

Northampton County Reporter

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VOL. LVI

EASTON, PA January 6, 2011

NO. 53

Discover Bank, Plaintiff v. Frimet Yagod, Defendant

Commonwealth of Pennsylvania v. David M. Henderson, Defendant

Northampton County Reporter Digest—2011-1

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Northampton County Reporter

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Phone (610) 258-6333 Fax (610) 258-8715

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PBA (800) 932-0311—PBI (800) 932-4637

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The Northampton County Reporter will be published every Thursday by the Northampton County Bar Association, 155 South Ninth St., Easton, PA 18042-4399. All legal notices relating to the business of the county, are required by rule of Court, to be published in this Journal. All legal notices must be submitted in typewritten form and are published exactly as submitted by the advertiser. Neither the Law Reporter nor the printer will assume any responsibility to edit, make spelling corrections, eliminate errors in grammar or make any changes to content.

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Editor

NOTICE TO NCBA MEMBERS – BAR NEWS

2011 Committee Preference Forms

Please return your forms as soon as possible. Committee Chairs are scheduling meetings and we want to invite you!

2011 NCBA and PBA Dues Notices

Dues notices were mailed out in December. If you have not yet received your notice please contact the NCBA Office.

Mark Your Calendars

Annual Association Meeting—Thursday, January 20, 2011

Registration form inside.

Reception for the Court—Friday, March 25, 2011

Philadelphia Flyers v. New Jersey Devils—Saturday, January 22, 2011

For all you NHL fans, join us on a bus trip to Philly for a fun filled day. The seats are all lower level this year.

Registration form inside. ONLY 8 TICKETS AVAILABLE

Show me a guy who's afraid to look bad, and I'll show you a guy you can beat.
~ Lou Brock (Baseball Hall of Fame)

ESTATE NOTICES

Notice is hereby given that in the estate of the decedents set forth below the Register of Wills has granted letters, testamentary or of administration to the persons named. All persons having claims or demands against said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay to the executors or administrators or their attorneys named below.

FIRST PUBLICATION**BAUER, GERALD H.,** dec'd.

Late of Bath, Northampton County, PA

Co-Executrices: Claire Burns and Michelle Carlisle c/o Jeffrey F. Hussar, Esquire, 946 Third Street, Whitehall, PA 18052

Attorney: Jeffrey F. Hussar, Esquire, 946 Third Street, Whitehall, PA 18052

BEALER, HAROLD J. a/k/a HAROLD BEALER, dec'd.

Late of the City of Bethlehem, Northampton County, PA

Executrix: Susan Schlough c/o Robert C. Brown, Jr., Esquire, Fox, Oldt & Brown, 940 West Lafayette Street, Suite 100, Easton, PA 18042-1412

Attorneys: Robert C. Brown, Jr., Esquire, Fox, Oldt & Brown, 940 West Lafayette Street, Suite 100, Easton, PA 18042-1412

BESCHEN, ELAINE M., dec'd.

Late of East Allen Township, Northampton County, PA

Executor: Richard S. Beschen c/o John W. Rybak, Esquire, 408 Adams Street, Bethlehem, PA 18105

Attorney: John W. Rybak, Esquire, 408 Adams Street, Bethlehem, PA 18105

COLVER, DONALD J., dec'd.

Late of the Borough of Pen Argyl, Northampton County, PA

Executor: Alfred S. Pierce, 124 Belvidere Street, Nazareth, PA 18064

Attorneys: Scott R. Steirer, Esquire, Pierce & Dally, LLP, 124 Belvidere Street, Nazareth, PA 18064

FIGLIOLI, ANNA, dec'd.

Late of the Township of Washington, Northampton County, PA

Executrix: Lucy Ann Gold, c/o David J. Ceraul, Esquire, 22 Market Street, P.O. Box 19, Bangor, PA 18013-0019

Attorney: David J. Ceraul, Esquire, 22 Market Street, P.O. Box 19, Bangor, PA 18013-0019

FORD, MARK D., dec'd.

Late of Bethlehem, Northampton County, PA

Administratrix: Mrs. Josephine T. Ford c/o John D. Lychak, Esquire, Law Offices of John D. Lychak, P.C., 35 East Elizabeth Avenue, Suite 21, Bethlehem, PA 18018

Attorneys: John D. Lychak, Esquire, Law Offices of John D. Lychak, P.C., 35 East Elizabeth Avenue, Suite 21, Bethlehem, PA 18018

HESTER, ROBERT L., SR., dec'd.

Late of the Borough of Nazareth, Northampton County, PA

Executor: Robert L. Hester, Jr. c/o Bradford D. Wagner, Esquire, 662 Main Street, Hellertown, PA 18055-1726

Attorney: Bradford D. Wagner, Esquire, 662 Main Street, Hellertown, PA 18055-1726

KELS, BETTY J. a/k/a BETTY JANE KELS, dec'd.

Late of the Township of Palmer, Northampton County, PA

Executrix: Betsy J. Kels a/k/a Betsy J. Rodriguez c/o Bradford D. Wagner, Esquire, 662 Main Street, Hellertown, PA 18055-1726

Attorney: Bradford D. Wagner, Esquire, 662 Main Street, Hellertown, PA 18055-1726

LAMBERT, EDWARD J., dec'd.

Late of Township of Forks, Northampton County, PA

Executrix: Beverly L. Lambert c/o Thomas L. Walters, Esquire, Lewis and Walters, 46 S. 4th Street, P.O. Box A, Easton, PA 18044-2099

Attorneys: Thomas L. Walters, Esquire, Lewis and Walters, 46 South 4th Street, P.O. Box A, Easton, PA 18044-2099

MELICK, MICHELE I., dec'd.

Late of 66 Wildbriar Court North, Bath, Northampton County, PA
Executrix: Linda L. Miller, 1409 South Main Street, Phillipsburg, NJ 08865

Attorneys: Lee A. Conrad, Esquire, Thomas, Conrad & Conrad, 3 North Main Street, Topton, PA 19562

PLUCHINSKY, DANIEL R., dec'd.

Late of Northampton, Northampton County, PA

Executor: John Fedor c/o Jeffrey F. Hussar, Esquire, 946 Third Street, Whitehall, PA 18052

Attorney: Jeffrey F. Hussar, Esquire, 946 Third Street, Whitehall, PA 18052

ROSCIOLI, ANNE a/k/a ANNA ROSCIOLI, dec'd.

Late of the Township of Hellertown, Northampton County, PA
Executrix: Paula A. Roscioli, 1310 Santee Mill Road, Bethlehem, PA 18017

Attorney: Gene F. Roscioli, Esquire, 830 Lehigh Street, Easton, PA 18042

STEIDINGER, KATHERINE, dec'd.

