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July 17, 2023

Via Electronic Filing

Rosemary Chiavetta, Esquire
Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Docket No. C-2023-3038201
Michael Hillman v. Aqua Pennsylvania, Inc
Reply of Aqua

Dear Secretary Chiavetta:

Attached for filing is the Reply of Aqua Pennsylvania, Inc. in the above-captioned proceeding.

A copy of the enclosed Reply has been forwarded to the Complainant in the manner indicated on the attached Certificate of Service.

If there are any questions, please do not hesitate to contact me.

Very truly yours,

Reger Rizzo & Darnall LLP

Margaret A. Morris, Esquire

MAM/co
Enclosures

cc: The Hon. Darlene Heep, PA Public Utility Commission [w/encls.]
Mary McFall Hopper, Esquire, Aqua Pennsylvania, Inc. [w/encls.]
Michael Hillman [w/encls.]

Re: Docket No. C-2023-3038201
Michael Hillman v. Aqua Pennsylvania, Inc
Reply of Aqua

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon the following person in the manner indicated, in accordance with the requirements of § 1.54 (relating to service by a participant).

Via First Class Mail

Michael Hillman
P.O. Box 27757
Philadelphia, PA 19118-0757

Dated: July 17, 2023

Margaret A. Morris, Esquire

BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

MICHAEL HILLMAN	:	
	:	
v.	:	Docket No. C-2023-3038201
	:	
AQUA PENNSYLVANIA, INC.	:	

REPLY OF AQUA PENNSYLVANIA, INC.

Pursuant to the directive of the Honorable Darlene Heep at the In-Person Hearing on June 27, 2023, Aqua Pennsylvania, Inc. (Company or Aqua), by and through its attorneys, Reger Rizzo & Darnall LLP, hereby submits its Reply in the above-captioned proceeding. Aqua is not offering new arguments related to its Motion for Judgement on the Pleading. Aqua is simply providing an accurate summary of holdings cited by Michael Hillman (Complainant) or pointing out where the Complainant attempts to amend his 2023 Formal Complaint by adding new/additional allegations/claims.

1. No response required.

2. The document speaks for itself.

3. The document speaks for itself.

4. The document speaks for itself. The Complainant's allegation that he was not served with the Initial Decision is not at issue in this proceeding.

5. The document speaks for itself. The Complainant's attempt to amend the present Formal Complaint and expand the scope of the proceedings should not be permitted.

6. The document speaks for itself.

7. The document speaks for itself.

8. No response required.

9. The document speaks for itself.

10. The document speaks for itself. The Complainant's attempt to amend the present Formal Complaint and expand the scope of the proceedings should not be permitted.

11. The transcript of the Telephonic Hearing held on May 16, 2023, speaks for itself.

12. No response required. The Complainant's attempt to amend the present Formal Complaint and expand the scope of the proceedings should not be permitted.

13. No response required.

14. No response required.

15. No response required.

16. No response required.

17. No response required.

18. No response required.

19. The cited case is not relevant to the present proceedings. The Pa. Supreme Court in *Elite Industries, Inc. v. PA PUC* held that an agency may amend its regulations in interpreting its statutory mandate. The 3-year state of limitation is not a regulation but is set forth in the Pennsylvania Public Utility Code (Code) at 66 Pa. C.S. § 3314. See Attachment 1.

20. No response required.

21. There was no paragraph 21 in Aqua's Motion.

22. There was no paragraph 22 in Aqua's Motion.

23. The cited case is not relevant to the present proceedings. *Popowsky v. PA PUC* also involved Commission regulations, not Section 3314 of the Code. See Attachment 2.

24. No response required.

25. No response required.

26. No response required.

27. The Commission in *Wilson v. Pa. American Water Company* fined the utility for failing to provide an actual meter read as required by Chapter 56 regulations. See Attachment 3.

28. No response required.

29. The cited case is not relevant to the present proceedings. *Info Connections v. PA PUC* also involved Commission regulations, not Section 3314 of the Code. See Attachment 4.

30. The cited case is not responsive or relevant to the present proceedings.

31. In *Kovarikova v. Pa American Water Company*, the Commission specifically stated:

> "We cannot waive the statute of limitations period set forth in Section 3314(a) of the Code or make a determination that the three-year period does not apply to the Complainant in this case. As a creature of legislation, this Commission has only the authority the legislature has granted to us in the Code. *Feingold v. Bell*, 477 Pa. 1, 383 A.2d 791 (1977). **We have consistently determined that Section 3314 (a) of the Code is non-waivable because it terminates the right to bring an action as well as any remedy the Commission may order. Here, Section 3314(a) divests the Commission of jurisdiction to hear the Complainant's action brought more than three years from the date the alleged liability arose.** See, e.g., *Tyrone Brown v. Philadelphia Gas Works*, Docket No. F-2018-2641015 (Initial Decision issued March 20, 2018; Final Order entered May 17, 2018); and *Sythierno Mansour v. Philadelphia Gas Works*, Docket No. C-2016-2528326 (Initial Decision issued August 19, 2016; Final Order entered October 25, 2016)."

(Emphasis Added). See Attachment 5.

32. *Ely v. Pa American Water Company* is not applicable; there is no allegation/record that Aqua's actions were fraudulent. See Attachment 6. *Battle v PECO* is not applicable; there is no allegation/record that Aqua's actions were misleading. See Attachment 7.

33. *Fine v. Checcio* is not applicable; there has been no allegation/record that Aqua's actions were fraudulent, deceptive or misleading. See Attachment 8.

34. No response required.

35. No response required.

36. *Barra v. Rose Tree Media Sch. Dist*. is not applicable; there is no gender discrimination or hostile work environment claims. See Attachment 9.

37. No response required.

WHEREFORE, Respondent, Aqua Pennsylvania, Inc., requests that the Honorable Darlene D. Heep affirm her *Order*, dated June 16, 2023, that dismissed any claim that arose prior to April 22, 2022, and grant any other relief deemed appropriate.

Respectfully submitted,

Date: July 17, 2023

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Counsel for Aqua Pennsylvania, Inc.

Attachment 1

Elite Industries, Inc. v. PA PUC

Elite Indus. v. Pa. PUC

Supreme Court of Pennsylvania

May 15, 2003, Argued ; September 24, 2003, Decided

No. 155 MAP 2002

Reporter
574 Pa. 476 *; 832 A.2d 428 **; 2003 Pa. LEXIS 1745 ***

ELITE INDUSTRIES, INC., CORPORATE LIVERY, INC., J & J LEASING & RENTALS, INC., TROPIANO TRANSPORTATION SERVICE, INC., Appellees v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, Appellant

Prior History: [*1]** Appeal from the Order of the Commonwealth Court entered 1-30-2002 at No. 1474 CD 2001 reversing the Order of the Public Utilities Commission entered 6-6-2001 at No. A00115605. Intermediate Court Judges: Dan Pellegrini, Judge, James R. Kelley, Senior Judge and Samuel L. Rodgers, Senior Judge.

Elite Indus. v. Pa. PUC, 793 A.2d 160, 2002 Pa. Commw. LEXIS 26 (Pa. Commw. Ct., 2002)

Disposition: Reversed.

Core Terms

regulation, certificate of public convenience, public need

Case Summary

Procedural Posture
An administrative law judge (ALJ) denied the applicant's request for a certificate of public convenience to operate a limousine service within Pennsylvania. Appellant Pennsylvania Public Utilities Commission (PUC) granted the applicant's exceptions and reversed the ALJ. The Commonwealth Court (Pennsylvania) reversed the PUC's decision. The state supreme court granted review. Appellees were corporations who protested the application.

Overview

On appeal, the PUC argued that the commonwealth court erred and abused its discretion in limiting its analysis to determining whether there was a public need for the proposed service. The state supreme court concluded that the commonwealth court ignored the PUC's statutory mandate set out in *66 Pa. Cons. Stat. § 1103(a)*, and instead substituted its discretion for that of the PUC when it concluded that the applicant had to demonstrate public need. The commonwealth court relied on *52 Pa. Code § 41.14(a)* to support its determination that the record did not support a finding of public need. However, this regulation was amended prior to the PUC's decision, so as to reflect the change in policy, i.e., now an applicant did not need to show public need for operating a limousine service. The changes in policy and regulation were made in consideration of the public interest. The PUC acted in the public interest by permitting competitive growth in an industry, which resulted in competitive pricing.

Outcome
The order of the commonwealth court was reversed.

LexisNexis® Headnotes

Business & Corporate
Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

HN1[] **Common Carrier Duties & Liabilities, State & Local Regulation**

See 52 Pa. Code § 41.14(a)-(c).

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

HN2[] Regulators, Public Utility Commissions

Pursuant to 66 Pa. Cons. Stat. § 1103(a), a certificate of public convenience shall be granted by order of the Pennsylvania Public Utility Commission (PUC) only if the PUC finds or determines the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

HN3[] Regulators, Public Utility Commissions

See 66 Pa. Cons. Stat. § 1103(a).

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

HN4[] Common Carrier Duties & Liabilities, State & Local Regulation

See 52 Pa. Code § 41.14(d).

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Constitutional Issues

Energy & Utilities Law > Administrative Proceedings > Judicial Review > General Overview

Energy & Utilities Law > Administrative Proceedings > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Energy & Utilities Law > ... > Public Utility Commissions > Hearings & Orders > Judicial Review

HN5[] Preservation for Review, Constitutional Issues

Appellate review of a Pennsylvania Public Utility Commission (PUC) order is limited to determining whether a constitutional violation, an error of law or a violation of PUC procedure has occurred and whether the necessary findings of fact are supported by substantial evidence.

Governments > Legislation > Interpretation

HN6[] Legislation, Interpretation

The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the legislature as expressed by the words employed.

Administrative Law > Judicial Review > Standards of Review > Clearly Erroneous Standard of Review

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Energy & Utilities Law > Administrative Proceedings > General Overview

Energy & Utilities Law > Administrative Proceedings > Judicial Review > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Governments > Legislation > Interpretation

HN7[] Standards of Review, Clearly Erroneous Standard of Review

Though deference to the Pennsylvania Public Utility Commission's discretionary interpretation does not preclude judicial review, courts may not disturb the commission's interpretation regarding a certificate of public convenience unless the result is clearly erroneous, arbitrary, and unsupported by substantial evidence. When interpreting provisions of the Public Utility Code, and the language of the statute is clear and unambiguous, a court need go no further to discern the legislature's intent. Further, the plain words of the statute may not be ignored, and each word should be given effect.

Administrative Law > Agency Rulemaking > Formal Rulemaking

Governments > Legislation > Enactment

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Agency Rulemaking > Informal Rulemaking

Administrative Law > Judicial Review > Standards of Review > General Overview

HN8[] **Agency Rulemaking, Formal Rulemaking**

The Supreme Court of Pennsylvania has long recognized the distinction in administrative agency law between the authority of a rule adopted pursuant to an agency's legislative rule-making power and the authority of a rule adopted pursuant to interpretive rule-making power. The former type of rule is the product of an exercise of legislative power by an administrative agency, pursuant to a grant of legislative power by the legislative body, and is valid and is as binding upon a court as a statute if it is (a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable. A court, in reviewing such a regulation, is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action involved, it is not enough that the prescribed regulations shall appear to be unwise or burdensome or inferior to another regulatory scheme. Error or lack of wisdom in a ruling is not per se equivalent to abuse. A regulation must appear to be so entirely at odds with fundamental principles as to be the expression of a whim rather than an exercise of judgment.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Energy & Utilities Law > Utility Companies > General Overview

HN9[] **Agency Rulemaking, Rule Application & Interpretation**

An agency may revise its policies and amend its regulations in interpreting its statutory mandates. Further, past interpretation of a statute, though approved by the judiciary, does not bind the Pennsylvania Public Utility Commission to that particular interpretation.

Counsel: For Pennsylvania Public Utility Commission, APPELLANT: Matthew Totino, Esq., Bohdan R. Pankow, Esq., Rhonda L. Daviston, Esq. and Robert James Longwell, Esq.

For Elite Industries, Inc., APPELLEE: Robyn Rachelle Ray, Esq.

For Pennsylvania Taxicab & Paratransit Association, APPELLEE AMICUS CURIAE: Ray Fredric Middleman, Esq.

Judges: BEFORE: Cappy, CJ; Castille, Nigro, Newman, Saylor, Eakin, Lamb, JJ. MR. JUSTICE EAKIN.

Opinion by: MR. EAKIN

Opinion

[429] [*478] MR. JUSTICE EAKIN**

On March 23, 2000, Perry J. Camerlengo applied to the Pennsylvania Public Utility Commission (PUC) for a certificate of public convenience to operate a limousine service **[*479]** within Pennsylvania. Appellees and others filed protests to the application after it was published in the Pennsylvania Bulletin.

On March 31, 2000, Camerlengo filed an application for temporary authority, which was also protested after publication in the Pennsylvania Bulletin. Camerlengo's application also sought a waiver of § 29.333(a). [1] The PUC granted temporary authority and the requested waiver.

---

[1] Section 29.333(a) of the PUC's regulations provides:

(a) Limousine service may be operated only in luxury type vehicles with seating capacities of ten passengers or less, excluding the driver.

52 Pa. Code § 29.333(a). Camerlengo sought to operate a service with vehicles which seated up to 15 passengers, excluding the driver.

[*2]** On August 9, 2000, at a hearing before the Administrative Law Judge (ALJ), Camerlengo appeared *pro se* and testified on his own behalf. The protestors, including appellees, appeared by respective counsel and presented documentary evidence only. The ALJ determined Camerlengo failed to meet his burden of proof pursuant to 52 Pa. Code § 41.14(a) and § 41.14(b), [2] and denied his application for a certificate of public convenience. The ALJ also ordered Camerlengo to stop providing unauthorized transportation service in the Commonwealth. Camerlengo filed exceptions to the ALJ's initial decision.

[*3]** **[*480]** The PUC stated that HN2[↑] pursuant to § 1103(a) of the Public Utility Code, [3] a **[**430]** certificate of public convenience shall be granted by order of the PUC only if the PUC finds or determines the granting of such certificate is necessary *or* proper for the service, accommodation, convenience, or safety of the public. The PUC also stated, at the time Camerlengo's application was pending before the ALJ, PUC regulation 52 Pa. Code § 41.14 required the applicant to show: (1) approval of the application will serve a useful public purpose, responsive to a public demand or need; and (2) it possesses the technical and financial ability to provide the proposed service. In addition, authority may be withheld if the record demonstrates the applicant lacks a propensity to operate safely and legally. 52 Pa. Code §§ 41.14(a), 41.14(b).

[*4]** The PUC adopted a final policy statement March 22, 2001. The policy states that an applicant seeking authority to operate a limousine service need not demonstrate approval of the application would serve a useful public purpose, responsive to a public demand or need. [4] The final policy statement became **[*481]** effective on the date of its publication, May 5, 2001. Pursuant to that statement, the PUC determined Camerlengo did not have to show a public necessity, but also stated the record established a public need for the proposed service. The PUC concluded Camerlengo was technically and financially able operate the service, and he had not shown a propensity to operate unsafely and illegally. *See* 52 Pa. Code § 41.14(b). Therefore, the PUC granted Camerlengo's exceptions and reversed the ALJ. The PUC also granted Camerlengo's request for waiver. Appellees appealed to the Commonwealth Court.

[*5]** The Commonwealth Court reversed the PUC's decision, holding an applicant must prove public necessity to obtain a certificate of public convenience, and in this case, the applicant failed to do so. We

---

[2] At the time of the ALJ's decision, § 41.14, entitled "Evidentiary Criteria Used to Decide Motor Common Carrier Applications-Statement of Policy," HN1[↑] provided:

a. An applicant seeking motor common carrier authority has a burden of demonstrating that approval of the application will serve a useful purpose, responsive to a public demand or need.

b. An applicant seeking motor common carrier authority has the burden of demonstrating that it possesses the technical and financial ability to provide the proposed service, and, in addition, authority may be withheld if the record demonstrates that the applicant lacks a propensity to operate safely and legally.

c. The Commission will grant common carrier authority commensurate with the demonstrated public need unless it is established that the entry of a new carrier into the field would endanger or impair the operations or existing common carriers to an extent that, on balance, the granting of authority would be contrary to public interest.

52 Pa. Code § 41.14(a)-(c).

[3] Section 1103 governs the procedure to obtain certificates of public convenience, and HN3[↑] provides:

(A) GENERAL RULE--Every application for a certificate of public convenience shall be made to the commission in writing, be verified by oath or affirmation, and be in such form, and contain such information, as the commission may require by its regulations. A certificate of public convenience shall be granted by order of the commission, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public. The commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable. In every case, the commission shall make a finding or determination in writing, stating whether or not its approval is granted. Any holder of a certificate of public convenience, exercising the authority conferred by such certificate, shall be deemed to have waived any and all objections to the terms and conditions of such certificate.

66 Pa.C.S. § 1103(a).

[4] Pursuant to the March 22, 2001 final policy statement, 52 Pa. Code § 41.14 was amended, effective May 5, 2001, to include subsection (d), which HN4[↑] provides:

(d) Subsections (a) and (c) do not apply to an applicant seeking authority to provide motor carrier of passenger service under §§ 29.331-29.335 (relating to limousine service).

52 Pa. Code § 41.14(d).

granted review to consider whether the Commonwealth Court gave appropriate deference to the PUC's authority and discretion.

The PUC asserts the Commonwealth Court erred and abused its discretion in limiting its analysis to determining whether there was a public need for the proposed service. The Commonwealth Court opined the necessary or proper standard in 66 Pa.C.S. § 1103(a) required the applicant to prove public necessity for the proposed service. The court reasoned prior PUC policy required a showing of public necessity, and the fact that courts routinely affirmed the PUC's interpretation of its statutory mandate is binding upon the PUC; put simply, the PUC may not change its policy.

