendant unilaterally decided to increase the cable package. Prior to living with Defendant, the Decedent lived by herself in a different home in LaBar Village. It is unknown if she had to switch cable providers when she moved or if Decedent and Defendant agreed to a different plan to facilitate the needs of multiple people in the home. Based upon the agreement that the parties share household expenses equally, Decedent was responsible for paying half of the cable bill. There was no convincing testimony that the cable costs were less than as represented by the Defendant. According to Defendant's accounting she paid $4,194.41 towards cable television. Defendant was entitled to reimbursement of $2,097.20 or one-half of that cost from the Decedent. We agree with the Defendant's accounting and will make no surcharge.

b. Food -

One of the more contentious issues in both accountings is the allocation of the cost of food. A negligible amount of money is recorded in the Decedent's ledger as being used for food. It appears Defendant regularly used her credit card to charge food expenses. During the time period Decedent and Defendant lived together, Defendant spent $26,120.93 at local food stores. Defendant's accountant notes this sum does not include charges at Walmart, which also sells a range of both food and non-food products; purchases

paid for in cash; or, despite Plaintiff's objection, expenses for restaurants or take out. Both parties have suggested theories on how to determine what Decedent's actual cost for food was in this case. Defendant's accountant suggests using United States Department of Agriculture statistics for a woman of Decedent's age. Plaintiff suggests that Decedent's costs should be limited to $5.00 a day based upon its own witness' testimony. Both of these methods are speculative at best. It was well established that Decedent and Defendant agreed to split costs evenly, except for food which was to be split three ways, or a third from the Decedent, and two-thirds from Defendant and her son. We find the food expenses as claimed by the Defendant to be convincing. Decedent should have been responsible for $8,706.97 for her food costs. We will not disturb the accounting in this regard.

c. Plowing -

We will give credit for certain snowplowing expenses set forth in the accounting. Defendant was able to provide proof of three separate instances when she paid to have plowing performed. These plowing receipts total $270. It is clear the plowing receipts are not complete because they account for so few instances of snow fall. Defendant is not entitled to be reimbursed for amounts she cannot provide documentation. Therefore, Defendant is entitled to $135, or 1/2 of the plowing for which she has receipts, but nothing else. Plaintiff argues the amount owed should be reduced further as certain plowings were for the entire block and Defendant allegedly over charged neighbors and kept the extra money. There was no evidence of this other

than Plaintiff's allegations. We find the information and testimony of the Defendant credible due to the receipts provided. As such, the amount of $135 for plowing owed to Defendant is appropriate for reimbursement.

d. Furnace Cleaning -

Plaintiff agrees Defendant paid a total of $288 for furnace cleaning and should be reimbursed the Decedent's share of $144 out of any surcharge.

6. Real Estate Taxes

The next issue is real estate taxes. Plaintiff claims to be due $8,763.30 as Defendant has only paid $1,914.64 towards the tax bills. Plaintiff's earlier accounting states that real estate taxes totaled $20,434.37 including $921.37 paid by Decedent's estate after the property passed to Defendant. Defendant owes this $921.37 back to the Estate as upon Decedent's death Defendant became the sole owner of the property. That leaves each party owing $9,756.50. Defendant's accounting of Decedent's records shows that Decedent paid only $15,908.69 in real estate taxes from June 2010 through March 2014, not the entire sum due. It is unknown how the rest of the sum was paid as the Defendant offered no evidence contrary to Plaintiff regarding Defendant's payment amount. We find the Plaintiff convincing in this regard. Defendant owes Plaintiff $6,143.19 for the amount Decedent overpaid in relation to what the Defendant should have contributed. Adding in the $921.37 paid by the Estate for tax due after Decedent's death, the total amount owed to the Decedent for real estate tax is $7,064.56. A surcharge of this amount

will be imposed.

7. Kimberly Clark Checks Not Deposited into Anna's Account

Plaintiff next claims the Estate is due $2,851.68 for checks from Kimberly Clark stock dividends which were cashed, but not deposited into Decedent's accounts. Testimony during the hearing, and Defendant's own accounting, claims that these checks were cashed and placed in the Decedent's petty cash envelope. As already explained there is no way of tracing when or how the petty cash money was used as Defendant failed to keep any record of transactions. We do not find the Defendant convincing on this issue. As Plaintiff has proven that money was not deposited into Decedent's accounts and Defendant has been unable to trace where it went, a surcharge in the amount of $2,851.68 is appropriate.