Late of the Borough of Northampton County, Northampton County, PA

Executor: Thea Marie Scioscia, 51 Mustang Court, Danville, CA 94526-5109

Attorney: Holly V. Calantoni, Esquire, 801 Lehigh Street, Easton, PA 18042-4327

TALABER, EDWARD R., dec'd.

Late of Lower Saucon Township, Northampton County, PA

Administratrix: Helen M. Talaber
Attorneys: Thomas J. Maloney, Esquire, Maloney, Danyi, O'Donnell & Tranter, 901 West Lehigh Street, P.O. Box 1279, Bethlehem, PA 18016-1279

ZECCHINE, LOUIS F. a/k/a LOUIS ZECCHINE, dec'd.

Late of the Township of Lehigh, Northampton County, PA

Executrix: Rose May, 49 Patchough Drive, Ruby Point, NY 11778

Attorneys: Neil D. Ettinger, Esquire, Ettinger & Associates, LLC, Peachtree Office Plaza, 1815 Schadt Avenue, Whitehall, PA 18052

SECOND PUBLICATION

BITTNER, DOROTHY L., dec'd.

Late of the Borough of Northampton, Northampton County, PA

Executor: William Schirmacher, Sr. c/o Frank M. Skrapits, Esquire, Steckel and Stopp, 2152 Main Street, Northampton, PA 18067-1211

CORALLO, JOSEPHINE B., dec'd.

Late of the Township of Bushkill, Northampton County, PA

Executor: Barry Shively, 3445 Harvard Place, Bethlehem, PA 18020-2027

Attorney: Louis S. Minotti, Jr., Esquire, 44 North Second Street, P.O. Box 468, Easton, PA 18042

MERLO, GARY, dec'd.

Late of the Borough of Bangor, Northampton County, PA

Administratrix: Cynthia Ann Merlo c/o P. Christopher Cotturo, Esquire, Attorney-at-Law, 75 Bangor Junction Road, Bangor, PA 18013

Attorney: P. Christopher Cotturo, Esquire, Attorney-at-Law, 75 Bangor Junction Road, Bangor, PA 18013

SAKOVICS, IRENE, dec'd.

Late of the Township of Lower Nazareth, Northampton County, PA

Executor: William L. Sakovics c/o Bradford D. Wagner, Esquire, 662 Main Street, Hellertown, PA 18055-1726

Attorney: Bradford D. Wagner, Esquire, 662 Main Street, Hellertown, PA 18055-1726

SENAVITIS, ALBERT M. a/k/a ALBERT SENAVITIS, dec'd.

Late of the City of Bethlehem, Northampton County, PA

Executrix: Gloria M. Senavitis, 334 Carver Drive, Bethlehem, PA 18017

Attorney: James J. Holzinger, Esquire, 1216 Linden Street, P.O. Box 1409, Bethlehem, PA 18016

SZEMPRUCH, WILLIAM, dec'd.

Late of the Township of Upper Mount Bethel, Northampton County, PA

Executrix: Jeannette Majka c/o Dionysios C. Pappas, Esquire,

Vasiliadis & Associates, 2551 Baglyos Circle, Suite A-14, Bethlehem, PA 18020

Attorneys: Dionysios C. Pappas, Esquire, Vasiliadis & Associates, 2551 Baglyos Circle, Suite A-14, Bethlehem, PA 18020

THIRD PUBLICATION

BALUM, JOSEPH T., SR. a/k/a JOSEPH T. BALUM, dec'd.

Late of 1030 New Jersey Avenue, Hellertown, Northampton County, PA

Executors: Robert P. Balum c/o Brian R. Joyce, Esquire, 2895 Hamilton Blvd., Ste. 203, Allentown, PA 18104

Attorney: Brian R. Joyce, Esquire, 2895 Hamilton Blvd., Ste. 203, Allentown, PA 18104

CHRIN, JENNIE I. a/k/a JENNIE IRENE CHRIN a/k/a JENNIE CHRIN, dec'd.

Late of the Township of Williams, Northampton County, PA

Executor: Scott M. Doncsecz c/o William A. Duh, Esquire, 2046 Leithsville Road, P.O. Box BB, Hellertown, PA 18055-0120

Attorney: William A. Duh, Esquire, 2046 Leithsville Road, P.O. Box BB, Hellertown, PA 18055-0120

FEEHAN, MARYANN, dec'd.

Late of the Township of Hanover, Northampton County, PA

Executrix: Margaret F. Hansen c/o Littner, Deschler & Littner, 512 North New Street, Bethlehem, PA 18018

Attorneys: Littner, Deschler & Littner, 512 North New Street, Bethlehem, PA 18018

REINSMITH, GEORGE E., dec'd.

Late of the City of Bethlehem, Northampton County, PA

Executors: Martin S. Reinsmith and Kerri L. Yost c/o Joseph M. Reibman, Esquire, 2957 Fairfield Drive, Allentown, PA 18103-5413

Attorney: Joseph M. Reibman, Esquire, 2957 Fairfield Drive, Allentown, PA 18103-5413

ZOLLINGER, WALTER F., dec'd.

Late of the Township of Lower Saucon, Northampton County, PA

Executrix: Lois B. Zollinger c/o Bradford D. Wagner, Esquire, 662 Main Street, Hellertown, PA 18055-1726

Attorney: Bradford D. Wagner, Esquire, 662 Main Street, Hellertown, PA 18055-1726

TRUST NOTICE

NOTICE IS HEREBY GIVEN of the existence of the trusts of the deceased settlors set forth below for whom no personal representatives have been appointed within 90 days of death. All persons having claims or demands against said trusts are requested to make known the same, and all persons indebted to said trusts are requested to make payment, without delay, to the trustees or to their attorneys named below.

SPORTELLI, PATRICIA M., dec'd.

Late of Easton, Northampton County, PA

Trustees of the Patricia M. Sportelli Revocable Trust: Salvatore Sportelli and David M. LaValva c/o Fitzpatrick Lentz & Bubba, P.C., 4001 Schoolhouse Lane, P.O. Box 219, Center Valley, PA 18034-0219

Attorneys: Fitzpatrick Lentz & Bubba, P.C., 4001 Schoolhouse Lane, P.O. Box 219, Center Valley, PA 18034-0219

Dec. 30; Jan. 6, 13

NOTICES OF INCORPORATION

NOTICE IS HEREBY GIVEN that Articles of Incorporation have been filed with the Department of State of the Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania, for the purpose of obtaining a Certificate of Incorporation of a proposed business corporation to be organized under the provisions of the Pennsylvania Corporation Law of 1988, approved December 21, 1988, P.L. 1444, No. 177, as amended.