HN5[] **[**431]** "Appellate review of a PUC order is limited to determining whether a constitutional violation, an error of law or a violation of PUC procedure has occurred and whether the necessary findings of fact are supported by substantial evidence." Rohrbaugh v. Pa. PUC, 556 Pa. 199, 727 A.2d 1080, 1084 (Pa. 1999) **[***6]** (citing 2 Pa.C.S. § 704).

HN6[] "The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the legislature as expressed by the words employed." Barasch v. Pennsylvania Public Utility Com., 516 Pa. 142, 532 A.2d 325, 331 (Pa. 1987) (citations omitted). HN7[] Though deference to the PUC's discretionary interpretation does not preclude judicial review, courts may not disturb the commission's interpretation regarding a certificate of public convenience unless the result is clearly erroneous, arbitrary, and unsupported by substantial evidence. *See* Peoples Natural Gas Co. v. **[*482]** Pa. PUC, 523 Pa. 370, 567 A.2d 642, 644 (Pa. 1989). When interpreting provisions of the Public Utility Code, and the language of the statute is clear and unambiguous, a court need go no further to discern the legislature's intent. *See* City of Phila. v. Bd. of Fin. & Revenue, 569 Pa. 381, 803 A.2d 1262, 1267 (Pa. 2002). Further, the plain words of the statute may not be ignored, and each word should be given effect. *See* Barasch, at 331. Clearly, the Commonwealth Court ignored the PUC's statutory mandate set out in § 1103(a) **[***7]** and instead substituted its discretion for that of the PUC when it concluded the applicant had to demonstrate public need. In doing so, the court focused only on the word "necessary" rather than on the phrase "necessary or proper." However, the conjunction "or" must be given its ordinarily disjunctive meaning unless such a construction would lead to an absurd result. Forty Fort Borough v. Kozich, 669 A.2d 469, 471 (Pa. Cmwlth. 1995), *affirmed*, 701 A.2d 1009 (Pa. 1997).

Here, the Commonwealth Court deprives the PUC of its discretion and authority under § 1103(a). The Commonwealth Court relied on 52 Pa.Code § 41.14(a) to support its determination the record did not support a finding of public need. However, this regulation was amended prior to the PUC's decision, so as to reflect the change in policy, *i.e.*, now the applicant need not show public need for operating a limousine service.

HN8[] This Court has long recognized the distinction in administrative agency law between the authority of a rule adopted pursuant to an agency's legislative rule-making power and the authority of a rule adopted pursuant to interpretive rule-making **[***8]** power. The former type of rule is the product of an exercise of legislative power by an administrative **[*483]** agency, pursuant to a grant of legislative power by the legislative body, and is valid and is as binding upon a court as a statute if it is (a) within the granted power; (b) issued pursuant to proper procedure, and (c) reasonable. A court, in reviewing such a regulation, is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action involved, it is not enough that the prescribed regulations shall appear to be unwise or burdensome or inferior to another regulatory scheme. Error or lack of wisdom in a ruling is not *per se* equivalent to abuse. A regulation must appear to be so entirely at odds with fundamental principles as to be the expression of a whim rather than an exercise of judgment.

Rohrbaugh, at 1085 (citations omitted). Thus, HN9[] an agency may revise its policies and **[**432]** amend its regulations in interpreting its statutory mandates. Further, past interpretation of a statute, though approved by the judiciary, does not bind the **[***9]** PUC to that particular interpretation. *See also* Seaboard Tank Lines v. PUC, 93 Pa. Commw. 601, 502 A.2d 762 (Pa. Cmwlth. 1985). In *Seaboard*, the Commonwealth Court affirmed the PUC's decision to eliminate the requirement that an applicant demonstrate inadequacy of existing service before a certificate of public convenience would be granted. The court stated:

The PUC's mandate with respect to the granting of certificates of public convenience is a broad one: "a certificate of public convenience shall be granted by

order of the commission, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public." The legislature, however, provided no definition of specifically what the criteria were to be in determining the propriety of granting a certificate, leaving the formulation of such criteria to the PUC. It is true, as discussed above, that courts have consistently articulated the "inadequacy" requirement as an element of a utility's application for authority. Nevertheless, it is evident that the policy of the **[*484]** legislature pursuant to which the original **[***10]** criteria were established does not show an intention that expanded service be allowed only when existing service is inadequate. Rather, we believe that that policy consists of the more broad intention that utilities not be allowed to engage in unrestrained and destructive competition, which activity was thought to be, by its very nature, at odds with the public interest.

Id., at 764-65 (citations omitted) (footnote omitted). Thus, the court acknowledged the PUC's prior interpretations of its statutory mandates are not binding upon it simply because those interpretations received judicial approval in the past. Of import to the court's reasoning was the fact the inadequacy requirement was not statutorily created, but a regulation. *Id., at 766-67*.

Here, the changes in policy and regulation were made in consideration of the public interest. *See* 31 Pa.B. 2385 (Final Policy Statement on Evidentiary Criteria Used to Decide Motor Common Carrier Applications). The PUC acted in public interest by permitting competitive growth in an industry, which results in competitive pricing. *Id.* An applicant seeking to establish a luxury service would be hard pressed to show a "public **[***11]** need" for convenience. Allowing the applicant to meet a less stringent evidentiary burden makes expansion of the market possible. This situation falls squarely within the PUC's area of expertise and is best left to the commission's discretion. Accordingly, we reverse the Commonwealth Court.

Order reversed.

End of Document

Docket No. C-2023-3038201
Michael Hillman v. Aqua Pennsylvania, Inc.

Attachment 2

Popowsky v. PA PUC

Popowsky v. Pa. PUC

Supreme Court of Pennsylvania

May 16, 2005, Argued ; November 21, 2006, Decided

No. 19 MAP 2005

Reporter
589 Pa. 605 *; 910 A.2d 38 **; 2006 Pa. LEXIS 2261 ***

IRWIN A. POPOWSKY, CONSUMER ADVOCATE, Appellant v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, Appellee, PENNSYLVANIA - AMERICAN WATER COMPANY, Intervenor

Prior History: [*1]** Appeal from the Order of the Commonwealth Court entered July 13, 2004 at 1995 CD 2003, 853 A.2d 1097, which affirmed the Order of the Public Utility Commission entered on August 8, 2003 at C-00015377, C-20028177, C-20028361. 853 A.2d 1097 (Pa. Cmwlth. 2004) (en banc). Intermediate Court Judges: James Gardner Colins, President Judge, Bernard L. McGinley, Doris A. Smith-Ribner, Dan Pellegrini, Renee Cohn Jubelirer, Robert E. Simpson, M. Hannah Leavitt, JJ.

Popowsky v. Pa. PUC, 853 A.2d 1097, 2004 Pa. Commw. LEXIS 495 (Pa. Commw. Ct., 2004)

Core Terms

regulations, customer, public utility, public need, Township, bona fide, costs, facilities, existing customers, argues, contributions, residents, contends, annual, conditions, courts, patrons, convenience, employees, territory, Tariff, annual revenue, public water, accommodation, case-by-case, Consumer, disputes, formula, obliged, cost of the project

Case Summary

Procedural Posture
Appellant Office of Consumer Advocate filed complaints against appellee utility company in which it alleged that a township had an inadequate water supply. Appellee Public Utility Commission (PUC) dismissed the complaints. On appeal, the Commonwealth Court (Pennsylvania) affirmed the PUC's decision.

Overview

The issue was whether a demonstration of public need for water alone was sufficient to require the utility to extend its water lines and service without receiving customer contribution when the cost of the extension would exceed the utility's expected revenue. The court stated that the PUC had properly interpreted its line extension regulations, *52 Pa. Code §§ 65.1 - 65.23*, as authorizing a utility to require contributions if the cost of the extension to the utility would exceed the expected return. The regulations were consistent with *66 Pa.C.S. § 1504(1)*, which vested broad powers in the PUC, and with *66 Pa.C.S. § 1501*, which recognized that reasonable conditions could attach to the rendering of service. Thus, the PUC was authorized to adopt regulations that accounted for economic factors. As for the substance of the regulations, there was nothing arbitrary or unreasonable in the PUC fixing the point at which a utility could be deemed to suffer a material economic harm from a mandated line extension as that point where the utility would face an out-of-pocket loss. It was that point where the utility would be forced to either absorb the loss or pass it on to existing customers.

Outcome
The court affirmed the order of the Commonwealth Court.

LexisNexis® Headnotes

Energy & Utilities Law > Utility Companies > General Overview

HN1[] **Energy & Utilities Law, Utility Companies**

A "bona fide service applicant" is defined in the Public Utility Commission's regulations as a person or entity applying for water service to an existing or proposed structure within the utility's certificated service territory for which a valid occupancy or building permit has been issued if the structure is either a primary residence of the applicant or a place of business. 52 Pa. Code § 65.1.

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN2[] **Common Carrier Duties & Liabilities, Rates & Tariffs**

A "tariff" is defined in the Public Utility Code as all schedules of rates, all rules, regulations, practices, or contracts involving any rate or rates, including contracts for interchange of service, and, in the case of a common carrier, schedules showing the method of distribution of the facilities of such common carrier. *66 Pa.C.S. § 102.*

Energy & Utilities Law > Utility Companies > General Overview

HN3[] **Energy & Utilities Law, Utility Companies**

See 52 Pa. Code § 65.21.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

HN4[] **Appeals, Reviewability of Lower Court Decisions**

When additional questions were not the subject of an appellate court's grant of review, it will not consider them.

Energy & Utilities Law > ... > Public Utility Commissions > Hearings & Orders > Judicial Review

HN5[] **Hearings & Orders, Judicial Review**

Appellate review of a Public Utility Commission (PUC) order is limited to determining whether a constitutional violation, an error of law, or a violation of PUC procedure has occurred and whether necessary findings of fact are supported by substantial evidence. 2 Pa.C.S. § 704. When the issues posed are questions of law, the court's review is plenary.

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Energy & Utilities Law > Utility Companies > General Overview

HN6[] **Public Utility Commissions, Authorities & Powers**

See 66 Pa.C.S. § 1501.

Energy & Utilities Law > Utility Companies > General Overview

HN7[] **Energy & Utilities Law, Utility Companies**

See 52 Pa. Code § 65.21.

Environmental Law > Water Quality > General Overview

HN8[] **Environmental Law, Water Quality**

There is no dispute that safe water implicates public safety. Pa. Const. art. 1, § 27 ("The people have a right to clean air, pure water"); 35 Pa. Stat. Ann. § 721.2(a)(1) ("An adequate supply of safe, pure, drinking water is essential to the public health, safety and welfare").

Energy & Utilities Law > Utility

Companies > General Overview

HN9[] Energy & Utilities Law, Utility Companies

A person will not be deemed a bona fide service applicant if any of the following apply: (i) The applicant is requesting water service to a building lot, subdivision or secondary residence. (ii) The request for service is part of a plan for the development of a residential dwelling or subdivision. (iii) The applicant is requesting special utility service. 52 Pa. Code § 65.1.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation

HN10[] Agency Rulemaking, Rule Application & Interpretation

When a court reviews an administrative agency's interpretation of its own regulations, it must follow a two-step analysis. First, in construing administrative regulations, the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. Second, the regulations must be consistent with the statute under which they were promulgated.

Energy & Utilities Law > Utility Companies > General Overview

HN11[] Energy & Utilities Law, Utility Companies

The Public Utility Commission (PUC) has interpreted its line extension regulations, 52 Pa. Code §§ 65.1 - 65.23, as authorizing a utility to require contributions from bona fide service applicants if the cost of the extension project to the utility will exceed the expected return on the extension. This interpretation is wholly consistent with the plain language of the regulations. Indeed, the regulations include an algebraic equation used to determine the amount of utility (and ultimately customer) contribution.

Administrative Law > Agency Rulemaking > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Validity

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation

HN12[] Administrative Law, Agency Rulemaking

The Supreme Court of Pennsylvania has long recognized the distinction in administrative agency law between the authority of a rule adopted pursuant to an agency's legislative rule-making power and the authority of a rule adopted pursuant to interpretive rule-making power. Legislative rule-making is an exercise of legislative power by an administrative agency, pursuant to a grant of legislative power by the legislative body, and is valid and is as binding upon a court as a statute if it is (a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable. An appellate court, in reviewing such regulations, may not substitute its own judgment for that of the agency. To overturn these sorts of regulations, it is not sufficient that they are unwise or burdensome or inferior to another regulatory scheme; rather, they must be so entirely at odds with fundamental principles as to be the expression of a whim rather than an exercise of judgment. As a consequence, an agency may revise its policies and amend such regulations in interpreting its statutory mandates. Further, past interpretation of a statute, though approved by the judiciary, does not bind the Public Utility Commission to that particular interpretation.

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Validity

HN13[] Standards of Review, Rule Interpretation

An interpretative rule depends for its validity not upon a law-making grant of power but rather upon the willingness of a reviewing court to say that it in fact tracks the meaning of the statute it interprets. While courts traditionally accord the interpretation of the agency charged with administration of the act some deference, the meaning of a statute is essentially a question of law for the court, and, when convinced that

the interpretative regulation adopted by an administrative agency is unwise or violative of legislative intent, courts disregard the regulation.

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

HN14[] Public Utility Commissions, Authorities & Powers

66 Pa.C.S. § 1504(1) vests broad powers in the Public Utility Commission (PUC): The commission may, after reasonable notice and hearing, upon its own motion or upon complaint: (1) Prescribe as to service and facilities, including the crossing of facilities, just and reasonable standards, classifications, regulations and practices to be furnished, imposed, observed, and followed by any or all public utilities. The rule-making power conferred by this provision is legislative in nature. Therefore, to be binding, regulations must fall within the power delegated to the PUC, be enacted according to proper procedures, and be reasonable.

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

HN15[] Public Utility Commissions, Authorities & Powers

Although 66 Pa.C.S. §§ 501 and 1501 certainly support that the Public Utility Commission has the authority to adopt regulations, the source of this authority comes from 66 Pa.C.S. § 1504(a).

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Energy & Utilities Law > Utility Companies > General Overview

HN16[] Public Utility Commissions, Authorities & Powers

While 66 Pa.C.S. § 1501 speaks to necessary extensions, it does not purport to speak to the economics of required extensions, much less does it suggest that the Public Utility Commission (PUC) is obliged to conclude that the entire cost of a water line extension must be borne by the utility. Indeed, § 1501 later states in explicit terms: "Subject to the provisions of this part and the regulations and orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service." Thus, in addition to the fact that the delegated power does not affirmatively restrict the PUC from authorizing customer contribution, the statute affirmatively recognizes that reasonable conditions may attach to the rendering of mandated service. Given the plain language of this construct, as well as the broad power delegated to the PUC to adopt "just and reasonable standards" under 66 Pa.C.S. § 1504, the PUC is authorized to adopt line extension regulations which account for economic factors.

Energy & Utilities Law > Utility Companies > General Overview

HN17[] Energy & Utilities Law, Utility Companies

The distinction the Public Utility Commission's line extension regulations, 52 Pa. Code §§ 65.1 - 65.23, draw between bona fide service applicants and other applicants--i.e., requiring utility investment only when the request is made by a bona fide service applicant, as opposed to a developer, or a secondary home owner, or an applicant requesting special service, 52 Pa. Code § 65.1--show that public need is specifically accounted for. The fact that public need may trigger a mandated extension, however, is separate and apart from the question of whether the utility must always bear the entire cost of the project.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

HN18[] Standards of Review, Abuse of Discretion

In passing upon the reasonableness of a discretionary agency action, appellate courts must accord deference to the agency and may only overturn an agency determination if the agency acted in bad faith or the

regulations constituted a manifest or flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions.

Energy & Utilities Law > Utility Companies > General Overview

HN19 **Energy & Utilities Law, Utility Companies**

Generally, water utilities are required to fund main line extension requests made by bona fide service applicants, but only so long as the project would not burden existing customers nor cause material economic harm to the companies.

Energy & Utilities Law > Utility Companies > General Overview

HN20 **Energy & Utilities Law, Utility Companies**

The Public Utility Commission's line extension regulations, 52 Pa. Code §§ 65.1 - 65.23, are reasonable and, as such, there is no basis for a court to interfere with them.

Energy & Utilities Law > Utility Companies > Rates > General Overview

Energy & Utilities Law > Utility Companies > General Overview

HN21 **Utility Companies, Rates**

A utility company is subject to separate regulations for the establishment and increases of its rates. 52 Pa. Code § 53.1 et seq. These requirements are separate and apart from the line extension regulations, 52 Pa. Code §§ 65.1 - 65.23. Rates are intended to compensate the utility for its ongoing service, i.e., providing regular water service, and are not required to be viewed as containing a component which compensates the provider for unrelated projects or expenditures, such as line extensions for the benefit of new customers.

Counsel: For Irvin A. Popowsky, APPELLANT: Joel Howard Cheskis, Esq. and Dianne Elaine Dusman, Esq.

For Collier Township, APPELLANT AMICUS CURIAE: Charles M. Means, Esq. and Mandi Lea Scott, Esq.

For Pennsylvania Public Utility Commission, APPELLEE: Bohdan R. Pankiw, Esq., Wayne Thomas Scott, Esq., Robert James Longwell, Esq., and Jaime Marie McClintock, Esq.

For Pennsylvania-American Water Company, INTERVENOR: Anthony C. DeCusatis, Esq., Thomas Parker Gadsden, Esq., and Susan Simms March, Esq.

Judges: COMPOSITION OF THE COURT: CAPPY, C.J.; CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, and BAER, JJ. MR. JUSTICE CASTILLE. Mr. Chief Justice Cappy and Messrs. Justice Saylor, Eakin and Baer join the opinion. Former Justice Nigro did not participate in the decision of this case. Madame Justice Newman files a dissenting opinion.

Opinion by: CASTILLE

Opinion

[*609] [40] MR. JUSTICE CASTILLE**

The issue on appeal is whether a demonstration of public need for water alone is sufficient to require a water company to extend its water lines and service without receiving customer contribution, in an instance where the cost of the extension project would exceed the company's expected revenue from the extension. Because we find that the Public Utility Commission's ("PUC's") line extension regulations, which authorize a utility to require customer contribution in an instance such as this, are a proper application of statutory authority, we affirm.