8. Homeowner's Insurance

The next costs at issue are premiums paid for homeowner's insurance. It is assumed the insurance policy was through Allstate Insurance Company as that is where the disputed fire insurance proceeds originated from in this case. Plaintiff alleges to be due $ 1,831.57 as Defendant never paid her share for the homeowner's insurance. A review of the Defendant's financial records confirms that she made payments to various insurance companies, including to Allstate. However, she was unable to show that she ever contributed to or reimbursed the Decedent her one-half share of these costs. Therefore, a surcharge of $1,831.57 for one-half of the homeowner's

insurance is appropriate.

9. Roof

Another contentious issue between the parties is the cost of replacing the roof on the home. As with replacement of the windows, Plaintiff believes this expenditure was unnecessary and did not benefit Decedent in anyway. During the hearings held in this matter the Plaintiff's witnesses argued that the roof could have been saved by patching. This issue requires the same rationale as the window replacement expenses. The roof was replaced before Decedent was declared incapacitated. Prior to a financial guardian being appointed by this Court, the only person who had any legal authority to help with Decedent's finances was the Defendant. There was no legal requirement to get approval from a financial "gatekeeper" such as Roberta or Marisa Guardo. Additionally, Decedent benefitted from the roof being replaced because she maintained a half ownership interest in the home and could have possibly inherited the entire property had Defendant predeceased her. There was no evidence that the Decedent herself did not authorize the work. Therefore, the Defendant and the Decedent were both responsible for paying for half of the roof's replacement cost. However, there is a discrepancy as to how much the roof replacement cost. The bill from JC Home Improvement quoted the cost as $10,800. However, the Decedent wrote two checks totaling $11,700 as reimbursement for the roof repair costs. Defendant was unable to explain the $900 difference between the sums during testimony. Likewise, Defendant's accountant was

unable to reconcile the differing amounts. Decedent's share of the roof expenditure should have been $5,400, which is one-half of the $10,800 estimate provided. The Defendant has not provided convincing evidence that $11,700 was the amount due nor has the Defendant provided convincing evidence that she paid one-half of the cost, or provided a reimbursement to the Decedent. Plaintiff is owed $5,400 and the $900 difference as to the total paid, or $6,300 as a surcharge against the Defendant.

10. Agency on Aging Checks

Plaintiff claims $8,469.68 is owed for monies received from the Monroe County Area Agency on Aging as set forth in their brief. Defendant's accountant notes that the Agency on Aging amounts are incomplete as Defendant did not keep adequate records and sometimes paid caregivers in cash. This issue falls back upon Defendant's duty as a fiduciary to keep financial records. It is not known what happened to the checks that were issued to Decedent from the Agency. Defendant appears to claim the monies were used for the Decedent's other expenses or put into petty cash. Plaintiff has sufficiently established that Defendant mishandled the money and is unable to account for where it went. We agree with Plaintiff's argument that Decedent paid money out of pocket for caregiver expenses, reimbursement was obtained from the Agency on Aging, and Decedent did not have the money deposited back into her accounts by the Defendant. The surcharge is appropriate in the amount of $8,469.68.

11. Rent

It is alleged that the Defendant did not pay Decedent approximately $1,500.00 due from rent paid by Joan Androcosky. From the available records it does not appear this money was ever paid into Decedent's bank accounts. Defendant has likewise been unable to establish where this money went or account for it in any way. Because Defendant breached her fiduciary duty in regards to the rent, a surcharge of $1,500.00 is appropriate.

12. Refrigerator

Defendant admitted taking a refrigerator from the real property when she moved out in March 2014 which had been jointly purchased by the Defendant and Decedent. Because Defendant was only a half owner of the refrigerator she owes the Plaintiff half of its cost, or $575.00. This will be surcharged against the Defendant.

13. Additional Expenses

Finally, Plaintiff alleges Defendant's accounting has shown an additional $2,017.51 due to Plaintiff from Defendant. This amount is essentially a catch-all of asserted expenses and costs. The only definite sum alleged by Plaintiff is another $898.56 in Kimberly Clark dividend checks which were not deposited into Decedent's accounts. Exceptions to accounts must be specific, not general. *Hilliard v. Sterlingworth Ry. Supply Co.*, 236 Pa. 82, 84 A. 680, 681 (1912). "The requirement that an exceptant should specify wherein as account is wrong, instead of relying upon a general objections, is so reasonable that it

needs no argument in its support." *Id.* With the exception of amounts claimed from the Kimberly Clark checks, Plaintiff has failed to specifically plead what additional monies are allegedly owed. Therefore only a surcharge in the amount of $898.56 will be granted for the Kimberly Clark checks.