The name of the Corporation is:

NORTHEAST HYPERBARIC CHAMBERS, INC.

The Articles of Incorporation were filed on December 23, 2010.

JAMES G. MURPHY, ESQUIRE
MURPHY & MURPHY, P.C.

106 N. Franklin St.

Suite 2

P.O. Box 97

Pen Argyl, PA 18072

Jan. 6

NOTICE IS HEREBY GIVEN that Articles of Incorporation were filed in the Department of State of The Commonwealth of Pennsylvania for:

PALMER MEDS, INC.

under the provisions of the Pennsylvania Business Corporation Law of 1988, as amended.

Jan. 6

**CORPORATE FICTITIOUS NAME
REGISTRATION NOTICE**

NOTICE IS HEREBY GIVEN, pursuant to the provisions of Act 295 of 1982, as amended, of the filing of in the Office of the Secretary of the Commonwealth of Pennsylvania, at Harrisburg, a certificate for the conduct of a business in Pennsylvania, under the assumed or fictitious name, style or designation of:

NORTHSTAR URGENT CARE

with its principal place of business at:
430 Nazareth Pike, Bethlehem,

Northampton County, Pennsylvania 18020.

The name and address of the entity owning or interested in said business is: George Manja, LLC, 2733 Buttermilk Road, Hellertown, Pennsylvania 18055.

The Certificate has been filed on December 24, 2009.

ABRAHAM P. KASSIS, ESQUIRE
2851 Baglyos Circle
Suite 200
Easton, PA 18020

Jan. 6

**CERTIFICATE OF AUTHORITY
NOTICE**

NOTICE IS HEREBY GIVEN that an Application for Certificate of Authority to do business in Pennsylvania has been filed with the Department of State of the Commonwealth of Pennsylvania, at Harrisburg, PA, on or about October 26, 2010, for **STANDARD TEXTILE CO., INC.**, a foreign corporation formed under the laws of the State of Alabama with a principal office located at One Knollcrest Drive, Cincinnati, Ohio 45237. The commercial registered office provider for this corporation is Corporation Service Company, Dauphin County, Pennsylvania. The corporation is filed in compliance with the requirements of the application provision of 15 Pa. C.S. 4124.

Jan. 6

NOTICE FOR CHANGE OF NAME

NOTICE IS HEREBY GIVEN that the petition of Matthew Michael Bold was filed in Northampton County Court of Common Pleas at No. C-

48CV2010-13462, seeking to change the name of Petitioner from Matthew Michael Bold to Madison Mikhaela Bold. The Court has fixed Thursday, February 3, 2011 at 10:00 A.M. in Courtroom 4 at the Northampton County Courthouse as the date for the hearing of the Petition. All parties interested in the proposed change of name may appear and show cause, if any they have, why the prayer of the Petitioner should not be granted.

Jan. 6

NOTICE

NOTICE IS HEREBY GIVEN that the BETHLEHEM AREA VOCATIONAL TECHNICAL SCHOOL will present a Petition to approve the private sale of a 12,928 square foot vacant lot located at 3903 Donegal Drive, Township of Bethlehem, Northampton County, Pennsylvania 18020, for a proposed consideration of Eighty-five Thousand (\$85,000.00) Dollars pursuant to Section 707(3) of the School Code on January 21, 2011, in the Northampton County Court of Common Pleas, in Courtroom No. 1, at 9:00 a.m.

DONALD F. SPRY, II, ESQUIRE
Solicitor for Bethlehem Area
Vocational Technical School
Dec. 23, 30; Jan. 6

LEGAL SECRETARY

Full-time with benefits for Bethlehem law office engaged in estate and long-term care planning, trust and estate administration. Fax or mail resume to Vasiliadis & Associates, 2551 Baglyos Circle, Suite A-14, Bethlehem, PA 18010. Fax (610) 694-9829.

Dec. 23, 30; Jan. 6

CHANGE OF ADDRESS

* * *

**THE LAW FIRM OF
MESHKOV & BRESLIN
HAS MOVED TO
830 LEHIGH STREET
EASTON, PA 18042**

* * *

Dec. 30; Jan. 6

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*** * ***

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EASTON, PA 18042

*** * ***

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*** * ***

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Dec. 30; Jan. 6

**IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA
ORDER**

AND NOW, this 3rd day of January, 2011, it appearing that the judges of the United States District Court for the Eastern District of Pennsylvania approved an amendment to Local Civil Rule 5.1.2, *Electronic Case Filing*, deleting Item #1 under Section 16B, “Administrative records, including Social Security records,” from the list of documents excluded from ECF procedures, and inserting in lieu thereof, “Administrative records.”

AND, as so amended, Local Civil Rule 5.1.2 comports with the ongoing initiative of the Social Security Administration to replace its paper transcripts with electronic certified administrative records (eCAR),

AND, as so amended, Local Civil Rule 5.1.2 also comports with relevant provisions of Rule 5.2 of the Federal Rules of Civil Procedures allowing parties in Social Security cases electronic access to any part of a Social Security case file, including the administrative record. Accordingly, it is hereby

ORDERED that the above amendment to Local Civil Rule 5.1.2 is adopted and made effective December 20, 2010, the date said amendments were approved by this court. It is

FURTHER ORDERED that a period of 45 days shall be afforded for the purpose of solicitation of comment in accordance with 28 U.S.C. §2071(e). Those wishing to comment on amended Local Civil Rule 5.1.2 may do so by submitting their comments in writing to Michael E. Kunz, Clerk of Court, United States Courthouse, 601 Market Street, Room 2609, Philadelphia, PA 19106, or by accessing the court’s website at www.paed.uscourts.gov, no later than close of business, February 17, 2011.

HARVEY BARTLE III
Chief Judge

Jan. 6

DISCOVER BANK, Plaintiff v. FRIMET YAGOD, Defendant*Summary Judgment—Admission—Material Fact—Scope of Discovery—Defenses.*

Plaintiff had filed a debt collection against Defendant, to which he had filed an Answer, asserting several affirmative defenses. Thereafter, Plaintiff served Defendant with a Request for Admissions, to which Defendant failed to respond. Thereafter, Plaintiff moved for summary judgment asserting that in failing to respond to requests for admissions, Defendant had thereby admitted all of the material elements of the claims against him, leaving no issue of material fact for disposition, in accordance with Pa. R.C.P. 4014. However, the Court found an admission waiving all defenses to the action beyond the scope of discovery, rendering the assertion of defenses a triable issue. Accordingly, the Court denied the motion for summary judgment.