On May 3, 2001, Cindy Parks filed a complaint with the PUC alleging that the town of **[***2]** Hickory in Mount Pleasant Township, Washington County, lacked public water that residents and property owners both needed and wanted. [1] **[***3]** The Township is located within the service territory of appellee/intervenor the Pennsylvania-American Water Company (the "PAWC" or the "utility"). On May 24, 2001, the PAWC filed an answer containing a general denial of the allegations in the **[*610]** complaint and a request that the complaint be

[1] Pursuant to Rule 1952(b) of the Rules of Appellate Procedure, the PUC has filed a certified list of documents in lieu of an official record. Where necessary, we will rely upon the reproduced record supplied by the parties.

dismissed. The PAWC alleged that it was willing to provide water service to bona fide service applicants [2] in the Township pursuant to the terms of Rule 27 of its Tariff, which was approved by the PUC and filed in compliance with the PUC's line extension regulations. [3] Rule 27 governs **[**41]** main extensions for bona fide service applicants. The significance of the PAWC's allegation, briefly stated, is that the PUC's regulations (and Rule 27, which implements those regulations) permit a utility to require customer contributions to a water extension project if the cost of the project exceeds what the regulations require the utility to contribute. [4]

[*4]** On June 14, 2001, the Office of Consumer Advocate ("OCA") filed a Motion of Intervention and Public Statement, stating that it intended to assist Parks and other Township residents to obtain public water at the lowest reasonable cost. After a pre-hearing conference, by letter dated January 25, 2002, the OCA requested an indefinite suspension of the litigation schedule because of an agreement between the parties that the PAWC would apply for a Penn Vest loan. Penn Vest **[*611]** loans are issued pursuant to the Pennsylvania Infrastructure Investment Authority Act, 35 P.S. §§ 751.1 - 751.20. The Act authorizes, *inter alia*, low-cost financing for water supply, sewage and stormwater projects to promote the health and safety of Pennsylvania citizens. Id. § 751.2. On January 28, 2002, an Administrative Law Judge ("ALJ") granted the OCA's request and suspended litigation. On July 18, 2002, however, the PAWC and the OCA apprised the ALJ that they were unable to reach an agreement.

On August 21, 2002, the OCA filed a complaint against the PAWC, alleging that the Township had an inadequate quantity and quality of water. The OCA requested **[***5]** that the PAWC be required, at the PAWC's sole expense, to extend its water service into the Township and alleged that the PAWC was in violation of Section 1501 of the Public Utility Code, 66 Pa.C.S. § 101 et seq., which requires public utilities to extend water lines "as shall be necessary ... for the accommodation, convenience and safety of its patrons, employees, and the public." Id. § 1501. On September 12, 2002, the PAWC filed an answer denying the claims made by the OCA, and asserting that it would extend service to bona fide service applicants if the terms of its Tariff were satisfied. Pursuant to that Tariff (and the PUC regulations it tracked), the PAWC claimed that it was obliged to expend $ 6200 per bona fide service applicant for the extension of water service, but the remainder of the cost of the project would have to be borne by the service applicants or some other entity on behalf of the applicants.

ALJ Larry Gesoff held evidentiary hearings on September 9, 2002 and December 3, 2002. Local residents, landowners and community leaders testified regarding the inadequate water supply and poor and unsafe quality of their water. Residents **[***6]** testified to problems they had encountered in accessing water, the costs they had expended in installing and maintaining equipment used to obtain, store and render potable their water supplies, and other costs attributable to having to turn elsewhere for water or water-related services **[**42]** (such as clothes laundering). Residents also testified to the danger posed in the event of a fire, as water for fighting fires must be **[*612]** brought by tanker truck; indeed, one home was destroyed by fire because firefighters ran out of water, and another resident lost a barn and 110 sheep to a fire.

The parties disputed the question of whether the line extension project was one that would require customer contribution under the Commission's line extension regulations and the PAWC's Rule 27. The PAWC argued that the cost of the project would exceed its

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[2] HN1[↑] A "bona fide service applicant" is defined in the PUC's regulations as: "[a] person or entity applying for water service to an existing or proposed structure within the utility's certificated service territory for which a valid occupancy or building permit has been issued if the structure is either a primary residence of the applicant or a place of business." 52 Pa. Code § 65.1.

[3] HN2[↑] A tariff is defined in the Public Utility Code as "[a]ll schedules of rates, all rules, regulations, practices, or contracts involving any rate or rates, including contracts for interchange of service, and, in the case of a common carrier, schedules showing the method of distribution of the facilities of such common carrier." ***66 Pa.C.S. § 102***.

[4] In 1999, the PAWC filed its Tariff with the PUC pursuant to Section 1501 of the Public Utility Code, 66 Pa.C.S § 101 et seq. Section 1501 provides in pertinent part that, "every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service." 66 Pa.C.S. § 1501. Consistently with Section 65.21 of the PUC's regulations, Rule 27 delineates, among other things, the circumstances under which an extension of service will occur, the formula by which the PAWC's required contribution will be calculated, the formula for calculating customer contribution when the costs of the extension exceed the company's contribution, the manner in which customer contributions must be forwarded, and financing for customer contributions.

required investment, and thus it was entitled to request customer contribution as a condition of undertaking the project, while the OCA argued that the PAWC's required investment would be substantially more than the cost of the project, and thus, no customer contribution would be required. To understand the competing calculations requires some understanding **[***7]** of the operation of the regulations. The regulations provide a method for determining the investment required of the utility for each "bona fide service applicant." That per-applicant investment is then multiplied by the number of bona fide service applicants; the total dollar figure represents the utility's required investment. The utility's investment amount is then measured against the estimated cost of the project. If the utility investment exceeds the cost, no customer contribution is required. If the required utility investment is less than the project cost, however, contribution may be requested of bona fide service applicants, whose individual obligation is determined by simply dividing the cost difference by the number of applicants.

The PAWC produced evidence that the main line water extension project in the Township (as proposed by the OCA) would involve in excess of 83,000 feet of water mains and a one-million gallon storage tank, and would cost $ 6,290,499. Calculating its investment obligation, the PAWC assumed 744 new customers as bona fide service applicants. [5] **[***9]** Applying the algebraic formula set forth in Section 65.21(3) of the PUC's **[*613]** regulations, the PAWC claimed, **[***8]** it would be required to invest $ 6,200 for each bona fide service applicant. [6] (In contrast, the utility noted, its investment in its **[**43]** existing facilities servicing existing

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[5] The PAWC's number of 744 potential bona fide service applicants was calculated by taking the total possible customers (701) in the Township and adjusting for the 17 non-residential customers included in that figure. The 17 non-residential customers were deemed to be the equivalent of 60 residential customers. The PAWC thus used the following equation: 701 - 17 + 60 = 744. Supplemental Testimony of Jay Lucas, at 6.

The ALJ ultimately rejected the 744 figure because it assumed that the Township would pass a mandatory connection ordinance or otherwise underwrite the project, which the ALJ deemed "unlikely to occur."

[6] Section 65.21(3) provides as follows: *HN3*[↑] The utility's investment for the line extension shall be based on the following formula, where X equals the utility's investment attributed to each bona fide applicant:

Go to table1

X

=

[AR-OM] divided by [I + D]; and,

AR

=

the utility's annual revenue

OM

=

the utility's operating and maintenance costs

I

=

the utility's current debt ratio multiplied by the

utility's weighted long-term debt cost rate

D

=

the utility's current depreciation accrual rate

52 Pa. Code § 65.21.

The PAWC calculated its obligation per bona fide service applicant as follows:

Go to table2

Average Annual Revenue:

$ 424

Less: Operating and Maintenance Expense:

$ 104

Subtotal:

$ 320

Divided by:

Go to table3

Depreciation Rate for 8" mains:

1.08%

Plus: Weighted Cost of Debt:

4.08%

Go to table4

Composite Rate:

0.0516

customers was only $ 2,309.) Multiplying its per-applicant obligation by the 744 applicants it projected, the PAWC calculated its required investment in the project to be $ 4,612,800 (744 x $ 6,200). Taking the $ 1,677,699 difference between the cost of the project and its required investment, the PAWC then calculated the customer contribution of each bona fide service applicant to be $ 2,255 (*i.e.*, $ 1,677,699 / 744). The actual contribution could be either more or less depending upon how many residents actually took service upon completion of the project, and indeed, under the regulations, the PAWC would be obliged to provide refunds to the original service applicant-contributors if additional customers attached to the new water mains in the ensuing ten years. [7]

[*10] [*614]** The OCA countered with evidence that the extension project should only cost $ 5.3 million. N.T.12/3/2002, at 393. The OCA's calculation was supported by the testimony of Terry L. Fought, a self-employed consulting engineer, who stated that the PAWC's project estimate included water mains that were oversized, pumping stations and tanks designed to serve more customers than had indicated an interest in the service, and facilities that would improve service to existing customers. Direct Testimony of Terry L. Fought, at 5. The OCA's calculations also differed from the PAWC's because the OCA assumed a Penn Vest interest rate of 1.387% in the debt portion of the formula, rather than the 4.08% rate the utility employed. Finally, the OCA suggested that there were 568 potential bona fide service applicants. [8] Based upon these figures, the OCA argued that the PAWC's investment obligation would be $ 12,971 per bona fide service applicant for a total project obligation of $ 7,367,528, a figure well in excess of the OCA's estimated project cost of $ 5.3 million, and also in excess of the PAWC's estimate of the project cost. [9] Under **[*615]** the **[**44]** OCA's evidence, the break-even point for the PAWC under **[***11]** the regulatory formula would require only 409 bona fide service applicants. N.T. 12/3/2002, at 393.

In a comprehensive, 89-page decision and order filed **[***12]** on April 16, 2003, ALJ Gesoff dismissed the complaints. Relevant to the issue before this Court, the ALJ found that the Township was in need of a dependable water source due to the diminishing quantity and quality of the water available, but that the need for water alone did not oblige the PAWC to extend its service without customer contribution. Instead, the ALJ found that the application of the PUC line extension regulations, and the PAWC's tariff, were reasonable, and that application of those regulations would require customer contribution. In reaching this conclusion, the

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Company Investment:

$6,200

[7] New water customers would be able to finance their contribution by paying the utility a one-third down payment and then paying the balance over a period of three years at an interest rate equal to the utility's cost for long-term debt. The PAWC also identified three banks in Washington County offering home equity loans at 4.75. The pre-tax cost of the loan, it was estimated, would be less than $ 30 per month. Supplemental Testimony of Paul T. Diskin, at 6-7.

[8] The OCA's number of potential bona fide service applicants was based upon the results of a survey of 701 residents. Of the 530 residents who responded to the survey, 430 (or 81) stated that they would connect to the public water system so long as customer contribution was not required. The OCA "extrapolated" from this response the inclinations of those who had not responded and then estimated a total of 568 (81 of 701) prospective customers in the Township.

[9] The OCA calculated PAWC's obligation per bona fide service applicant as follows:

Go to table5

Average Annual Revenue:

$ 424

Less: Operating and Maintenance Expense:

$ 104

Subtotal:

$ 320

Divided by:

Go to table6

Depreciation Rate for 8" mains:

1.08%

Plus: Weighted Cost of Debt:

1.387%

Go to table7

Composite Rate:

0.02467

Company Investment:

$ 12,971

ALJ accepted the PAWC's weighted cost of debt and its estimated cost of the project. PUC Initial Decision, at 56-70. [10] The ALJ also rejected the OCA's argument that an exception to the regulations and their application was appropriate.

The OCA filed exceptions **[***13]** to the ALJ's order with the PUC and the PAWC filed reply exceptions. In an opinion and order entered on August 8, 2003, the PUC denied the OCA's exceptions, adopted the ALJ's Initial Decision to the extent it was consistent with the PUC's opinion and order, and dismissed the complaints. The PUC rejected the OCA's argument that the demonstration of public need alone requires the extension of water lines at the utility's expense, noting that it had already considered and rejected that argument in previous cases, including a challenge brought by the OCA to the PAWC's adoption of its Tariff Rule 27. Opinion and Order at 5, *citing* *Popowsky v. Pennsylvania-American Water Co., Docket No. R-00943155C001, 1997 Pa. PUC LEXIS 142* (order entered June 9, 1997). In the prior decision, the PUC had noted that, although the OCA's suggestion of such a duty upon the part of the utility "is an interesting social program," neither the Commission nor the courts had required it, and **[*616]** such a program "would make the utility the provider of last resort without regard to cost."

The PUC also dismissed the OCA's claim that the PUC should waive the regulations upon a showing of compelling need. **[***14]** The PUC acknowledged that it had the authority to waive a requirement in its regulations, but only if the waiver would not adversely affect the substantive right of a party. Id. at 7. The PUC then went on to explain at some length why the waiver/exception posed by the OCA was neither required nor acceptable:

> [The PUC's line extension] regulations were approved by the Commission's Order entered on October 7, 1996... . Following approval by the Independent Regulatory Review Commission (IRRC) and the applicable committees of the Pennsylvania House and Senate, the regulations and the Commission['s] October **[**45]** 7, 1996 Order were published at 27 *Pennsylvania Bulletin* 799 *et seq.* (February 15, 1997). The final line extension regulations were three years in the making and reflect the Commission's definitive statement of how requests for main extensions by "Bona Fide Service Applicants" are to be resolved.
>
> We also note that ignoring the existence of our line extension regulations, as advocated by the OCA, would open the door to a pattern of burdensome, case-by-case litigation of requests for line extensions. As the Commission made clear in its October 7, 1996 Order, our **[***15]** line extension regulations were adopted for the express purpose of supplanting case-by-case adjudications, which experience had shown to be unacceptable. (27 *Pa. Bull.* at 800.) Yet the broad "exception" urged by the OCA in this proceeding, *i.e.*, a "public need" exception, would make virtually all line extensions subject to such burdensome case-by-case litigation. Therefore, we find that this case is governed by our regulations on line extensions and that the presiding ALJ applied the appropriate standard of review.

Id. In response to additional objections from the OCA, the PUC further upheld the ALJ's determinations that, *inter alia*: (1) under the regulatory definition of the term, there were no **[*617]** bona fide service applicants, and thus, the OCA could not show that the utility-required investment would exceed the cost of the project; (2) OCA's proffered use of a Penn Vest interest rate in computing the utility-required investment was inappropriate; and (3) PAWC's estimate of the cost of the project was accurate.

The OCA then appealed to the Commonwealth Court, which affirmed in a divided, published, *en banc* decision. *Popowsky v. Pa. PUC, 853 A.2d 1097 (Pa. Cmwlth. 2004)* **[***16]** (*en banc*). The panel majority, per the Honorable Mary Hannah Leavitt, summarized the issues as follows: (1) whether the PUC's application of its line extension regulations violated Pennsylvania case law holding that a utility must bear the capital expense of extending service where there is a public need for that service; (2) whether the PUC'S acceptance of the PAWC's interpretation of Rule 27 of its Tariff "nullified" the PUC's duty to adjudicate complaints pursuant to the Public Utility Code; and (3) whether the PUC's decision was supported by substantial evidence.

Respecting the first question, the majority noted that it was undisputed that the PUC's regulations were adopted in compliance with the requirements of the Commonwealth Documents Law, *45 P.S. § 1102 et seq.*, the Commonwealth Attorneys Act, *71 P.S. § 732-*

[10] Given the limited nature of the issues properly before us, see note 12 *infra*, the reasons for the ALJ's crediting PAWC's position in this regard are of no moment.

204(b), and the Regulatory Review Act, 71 P.S. §§ 745.1-745.15. The OCA argued, however, that the regulations as so adopted conflicted with a duty every utility has under Section 1501 the Public Utility Code to provide service to the public where **[***17]** a need for such service is established. In the OCA's view, the PUC was obliged to allow for an exemption from customer contributions on a case-by-case basis in "public need" instances where such an exemption would not cause the utility "material, economic harm."

Before analyzing the OCA's public need claim, the majority outlined the history and purpose of the PUC's regulations. The majority began by citing Section 1501 of the Code, which expressly authorizes a utility, with the approval of the PUC, to adopt "reasonable rules and regulations governing the conditions under which it shall be required to render service." 66 Pa.C.S. 1501. **[*618]** The majority then noted that the PUC had determined that it was **[**46]** reasonable to require customer contribution to a main extension "if necessary to prevent the utility from a negative return on investment, *i.e.*, the utility must realize at least a 'break even' return on mandated extensions." 853 A.2d at 1104. The majority further noted that the PUC had spent three years finalizing the line extension regulations; that the regulations expressed the PUC's "definitive statement" of the "reasonable conditions" under **[***18]** which public utilities were required to provide main extensions to bona fide service applicants; and that, in adopting the conditions, the PUC balanced the needs of the bona fide service applicant seeking the extension against "'the right of the public utility to remain financially viable and the right of existing customers to avoid subsidizing uneconomic line extensions for new customers.'" Id. at 1104 (quoting 27 Pa. B. 799, 800 (1997) (setting forth regulations) (majority's emphasis deleted). Finally, the majority quoted the PUC's statement of purpose respecting the regulations: "'the purpose of this rulemaking is to create a fair, reasonable, and predictable economic standard to address this regulatory problem that will eliminate uncertainty and greatly reduce the litigation in this area.'" Id.