Total Surcharge

We find that most of the exceptions to accounting filed by the Estate, and request for a surcharge are appropriate. The amounts due the Decedent and surcharged against the Defendant from above are as follows:

1209.70	6300.00
8100.00	8469.68
4582.00	1500.00
7064.56	575.00
2851.68	898.56
1831.57	
TOTAL:	$43,382.75

The total deductions for credit owed the Defendant are as follows:

595.38	2097.20
144.00	135.00
TOTAL:	($2,971.58)

The balance due the Estate by a surcharge against the

Defendant is $40,411.17.

II. Petition for Declaratory Judgment

The final issue before the Court is Defendant's Petition for Declaratory Judgment regarding the insurance proceeds obtained after the home burnt down. Defendant believes that she is the rightful owner of the entire $278,000.00 insurance proceeds held in escrow. Defendant argues that because Decedent's Estate did not come into existence until two weeks after the home had burned down, it never had an insurable interest in the property. Defendant believes that because she became the sole owner of the property upon Decedent's death, she also should become the sole owner of the insurance proceeds. This argument ignores the fact that the fire, and the right to the insurance proceeds from it, occurred before Decedent passed away. As Decedent has a right to the insurance money before her passing, her estate now has a right to claim it. Defendant is correct that the real property itself was not a part of probate and passed directly to her at Decedent's death. However, the insurance proceeds are separate from the real estate itself. We believe that Defendant's argument is untenable and that the reasoning in our previous opinion on this matter is correct. We incorporate the reasoning set forth in our prior Opinion and Order dated January 7, 2016 (later rescinded) in this decision. Therefore, this Court's previous Opinion and Order from January 7, 2016, decreeing the proceeds to be jointly owned by Plaintiff and Defendant is reinstated.

DECREE

AND NOW, this 23rd day of March, 2017, Plaintiff's

Exceptions to Defendant's Accounting are GRANTED in part and DENIED in part consistent with the attached Opinion. A surcharge shall be entered against the Defendant Susan L. Buzzuro and in favor of the Estate of Anna Miscella in the amount of $40,411.17.

Defendant's Petition for Declaratory Judgment finding that she is the sole owner of proceeds held in escrow from the fire loss is DENIED. We hereby find that the Defendant Susan L. Buzzuro and the Estate of Anna Miscella are each owed one-half of the insurance proceeds paid, and now held in escrow. This Court's January 7, 2016 Order and Opinion are hereby reinstated and incorporated herein.

Lehigh Valley Media Holding, LLC v. Aaroe Law Offices, P.C.

Statute of limitations — Unpaid installments — Renewal of contract

The term "renewal" in an advertising contract did not render the statute of limitations inapplicable to installments which accrued more than four years prior to the filing of the complaint. The court granted summary judgment as to the installments due more than four years before the complaint was filed, but denied summary judgment to the extent that installments were due within four years of the date of filing.

On February 24, 2010, and November 3, 2011, defendant executed advertising contracts with respect to its purchase of advertisements in plaintiff's telephone directory. Each advertising contract set out a payment plan, with payments to be made in installments. On both contracts, the "renewal" box was checked on the contract form.

Plaintiff filed a breach of contract action on July 1, 2015, alleging defendant breached the advertising contracts by failing to make the required installment payments. Defendant's answer asserted that plaintiff's claims were barred by the statute of limitations. Defendant

then filed a motion for summary judgment.

Pennsylvania law provides that when a contract calls for periodic or installment payments, a separate and distinct cause of action accrues with each failure to make payment. Total Control, Inc. v. Danaher Corp., 359 F.Supp.2d 387, 391. Each unpaid installment under the advertising contracts marked a separate and distinct cause of action. Applying this rule, the court concluded that all four alleged unpaid installment payments under the 2011 contract as well as the final three unpaid instalments under the 2010 contract were due within the four years preceding the filing of plaintiff's complaint. Accordingly, the court denied the motion for summary judgment as to those installments.