In the Court of Common Pleas of Northampton County, Pennsylvania,
Civil Division, No. C-0048-CV-2006-1431.

ERIC M. BERMAN, ESQUIRE, for Plaintiff.

R. MICHAEL EDRIDGE, ESQUIRE, for Defendant.

Order of the Court entered on September 27, 2010 by DALLY, J.

ORDER

AND NOW, this 27th day of September 2010, Plaintiff's Motion for Summary Judgment is hereby DENIED, as set forth more fully in the attached Statement of Reasons.

STATEMENT OF REASONS

The matter now before the Court is a debt collection action. On February 23, 2006, Plaintiff Discover Bank filed a Complaint against Defendant Frimet Yagod, alleging his default credit account in the amount of nine thousand six-hundred forty-two dollars and thirty-seven cents (\$9,642.37) and seeking judgment in that amount, plus interest costs and attorneys fees. On March 1, 2007, Defendant filed preliminary objections thereto. The objections were praeciped for argument and sustained as a matter of course on May 8, 2007 for Plaintiff's failure to appear at argument. Plaintiff was given twenty (20) days within which to file an Amended Complaint, and did so on June 11, 2007. Defendant filed an Answer and New Matter on July 6, 2007. The New Matter alleged Plaintiff's failure to state a cause of action and raised the affirmative defenses of statute of limitations and accord and satisfaction. Plaintiff filed an Answer to New Matter on July 26, 2007. On or about the same time, Plaintiff served Defendant with Requests for Admission, Interrogatories and Request for Production of Documents, to which Defendant failed to respond. The instant Motion for Summary Judgment was filed on June 4, 2010. Therein, Plain-

tiff asserts that Defendant's failure to respond to the aforementioned Requests for Admission within thirty (30) days constitutes an admission to the same, leaving no issue of material fact in the case. As such, Plaintiff contends that it is entitled to summary judgment as a matter of law. The matter came before the Court via the Argument List of September 7, 2010 on brief. The time for filing briefs having passed,¹ the matter is now ready for disposition.

STANDARD OF LAW

A motion for summary judgment may only be granted when it is apparent from the entire record, inclusive of pleadings, depositions, affidavits, answers to interrogatories and admissions on file, that there exists no genuine issue of material fact in the case, and thus the movant is entitled to judgment as a matter of law. Pa. R.C.P. 1035.2. A material fact is one which affects the outcome of the case. *Beach v. Burns International Security Services*, 406 Pa. Super. 160, 164, 593 A.2d 1285, 1286 (1991). In considering such motion, the Court must view the record in the light most favorable to, and must resolve all doubts in favor of the non-movant. *Id.* Summary judgment may not be entered for a party's failure to respond. It may only be granted on the merits.

DISCUSSION

By the present motion, Plaintiff asserts that pursuant to Defendant's failure to respond to the aforementioned Requests for Admission, Defendant thereby admitted all of the essential elements of the cause of action. The Requests for Admission, appended to the instant motion, were set forth as follows:

1. Defendant admits that Defendant owes, at a minimum, \$9,642.37 against the amounts set forth in the Complaint in this action.
2. Defendant admits that Defendant has no defense to \$9,642.37 of the damages claimed in the Complaint in this action.
3. Defendant admits that Defendant had an account with the Plaintiff and account number was *****.
4. Defendant admits that Defendant voluntarily applied for an account with Plaintiff, DISCOVER BANK.
5. Defendant admits that Defendant used or authorized the use of this account with Plaintiff, account number *****.

¹ Plaintiff filed a brief contemporaneously with the motion. Briefs were not filed on behalf of Defendants.

In failing to respond to Plaintiff's Requests for Admission within thirty (30) days, the same were conclusively² admitted. Pa. R.C.P. 4014(b), (d). With admissions to all of the essential elements of Plaintiff's claim, it would appear that there are no issues of genuine fact in the case, and that therefore, it is ripe for summary judgment. Yet, the admission at Paragraph Two (2) gives the Court pause. Therein, Defendant admitted by failure to respond, that he has no defense to the damages claimed by in the Complaint. Such a request for admission calls for a legal conclusion. *Brindley v. Woodland Village Restaurant, Inc.*, 438 Pa. Super. 385, 652 A.2d 865, (1995). As such, it lies beyond the scope of discovery and therefore improper. Pa.R.C.P. 4014(a) (limiting the scope of the Rule to "the truth of any matters within the scope of Rule 4003.1 through 4003.5." Pa. R.C.P. 4014(a).

Defendant asserted the affirmative defenses of accord and satisfaction and statute of limitations in his Answer and New Matter to the underlying Complaint, and those defenses cannot be disposed of through admissions. Pa.R.C.P. 4014. *See also, J-Mark, Inc. v. Post*, 23 D. & C. 3d 317 (Erie Cty. 1982) (Persuasive authority setting forth and discussing the mandate of Pa.R.C.P. 4014 and holding that a request for an admission of the lack of a defense is inappropriate in that it states a legal conclusion). Accordingly, the Court finds that there are issues of material fact with respect to the validity of Defendant's affirmative defenses to the instant action, which preclude the entry of summary judgment. *See generally, Marchese v. Marchese*, 457 Pa. 625, 630, 326 A.2d 321, 323 (1974) (Where defendant had pled an affirmative defense of laches, court declined entry of summary judgment, noting defendant's burden of proving his defenses, and stating that he should be given the opportunity to do the same). As such, Plaintiff's Motion for Summary Judgment is hereby DENIED.

² An admission by default may only be withdrawn or amended by leave of court. Pa.R.C.P. 4014(d).

**COMMONWEALTH OF PENNSYLVANIA v. DAVID M.
HENDERSON, Defendant**

Writ of Habeas Corpus—Motion to Dismiss—Aggravated Assault—Resisting Arrest—Terroristic Threats.

Defendant was originally charged with one count of tampering with or fabricating physical evidence, two counts of aggravated assault, one count of resisting arrest, and two counts of terroristic threats. At a preliminary hearing, the Magisterial District Court dismissed the charge of tampering with or fabricating physical evidence.

Defendant filed a writ of *habeas corpus*, seeking to quash the remaining charges. After considering the testimony produced by the Commonwealth at the preliminary hearing, and based upon recent Pennsylvania Supreme Court cases discussing both aggravated assault and resisting arrest, the Court denied Defendant's motion as it pertained to those charges. The Court also denied Defendant's motion as it pertained to the charge of terroristic threats.

In the Court of Common Pleas of Northampton County, Commonwealth of Pennsylvania—Criminal Division—No. C-48-CR-1284-2010.