With this background in mind, the majority turned to the OCA's public need argument, noting that the OCA principally relied upon Ridley Township v. Pennsylvania Public Utility Comm'n, 172 Pa. Super. 472, 94 A.2d 168 (Pa. Super. 1953), which it cited for the proposition that public utilities must provide service without customer contribution unless the **[***19]** utility can demonstrate "material economic harm to the utility or undue burden upon existing customers." The majority disagreed with the OCA's reading of Ridley Township, concluding that, in fact, that case recognized that the PUC has discretion to determine when customer contribution is appropriately required for a line extension project, and noting that subsequent appellate cases support this reading of the case. 853 A.2d at 1105-06, citing Colonial Products Co. v. Pennsylvania Public Utility Comm'n, 188 Pa. Super. 163, 146 A.2d 657 (Pa. Super. 1958) and Lynch v. **[*619]** Pennsylvania Public Utility Comm'n, 140 Pa. Commw. 599, 594 A.2d 816 (Pa. Cmwlth. 1991). Moreover, Ridley Township could not be deemed dispositive because it predated enactment of the line extension regulations and, the majority reasoned, an agency is not bound to follow a narrow interpretation in a prior appellate case that was rendered in the absence of such regulations.

The majority went on to note that Section 1504 of the Public Utility Code provides the PUC with the express power to prescribe by regulation "just and reasonable standards ... to be furnished, imposed, **[***20]** observed and followed by any and all public utilities." 66 Pa.C.S. § 1504(1). The majority further noted that, in its order adopting the line extension regulations, the PUC stated its belief that the regulations were consistent with Ridley Township because "a negative equity return is a material handicap." 853 A.2d at 1106. The majority then explained that Rule 27 of the PAWC's tariff was approved by the PUC because it satisfied the standards outlined in the regulations.

Turning to the effect of the regulations, the majority noted that agency regulations are binding on the court so long as they are in accord with the power delegated to the agency, are enacted with proper procedures, and are reasonable; and an agency's interpretation of its own regulations will be deemed controlling unless it is plainly erroneous or inconsistent with the regulation. 853 A.2d at 1106, citing Moyer v. Berks County Bd. of Assessment Appeals, 803 A.2d 833, 842 (Pa. Cmwlth. 2002). In the case *sub judice*, the majority found, **[**47]** the PUC's interpretation of the regulations was not clearly erroneous and the regulations themselves were **[***21]** consistent with the judicial interpretation of Section 1501, as found in Ridley Township and its progeny. Accepting the OCA's "public need" exception, the majority reasoned, would vitiate the line extension regulations and would mean that all line extension disputes would be subject to "ponderous and protracted case-by-case litigation," which was precisely the result the regulations were designed to avoid. Thus, the majority concluded, the PUC did not err in applying its regulations in this case, and the complaints were

properly dismissed.

[*620] The majority then turned to the OCA's argument that application of the "break-even" analysis codified in the regulations "nullified" the PUC's duty to adjudicate individual consumer complaints. The majority recognized this argument to be "simply a rephrasing" of the OCA's primary argument that the utility must bear all costs where a public need is established. In addition to disputing that there would be no role for the PUC under the regulation, the majority rejected the core of the argument as follows:

> The fact that the PUC has established standards that give meaning to the requirement in Section 1501 that a utility establish "reasonable **[***22]** conditions" for extending service is not an abdication of responsibility. To the contrary, giving precision to what otherwise may be characterized as an open-ended statute is a proper exercise of the PUC's responsibility.

853 A.2d at 1107-08 (footnote omitted).

Finally, the majority discussed at some length, and ultimately rejected, the OCA's fact-bound claim that the order of the PUC was not supported by substantial evidence. Since the propriety of that determination was not challenged in the allocatur petition in this matter, see discussion infra, the specifics of the claim, and the court's reasoning, are of no moment here.

Judge Smith-Ribner authored a dissenting opinion, which President Judge Colins joined. The dissent confined itself to the OCA's public need argument. The dissent noted that the "break-even" formula adopted in the PUC's regulations determines a utility's financial obligation for service extension by looking only to "costs and revenue, without separate regard for the degree of public need for the service extension." In the dissent's view, the PUC's "categorical" exclusion of public need as an independent factor in determining whether **[***23]** customer contributions should be required "contravenes" Section 1501's "mandate ... that a public utility "'shall make all such ... extensions ... as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public.'" Popowsky, 853 A.2d at 1111 **[*621]** (Smith-Ribner, J., dissenting), quoting 66 Pa.C.S. § 1501. The dissent did not dispute that customer contribution might be deemed appropriate where there is no demonstrated public need or where the costs in extending service would be prohibitive to the utility or risk its ability to earn a fair return on its entire operation; but, the dissent maintained, the Commission had to recognize public need as a relevant factor and in some instances it might be a determinative factor. Because the record in the case *sub judice* demonstrated a public need for the extension, the dissent concluded, the PUC should have waived its regulations and made a determination regarding the degree of service extension required to ensure the public health and safety. Popowsky, 853 A.2d at 1111-12 (Smith-Ribner, J., dissenting).

The OCA petitioned this **[***24]** Court for further review, raising three questions **[**48]** which, in actuality, were all permutations of a basic claim concerning whether the Commonwealth Court and the administrative tribunals erred in determining that a demonstrated public need for water alone is not enough to require a water utility to extend service without customer contribution under Section 1501. We granted review. [11]

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[11] The OCA's petition for allowance of appeal contained the following questions:

> 1. Whether the Commonwealth Court erred by failing to require a utility to forward the costs of line extension without customer contribution upon a showing of public need?
>
> 2. Whether the Commonwealth Court erred in its determination that the line extension regulations were consistent with Section 1501 of the Public Utility Code?
>
> 3. Whether the Commonwealth Court erred in finding that the PUC did not abuse its discretion when it required customer contributions even though there had been a demonstration of public need?

In its appellate brief, however, the OCA lists these two additional questions:

> 4. Whether the PUC's decision that the project was uneconomical was supported by substantial evidence?
>
> 5. Whether the PUC erred by dismissing the complaints on the grounds that there were no bona fide applicants?

Brief for Appellant, at 7. The OCA fails to acknowledge that it did not seek review of these questions in its allocatur petition, much less does it explain why it believes it is entitled to consideration of them. HN4[↑] Because the additional questions were not the subject of our grant of review, we will not consider them. See Continental Ins. Co. v. Schneider, Inc., 582 Pa. 591, 873 A.2d 1286, 1294 n.11 (Pa. 2005).

We also note that the OCA confuses matters further because its argument is divided into 12 parts with no attempt to relate the dozen parts back to any particular question. Again, we will

[*25] [*622]** HN5[↑] Appellate review of a PUC order is limited to determining whether a constitutional violation, an error of law, or a violation of PUC procedure has occurred and whether necessary findings of fact are supported by substantial evidence. 2 Pa.C.S. § 704; Rohrbaugh v. Pennsylvania Public Utility Comm'n, 556 Pa. 199, 727 A.2d 1080, 1084 (Pa. 1999). The questions on appeal involve the proper interpretation of the Public Utility Code and the validity of the line extension regulations promulgated by the PUC pursuant to that Code. The OCA essentially alleges errors of law with respect to these points. Since the issues so posed are questions of law, this Court's review is plenary. Street Road Bar & Grille, Inc. v. Pennsylvania Liquor Control Bd., 583 Pa. 72, 876 A.2d 346, 352 (Pa. 2005).

The core of the dispute centers on the meaning of Section 1501 of the Code, and the congruence of the PUC's regulations with that provision. Section 1501 provides as follows:HN6[↑]

> Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, **[***26]** substitutions, extensions, and improvements in or to such service facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the regulations and orders of the commission, every public utility may have reasonable rules **[**49]** and regulations governing the conditions under which it **[*623]** shall be required to render service. Any public utility beyond its corporate limits shall be subject to regulation and control by the commission as to service and extensions, with the same force and in like manner as if such service were rendered by a public utility. The commission shall have sole and exclusive jurisdiction to promulgate rules and regulations for the allocation of natural or artificial gas supply by a public utility.

66 Pa.C.S. § 1501. The PUC has adopted regulations that address the instances in which a public utility company is required to extend its **[***27]** services. 52 Pa. Code §§ 65.1 - 65.23. Section 65.21, entitled "Duty of public utility to make line extensions," addresses when customer contributions (advances) may (or may not) be required of bona fide service applicants, adopting what is indeed essentially a "break-even" analysis:HN7[↑]

> Each public utility shall file with the Commission, as part of its tariff, a rule setting forth the conditions under which facilities will be extended to supply service to an applicant within its service area. Upon request by a bona fide service applicant, a utility shall construct line extensions within its franchised territory consistent with the following directives:
>
> (1) Line extensions to bona fide service applicants shall be funded without customer advance if the annual revenue from the line extension will equal or exceed the utility's annual line extension costs.
>
> (2) If the annual revenue from the line extension will not equal or exceed the utility's annual line extension costs, a bona fide service applicant may be required to provide a customer advance to the utility's cost of construction for the line extension. The utility's **[***28]** investment for the line extension shall be the portion of the total construction costs which generate annual line extension costs equal to annual revenue from the line extension. The customer advance amount shall be determined by subtracting the utility's investment for the line extension from the total construction costs.

[*624] 52 Pa. Code § 65.21. Subsection (3) sets forth the algebraic formula for computing the utility's required investment. See supra n.6.

The parties track the positions they established in the proceedings below. The OCA focuses on the language in Section 1501 providing that utilities shall make all extensions "as shall be necessary or proper for the ... safety of its patrons, employees and the public." The OCA construes the statute as dictating that utilities are required to provide line extensions upon a showing of public need alone, and thus the PUC's regulations must account for public need. The OCA argues that there clearly was a showing of public need for water service in the case *sub judice* and the Commonwealth Court majority ignored the statutory mandate that that need be

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consider only those points arguably encompassed in the allocatur grant and argued with relevance and specificity in the appellate brief. We caution the OCA that this lack of order and focus alone could warrant dismissal of the appeal as improvidently granted.

considered. [12] The OCA differentiates public **[***29]** utilities from unregulated businesses and argues that the PAWC is a territorial monopoly, which has a statutory duty to provide line extensions to communities **[**50]** within its territory that have a demonstrated need for public water service.

In support of its position, the OCA relies upon Ridley Township and a 1992 policy statement from the PUC declaring that the holding in Ridley Township was the policy of the Commission. [13] It claims that Ridley Township requires utilities to **[***30]** shoulder the costs required to extend typical residential service, unless the extension would prevent the utility from earning a return on its overall operations or would become an undue burden on existing customers. The regulations, the OCA contends, are inconsistent with Ridley Township.

[*625] The OCA also argues that the case law suggests that line extension disputes fall into two categories: those where there is a demonstrated need for ordinary residential service, and those where an individual or a developer seeks a particular type of special service. Citing *Lynch v. Pennsylvania Public Utility Comm'n, 140 Pa. Commw. 599, 594 A.2d 816 (Pa. Cmwlth. 1991)*, the OCA contends that customer contribution for construction is appropriate when an applicant requests a special service or a developer seeks a line extension to its project. The OCA cites **[***31]** *Riverton Consolidated Water Co. v. Public Service Comm'n, 105 Pa. Super. 6, 159 A. 177 (Pa. Super. 1932)*, as an instance where the PUC required a utility to provide a line extension even when doing so would not result in an immediate profit for that utility. See also *McCormick v. Pennsylvania Public Utility Comm'n, 48 Pa. Commw. 384, 409 A.2d 962 (Pa. Cmwlth. 1980)*; *Philadelphia Rural Transp. Co. v. Public Service Comm'n, 103 Pa. Super. 256, 158 A. 589 (Pa. Super. 1931)*.

The OCA further argues that the PUC's interpretation and application of the statute and the line extension regulations in this case is inconsistent with the meaning and intent of *Section 1501* and is unreasonable. The OCA contends that the PUC failed to implement the plain language of *Section 1501*, neglected to give effect to all of the Code's provisions, and ignored its responsibility to consider public interest over private concerns. Thus, the OCA contends, even though the PUC had the authority to promulgate the line extension regulations and did so in a procedurally proper manner, the regulations should be overturned because their application and interpretation **[***32]** produced an unlawful result here.

Finally, the OCA argues that requiring the utility to extend service without new customer contribution would not result in an ultimate loss to the utility because the utility would benefit from the revenue generated by new customers. Traditionally, it argues, rates are determined by averaging all costs associated with a particular customer class; thus, utilities do not charge individual customers for the costs of repairs to their specific lines. Such principles, the OCA contends, should also be considered in line extension cases. The OCA suggests that **[*626]** the PAWC has repeatedly requested base rate increases and through such future increases will recover the costs of extending service.

The PAWC and the PUC have filed separate briefs, each arguing that the Commonwealth Court's decision was consistent with the Public Utility Code, the line extension regulations, and applicable Pennsylvania case law. They contend that the regulations were a proper exercise of the PUC's rulemaking authority and provide a uniform standard under which customers may be required to pay a portion of initial construction costs, but in instances **[**51]** where the annual revenue expected **[***33]** from the line extension does not equal or exceed the annual line extension costs.

The PAWC notes that the current regulations were established in response to a massive amount of litigation arising from a prior policy of case-specific review for all disputed line extension cases. The problems with the prior policy also led to the rescinding of the 1992 policy statement relied upon by the OCA. In response to the claim that the regulations ignore public need, the PAWC explains that, when a bona fide service applicant applies for the extension of service, the PUC's regulations presume the existence of public need, as demonstrated by the distinction the regulations draw

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[12] *HN8*[↑] There is no dispute that safe water implicates public safety. See *Pa. Const. Art. 1, § 27* ("The people have a right to clean air, pure water ..."); *35 P.S. § 721.2(a)(1)* ("An adequate supply of safe, pure, drinking water is essential to the public health, safety and welfare ..."); *Hatfield Township v. Lansdale Mun. Auth., 403 Pa. 113, 168 A.2d 333 (Pa. 1961)* (recognizing direct connection between adequate supply of safe water and public health, safety and general welfare).

[13] The 1992 policy statement was adopted at a public meeting held on August 20, 1992 and published in The Pennsylvania Bulletin on September 19, 1993.

between developers and bona fide service applicants. [14] The PAWC argues that the OCA's current "public need" proposal would require a return to the case-by-case analysis that already proved to be unworkable and unfair because it requires an evaluation of the affected utility's financial condition upon each receipt of an **[*627]** additional line extension request. The PAWC also claims that the OCA's proposal has an arbitrary and discriminatory effect because an applicant's obligation to advance a customer contribution could depend **[***34]** upon mere timing: *i.e.*, when the customer applied for an extension relative to other prospective customers who also applied for line extensions.

The PAWC further disputes the OCA's argument that the plain language **[***35]** of *Section 1501* requires the PAWC to bear the cost of line extension upon a showing of public need. Citing this Court's decision in Rohrbaugh, the PAWC argues that *Section 1504* confers on the PUC the authority to adopt regulations regarding a utility's obligation arising from *Section 1501*. It further contends that the plain language of *Section 1501* provides for the establishment of regulations and that these legislative regulations must be shown deference by the courts as they fairly balance the interests of utilities, existing customers, and prospective customers. The PAWC also claims that because new customers will receive a refund if additional customers attach to the extended main, the utility does not profit at all on line extensions funded in part by customer contributions.

The PAWC also notes that *Section 1501* applies to all aspects of utility service and that if a utility's service obligation were as absolute as the OCA contends, the PUC would be precluded from adopting regulations that condition any aspect of utility service, including the requirement that customers pay rates. The PAWC contends that a plain reading of *Section 1501* can reasonably allow for both rates and **[***36]** customer contribution to line extension and that the regulations at issue here do not relieve the PAWC of its obligation to extend its service lines, they just require bona fide service applicants to contribute to such extensions in instances where the utility otherwise would not break even on the extension investment.

[52]** The PAWC emphasizes that the regulations were established by the PUC and the PUC has special expertise regarding utility law. The criteria set forth in the regulations, the PAWC contends, represent an exercise of the PUC's ratemaking **[*628]** authority and this authority is subject to appropriate deference by the courts. The PAWC further notes that the regulations are presumptively valid and reasonable and the Independent Regulatory Review Commission deemed them to be consistent with the public interest.

In its brief, the PUC notes that it explained the purpose and meaning of its regulations in the order which adopted the regulations. That order indicated that the PUC recognized that it was required to balance the interests of potential customers, existing customers, and the utilities, and had concluded that there is no obligation for a utility to make line extensions "which **[***37]** are uneconomic or unreasonable." OCA Brief, at 16 (citing 27 Pa. Bull. 799, 800). The PUC suggests that the purpose of the formula in the regulations (which sets forth the utility's required contribution) is to allow the utility to avoid an out-of-pocket loss that ultimately would be passed on to existing customers. Citing *Lynch, 594 A.2d at 818*, the PUC argues that customers may be required to contribute to line extension costs unless they can show that there is a public necessity for the extension and that the extension will yield a positive return of investment for the utility. The PUC also contends that the OCA's reliance on Ridley Township is an attempt to re-litigate an issue that was considered by the PUC during the enactment of the regulations and was rejected in the final version of those regulations.

The PUC does not dispute that utilities may be required to extend service upon a showing of public need, but it emphasizes that, contrary to the OCA's argument, utilities are not always required to do so at their sole cost. Instead, customer contribution may be required where the utility's annual line extension costs will exceed the annual return on the **[***38]** service

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[14] Section 65.1 of the PUC's regulations provides that *HN9*[↑] a person will not be deemed a bona fide service applicant if any of the following apply:

> (i) The applicant is requesting water service to a building lot, subdivision or secondary residence.
>
> (ii) The request for service is part of a plan for the development of a residential dwelling or subdivision.
>
> (iii) The applicant is requesting special utility service.

52 Pa. Code § 65.1. The PAWC contends that utility investment is only required when a bona fide service applicant is requesting an extension of service. If anyone else requests an extension, the utility is not required to contribute to the costs of constructing the lines because there is no public need for service. PAWC Brief, at 17.

extension. The PUC argues that the OCA fails to recognize the language in Section 1501 which empowers the PUC to establish regulations "governing the conditions under which [utilities] may be required to render service." 66 Pa.C.S. § 1501. The PUC argues that, when read in its entirety, Section 1501 clearly bestows upon the PUC the power to **[*629]** determine when customers will be required to contribute to the cost of a line extension.