The remaining seven installments under the 2010 advertising contract that were due more than four years before the complaint was filed were barred by the statute of limitations. Plaintiff argued the statute of limitations did not apply because the 2011 contract renewed the 2010 contract, effectively restarting the statute of limitations period. Plaintiff's argument was based on the "renewal" box that was checked on the contract form. Defendant responded that the word "renewal" in this context simply meant that the consumer was purchasing additional advertisements. The court declined to construe the word "renewal" to mean that the statute of limitations for each installment due under the 2010 contract was restarted. Therefore, the court granted defendant's motion for summary judgment as to those installments.

C.P. of Northampton County, No. CV-2015-5893

MURRAY, *J*., Mar. 24, 2017—

ORDER OF COURT

AND NOW, this 24th day of March, 2017, upon consideration of Defendant's, Aaroe Law Offices, P.C. ("Defendant"), Motion for Summary Judgment and Memorandum in Support of its Motion for Summary Judgment, and Plaintiff's, Lehigh Valley Media Holdings, LLC d/b/a The Lehigh Valley Easy Pages, assignee of Picnic Lane Holdings, LLC ("Plaintiff"), Answer to Defendant's Motion for Summary Judgment and Brief in Opposition to Defendant's Motion for Summary

Judgment, it is hereby ORDERED that Defendant's Motion for Summary Judgment is DENIED, in part, and GRANTED, in part as follows:

1. Defendant's Motion for Summary Judgment is DENIED as it pertains to the four alleged unpaid installments due under the Advertising Contract dated November 3, 2011, and the final three unpaid installments — those due in July, August, and September 2011 — under the Advertising Contract dated February 24, 2010.

2. Defendant's Motion for Summary Judgment is GRANTED as it pertains to the seven remaining payments — those payments due prior to July 2011 — under the Advertising Contract dated February 24, 2010.

STATEMENT OF REASONS

I. Factual and Procedural History

The following facts are stated as averred by Plaintiff in its Complaint. On February 24, 2010, and November 3, 2011, Defendant, a professional corporation, executed Advertising Contracts to document its purchase of advertisements in Plaintiff's publication known as "The Lehigh Valley Yellow Pages." Compl. ¶ 4. Each Advertising Contract set forth a "Payment Plan," whereby payments were to be made in installments. *Id.* at ¶ 6, Exs. A, B. The February 24, 2010, Advertising Contract (the "2010 Contract") provided that ten payments in the amount of $1,250.00 each were to be paid monthly with the first payment due in December 2010. *Id.* at Ex.

B. The November 3, 2011, Advertising Contract (the "2011 Contract") provided that Defendant would pay four installment payments to Plaintiff in January, April, June, and September of 2012. *Id.* at Ex. A. At the top right page of the 2010 and 2011 Contracts are three boxes with the options "New," "Renewal," and "Superseding Contract." *Id.* at Ex. A, Ex. B. On both Contracts, there is an "X" through a box next to the "Renewal" option. *Id.* Thereafter, Plaintiff created and published advertisements in accordance with the Advertising Contracts. *Id.* at ¶ 5.

On July 1, 2015, Plaintiff filed its Complaint, alleging that Defendant breached the Advertising Contracts by failing to make payments on said contracts. *Id.* at ¶ 7. Plaintiff seeks the balance owed under the Advertising Contracts, interest, and attorneys' fees. *Id.* at ¶ 10. On August 12, 2015, Defendant filed an Answer to Complaint, in which it raised New Matters and a Counterclaim sounding in fraud. Defendant's New Matter asserted, *inter alia*, that Plaintiff's claims against Defendant were barred by the applicable statute of limitations. On September 23, 2015, Plaintiff filed its Reply to Defendant's New Matter and Answer to Counterclaim with New Matter.

On September 21, 2016, Defendant filed its Motion for Summary Judgment (the "Motion") and Memorandum of Law in Support of the same, in which it argues that the claims raised in Plaintiff's Complaint must be barred by the statute of limitations. Plaintiff filed its Answer and Brief in Opposition to Defendant's Motion on October 20, 2016. The matter of Defendant's Motion was placed on the January 24, 2017, Argument List. The parties presented

argument before the undersigned.