ROBERT EYER, ESQUIRE, for the Commonwealth.

MATTHEW J. GOODRICH, ESQUIRE, for Defendant.

Order of the Court entered on October 13, 2010 by KOURY, JR., J.

OPINION

Defendant David Matthew Henderson has presented this Court with the instant matter, an Omnibus Pretrial Motion. Specifically, Henderson asked this Court to consider his Motion to Dismiss/Petition for Writ of Habeas Corpus.¹ It was assigned from the September 3, 2010 Miscellaneous Hearing List to the Honorable Michael J. Koury, Jr.

The parties submitted briefs and Defendant submitted a transcript of the April 6, 2010 preliminary hearing before the Honorable Adrienne Masut, Magisterial District Judge. The matter is now ready for disposition.

On February 4, 2010, Henderson called 9-1-1 and threatened to jump out of a window. N.T. Preliminary Hearing, 4/6/10, at 4, 7, 15. Accordingly, the Northampton County Control Center contacted the Plainfield Township Police Department, which dispatched Officers Douglas Possinger and John Kowaczyk to Henderson's residence. *Id.* When Possinger and Kowaczyk arrived, they found Henderson in bed. *Id.* at 5, 15-16. They initially believed that Henderson was sleeping but determined that he was, in fact, awake because he began opening his eyes and smiling. *Id.* at 5, 7, 15, 17. Henderson soon sat up and began speaking with the officers. *Id.*

Without warning, and while still in bed, Henderson extended his right arm and then moved his hand quickly toward his mouth. *Id.* Possinger and

¹ Henderson's Omnibus Pretrial Motion originally included a Motion to Suppress. That motion was withdrawn at a September 10, 2010 conference before the undersigned.

Kowaczyk determined that Henderson ingested several small, white, unidentified pills. *Id.* at 5, 8, 17, 20. Some of the pills fell onto Henderson's bed. *Id.* at 5. Possinger instructed Henderson to spit out the pills and Henderson refused. *Id.* Since the officers were unsure what Henderson had ingested, and in what quantity, they requested an Emergency Medical Services (EMS) response for a possible overdose. *Id.* at 6, 10. Matthew Bielinski, a paramedic, arrived shortly thereafter. *Id.* at 24.

Possinger, Kowaczyk, and Bielinski determined that it was medically necessary to transport Henderson to a hospital. *Id.* at 17, 21, 25, 28. They informed Henderson that he had to go, but Henderson refused. *Id.* at 12. He started to back away from the officers and paramedic. *Id.* at 11-12. At that point, Possinger and Kowaczyk attempted to take Henderson into custody. *Id.* at 11-12. Possinger testified at the preliminary hearing that, as of that moment, Henderson was not under arrest. *Id.* at 11-12.

When Possinger and Kowaczyk tried to take Henderson into custody, Henderson began fighting and flailing at the Officers. *Id.* at 12, 22, 26. To get Henderson to the hospital while minimizing injury to Henderson, Officers Possinger and Kowaczyk, together with Bielinski, handcuffed Henderson. *Id.* at 22. It required the efforts of both officers and Bielinski to restrain Henderson. *Id.* at 6, 13. All the while, and after he was handcuffed, Henderson kicked and head-butted Possinger and Kowaczyk, and kicked Bielinski. *Id.* at 6, 17. He also told the officers and Bielinski that he knew where they lived and that he would kill them. *Id.* at 23. While in the ambulance, Henderson attempted to bite Bielinski's leg. *Id.* at 6, 26, 30.

After Henderson was secured in the ambulance, he was sedated and transported to St. Luke's Hospital in Bethlehem, Pennsylvania, for treatment. *Id.* at 27. After arrest, the police determined that Henderson's pills were prescribed to him. *Id.* at 8. The police did not take any of the pills into evidence or test them. *Id.* The police also did not charge Henderson with any drug charges. *Id.* at 8-9.

Based on the foregoing, Officer Possinger charged Henderson with one count of tampering with or fabricating physical evidence,² two counts of aggravated assault,³ one count of resisting arrest,⁴ and two counts of terroristic threats.⁵ At the April 6, 2010 preliminary hearing, however, Magisterial District Judge Masut dismissed the charge of tampering with or fabricating physical evidence. Thereafter, Defendant filed the instant Petition for Writ of Habeas Corpus, moving to quash the information on the basis that the evidence presented at the preliminary hearing did not establish a *prima facie* case of the remaining charges against him.

² 18 Pa. C.S. §4910.

³ 18 Pa. C.S. §2702(a)(3).

⁴ 18 Pa. C.S. §5104.

⁵ 18 Pa. C.S. §2706.

Initially, we note that:

[t]he method for testing a finding of a *prima facie* case prior to trial, in this Commonwealth, is by a writ of habeas corpus. ... Proof of guilt beyond a reasonable doubt is not required at this stage. ... Rather, the Commonwealth must show ... that the defendant committed the offense, and the evidence would be such that if presented at trial, and accepted as true, the judge would be warranted in allowing the case to go to trial.

Commonwealth v. Kowalek, 436 Pa. Super. 361, 364, 647 A.2d 948, 949 (1994) (citations omitted); *see also*, *Commonwealth v. Packard*, 767 A.2d 1068 (Pa. Super. 2001) (establishing that *prima facie* case requires Commonwealth to demonstrate that crime has been committed and accused probably committed that crime). For purposes of this motion, we accept as true all the evidence produced by the Commonwealth, along with all inferences reasonably drawn from the evidence of record that would support a verdict of guilty. *Packard*, *supra*. We do not, however, accept “suspicion” or “conjecture” as neither constitutes evidence and would be unacceptable as such. *Id.*

To meet its burden in a *habeas corpus* proceeding, the Commonwealth may rely on the evidence presented at the preliminary hearing or it may submit additional evidence. *Commonwealth v. Fowlin*, 450 Pa. Super. 489, 504, 676 A.2d 665, 673 (1996). In this matter, the Commonwealth chose to rely on the transcript of the April 6, 2010 preliminary hearing. Thus, we must review the charges against Henderson, determine the elements of each charge, and, based on the transcript of the preliminary hearing, determine if the Commonwealth established a *prima facie* case of each charge against him.