Finally, the PUC argues that an agency's interpretation of its regulations are entitled to deference as long as the interpretation is consistent with the statute and the legislative intent, and are narrowly construed. The PUC claims that in this case, it lawfully applied the line extension regulations. The PUC also contends that the regulations are binding on the courts because they are within the scope of the delegated power, were properly enacted, and are reasonable. Likewise, the PUC claims that the PAWC's tariff, and the PUC's interpretation of it, is binding on the courts because it is not discriminatory or unreasonable.

HN10[↑] When this Court reviews an administrative agency's interpretation of its own regulations, we must **[***39]** follow a two step analysis. "First, '[i]n construing administrative regulations, the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation ... .' Second, the regulations 'must be consistent with the statute under which they were promulgated.'" Commonwealth of Pennsylvania, Dept. of Public Welfare v. Forbes Health System, 492 Pa. 77, [**53] 422 A.2d 480, 482 (Pa. 1980) (citations omitted).

Here, the administrative agency -- HN11[↑] the PUC -- interpreted its line extension regulations as authorizing a utility to require contributions from bona fide service applicants if the cost of the extension project to the utility will exceed the expected return on the extension. This interpretation is wholly consistent with the plain language of the regulations. Indeed, the regulations include an algebraic equation used to determine the amount of utility (and ultimately customer) contribution. Therefore, we find that the PUC's interpretation of the regulation was correct and consistent with the regulation itself.

Turning to the question of whether the regulation itself is consistent with **[***40]** the statutory delegation of authority, we first note the importance of considering the type of regulation **[*630]** at issue. Historically, HN12[↑] this Court "has long recognized the distinction in administrative agency law between the authority of a rule adopted pursuant to an agency's legislative rule-making power and the authority of a rule adopted pursuant to interpretive rule-making power." Elite Industries, Inc. v. Pennsylvania Public Utility Com'n, 574 Pa. 476, 832 A.2d 428, 431 (Pa. 2003). See also Girard School Dist. v. Pittenger, 481 Pa. 91, 392 A.2d 261, 262 (Pa. 1978). Legislative rule-making is "an exercise of legislative power by an administrative agency, pursuant to a grant of legislative power by the legislative body, and is valid and is as binding upon a court as a statute if it is[:] (a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable." Rohrbaugh, 727 A.2d at 1085, citing Girard School Dist., 392 A.2d at 263, citing K.C. Davis, 1 Administrative Law Treatise § 503, at 299 (1958). See also Housing Authority of the County of Chester v. Pennsylvania State Civil Service Comm'n, 556 Pa. 621, 730 A.2d 935, 942 (Pa. 1999). **[***41]** An appellate court, in reviewing such regulations, may not substitute its own judgment for that of the agency. Rohrbaugh, 727 A.2d at 1085. To overturn these sorts of regulations, it is not sufficient that they are "unwise or burdensome or inferior to another regulatory scheme;" rather, they must be so "entirely at odds with fundamental principles as to be the expression of a whim rather than an exercise of judgment." Id.; Housing Authority of the County of Chester, 730 A.2d at 942. As a consequence, we have recognized, "an agency may revise its policies and amend [such] regulations in interpreting its statutory mandates. Further, past interpretation of a statute, though approved by the judiciary, does not bind the PUC to that particular interpretation." Elite Industries, 832 A.2d at 431-32.

In the Girard School District case, this Court noted the very different review accorded when a mere interpretive rule is at issue:

> HN13[↑] "An interpretative rule on the other hand depends for its validity not upon a Law -making grant of power, but rather upon the willingness of a reviewing court to say that it in fact tracks the meaning **[***42]** of the statute it interprets. While **[*631]** courts traditionally accord the interpretation of the agency charged with administration of the act some deference, the meaning of a statute is essentially a question of law for the court, and, when convinced that the interpretative regulation adopted by an administrative agency is unwise or violative of legislative intent, courts disregard the regulation. See, e.g., United States v. Cartwright,

411 U.S. 546, 93 S. Ct. 1713, 36 L. Ed. 2d 528 (1973); Skidmore v. Swift & Co., 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944)."

[54]** 392 A.2d at 263 (quoting Uniontown Area School Dist. v. Pennsylvania Human Relations Comm'n, 455 Pa. 52, 313 A.2d 156, 169 (Pa. 1973)).

Here, the line extension regulations were adopted pursuant to HN14[↑] 66 Pa.C.S. § 1504(1), which vests broad powers in the PUC:

> The commission may, after reasonable notice and hearing, upon its own motion or upon complaint:
>
> (1) Prescribe as to service and facilities, including the crossing of facilities, just and reasonable standards, classifications, regulations and practices to be **[***43]** furnished, imposed, observed and followed by any or all public utilities.

In Rohrbaugh, this Court recognized that the rule-making power conferred by this provision is legislative in nature. 727 A.2d at 1085. [15] Therefore, to be binding, the regulations must fall within the power delegated to the PUC, be enacted according to proper procedures, and be reasonable. Id..

The OCA concedes that the PUC was authorized to establish the line extension regulations. The OCA also concedes that the regulations **[***44]** were adopted in a procedurally lawful manner. The OCA disputes, however, whether the regulations were (1) within the delegated power and (2) reasonable. **[*632]** On the delegated power point, the OCA essentially argues that requiring customer contribution in an instance where an extension is necessary for public need is beyond the power delegated to the PUC because the first sentence in Section 1501 mandates that, "[e]very public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such . . . extensions . . . as shall be necessary or proper for the . . . safety of its patrons, employees, and the public." When an extension is necessary for public safety, the OCA argues, the utility must provide it at its sole cost, unless that obligation would prevent the utility from earning a return on its overall operations or would create an undue burden on existing customers. But HN16[↑] while Section 1501 speaks to necessary extensions, it does not purport to speak to the economics of required extensions, much less does it suggest that the PUC was obliged to conclude that the entire cost of a water line extension must be borne by the utility. **[***45]** Indeed, Section 1501 later states in explicit terms that: "Subject to the provisions of this part **and the regulations and orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service."** Id. (emphasis supplied). Thus, in addition to the fact that the delegated power does not affirmatively restrict the PUC from authorizing customer contribution, the statute affirmatively recognizes that reasonable conditions may attach to the rendering of mandated service. Given the plain language of this construct, as well as the broad power delegated to the PUC to adopt "just and reasonable standards" under Section 1504, we hold that the PUC was authorized to adopt line extension regulations which accounted for economic factors. [16]

[*46]** **[*633]** **[**55]** We turn then to whether the "break even" approach adopted in the regulations is reasonable. HN18[↑] In passing upon the reasonableness of any such discretionary agency action, this Court has noted, appellate courts must accord deference to the agency and may only overturn an agency determination if the agency acted in bad faith or the regulations constituted a "manifest or flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions." Rohrbaugh, 727 A.2d at

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[15] The OCA claims that the PUC obtains its authority to promulgate the regulations from 66 Pa.C.S. § 501. The Commonwealth Court found that the PUC gleaned its authority from Section 1501 of the Public Utility Code. Popowsky 853 A.2d at 1103-04. HN15[↑] Although Sections 501 and 1501 certainly support that the PUC has the authority to adopt regulations, the source of this authority comes from Section 1504(1). Rohrbaugh, 727 A.2d at 1084.

[16] We reject the argument in the dissenting opinion below that the regulations are contrary to the legislative grant because they categorically eliminate public need from the equation. As the PAWC has explained, HN17[↑] the distinction the regulations draw between bona fide service applicants and other applicants -- i.e., requiring utility investment **only** when the request is made by a bona fide service applicant, as opposed to a developer, or a secondary home owner, or an applicant requesting special service, 52 Pa. Code § 65.1 -- show that public need is specifically accounted for. See supra note 15 and accompanying text. The fact that public need may trigger a mandated extension, however, is separate and apart from the question of whether the utility must always bear the entire cost of the project.

1085 (citing Slawek v. State Bd. of Medical Education and Licensure, 526 Pa. 316, 586 A.2d 362, 365 (Pa. 1991)). Here, the PUC, which has special expertise in this area, engaged in an extensive regulatory review process that began at a public meeting on November 10, 1993 and was not concluded until the final regulations were enacted on October 3, 1996. PUC Initial Decision at 28-29. During this process, the PUC held several public meetings, temporarily withdrew the proposed regulations at one point to consider certain concerns raised about them, and published a notice in the Pennsylvania Bulletin every time an event concerning the proposed regulations occurred. Id. **[***47]** Thus, there certainly was nothing arbitrary or unreasonable in the procedural background of the regulations.

With respect to substance, in its final order adopting the regulations, the PUC discussed existing appellate cases that had recognized that a utility's duty to provide line extensions is not unlimited. See 27 Pa. Bull. at 799. It also discussed the need to balance the rights of the utility, existing customers, and individuals seeking main line extensions. Id. Further, the PUC stated that the purpose behind the regulations at issue was to "create a fair, reasonable and predictable economic standard." Id. Ultimately, in the PUC's considered view, it was reasonable to require a utility to absorb the entire initial cost of a line extension, but only if the utility could expect that the annual revenue resulting from the extension would equal or exceed the annual cost of the project. If the project would **[*634]** otherwise project as a net loss for the utility, however, the PUC determined that it was proper to authorize customer advances to the cost of constructing the extension, the amount of the customer contribution to be determined by the algebraic formula set forth in the **[***48]** regulation.

The PUC's exercise of its delegated power in this instance reveals no evidence of bad faith, unreasonableness or arbitrariness. In undertaking its evaluation, the PUC did not write upon a blank slate, but with the benefit of years of experience in such matters, including experience with what it deemed an unworkable, burdensome case-by-case approach to extension requests. Moreover, the Commission, though not obliged to adopt regulations consistent with the (intermediate appellate) judicial interpretations that existed in the absence of explicit regulations, Elite Industries, 832 A.2d at 431-32, nevertheless demonstrated an awareness of the existing case law and did not act inconsistently with it. See e.g., Huntingdon, Inc. v. Pennsylvania Public Utility Comm'n, 76 Pa. Commw. 387, 464 A.2d 601, 603 (Pa. Cmwlth. 1983); Lynch, 594 A.2d at 818; Colonial **[**56]** Products Co. v. Pennsylvania Public Utility Comm'n, 188 Pa. Super. 163, 146 A.2d 657, 662 (Pa. Super. 1958); Ridley Twp. v. Pennsylvania Public Utility Com., 172 Pa. Super. 472, 94 A.2d 168. These cases recognize that, HN19[↑] generally, water utilities are required to fund main line **[***49]** extension requests made by bona fide service applicants, but only so long as the project would not burden existing customers nor cause material economic harm to the companies. Although the OCA might prefer that a heavier burden be placed upon the utility, [17] **[***50]** there was nothing arbitrary or unreasonable in the PUC fixing the point at which the utility could be deemed to suffer a material economic harm **[*635]** from a mandated line extension as that point where the utility would face an out-of-pocket loss. It is that point where the utility would be forced to either absorb the loss or pass it on to existing customers. [18] Accordingly, we hold that HN20[↑] the regulations are reasonable and, as such, there is no basis for this Court to interfere with them.

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[17] We agree with the Commonwealth Court that Ridley Township, properly read, does not require utilities to extend service, even if it is not profitable, so long as they receive an overall return on its entire operations. Rather, Ridley Township is one of the many intermediate appellate cases that generally posited that utility companies were obliged to provide the initial capital required for line extensions unless doing so would subject the company to "unreasonable expenditures" or would "unduly burden the public." Ridley Township, 94 A.2d at 171. Furthermore, Ridley Township was decided prior to the promulgation of the line extension regulations, which now control. If the regulations are valid, Ridley Township is no basis upon which to upset them.

[18] We also are unpersuaded by the OCA's argument that the revenue the PAWC could expect in future rate increases should require it to forward the entire cost of mandated line extension projects. In addition to the fact that this is a policy argument which does not prove the unreasonableness of the agency's regulatory scheme, the argument confuses two separate costs to utilities: costs associated with line extension and costs associated with regular service. HN21[↑] The PAWC is subject to separate regulations for the establishment and increases of its rates. See 52 Pa. Code § 53.1 et seq. These requirements are separate and apart from the line extension regulations. Rates are intended to compensate the utility for its ongoing service, *i.e.*, providing regular water service, and are not required to be viewed as containing a component which compensates the provider for unrelated projects or expenditures, such as line extensions for the benefit of new customers.

For the foregoing reasons, we affirm the order of the Commonwealth Court.

Mr. Chief Justice Cappy and **[***51]** Messrs. Justice Saylor, Eakin and Baer join the opinion.

Former Justice Nigro did not participate in the decision of this case.

Madame Justice Newman files a dissenting opinion.

Dissent by: NEWMAN

Dissent

DISSENTING OPINION

MADAME JUSTICE NEWMAN

The Majority concludes that the demonstration of public need for water, alone, is insufficient to require a water company to extend its water lines and service to the residents of Mount Pleasant Township (Township) without contributions from those residents in aid of construction. Based on this precept, the Majority affirms the Order of the Commonwealth Court to require contribution in aid of construction by the residents of the Township before the Pennsylvania American Water Company (PAWC) will begin the water line extensions. [1] **[*636]** Because I believe that the determination of the Public Utility Commission (Commission) is fundamentally **[**57]** flawed and would vacate and remand this matter for further findings, I must respectfully dissent.

[*52]** The gravamen of this appeal is Consumer Advocate's challenge to the application of the Commission's line extension regulations. As noted by the Majority, these regulations were adopted in compliance with the substantive and procedural requirements of the Commonwealth Documents Law, [2] the Commonwealth Attorneys Act, [3] and the Regulatory Review Act. [4] However, I agree with Consumer Advocate that the regulations conflict with the duty that every utility has pursuant to Section 1501 of the Public Utility Code, *66 Pa.C.S. § 1501*, to provide service to the public where a need for the service has been demonstrated.

[*53]** It is beyond cavil that utility service is crucial to the well being of the public, which, because of the monopolistic nature of public utilities, generally has no other source for the service. *Section 1501* provides that:

> Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, **extensions**, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public.

66 Pa.C.S. 1501.

The PAWC certificate of public convenience includes many municipalities and territories in thirty-five counties in this Commonwealth, including Mount Pleasant Township. The Township has no alternative supplier to which it may legally turn for public water service. Further, it is undisputed that **[*637]** the water supply in the Township is inadequate and that the water quality is poor. While PAWC has not refused to service the Township at all, it has refused to service the Township unless the residents, wishing to connect to service line extensions **[***54]** to receive the benefits of public water service, pay a non-refundable, non-reimbursable contribution in aid of construction of $ 2,255.00 per household. I believe this determination flies in the face of the statutory requirement that public utilities, as governmentally authorized monopolies, bear the cost of capitalizing the investment necessary to extend service to *bona fide* service applicants. When interpreting *Section 1501*, the appellate courts of this Commonwealth have generally concluded that the costs associated with maintaining and expanding the physical facilities necessary to provide utility service are the

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[1] The plight of these residents has been assumed by Irwin A. Popowsky (Consumer Advocate), Appellant in the matter before this Court.

[2] Act of July 31, 1968, P.L. 769, as amended, *45 P.S. §§ 1102-1602*.

[3] Section 204(b) of the Act of October 15, 1980, P.L. 950, *71 P.S. § 732-204(b)*.

[4] Act of June 25, 1982, P.L. 633, reenacted and amended by, Act of June 30, 1989, P.L. 73, *71 P.S. §§ 745.1 to 745.15*.

initial responsibility of the public utility. [5] **[***55]** In circumstances in which there is no public need for improvements or extensions in service, *e.g.*, when the proposed **[**58]** project involves special services or benefits only a particular customer or developer, the Commission and courts have approved the assessment of customer contributions. [6]

The Commission relies on its regulations found at 52 Pa. Code §§ 65.1 and 65.21-65.23, which establish a duty in a public utility to provide line extensions to *bona* **[***56]** *fide* service **[*638]** applicants without customer contribution where the annual expected revenues equal or exceed the annual expenses and capital costs associated with the new line. 52 Pa. Code § 65.21 (1). According to the regulations, if the annual revenue does not equal or exceed the line's annual costs, then the utility may require a contribution from customers that is proportional to the annual costs not covered by the annual revenue. 52 Pa. Code § 65.12 (2). The regulations were adopted pursuant to Section 1501 of the Public Utility Code, which expressly authorizes a utility, with the approval of the Commission, to adopt "reasonable rules and regulations governing the conditions under which it shall be required to render service." 66 Pa.C.S. § 1501. The Commission determined that it is reasonable to require customer contributions to an extension if the contributions are required to prevent the utility from a negative return on investment, *i.e.*, the utility must realize at least a "break even" return on mandated extensions. The Commission believes that new customers should be required to contribute **[***57]** to the cost of a utility's extension when it is necessary to protect that utility's existing customers from excessive rates or to preserve the financial viability of the utility.

I believe that this "break-even analysis," which is the touchstone of the line extension regulations, is neither required nor consonant with the Public Utility Code. Section 1501 clearly requires a utility to provide safe and adequate service to an area lacking public water without customer contribution where a public need exists and the financial viability of the utility is not threatened. The statute does not include a caveat that "repairs, changes, alterations, substitutions, extensions, and improvements" are made only where the financial health or profitability of the utility can be maintained. The Commission rejected this public need argument in its adjudication, noting it has consistently held that public need does not invalidate the regulation's requirement for customer contribution where the cost of supplying service is more than the immediate return from that service. [7]

[*58]** **[*639]** To advance his "public need" argument, Consumer Advocate relies principally upon **[**59]** the holding in Ridley Township v. Pennsylvania Public Utility Commission, 172 Pa. Super. 472, 94 A.2d 168 (Pa. Super. 1953). Ridley requires public utilities to provide service without customer contribution unless the utility can demonstrate material economic harm or undue burden upon existing customers. Id. at 171. In Ridley, twelve homeowners sought an extension of a public water utility's facilities to a residential section of a

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[5] See Kossman v. Pennsylvania PUC, 694 A.2d 1147 (Pa. Cmwlth. 1997); Honey Brook Water Co. v. Pa. Pub. Util. Comm'n, 167 Pa. Commw. 140, 647 A.2d 653 (Pa. Cmwlth. 1994) (*en banc*), petition for allowance of appeal denied, ***540 Pa. 587, 655 A.2d 518 (Pa. 1995)***; East Goshen Twp. v. Pa. Pub. Util. Comm'n, 87 Pa. Commw. 52, 486 A.2d 550 (Pa. Cmwlth. 1985); Fairview Water Co. v. Pa. Pub. Util. Comm'n, 55 Pa. Commw. 96, 422 A.2d 1209 (Pa. Cmwlth. 1980); McCormick v. Pa. Pub. Util. Comm'n, 48 Pa. Commw. 384, 409 A.2d 962 (Pa. Cmwlth. 1980); Ridley Twp. v. Pa. Pub. Util. Comm'n, 172 Pa. Super. 472, 94 A.2d 168 (Pa. Super. 1953); ***Borough of Warren v. Pa. Pub. Serv. Comm'n, 80 Pa. Super. 10, 1922 WL 2961 (Pa. Super. 1922)***.