II. Discussion

A. Legal Standard

After the relevant pleadings are closed, but within such time as to not unreasonably delay trial, any party may move for summary judgment. Pa.R.C.P. 1035.2(1). Summary judgment, in whole or in part, is proper "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report," and the "moving party is entitled to relief as a matter of law." Pa.R.C.P. 1035.2(1), *Reeves v. Middletown Athletic Ass'n*, 866 A.2d 1115, 1124-25 (Pa. Super. 2004) *quoting Downey v. Crozer-Chester Medical Center*, 817 A.2d 517, 524 (Pa. Super. 2003). The moving party bears the burden of proving that no genuine issues of material fact exist. *Burger v. Owens Illinois, Inc.*, 966 A.2d 611, 614 (Pa. Super. 2009). Moreover, the record is viewed in the light most favorable to the non-moving party. *New York Guardian Mortgage Corp. v. Dietzel*, 524 A.2d 951, 952 (Pa. Super. 1987). Thus, summary judgment is proper only when the uncontroverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exist, and that the moving party is entitled to judgment as a matter of law. *Burger*, 966 A.2d at 614.

B. Legal Discussion

Generally, for a claim based upon contract, "the cause

of action accrues and the statute of limitations begins to run on the date that the contract is breached." *GAI Consultants, Inc. v. Homestead Borough*, 120 A.3d 417, 423 — 24 (Pa. Commw. Ct.), *appeal denied*, 128 A.3d 222 (Pa. 2015). Further, "where a contract calls for periodic or installment payments, a separate and distinct cause of action accrues with each failure to make payment." *Total Control, Inc. v. Danaher Corp.*, 359 F. Supp. 2d 387, 391 (E.D. Pa. 2005) (citations omitted).

The 2010 and 2011 Contracts plainly set forth installment payments. Hence, each purportedly unpaid installment marks a "separate and distinct cause of action." In applying this general rule, all four alleged unpaid installments due under the 2011 Contract as well as the final three unpaid installments — those due in July, August, and September 2011 — under the 2010 Contract were due within the four years preceding the filing of Plaintiff's Complaint. Accordingly, we deny Defendant's Motion as it relates to these seven installment payments, on the basis that each of these payments fall within the applicable statute of limitations.

Having found the seven aforementioned installment payments are not barred by the statute of limitations, we consider the seven remaining installment payments under the 2010 Contract that were due more than four years from the filing of Plaintiff's Complaint. These remaining payments comprise the monthly payments due from December 2010 through June 2011. *See* Compl. Ex. B. In responding to Defendant's Motion, Plaintiff argues that the statute of limitations does not bar these installment

payments because the 2011 Contract "renewed" the 2010 Contract, effectively "restart[ing] the [statute of] limitations period." Pl.'s Br. Opp'n 3. Plaintiff bases its argument on a notation on the 2011 Contract: a mark in a box next to the word "Renewal" and cites to *Gillingham v. Gillingham*, an 1851 case from our Supreme Court. *See* Compl. Ex. A.

We first address Plaintiff's citation to *Gillingham*. In *Gillingham*, the plaintiff sought to recover a nineteen year old debt. 17 Pa. 302, 302 (1851). When the defendant argued that the statute of limitations barred the plaintiff's claim, the plaintiff presented evidence that the defendant told a non-party that he intended to pay the debt at issue. *Id.* On appeal, our Supreme Court reasoned that "the alleged promise, which in fact was no promise to the plaintiff or to any one in his behalf, but a mere statement by the defendant to his friend, was too vague and uncertain, even if made to the plaintiff or his agent, to take the case out of the statute." *Id.* at 303. Accordingly, *Gillingham* has been used to support the proposition that one's acknowledgement of a debt to someone other than the plaintiff or the plaintiff's agent does not take the case out of the applicable statute of limitations. *See Stebbins v. Cty. of Crawford*, 92 Pa. 289, 294 (1879); *Appeal of Kutz*, 40 Pa. 90, 93 (1861). Such allegations are not made in the present matter.

Having found *Gillingham* inapplicable to the present matter, we address the balance of Plaintiff's argument: that the 2011 Contract "restarted the limitations period." Pl.'s Br. Opp'n 3. Although Defendant's Motion does not reference the 2011 Contract, at the Argument Hearing,

Defendant opposed Plaintiff's interpretation of the 2011 Contract, arguing, in effect, that Plaintiff's interpretation of the word "renewal" in the 2011 Contract stretched the plain meaning of the word and that, to a consumer like Defendant, "renewal" simply means that Defendant will purchase additional advertisements. In the absence of any further explanation regarding the statute of limitations or the meaning of the "Renewal" option in either Contract, we cannot construe the use of the word "Renewal" to mean that the statute of limitations for each installment due under the 2010 Contract was restarted. In so holding, we grant the balance of Defendant's Motion.