1. AGGRAVATED ASSAULT

A person commits aggravated assault if he “attempts to cause or intentionally or knowingly causes bodily injury” to any police officer or paramedic. 18 Pa. C.S. 2702(a)(3), (c)-(d). The statute protects all police officers effectuating an arrest, “even those which are subsequently determined to have lacked probable cause at their inception.” *See Commonwealth v. Biagini*, 540 Pa. 22, 35, 655 A.2d 492, 498 (1995). The Pennsylvania Supreme Court has explained the policy behind the statute:

The determination that a police officer placed an individual under arrest without probable cause is a legal determination; it is an issue to be resolved in a courtroom, not on a street corner. Within a civilized society rules exist to resolve disputes in an orderly and peaceful manner. Physical resistance to a police officer is not only counter-productive to the orderly resolution of controversy, but it is also specifically prohibited by statute.

Id. at 33, 655 A.2d at 497.

In the instant matter, Henderson called 9-1-1 and threatened to jump out of a window. N.T. at 4, 7, 15. Officers and a paramedic arrived at the scene and, after watching Henderson ingest an unknown number of unidentified small, white pills, determined that he required immediate medical treatment to prevent a potential overdose. *Id.* at 5, 8, 17, 20-21. As the officers and paramedic attempted to carry out their official duties, Henderson attempted to kick and swing at them. *Id.* at 6, 12, 17, 22, 26. He kicked and head-butted the officers several times. *Id.* He also kicked and attempted to bite the paramedic's leg. *Id.* at 6, 17, 26, 30.

Thus, based on the foregoing and accepting as true all testimony produced by the Commonwealth and the inferences reasonably drawn from it that would support a verdict of guilty, *see Packard*, supra, 767 A.2d at 1068, this Court concludes that the Commonwealth established a *prima facie* case of two counts of aggravated assault. The Commonwealth established that Henderson both attempted to cause and intentionally or knowingly caused bodily injury to Officers Possinger and Kowaczyk, and to Bielinski.

2. RESISTING ARREST

A person commits the crime of resisting arrest “if, with the intent of preventing a public servant from effecting a *lawful arrest* or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else. ...” 18 Pa. C.S. §5104 (emphasis added). Thus, in determining whether the Commonwealth set forth a *prima facie* case of resisting arrest, the Court must engage in a two-fold analysis. First, the court must determine whether the arrest underlying Henderson’s resisting arrest charge was lawful. To prove that the underlying arrest was lawful, the Commonwealth must demonstrate “that the arresting officer acted with authority and probable cause.” *Biagini*, supra at 32, 655 A.2d at 497. If the underlying arrest was not lawful, this Court must dismiss the charge. *Id.* Second, if the underlying arrest was lawful, this Court must determine whether, during his arrest, the defendant “create[d] a substantial risk of bodily injury” to public servants or other people. *See* 18 Pa. C.S. §5104.

In *Commonwealth v. Jackson*, 592 Pa. 232, 924 A.2d 618 (2007), the Pennsylvania Supreme Court addressed this Court’s first consideration, the lawfulness of an arrest supporting a charge of resisting arrest. After observing Jackson play a dice game in the street, a Philadelphia police officer suspected that Jackson had violated anti-gambling portions of the Philadelphia City Code. *Id.*, 924 A.2d at 619. Intending to arrest Jackson, the officer confronted him but was unable to effectuate arrest because Jackson fled. *Id.* After the officer chased and caught Jackson, Jackson punched the officer in the face several times and again escaped. *Id.* The officer chased Jackson and was able to catch him a second time. During this encounter, Jackson kned the officer in the groin, knocked him to the ground, ver-

bally threatened him, and tried to steal the officer's gun. *Id.* The officer subdued and placed Jackson under arrest.

The Commonwealth charged Jackson with aggravated assault and resisting arrest, and Jackson was subsequently convicted and sentenced. He filed an appeal, challenging the sufficiency of the evidence for his resisting arrest conviction. The Superior Court, relying on *Biagini*, overturned his conviction. *Id.* at 619, 620. Based on the facts of the case, it determined that the police officer lacked probable cause to arrest Jackson for violating the anti-gambling sections of the city code. *Id.* at 619. The Superior Court concluded that because the underlying arrest was unlawful, the underlying arrest could not support a resisting arrest charge, and overturned the conviction. *Id.*

The Pennsylvania Supreme Court granted *allocatur* in *Jackson* to determine:

[w]here a defendant's assault on a police officer occurs as the result of the officer's attempt to unlawfully arrest him, whether that assault may give rise to a lawful arrest, the resistance of which will support a charge of resisting arrest under 18 Pa. C.S. §5104.

Id. at 619-20. After examining the case, the Court overturned the Superior Court's ruling and reinstated the resisting arrest charge. It agreed that resisting arrest charges must be supported by a lawful underlying arrest. *Id.* at 620. It also agreed with the Superior Court's determination that Jackson's initial arrest, premised upon illegal gambling, could not support the resisting arrest charge because it was not properly supported by probable cause. *Id.* Nevertheless, the Court concluded that Jackson provided the police with probable cause for arrest by assaulting the police officer. *Id.* at 620-21.

The court stated that:

committing a new crime during [the course of arrest] can serve as the basis for probable cause to arrest appellee. Clearly appellee could be prosecuted for other crimes he committed while resisting an unlawful arrest, *see Biagini*, [655 A.2d] at 493, 499; his new criminal activity would establish cause to arrest him, lawfully, for these new crimes. The initial illegality does not give the arrestee a free pass to commit new offenses without responsibility. Neither does that initial illegality "poison the tree," preventing lawful police conduct thereafter—the new crimes are new trees, planted by appellee, and the fruit that grows from them is not automatically tainted by the initial lack of probable cause.

* * *

We hold on the facts of this case, where a defendant's assault on a police officer occurs as the result of the officer's

attempt to unlawfully arrest him, that assault would justify a subsequent lawful arrest, the temporally distinct resistance of which will support a charge of resisting arrest under 18 Pa.C.S. §5104.

Id. at 621 (footnote omitted). Citing *Biagini*, the court reiterated that “individuals do not have a right to resist arrest even when they believe the arrest is unlawful.” *Id.* at 620.

Here, Henderson argues that the Commonwealth failed to establish a *prima facie* case of resisting arrest because the underlying arrest was premised on charges that were dismissed at the preliminary hearing. After reviewing the applicable case law, this Court disagrees with Henderson and concludes that the Commonwealth met its burden.

Officers Possinger and Kowaczyk confronted Henderson in his bedroom and saw him ingest an unknown quantity of small, white pills. N.T. at 5, 8, 15-16, 17, 20. Based on this action, Officer Possinger charged Henderson with tampering with or fabricating physical evidence. At the preliminary hearing, Magisterial District Judge Masut dismissed the charge. N.T. at 30.