[6] See Kossman v. Pennsylvania PUC, 694 A.2d 1147 (Pa. Cmwlth. 1997) (development); Lynch v. Pa. Pub. Util. Comm'n, 140 Pa. Commw. 599, 594 A.2d 816 (Pa. Cmwlth. 1991), petition for allowance of appeal denied, *529 Pa. 670, 605 A.2d 335 (Pa. 1992)* (single customer); Huntingdon, Inc. v. Pa. Pub. Util. Comm'n, 76 Pa. Commw. 387, 464 A.2d 601 (Pa. Cmwlth. 1983) (residential development); Colonial Prods. Co. v. Pa. Pub. Util. Comm'n, 188 Pa. Super. 163, 146 A.2d 657 (Pa. Super. 1958) (single customer); Borough of Phoenixville v. Pa. Pub. Util. Comm'n, 3 Pa. Commw. 56, 280 A.2d 471, 63 Mun. L. Rep. 46 (Pa. Cmwlth. 1971) (shopping center); see also City of Altoona v. Pa. Pub. Util. Comm'n, 168 Pa. Super. 246, 77 A.2d 740 (Pa. Super. 1951) (eight property owners).

[7] The Commission cites its previous determinations in Popowsky v. Pennsylvania American Water Company, Docket No. R-00943155C001, 1997 Pa. P.U.C. LEXIS 143, 1997 WL 1050746 (Order entered June 9, 1997) (specifically rejecting the public need exception to the regulations); and Collier Township v. Pennsylvania American Water Company, Docket No. C-00934978 (Order entered March 18, 1996) (evidence of contaminated and insufficient wells did not overcome the economic standards set forth in the line extension regulations). I note that neither of these matters was reviewed by an appellate court.

township, a part of which was already served by the utility. In addition, the township requested the installation of fire hydrants. Despite evidence showing that the extension would entail the expenditure of less than one-fourth of one percent of the company's current and accrued assets, the Commission concluded that it was "not economically feasible" for the utility to extend its mains and did not require the extension. *Id. at 170*.

The homeowners appealed, and the Superior Court reversed. It found that pursuant to the Public Utility Code, a utility may not serve only the presently profitable territory covered by its franchise. The Superior **[***59]** Court reasoned as follows:

> A public utility cannot collect the cream in its territory and reject the skimmed milk. . . . If a portion of the territory served is not profitable, but the entire service produces a fair return on the investment, the utility may still be required to serve the unprofitable portion, if the rendering of such service does not result in an unreasonable burden on its other service. . . .
>
> Ordinarily, it is not the business of the citizen or consumer to construct any part of a utility's system. There are, doubtless, instances where, under special circumstances, warranted by the evidence, the Commission may, in the **[*640]** exercise of its administrative discretion, withhold exercise of its power unless patrons offer to participate in the cost of construction. But no inflexible rule can be laid down; participation in construction costs cannot be exacted indiscriminately; and it cannot be required upon a mere showing that an extension will not immediately produce an adequate profit.

Id. at 171 (internal citations and quotation marks omitted). Thus, the Superior Court held that affected members of the public "are entitled to fire protection and domestic **[***60]** water service without subsidizing a large and prosperous utility." *Id. at 172*. Of even greater significance, the Ridley court rejected the position of the Commission that individual line extensions must be profitable for the utility, or customer contributions are required. The court observed that the "purpose of an inquiry upon a complaint for refusing an extension of facilities is . . . to determine the effect of an extension upon the **total** return from the overall operation of the entire system." *Id. at 170* (emphasis added). As did the Superior Court in Ridley, I find that the Commission erred in failing to analyze whether, by extending the service line to the Township residents, the total revenues and expenses would produce an impermissible rate of return or financial harm to the utility. There is a palpable distinction between securing a fair return and maintaining the current level of profitability, a distinction that was not explored in the hearings before the Commission. Because I believe that the regulations promulgated by the Commission, and their strict application, are at odds with *Section 1501*, I would vacate the Order of the Commonwealth Court and **[***61]** remand for additional findings. The statutory rule provides that "[e]very public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, **extensions**, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, **[**60]** convenience, and safety of its patrons, employees, and the public." *66 Pa.C.S. § 1501* (emphasis added). While the statue provides the Commission with the **[*641]** authority to promulgate regulations to ensure that the statutory mandate is met, and while the statute permits utilities to formulate rules as to how it will conform to the statutory mandate, I believe that the General Assembly has decreed that the "accommodation, convenience, and safety of its patrons, employees, and the public" is the paramount concern.

On the established record, there can be little doubt that those portions of Mt. Pleasant Township requesting service are in need of a public water system. Moreover, whether one uses the figures of Consumer Advocate that 568 residents would use the service or the figure of PAWC that **[***62]** 744 residential customers would be served, this is clearly not a de minimus number and militates even more for a determination that public need is the overriding factor here. The degree of public need in this case is not one of mere accommodation or convenience but one affecting public health and safety, and I believe that the Commission erred in concluding that, absent customer contributions, the Utility need not extend water service to the affected area. The Commission should have evaluated the need for customer contributions on the basis of a fair overall return to the utility, not on the basis of whether the individual line extension would be profitable. Accordingly, because: (1) a utility is obligated by statute to supply service within its certificated area; (2) there is a demonstrated substantial need for water service in the Township; (3) there is no finding that extending service into the Township would have a detrimental effect on the total return on investment of PAWC, I believe that the Order of the Commonwealth Court should be vacated and the matter remanded for additional findings.

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Docket No. C-2023-3038201
Michael Hillman v. Aqua Pennsylvania, Inc.

Attachment 3

Wilson v. Pa. American Water Company

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held July 11, 2007

Commissioners Present:

Wendell F. Holland, Chairman
James H. Cawley, Vice Chairman
Terrance J. Fitzpatrick
Tyrone J. Christy
Kim Pizzingrilli

Doris Anne Wilson C-20066331

v.

Pennsylvania-American Water Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for consideration are the Comments of the Pennsylvania-American Water Company (PAWC), filed on May 29, 2007, to the Tentative Opinion and Order of the Commission, which was issued on May 17, 2007, in the above-captioned proceeding. No other comments were filed.

History of the Proceeding

On May 1, 2006, Doris Anne Wilson (Complainant) filed a Formal Complaint (Complaint) against PAWC alleging that there were incorrect charges on her

water bill amounting to approximately $590.83. Included with the Complaint, as support for her position, was a letter she received from PAWC stating that she would be billed for service in the amount of $590.83 for the period May 21, 2002 through May 30, 2002. The Complainant averred that this had to be a mistake because she could not have used that amount of water in a ten-day period.

On May 25, 2006, PAWC filed an Answer admitting that on June 5, 2002, it sent a letter to the Complainant indicating that she would receive a water bill in the amount of $590.83 for the time period of May 21, 2002 through May 30, 2002. PAWC stated that the letter was inaccurate. PAWC averred that the Complainant was being billed for $238.04, and that the Complainant was never overbilled. PAWC sought dismissal of the Complaint.

A telephonic hearing was held in this matter on July 26, 2006, before Administrative Law Judge (ALJ) Herbert Smolen. The Complainant testified on her own behalf. PAWC appeared by counsel and presented the testimony of one witness who sponsored five exhibits: (1) PAWC Exhibit 1 and Supplemental Exhibit 1, a water bill for service with a billing date of June 10, 2002; (2) PAWC Exhibit 2, the account statement from May 21, 2001 through June 28, 2006; (3) PAWC Exhibit 6, a record of utility contact for the account of the Complainant; and (4) PAWC Exhibit 7, an adjustment letter, dated October 19, 2005, showing a credit adjustment in the amount of $153.18, as a matter of good public relations.

On August 14, 2006, the ALJ's Initial Decision was issued. ALJ Smolen recommended that the Complaint be dismissed due to the Complainant's failure to satisfy her burden of proof. On October 10, 2006, the Complainant filed Exceptions *Nunc Pro Tunc*.

In a letter dated September 19, 2006, the Secretary of the Commission informed the Complainant that her Exceptions, which were received on September 11, 2006, were not timely and would not be considered. On October 12, 2006, the Secretary granted a request from the Complainant asking that her Exceptions be accepted. PAWC was then notified of the receipt and acceptance *nunc pro tunc* of the Complainant's Exceptions. No Reply Exceptions were filed by PAWC.

In the aforementioned Tentative Opinion and Order issued May 17, 2007, the Commission denied the Complainant's Exceptions. However, the Commission modified the ALJ's Initial Decision by imposing a civil penalty in the amount of $8,000 upon PAWC for its failure to provide the Complainant with reasonable service. Because of this modification, the Commission afforded the Parties ten days to file written comments. On May 29, 2007, PAWC filed Comments in response to the Tentative Opinion and Order.

Discussion

As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Public Utility Code (Code), 66 Pa. C.S. § 332(a), which provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding. It is axiomatic that "[a] litigant's burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible." *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

In its Comments, PAWC requests that the Tentative Order be withdrawn and that no civil penalty be assessed against it, or in the alternative, before any penalty is assessed, that the Commission remand the formal complaint to the Office of Administrative Law Judge (OALJ) for further hearing and the development of a more

complete record. As an alternative, PAWC suggests that the civil penalties be reduced to no more than $500 per violation. PAWC makes three separate arguments in regard to the Tentative Order which will be discussed below.

Statute of Limitations

PAWC avers that Pennsylvania law does not permit the Company to be penalized for actions that occurred more than three years ago. It claims that the penalties imposed by the Tentative Order are based on actions that occurred in 2001-2002. The Company, citing 66 Pa. C.S. § 3314(a), avers that the law provides that no penalties or prosecution may occur beyond three years from the date at which the liability arose. PAWC claims that it filed new matter stating that the Complaint was time-barred as the Complainant failed to file the formal complaint until May 2006, beyond the three-year time period. Furthermore, according to PAWC, this affirmative defense was not addressed by the ALJ or by the Commission.

PAWC avers that if it is correct about the statute of limitations, no action or liability may be imposed upon the Company. PAWC notes that the only tolling of the statute would be for the time that the informal complaint was pending, citing *Duquesne Light Co. v. Pa. PUC,* 611 A.2d 370 (Pa. Cmwlth. 1992). PAWC admits that there is evidence that two informal complaints were filed by the Complainant regarding this same issue. PAWC requests that if the Commission believes a further hearing is necessary, the Office of Administrative Law Judge (OALJ) should be requested to determine whether the formal complaint was timely filed per Pennsylvania law. (PAWC Comments at 5).

> Subsection 3314(a) of the Code reads as follows:
>
> (a) General rule.— No action for the recovery of any penalties or forfeitures incurred under the provisions of this part, and no prosecutions on account of any matter or thing mentioned in this part, shall be maintained unless

> brought within three years from the date at which the liability therefore arose, except as otherwise provided in this part.

66 Pa. C.S. § 3314(a).

In determining whether the Complaint was filed within the three-year statute of limitations, we must first determine the date at which liability for the issue arose. The record indicates that the first time the Complainant was notified of the high bill was by a letter dated June 5, 2002. In this letter, PAWC informed the Complainant that she was going to receive a bill for $590.83 for the time period from May 21, 2002 to May 30, 2002. It was at this point the Complainant was aware of a potential dispute with the Company, and as such, liability for the Complaint arose as of this date.

As acknowledged by PAWC, the statute of limitations does not run while the Bureau of Consumer Services (BCS) is investigating an informal complaint. *Duquesne Light Co. v. Pa. PUC,* 611 A.2d 370 (Pa. Cmwlth. 1992). In the case at hand, the Complainant made two informal complaints within the statutory time frame, which ran almost concurrently, regarding the same issue. The first informal investigation opened on August 12, 2002. On October 29, 2003, BCS issued its informal decision closing the second investigation.[1] Accordingly, the time period from August 12, 2002 to October 29, 2003 will not be included in the calculation of the three year period. The Complainant brought her issue to the full Commission on May 1, 2006, with the filing of her Formal Complaint.

As stated above, liability for the issue arose on June 5, 2002, and the Complainant filed her informal complaint on August 12, 2002. As such, sixty-eight days elapsed which must be included in the three-year statute of limitations calculation. The

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[1] The two informal investigations overlapped each other causing no break from one to the next. The first informal investigation ran from August 12, 2002 to July 22, 2003, and the second investigation ran from September 6, 2002 to October 29, 2003.

BCS informal investigations ran a total of 444 days and will not be included in the calculation of the three-year period. Lastly, 915 days passed between the closing of the informal investigation and the filing of the Formal Complaint. The total number of days included in the calculation of the three-year (1,095 days) statute of limitations is 983. As such, the Formal Complaint was filed within the statute of limitations prescribed by 66 Pa. C.S. §3314.

The September 25, 2006 Final Order

PAWC avers that this matter became final on September 25, 2006, when the Commission issued its Final Order dismissing the Complaint. (Comments at 3). According to PAWC, if the Complainant was dissatisfied, the law permitted an appeal to the Commonwealth Court. In its opinion, this Final Order should remain final because the Complainant did not pursue an appeal in Commonwealth Court. The Company, citing *Witherspoon v. Wal-Mart Stores, Inc.*, 814 A.2d 1222 (Pa. Super. 2002), opines that Pennsylvania law provides that a court or administrative agency has a thirty-day time period to alter a final order. (Comments at 4). PAWC avers that this time period gives the tribunal an opportunity to correct any mistakes or make any alterations to its ruling. PAWC admits that it recognizes that, statutorily, the Commission has an ability to rescind or amend its earlier order; but that to exercise this power; the Commission must afford notice and an opportunity to be heard. (*Id.*). PAWC avers that the Tentative Order does not address the issuance of the Final Order on September 25, 2006, nor have the Parties been given notice and an opportunity to be heard regarding the rescinding of the Final Order. (*Id.*).

PAWC is correct in that Pa. R.A.P. 1512(a)(1) states that a petition for review of a quasi-judicial order shall be filed within thirty days after entry of the order. However, Subsection 703(g) of the Code provides that,

> The Commission may, at any time, after notice and after opportunity to be heard as provided in this chapter, rescind or amend any order made by it. Any order rescinding or amending a prior order shall, when served upon the person, corporation, or municipal corporation affected, and after notice thereof is given to the other parties to the proceedings, have the same effect as is herein provided for original orders.

66 Pa. C.S. § 703(g). Our Tentative Opinion and Order of May 17, 2007, did not expressly state that "we hereby rescind/amend our Order of September 25, 2006." However, we do not believe that such a statement was required. First, the sole issue of the September 25, 2006 Order was that the Complainant failed to meet her burden of proving that PAWC over-billed her account. The May 17, 2007 Order sustained that ruling. The May 17, 2007 Order did amend the September 26, 2006 Order by fining PAWC for not reading the Complainant's meter. However, as provided in 66 Pa. C.S. § 703(g), the May 17, 2007 Order was issued as a tentative order, it solicited comments regarding the proposed amendment from the Parties, and it was served upon all Parties of record. Accordingly, the Commission afforded the Parties with notice and an opportunity to be heard regarding the proposed civil penalty.

Whether the Matter Should be Remanded

PAWC comments that before imposing the maximum penalty for the Company's actions, a further hearing should be held to allow the Company to present additional evidence. PAWC attached Exhibit 1 to its Comments indicating that it sent three separate letters to the Complainant requesting access to her property so that it could read her meter. PAWC opines that, at a minimum, this evidence should mitigate the $8,000 civil penalty levied against the Company for not providing reasonable service by failing to read the Complainant's meter. (Comments at 6). According to PAWC, given that the Commission has not altered the Initial Decision denying direct relief to the

Complainant, there is no prejudice to the Complainant by the holding of a further hearing. (*Id.*).

In the alternative, the Company suggests that the maximum penalty the Commission imposed for each violation[2] be reduced based upon the *Rosi* standards. *Joseph A. Rosi v. Bell Atlantic – Pennsylvania, Inc. and Sprint Communications Co., L.P.,* Docket No. C-00992409, Order entered March 16, 2000. PAWC maintains that that there is no evidence that the Company committed any intentional actions and the record does not warrant the implication that the Company did nothing to correct the meter problem for one year. PAWC suggests the civil penalties be reduced to no more than $500.00 per violation. (Comments at 6-7).

We will deny PAWC's request to reopen the record in this proceeding. The Exhibit PAWC attached to its Comments contains letters dated May 22, 2002, or earlier. The letters were available and presentable as evidence at the hearing but the Company chose not to submit them.

However, based upon the evidence and the Comments submitted by PAWC, we will revise our earlier imposition of a recommended fine of $1,000.00 per violation, or a total of $8,000.00. We agree with PAWC that the record is silent as to any actions the Company may have undertaken to correct the meter problem and that the record does not demonstrate that the violations resulted from intentional conduct within the meaning of the first *Rosi* standard.[3] Accordingly, we adopt the alternative request of

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[2] The Commission directed the imposition of civil penalties of $1,000.00 for each of the separate violation for a total civil penalty of $8,000.00. (Order at 9).

[3] The first *Rosi* standard states: "Whether the violation was intentional or negligent. If the violation is intentional, the Commission should start with the presumption that the penalty will be in the range of $500.00 to $1,000.00 per day. If the violation is negligent, the Commission should start with the presumption that the penalty will be in the range of zero dollars to $500.00 per day."

PAWC and revise our Tentative Opinion and Order of May 17, 2007, by reducing the civil penalty to be imposed upon PAWC for its failure to provide the Complainant with reasonable service to $500.00 per violation or $4,000.00; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions of Doris Anne Wilson to the Initial Decision of Administrative Law Judge Herbert Smolen are denied.

2. That the Initial Decision of Administrative Law Judge Herbert Smolen is modified, consistent with this Opinion and Order.

3. That the Formal Complaint of Doris Anne Wilson against Pennsylvania-American Water Company is dismissed.

4. That Pennsylvania –American Water Company is directed to pay a civil penalty of four thousand dollars ($4,000.00) pursuant to Sections 3301 and 3315 of the Public Utility Code, 66 Pa. C.S. §§ 3301 and 3315, by sending a certified check or money order, within twenty (20) days after notice of a Final Commission Order in this proceeding is issued, to the Secretary of the Commission at:

Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

5. That Pennsylvania-American Water Company is directed to cease and desist from further violations of the Public Utility Code, 66 Pa. C.S. § 101, *et seq.*, and the Commission's Regulations, 52 Pa. Code § 1.1, *et seq.*

5. That a copy of this Opinion and Order shall be served upon the Commission's Financial and Assessment Chief, Office of Administrative Services.

BY THE COMMISSION,

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: July 11, 2007

ORDER ENTERED: July 11, 2007

Docket No. C-2023-3038201
Michael Hillman v. Aqua Pennsylvania, Inc.

Attachment 4

Info Connections v. PA PUC

Info. Connections v. Pa. Pub. Util. Comm'n

Commonwealth Court of Pennsylvania

February 1, 1993, Argued ; August 4, 1993, Decided ; August 4, 1993, Filed

No. 1215 C.D. 1992, No. 1307 C.D. 1992

Reporter
157 Pa. Commw. 463 *; 630 A.2d 498 **; 1993 Pa. Commw. LEXIS 480 ***

INFO CONNECTIONS, INC., Petitioner, v. The PENNSYLVANIA PUBLIC UTILITY COMMISSION, Respondent. The BELL TELEPHONE COMPANY OF PENNSYLVANIA, Petitioner, v. The PENNSYLVANIA PUBLIC UTILITY COMMISSION, Respondent

Prior History: [*1]** APPEALED From No. C-871468. State Agency, Pennsylvania Public Utility Commission

Core Terms

tariff, audiotex, collected, terminate, argues, public utility, service area, originated, regulation, customer, Telephone, violating

Case Summary

Procedural Posture

Petitioner information company sought review of an order from respondent Public Utility Commission (Pennsylvania), which dismissed petitioner's complaint seeking funds that petitioner telephone company collected on its behalf. Petitioner telephone company sought review of respondent's order which assessed a penalty against it for violating section 1501 of the Public Utility Code, 66 Pa. Cons. Stat. § 1501.

Overview

Petitioner information company and petitioner telephone company entered into an agreement whereby petitioner telephone company would collect a sponsor-selected price for calls placed on petitioner information company's chatline service. Subsequently the parties discovered that, due to the network configuration, petitioner information company did not receive reimbursement for calls to its audiotex number that were not directly dialed within Pennsylvania. Respondent public utility commission dismissed petitioner information company's complaint seeking reimbursement. Respondent also imposed a fine against petitioner telephone company for violating § 1501 of the Public Utility Code, 66 Pa. Cons. Stat. § 1501. The court affirmed respondent's order of dismissal, holding that it could not disturb respondent's determination that the calls did not originate within the audiotex service area because the determination was based upon substantial evidence. The court reversed the imposition of the fine, finding that petitioner telephone company did not violate its tariff by failing to suspend or terminate the audiotex service.

Outcome

The court affirmed an order that dismissed petitioner information company's complaint seeking funds that petitioner telephone company collected on its behalf where substantial evidence supported respondent public utility commission's determination that calls did not originate within the audiotex service area. The court reversed respondent's imposition of a fine against petitioner telephone company where petitioner did not violate its tariff.

LexisNexis® Headnotes

Energy & Utilities Law > Administrative Proceedings > Judicial Review > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Energy & Utilities Law > ... > Public Utility Commissions > Hearings & Orders > Judicial Review

HN1[] Administrative Proceedings, Judicial Review

The court's scope of review in public utility commission (the commission) cases is limited to a determination of whether constitutional rights have been violated, an error of law has been committed, or the commission's findings and conclusions are not supported by substantial evidence.

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN2[] Utility Companies, Rates

Section 1303 of the Public Utility Code, 66 Pa. Cons. Stat. § 1303, provides that a public utility shall not receive from any person a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto.

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

HN3[] Regulators, Public Utility Commissions

Exceptions to an initial decision of an administrative law judge may be filed within 20 days after the decision is issued. 52 Pa. Code § 5.533. Further, 52 Pa. Code § 1.12(a) provides that except as otherwise provided by statute, in computing a period of time prescribed or allowed by this title or by statute, the day of the act, event, or default after which the designated period of time begins to run shall not be included.

Administrative Law > Agency Adjudication > Decisions > Contents

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

HN4[] Decisions, Contents

52 Pa. Code § 5.533(b) states that exceptions shall be stated in specific, numbered paragraphs, identifying the finding of fact or conclusion of law to which exception is taken and cite relevant pages of the decision. Supporting reasons for the exceptions shall follow each specific exception.

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

HN5[] Public Utility Commissions, Authorities & Powers

The Pennsylvania Public Utility Commission has the authority to waive procedural defects when they do not affect the substantive rights of the parties. 52 Pa. Code § 1.2(a).

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Energy & Utilities Law > Utility Companies > General Overview

HN6[] Public Utility Commissions, Authorities & Powers

By law every public utility shall furnish and maintain adequate, efficient, safe, and reasonable services and facilities and shall make repairs, changes, alterations, substitutions, extensions, and improvements in its services and facilities as necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Section 1501 of the Public Utility Code (the code), 66 Pa. Cons. Stat. § 1501. Further, § 501(a) of the Public Utility Code, 66 Pa. Cons. Stat. § 501(a), gives the Pennsylvania Public Utility Commission the authority to execute and carry out the provisions of the code, including those of § 1501.

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN7[] **Utility Companies, Rates**

See 66 Pa. Cons. Stat. § 3303(a).

Administrative Law > Judicial Review > Standards of Review > Clearly Erroneous Standard of Review

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

HN8[] **Standards of Review, Clearly Erroneous Standard of Review**

The construction given a statute by those charged with its execution is entitled to great weight and should be disregarded or overturned only for cogent reasons and if clearly erroneous.

Counsel: Richard T. Mulcahey, Jr., for petitioner, Info Connections, Inc.

Julia A. Conover, for petitioner/intervenor, Bell Telephone Co. of Pennsylvania.

Donna Stanek Zehner, Asst. Counsel, for respondent.

Judges: Palladino and Smith, JJ., and Narick, Senior Judge.

Opinion by: SMITH

Opinion

[499] [*465]** Info Connections, Inc. and Bell Telephone Company of Pennsylvania appeal from an order of the Pennsylvania Public Utility Commission which dismissed Info Connections' complaint seeking funds Bell collected on its behalf, and assessed a penalty against Bell for continuing Info Connection's service when Bell knew it could not tender the collected funds to Info Connections. [1] The issues presented on appeal are whether the Commission erred by determining that Info Connections failed to meet its burden to prove that it was entitled to the funds; whether the Commission erred by accepting Bell's exceptions; and whether the Commission properly determined that Bell's actions constituted unreasonable service.

[*2]** Info Connections is a California company involved in the business of providing telephone introduction services to individuals with common interests. On or about March 28, 1987, **[*466]** Info Connections and Bell entered into an agreement whereby Info Connections would use Bell's 976 audiotex network service and Bell would collect a sponsor-selected price for calls placed to Info Connections' service. Bell's audiotex service is a tariffed and regulated service in Pennsylvania which provides facilities for passive recorded announcements, interactive recorded announcements, and live programs within a service area. The two audiotex service areas in Pennsylvania are located in Philadelphia and Pittsburgh. Info Connections contracted with Bell to bill callers $ 2.12 per call which included Pennsylvania sales tax, an amount to be retained by Bell, and a remittance to be paid to Info Connections. [2]

[*3]** In April, 1987, Info Connections began operating its chatline service marketed solely in New York by advertising in New York newspapers. Info Connections never disclosed its network configuration to Bell before commencing service. During the Spring of 1987, Info Connections realized that it was not receiving compensation from Bell for calls to its service. Info Connections' vice president communicated with Bell's product manager about this problem and after discussing how the service was configured, Bell informed Info Connections that calls to its audiotex number were not reimbursable under the terms of the tariff because the calls were not directly dialed within Pennsylvania.

On August 28, 1987, Info Connections filed a complaint against Bell seeking compensation for calls placed to its chatline. The parties stipulated that from March, 1987 until Info Connections terminated its **[**500]** service in February, 1988, 102,132 calls were completed to Info Connections' audiotex number for which Bell has not remitted compensation but has collected $ 138,269. The administrative law judge dismissed Info Connections' complaint because he found that the calls were not chargeable under the audiotex **[***4]** tariff as the calls originated outside Pennsylvania. The ALJ also

[1] By order of June 24, 1992, this Court consolidated the cross-appeals.

[2] Under the tariff in effect at the time Info Connections began using Bell's audiotex service, Info Connections was to receive $ 1.05 per call. Under the tariff filed after June 9, 1987, Info Connections was to receive $ 1.45 per call.

noted that **[*467]** Bell should not "escape culpability" as it retained the entire fee when it knew or should have known that a questionable practice was continuing; and that by collecting fees that it could not tender to Info Connections, Bell violated its tariff. The ALJ imposed civil penalties against Bell in the amount of $ 100,000 for violating its tariff and $ 153,523.63 under a theory of unjust enrichment.

Both parties filed exceptions and Info Connections filed a motion to strike Bell's exceptions. The Commission upheld the dismissal of Info Connections' complaint and denied its exceptions and motion to strike Bell's exceptions, finding that Bell's exceptions were timely filed. With respect to Bell's exceptions, the Commission determined that while the fees collected and retained for transportation, billing, collection, taxes and surcharges are undeniably tariffed charges, the fees Bell collected for remittance to Info Connections are the value of a contract between the parties and therefore a matter which belonged before a trial court rather than the Commission. The Commission also determined that Bell's **[***5]** actions in continuing to permit service and collect fees and in failing to initiate suspension and/or termination after it knew or should have known that the calls were not reimbursable, constitute "unreasonable provisioning of service" in violation of Section 1501 of the Public Utility Code (Code), 66 Pa.C.S. § 1501. The Commission granted Bell's exceptions to the extent it determined that Bell did not overcharge Info Connections' customers and that the Commission had no authority to impose the civil penalty for unjust enrichment; however, the Commission did impose a $ 105,000 fine against Bell for violating Section 1501 representing $ 500 per day for the seven month period running from July, 1987 through February, 1988 when service was disconnected.

I.

On appeal to this Court, Info Connections argues that the Commission capriciously disregarded substantial evidence and erroneously concluded that it failed to sustain its burden to prove that the calls were placed within the audiotex service **[*468]** area because the originating call to the audiotex number was from Info Connection's Philadelphia-based computer and the calls were subject to Pennsylvania sales tax. Info Connections **[***6]** also argues that the Commission erred when it failed to adopt the ALJ's determination that Bell should pay a civil penalty for violating Section 1303 of the Code, 66 Pa.C.S. § 1303. In addition, Info Connections maintains that Bell's exceptions were not timely filed with the Commission and did not adhere to proper form, and that the Commission's acceptance of the exceptions deprived Info Connections of procedural and substantive due process under the Pennsylvania and United States Constitutions. [3]

[*7]** The audiotex tariff in effect when Info Connections started its service defined chargeable calls as: "directly dialed calls to 976 Audiotex Services by Telephone Company callers originating within the specific Serving Area to a 976 Audiotex Service also within the same specified Serving Area." Bell's audiotex tariff was amended in June, 1987 and provided that calls were "reimbursable" if they were "billed within the Commonwealth of Pennsylvania" and were "originated by . . . callers within the specific 976 Audiotex Service Serving Area."

[501]** Info Connections argues that the calls from its Philadelphia-based computer were chargeable calls and therefore the calls originated within the audiotex service area. However, Info Connections does not dispute that the customer's calls were dialed from New York and that the calls were transferred into the audiotex service area. Clearly, it is the customer's call which initiates the transaction and culminates in the customer being billed for a call to the chat-line. Therefore, this Court cannot disturb the Commission's determination that the calls did not originate within the audiotex service area as that determination is based upon substantial **[***8]** evidence.

[*469] HN2[↑] Section 1303 of the Code provides that a public utility shall not "receive from any person . . . a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto." Info Connections does not challenge the Commission's determination that the portion of the sponsor fee reimbursable to Info Connections is a charge for non-utility service outside the bounds of the tariffs and therefore a private contract matter. *See* Elkin v. Bell Telephone Co. of Pennsylvania, 491 Pa. 123, 420 A.2d 371 (1980); Feingold v. Bell of Pennsylvania, 477 Pa. 1,

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[3] HN1[↑] This Court's scope of review in Public Utility Commission cases is limited to a determination of whether constitutional rights have been violated, an error of law has been committed, or the Commission's findings and conclusions are not supported by substantial evidence. West Penn Power Co. v. Pennsylvania Public Utility Commission, 134 Pa.Commonwealth Ct. 53, 578 A.2d 75 (1990), *appeal denied*, ***527 Pa. 660, 593 A.2d 429 (1991).***

383 A.2d 791 (1977) (the Commission does not have the power to award damages to a private litigant for breach of contract by a public utility). Therefore, the Commission correctly determined that Bell could not be assessed a fine for violating Section 1303 as that portion of the sponsor fees at issue was not subject to tariffs. [4]

[*9]** Procedurally, Info Connections argues that Bell's exceptions were not timely filed and therefore were not properly accepted by the Commission. HN3[↑] Exceptions to an initial decision of an ALJ may be filed within twenty days after the decision is issued. 52 Pa.Code § 5.533. Further, 52 Pa.Code § 1.12(a) provides that "[e]xcept as otherwise provided by statute, in computing a period of time prescribed or allowed by this title or by statute, the day of the act, event or default after which the designated period of time begins to run shall not be included." The ALJ's decision in this case was issued on March 16, 1990. Bell's exceptions filed on April 5, 1990 were timely as they were filed on the twentieth day after issuance of the ALJ's decision.

In addition, Info Connections argues that Bell's exceptions did not comply with HN4[↑] 52 Pa.Code § 5.533(b) which requires: **[*470]** "[e]xceptions shall be stated in specific, numbered paragraphs, identifying the finding of fact or conclusion of law to which exception is taken and cite relevant pages of the decision. Supporting reasons for the exceptions shall follow each specific exception." However, the Commission waived this requirement and stated **[***10]** in its opinion that Bell "referenced pages of the [ALJ's] Decision which, by implication, address specific Findings of Fact and Conclusions of Law along with supporting rationale for said Exceptions." Clearly, HN5[↑] the Commission has the authority to waive such procedural defects when they do not affect the substantive rights of the parties. See 52 Pa.Code § 1.2(a). Based on the foregoing discussion, this Court concludes that the Commission properly dismissed Info Connections' complaint and exceptions and denied its motion to strike Bell's exceptions.

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[4] The Commission also noted that a claim by Info Connections for those fees represents a contract matter and is best handled through the civil court system. In fact, Info Connections did file a breach of contract action in the United States District Court for the Eastern District of Pennsylvania and on September 10, 1992 the court entered an opinion and order concluding that there was no breach of contract but awarded $ 112,485.20 to Info Connections in sponsor fees on a theory of unjust enrichment.

II.

Bell argues that the Commission had no grounds to conclude that its failure to terminate Info Connections' service constituted "unreasonable service" because Bell had a statutory duty to provide service to Info Connections under the tariff. Bell further argues that because its actions were completely consistent with the terms of its tariff, it is shielded from any penalty or forfeiture pursuant to Section 3303(a) of **[**502]** the Code, 66 Pa.C.S. § 3303(a). Finally, Bell argues that even if it did violate a statutory duty, the penalty the Commission imposed is unlawful because it was imposed for violating a duty that was not clearly and **[***11]** unambiguously defined.

HN6[↑] By law every public utility shall furnish and maintain adequate, efficient, safe and reasonable services and facilities and shall make repairs, changes, alterations, substitutions, extensions and improvements in its services and facilities as necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Section 1501 of the Code, 66 Pa.C.S. § 1501. Further, Section 501(a), 66 Pa.C.S. § 501(a), gives the Commission the authority to execute and carry out the provisions of the Code, including those of Section 1501. AT & T Communications of Pennsylvania v. Pennsylvania **[*471]** Public Utility Commission, 130 Pa.Commonwealth Ct. 595, 568 A.2d 1362 (1990) (misquoting telephone rates is an unreasonable service and a violation of Section 1501).

Bell's tariff indicates that if a customer fails to comply with tariff regulations, Bell may suspend or terminate the audiotex service. This provision is permissive and not mandatory and failure to suspend or terminate does not constitute a tariff violation. Although this Court has recognized that the word "may" can have a mandatory **[***12]** import where the logical context of a provision requires it, Carroll Township v. Jones, 85 Pa.Commonwealth Ct. 400, 481 A.2d 1260 (1984), the Commission specifically determined that Bell's tariff regarding suspension or termination is permissive. Thus, Bell did not violate its tariff by not suspending or terminating the audiotex service as the Commission has unequivocally determined.