If the instant charge of resisting arrest was premised only on the dismissed charge of tampering with or fabricating physical evidence, this Court would be compelled to dismiss it. *See Biagini*, *supra* at 32, 655 A.2d at 497 (demonstrating that proper resisting arrest charges rest on showing “that the arresting officer acted with authority and probable cause”). Here, however—as in *Jackson*—the resisting arrest charge is premised on an underlying lawful arrest for aggravated assault.

As in *Jackson*, the police’s original contact with the defendant would not properly support a charge of resisting arrest. Possinger and Kowaczyk did not respond to Henderson’s residence because of any reported crime. To the contrary, they responded to a 9-1-1 call that Henderson was suicidal. Even after Henderson ingested several of the unidentified small, white pills, the police did not place him under arrest. At the preliminary hearing, Possinger testified that, as of that moment, Henderson was not under arrest. N.T. at 11-12. Bielinski testified further that, to that point, Henderson was friendly and had voluntarily agreed to go to the hospital.

At some point, however, Henderson became violent. Possinger and Kowaczyk then had probable cause to arrest Henderson for aggravated assault. As discussed in more detail above, the Pennsylvania Criminal Code provides that a suspect commits aggravated assault if he “attempts to cause or intentionally or knowingly causes bodily injury” to any police officer or paramedic. 18 Pa. C.S. 2702(a)(3), (c)-(d). Based on the testimony provided at the preliminary hearing, the officers had probable cause to believe that Henderson attempted to cause them bodily injury. During their exchange with Henderson, the responding officers and paramedic determined that it was medically necessary to transport him to St. Luke’s Hospital for treat-

ment. N.T. at 17, 21, 25, 28. Henderson initially indicated that he would go voluntarily but, at some point, changed his mind. *Id.* at 21. Officer Possinger advised Henderson that “he did not have a choice on whether or not to go to the hospital” but, at the preliminary hearing, testified that at this point Henderson “was not under arrest.” *Id.* at 11.

Instead, Henderson was arrested when he began lashing out at Officers Possinger and Kowaczyk. After informing Henderson that he did not have a choice in whether or not to go to the hospital for treatment, the officers attempted to escort Henderson out of his house. *Id.* at 11-12. Henderson backed away from the officers and, when they neared, began “fighting and flailing with them.” *Id.* at 12. Officer Possinger testified that “for our safety and everybody else’s, that was when [Henderson] was handcuffed to be taken out.” *Id.*

From the facts above, this Court concludes that the instant case is similar to *Jackson* in four important aspects. First, the police officers’ first contact with the defendant would not support a charge of resisting arrest. In *Jackson*, it was an observation that the defendant was rolling dice in the street; here, it could be either the officers’ response to the 9-1-1 call or the dismissed charge of tampering with or fabricating physical evidence. Second, after the police officers’ first contact with the defendant, the defendant committed the new crime of aggravated assault. In *Jackson*, the defendant struck the officer after the officer chased and caught him. In the instant case, Henderson flailed at and fought with Officers Possinger and Kowaczyk when they tried to escort him to an awaiting ambulance for necessary medical treatment. Both qualify as aggravated assault under the Pennsylvania Criminal Code. Third, based on the new crime of aggravated assault, the police in both cases lawfully arrested the respective defendant.

Fourth, in both cases, the incidents giving rise to the aggravated assault charge were temporally distinct from the incidents giving rise to the initial resisting arrest charge that lacked a lawful arrest. In *Jackson*, those incidents were separated by a period when the police officer chased and finally caught Jackson, who was trying to escape. Here, the temporal difference is slighter but still exists. The incidents giving rise to Henderson’s arrest for aggravated assault were the “flailing and fighting” that Officer Possinger described at the preliminary hearing. This “flailing and fighting” caused the officers to approach Henderson and to try and restrain him. Henderson then acted in such a way to give rise to the charge of resisting arrest. Henderson tried to fight the officers off, requiring three men to hold him down, handcuff him, and escort him out of the house.

Thus, based on the foregoing and accepting as true all testimony produced by the Commonwealth and the inferences reasonably drawn from it that would support a verdict of guilty, *see Packard*, *supra*, the court concludes that the Commonwealth established the lawfulness of the underlying arrest. The Court thus turns to the second requirement: whether Henderson

created a substantial risk of bodily injury to a public servant or other people during his arrest.

The resisting arrest statute prohibits individuals from “preventing a public servant from effecting a lawful arrest” by “creat[ing] a substantial risk of bodily injury to the public servant or anyone else. ...” 18 Pa. C.S. §5104. The Pennsylvania Superior Court has stated that “Section 5104 does not require evidence of serious bodily injury, nor does it require actual injury. Merely exposing another to the risk of injury is sufficient to sustain a conviction under Section 5104.” *In re Woodford*, 420 Pa. Super. 179, 183, 616 A.2d 641, 644 (1992); *see also*, *Commonwealth v. Lyons*, 382 Pa. Super. 438, 448, 555 A.2d 920, 925 (1989).

In *Commonwealth v. Rainey*, the Superior Court discussed conduct that did not support a charge of resisting arrest. *See Commonwealth v. Rainey*, 285 Pa. Super. 75, 426 A.2d 1148 (1981). In *Rainey*, the defendant, George Rainey, was arrested on suspicion of criminal trespass. As the police tried to load Rainey into a police van, he “began to shake himself violently, to wiggle and squirm in an attempt to free himself of the officer’s grasp.” *Id.* at 77, 426 A.2d at 1149. He never, however, struck, pushed, kicked, or otherwise attacked the police officers. *Id.* Instead, he merely tried to “squirm, wiggle, twist and shake his way free of their grasp.” *Id.*

The Superior Court overturned Rainey’s conviction for resisting arrest. The Court noted that the underlying resistance was nothing more than a “minor scuffle” incident to arrest. It also emphasized that Rainey did not physically attack the police officers. In part, the Court supported its decision by citation to Model Penal Code (MPC) Section 208.31, Section 5104’s MPC counterpart. The commentary to MPC Section 208.31 notes that the MPC’s drafters wished to confine a charge of resisting arrest to an incident of “forcible resistance that involves some substantial danger to the person.” *Id.* (citing MPC §208.31, cmt.).

Accepting as true all testimony produced by the Commonwealth and the inferences reasonably drawn from it that would support a verdict of guilty, *see Packard*, *supra*, the Court concludes that Henderson engaged in forcible resistance that involved substantial danger to Possinger, Kowaczyk, and Bielinski. Henderson, unlike Rainey, did not merely attempt to wiggle or squirm free from police detainment. To the contrary, Possinger testified that Henderson began flailing his limbs and attempting to strike the officers when the officers approached him. N.T. at 12. After the officers handcuffed Henderson and they, and Bielinski, started to escort him to an awaiting ambulance, Henderson continued attempting to attack them. *Id.* at 6, 12, 17, 22, 26. He kicked and head-butted the officers several times. *Id.* He also kicked and attempted to bite the paramedic’s leg. *Id.* at 6, 17, 26, 30.

The Commonwealth was not under any obligation to demonstrate actual physical injury or even the severity of any potential bodily injury that Henderson created. *See Woodford*, *supra* at 183, 616 A.2d at 644; *Lyons*,

supra at 448, 555 A.2d at 925. Instead, the Commonwealth merely had to demonstrate that Henderson exposed another to the risk of injury. *See Woodford*, supra at 183, 616 A.2d at 644. Accordingly, the Commonwealth established its *prima facie* case for resisting arrest.

3. TERRORISTIC THREATS

Under the Pennsylvania criminal code:

a person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to:

- (1) commit any crime of violence with intent to terrorize another;
- (2) cause evacuation of a building, place of assembly or facility of public transportation; or
- (3) otherwise cause serious public inconvenience, or cause terror or serious public inconvenience with reckless disregard of the risk of causing terror or inconvenience.

18 Pa. C.S. §2706. With respect to terroristic threats, the Superior Court has recognized that a defendant's threat to kill the victim constitutes a threat of violence made with intent to terrorize the victim. *See e.g., Commonwealth v. Reynolds*, 835 A.2d 720, 730 (Pa. Super. 2003). Furthermore, while "the harm sought to be prevented by the statute is the psychological distress that follows from an invasion of another's sense of personal security," the Superior Court has stated that "[n]either the ability to carry out the threat, nor a belief by the person threatened that the threat will be carried out, is an element of the offense." *Id.*

The Superior Court has stated that §2706 "was not designed to penalize spur-of-the-moment threats that arise out of anger in the course of a dispute." *Commonwealth v. Tizer*, 454 Pa. Super. 1, 7, 684 A.2d 597, 600 (1996). In that vein, the Court overturned a conviction under §2706 when the defendant's threat arose in the course of an angry conversation between neighbors. *Commonwealth v. Anneski*, 362 Pa. Super. 580, 585, 525 A.2d 373, 376-377 (1987). The Court upheld a similar conviction, however, when the defendant kicked and threatened a victim with violence during the commission of a robbery. *See Commonwealth v. Griffin*, 310 Pa. Super. 39, 456 A.2d 171 (1983).

While the Court was unable to find a case with facts directly analogous to those presently before it, the Court has determined that the facts in this case are closer to those of *Griffin* than those of *Anneski*. The Court draws this conclusion because, accepting as true all testimony produced by the Commonwealth and the inferences reasonably drawn from it that would support a verdict of guilty, *see Packard*, supra, the Court determines that Henderson committed the crime of terroristic threats by threatening the safety of two police officers and a paramedic during and/or immediately after committing various crimes.

As detailed above, Henderson was arrested after committing two counts of aggravated assault and one count of resisting arrest. As a result of his demonstrated aggression toward Possinger, Kowaczyk, and Bielinski, the Officers handcuffed Henderson and, with Bielinski's help, escorted him down the stairs to an awaiting ambulance. As they escorted Henderson outside, Henderson threatened to kill each of them. N.T. at 23, 25. At the preliminary hearing, Kowaczyk stated that Henderson "said he was going to basically kill everybody, and he knows where we live, and he's going to find us. ..." *Id.* at 23. Bielinski corroborated this testimony and added that Henderson also threatened their families. *Id.* at 25. As noted above, Henderson's threat to kill Possinger, Kowaczyk, Bielinski, and their families constitutes a threat of violence made with intent to terrorize the victim. *See e.g., Reynolds*, supra, 835 A.2d at 730. Accordingly, the Commonwealth established a *prima facie* case for terroristic threats.

WHEREFORE, we enter the following:

ORDER

AND NOW, this 13th day of October, 2010, upon consideration of Defendant's "Motion to Dismiss/Petition for Habeas Corpus/Motion to Quash" and the parties' briefs thereon, it is hereby ORDERED that Defendant's Motion is DENIED.

NORTHAMPTON COUNTY REPORTER DIGEST—2011-1

Caption: **Stuart Schmookler, Executor of the Estate of Jian Yao, Deceased v. Amy Wankanich, Executor of the Estate of Diane Fosco, Deceased**

Term No.: C-0048-CV-2010-4039

Keywords: Survival Action; Wrongful Death Claim; Constitutionality; Rational Basis; Punitive Damages; Driving Under the Influence

Attorney(s): Richard J. Orloski, Esquire for Plaintiff
Jody A. Mooney, Esquire for Defendant

Date of Order: October 22, 2010

Judge: Craig A. Dally, J.

Description of Decision:

By a Complaint, it was alleged that Plaintiff's decedent was struck by a car driven by Defendant's decedent while riding his bicycle, sustaining fatal injuries. Plaintiff filed a survival action on behalf of the sister of Plaintiff's decedent, and a wrongful death claim on behalf of his estate. Defendant filed preliminary objections thereto, alleging Plaintiff's failure to state a claim as a matter of law as to both counts of the Complaint. Alternatively, Defendant sought to strike all claims of recklessness, gross, willful, wanton or outrageous conduct from the Complaint. The Court found the survival action properly pled and overruled Defendant's preliminary objection to the same. However, the Court granted Defendant's preliminary objection to the wrongful death claim, finding it improper, as it was not brought for the benefit of an eligible party under the Wrongful Death Statute. In so doing, the Court rejected Plaintiff's contention as to the unconstitutionality of the Wrongful Death Statute. Finally, the Court declined to strike the averments of the Complaint in support of a punitive damages claim, finding that the averments of the Complaint, if proven, were sufficient to sustain the same.

Caption: **Richard W. Wyant and Leeann Wyant v. James McCullian**

Term No.: C-0048-CV-2010-3135

Keywords: Motion to Strike; Insufficient Specificity; Material Facts; Concise and Summary Form

Attorney(s): John R. Vivian, Esquire for Plaintiff
Ryan C. Blazure, Esquire for Defendant

Date of Order: November 17, 2010

Judge: Craig A. Dally, J.

Description of Decision:

Plaintiffs filed a Complaint against Defendant seeking damages in connection with an automobile accident. Defendant filed preliminary objections seeking to strike several averments therefrom on the basis of insufficient specificity. Upon review, the Court found the challenged averments dealt directly with Defendant's control of his vehicle. As such, the Court found them sufficiently specific, in that they were neither vague, nor extraneous. The preliminary objections were denied.

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