Although Bell did not provide written notice to Info Connections of its position regarding the New York calls and Info Connections' configuration, the Commission nonetheless found that Bell advised Info Connections that it would not be compensated for the calls under the

terms of the tariff. The Commission has provided no authority for its position that Bell's notice was required to be in writing and that this omission, among others, supports a Section 1501 violation of providing unreasonable service. The record clearly demonstrates that it was Info Connections who failed to heed Bell's warning and instead continued the service until February, 1988 when it decided to terminate the service. Under the facts established, the Commission may not conclude that **[***13]** this was a case wherein Bell was misleading a customer by supplying inaccurate information. *Compare AT & T Communications of Pennsylvania.*

In addition, while the filing of a petition for a declaratory order with the Commission may have been a prudent course of action, Bell had no duty to file such a petition and cannot be penalized for this omission when it was under no duty to take action. *See Commonwealth v. Stein, 519 Pa. 137, 546 A.2d 36 (1988), cert. denied, 490 U.S. 1046, 109 S.Ct. 1953, 104 L.Ed.2d 422 (1989)* (administrative rules and regulations must be written, **[*472]** must describe with particularity what is forbidden, and must create standards that eliminate vagueness and uncertainty). Logic therefore dictates that where one has no legal duty to take a particular action under a given set of circumstances not specifically forbidden, that person may not be penalized for such inaction because, as here, it causes "concern" to the administrative agency.

Section 3303(a) provides that public utilities:

> HN7[↑] shall [not] be liable for any penalty or forfeiture, or be **[***14]** subject to any prosecution, on account of demanding, collecting, or receiving any rate for any service, or for enforcing any regulation, or practice when such rate, regulation, or practice is contained in a tariff properly filed with the commission and posted or published as herein provided, and is applicable by the terms thereof at the time to such service although such rate, regulation, method or practice may be found by the commission to be unjust or unreasonable.

Consequently, Bell cannot be penalized for collecting its rate in accordance with the **[**503]** tariff, and, as the Commission found, Bell did not collect excessive rates. Furthermore, the Commission had no authority to penalize Bell for its inaction regarding a private contract matter which the Commission has determined was not properly before it. *See Elkin; Feingold.* Since Bell did not violate its tariff and since the private contract matter was not properly before the Commission, it erred by imposing the $ 105,000 penalty. [5] Hence, the order of the Commission is reversed as to imposition of the fine against Bell and affirmed in all other respects.

[*15]** ORDER

AND NOW, this 4th day of August, 1993, the order of the Public Utility Commission entered May 8, 1992 is reversed to **[*473]** the extent that it imposed a $ 105,000 fine against Bell Telephone Company of Pennsylvania and affirmed in all other respects.

End of Document

[5] This Court has repeatedly observed the well-established rule that HN8[↑] "the construction given a statute by those charged with its execution is entitled to great weight and should be disregarded or overturned only for cogent reasons and if clearly erroneous." *Pennsylvania Liquor Control Board v. Burrell Food Systems, Inc., 97 Pa.Commonwealth Ct. 101, 104, 508 A.2d 1308, 1309 (1986), appeal denied, **513 Pa. 636, 520 A.2d 1386 (1987)**.* Here, the Commission's interpretation finds no basis in law.

Docket No. C-2023-3038201
Michael Hillman v. Aqua Pennsylvania, Inc.

Attachment 5

Kovarikova v. Pa. American Water Company

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held August 23, 2018

Commissioners Present:

Gladys M. Brown, Chairman
Andrew G. Place, Vice Chairman
Norman J. Kennard
David W. Sweet
John F. Coleman, Jr.

Daria Kovarikova a/k/a Daria Kovarik C-2017-2592131

v.

Pennsylvania American Water Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Daria Kovarikova a/k/a Daria Kovarik (Ms. Kovarik or Complainant), filed on July 31, 2017, to the Initial Decision Granting Respondent's Motion for Summary Judgment (I.D.) of Administrative Law Judge (ALJ) Benjamin J. Myers, issued on July 13, 2017. Pennsylvania American Water Company (PAWC, Company or Respondent) filed Replies to Exceptions on August 11, 2017. For the reasons stated below, we will deny the Complainant's Exceptions and adopt the ALJ's Initial Decision.

History of the Proceeding

This matter pertains to the shut-off of the Complainant's water service in April 2013 and her request to the Commission to order the restoration of her service.

On March 3, 2017, Ms. Kovarik filed a Formal Complaint (Complaint) against PAWC, through her counsel, alleging that the water service at 211 Ridge Road, Annville, Pennsylvania (Service Address) had already been shut off by the Respondent and requested that the Commission direct the Company to turn the service back on. Ms. Kovarik attached two items to her Complaint – a copy of an April 16, 2013 water bill from the Respondent and a letter dated April 10, 2013, from the Company (April 2013 Letter). In the April 2013 Letter, the Respondent stated that the Company's action in shutting off the water was taken in accordance with an agreement between PAWC and the South Annville Township Authority (Authority) pursuant to 53 P.S. § 3102.501, *et seq*. Complaint at 2-3.[1]

On March 27, 2017, PAWC filed an Answer to the Complaint. In the Answer, the Respondent admitted that it shut off the Complainant's water service in April 2013 and averred that Ms. Kovarik had not been a customer of the Company since that time. Additionally, the Respondent alleged that it did not have any record of contact with the Complainant since April 2013 and that there had been no request to re-establish service. Answer at 1-2.

On June 12, 2017, the Complainant's counsel submitted an application for the issuance of several subpoenas (Subpoena Application) to require the presence of certain witnesses and documents at the scheduled hearing in this matter. In the Subpoena Application, the Complainant asserted that each of the requested witnesses and associated

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[1] The dispute between the Complainant and the Authority appears to relate to allegations of failing to pay sewer tapping and sewer rental fees. For a background discussion, *see South Annville Twp., v. Jaromir Kovarik and Daria Kovarik*, 2014 WL 2864898 (M.D. of Pa. June 24, 2014), *aff'd*, 651 F.App'x 127 (3d Cir. June 3, 2016), *cert. denied*, 137 S.Ct. 580 (Dec. 5, 2016).

documents requested would provide specific testimony and evidence "relevant to the request of the South Annville Township, Lebanon County Authority of water shut-off" at the Service Address. Subpoena Application at 2. The Subpoena Application further asserted that the testimony and evidence supplied by each of these witnesses would "prove that the shut-off request was not justified or in the alternative was in error." *Id.* at 3.

On June 13, 2017, the Respondent filed a Motion for Summary Judgment (Motion). In its Motion, the Company argued that based on the averments of the Complaint and the Subpoena Application pertaining to alleged acts concerning the water service shut off in April 2013, the Complainant was attempting to litigate matters that occurred in 2013, and such claims were barred by the applicable three-year statute of limitations under 66 Pa. C.S. § 3314. The Respondent asserted that because the Complainant was bringing an action more than three years after the date the liability arose, the Commission was divested of jurisdiction. For relief, the Company requested that the Complaint be dismissed as a matter of law. Motion at 3-6.

On June 19, 2017, the Respondent filed an objection to the Subpoena Application that raised arguments similar to those contained in its Motion. In response, the Complainant filed a revised application for the issuance of subpoenas (Revised Subpoena Application) on June 20, 2017. The Revised Subpoena Application identified the same witnesses as the previous application. However, the Complainant indicated that instead of testimony and evidence regarding the April 2013 water shut-off, the witness testimony would now be "relevant to the continuous request of the South Annville Township, Lebanon County Authority of water shut-off" to the Complainant's property and "the Authority's continuous conspiracy" with the Respondent to "deny water service to the property as of today." Revised Subpoena Application at 2-4.

On July 3, 2017, the Respondent filed an objection to the Revised Subpoena Application. The Company argued that the filing was an attempt to circumvent

the three-year statute of limitations by re-characterizing the subpoenas as seeking testimony regarding a continuous shut-off request by the Authority and a continuous conspiracy between the Authority and the Respondent to deny water service to Ms. Kovarik. The Respondent renewed its previous objections and requested that the Revised Subpoena Application be dismissed. Objection to Revised Subpoena Application at 1-2.

The Complainant filed an Answer to PAWC's Motion on July 3, 2017, arguing that the Motion was improper because it failed to be filed within an appropriate timeframe so as not to delay a hearing in this matter. The Complainant also contended that the Motion misrepresented facts in dispute and misapplied certain statutes and case law to the facts in dispute including the allegations of continuous misconduct and overt acts by the Respondent within the three years preceding the Complaint filing. As a result, the Complainant requested that the Commission deny the Motion. Answer to Motion at 2-5.[2]

In the Initial Decision, issued on July 13, 2017, the ALJ granted PAWC's Motion and dismissed the Complaint for lack of jurisdiction. I.D. at 11-12. As previously noted, the Complainant filed Exceptions on July 31, 2017. Also, on July 31, 2017, Ms. Kovarik filed an Amended Complaint. The Respondent filed Replies to Exceptions on August 11, 2017. On August 21, 2017, the Company filed an Answer to the Amended Complaint.

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[2] The Complainant attached several exhibits to her Answer to the Motion including her affidavit, a Non-Pay Sewer Shut Off Form, and a Shut-Off Agreement between the Authority and PAWC dated January 15, 2013 (Shut-Off Agreement). Answer to Motion at Exhs. I, B and C.

Discussion

Before addressing the Exceptions, we note that any issue or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC,* 625 A.2d 741 (Pa. Cmwlth. 1993); *also see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

In the Initial Decision, ALJ Myers made thirteen Findings of Fact and reached six Conclusions of Law. I.D. at 5-6, 11. We shall adopt and incorporate herein by reference the ALJ's Findings of Fact and Conclusions of Law unless they are either expressly or by necessary implication overruled or modified by this Opinion and Order.

Legal Standards

Initially, we note that this case is before us on the ALJ's ruling on a Motion for Summary Judgment. Motions for summary judgment are governed by Section 5.102 of our Regulations, which provides, in relevant part, as follows:

> **§ 5.102. Motions for summary judgment and judgment on the pleadings.**
>
> * * *
>
> (d) *Decisions on motions.*
>
> (1) *Standard for grant or denial on all counts*. The presiding officer will grant or deny a motion for judgment on the pleadings or a motion for summary judgment, as appropriate. The judgment sought will be rendered if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue of material fact and

> that the moving party is entitled to a judgment as a matter of law.

Summary judgment is available when the pleadings, depositions, and other documents show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Summary judgment should be granted only when the right to relief is clear and free from doubt. In determining the absence of a genuine issue of material fact, the Commission must view the record in the light most favorable to the non-moving party and resolve any doubts against the entry of the judgment. *Day v. Volkswagonwerk Aktiengesellschaft*, 464 A.2d 1313, 1316 (Pa. Super. 1983). In this proceeding, PAWC bears the burden of demonstrating clearly that there is no genuine issue of material fact; however, as the non-moving party the Complainant must allege facts showing that an issue for trial exists. *First Mortgage Co. of Pennsylvania v. McCall*, 459 A.2d 406 (Pa. Super. 1983); *Commonwealth v. Diamond Shamrock Chemical Co.*, 391 A.2d 1333 (Pa. Cmwlth. 1978).

The provisions at 52 Pa. Code § 5.102 serve judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa. C.S. § 703(a); *Lehigh Valley Power Committee v. Pa. PUC*, 563 A.2d 557 (Pa. Cmwlth. 1989).

ALJ's Initial Decision

The ALJ determined that PAWC is entitled to judgment as a matter of law because Ms. Kovarik's claims regarding the shut-off of her water in April 2013 are barred by the statute of limitations. The ALJ addressed the applicable statute of limitation under Section 3314(a) of the Code, which provides:

> General rule.—No action for the recovery of any penalties or forfeitures incurred under the provisions of this part, and no prosecutions on account of any matter or thing mentioned in this part, shall be maintained unless brought within three

> years from the date at which the liability therefor arose, except as otherwise provided in this part.

66 Pa. C.S. § 3314(a). The ALJ explained that Section 3314(a) of the Code is non-waivable because the time limitation contained in it terminates not only the remedy but also the actual right to bring the action. I.D. at 8 (citing *Reuben v. O'Brien*, 445 A.2d 801 (Pa. Super. 1982). Thus, the ALJ reasoned the statute of limitations under 66 Pa. C.S. § 3314 divests the Commission of jurisdiction to hear an action brought more than three years from the date liability arose. I.D. at 8.

Applying Section 3314 to this proceeding, the ALJ explained that Ms. Kovarik filed her Complaint on March 3, 2017, which means that Commission jurisdiction extends to claims arising on or after March 3, 2014. According to the ALJ, however, the Complainant's claims here relate to the April 2013 shut-off of her water service. In support, the ALJ noted the sole averment in the Complaint that the water service had already been shut off and the only requested relief pertained to the restoration of her water service. Additionally, the ALJ cited the Complainant's Subpoena Application that demonstrates that she is seeking evidence and testimony regarding a claim relating directly to the April 2013 shut-off. The ALJ stated that the April 2013 shut-off and the circumstances surrounding it are plainly outside the three-year statute of limitations in this matter. I.D. at 9.

Next, the ALJ addressed Ms. Kovarik's filing of the Revised Subpoena Application and her admission of submitting the revised request in direct response to the Respondent's previous objection. The ALJ indicated that the Complainant sought the testimony of the same four witnesses identified in the original Subpoena Application. According to the ALJ, the only material difference between the applications was Ms. Kovarik's latest assertion that the witnesses would provide testimony relevant to the allegations of a continuous request by the Authority to shut off the water at the Service Address and of a continuous conspiracy between the Authority and PAWC to currently

deny water service to the property. In response, the ALJ agreed with the Respondent that the Complainant was simply re-characterizing the testimony and evidence sought in the initial Subpoena Application in an apparent attempt to escape dismissal. Regardless of the characterization, the ALJ concluded it is evident that the requested testimony is related directly to the shut-off in April 2013, which was barred by 66 Pa. C.S. § 3314. I.D. at 9-10.

Exceptions and Replies

The Complainant raises five main exceptions to the Initial Decision. In her first Exception, Ms. Kovarik objects to the ALJ's characterization of the proceeding in the Introduction section of the Initial Decision as being a penalty for a shut-off. Although the Complainant concedes that the matter arose following the shut-off of service in 2013, Ms. Kovarik asserts that her Complaint merely requested an order to reinstate her service. The Complainant further contends that she has disavowed a claim seeking a penalty for improper termination of her service. Exc. at 1.

In its Replies, PAWC argues that the Introduction section of the Initial Decision does not contain the word "penalty" and that the section simply characterizes the action in the same manner as set forth in the Complainant's Exceptions. According to the Company, the Introduction accurately summarizes the nature of the Complaint, and the Exceptions provide no basis for rejecting or modifying the Introduction. R. Exc. at 3.

In her second Exception, Ms. Kovarik objects to the ALJ's failure to reference her Response to Objection to Subpoenas dated July 11, 2017. According to the Complainant, the contents of this filing should have been considered in determining whether there was a material issue of fact for purposes of the Motion. Exc. at 1-2.

The Company makes three responses to the Complainant's second Exception. First, the Commission's Regulations do not authorize the filing of responses

to objections to subpoenas. Thus, PAWC asserts that the ALJ's lack of reference to the filing is not an error that would void the Initial Decision. Second, the Company submits that the July 11, 2017 filing was made eight days after the Complainant filed her Answer to the Motion. PAWC submits that if Ms. Kovarik wished to provide additional documents or arguments in response to the Motion, she was required to do so in her Answer to the Motion pursuant to 52 Pa. Code § 5.102(b). The Company adds that the documents attached to the July 11, 2017 filing were dated from 2015, and thus were not newly obtained items. According to the Company, the Complainant could not argue that the documents were unavailable at the time of her filing of the Answer to the Motion. Third, PAWC argues that even if the Commission were to consider the late-filed response, the information contained in the filing is centered on the need to subpoena witnesses who could testify regarding the 2013 water shut-off. R. Exc. at 3-4.

The Complainant argues in her third Exception that the ALJ failed to consider the whole record and prepared incomplete Findings of Fact. According to Ms. Kovarik, there is a factual dispute regarding whether and when she requested restoration of service and whether the Company followed the appropriate procedures for restoring her service pursuant to 52 Pa. Code § 56.421(7). The Complainant refrains from stating that the Findings of Fact are inaccurate, but instead submits that they are materially incomplete, and the granting of summary judgment based on disputed findings was improper. Exc. 2-3.[3]

In its Replies to the third Exception, the Company first responds to the allegation of failure to restore service. PAWC argues that there is nothing in the record to support a conclusion that the Complainant requested restoration of service within the three-year period before the filing of her Complaint. In addition, the Respondent proffers

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[3] The Complainant makes overlapping arguments in her fifth numbered Exception contending that the ALJ disregarded Ms. Kovarik's position in concluding there were no issues of material fact. She makes the added argument that the Company's denial of her service constitutes a *prima facie* violation of 66 Pa. C.S. § 1502, pertaining to discrimination of service. Exc. at 5-6.

that to prevail on a claim of failure to restore service, Ms. Kovarik would need to show that the Company was required to restore her service. PAWC asserts that it was not required to restore service but is, in fact, prohibited from restoring service pursuant to the Shut-Off Agreement between the Authority and PAWC. The Company further contends that the Complainant's argument regarding her right to restoration is predicated on her claim that the initial shut-off was defective. According to the Respondent, Ms. Kovarik is seeking the Commission's examination of the shut-off which occurred more than three years prior to the filing of the Complaint and is beyond the statute of limitations and the jurisdiction of the Commission. R. Exc. at 5-6.

In further response, the Company argues that the Commission does not have jurisdiction over the actions and operations of the Authority because municipal authorities are not public utilities within the meaning of the Code. Thus, PAWC continues, the Complaint is outside the Commission's jurisdiction to the extent that Ms. Kovarik is complaining about the actions of the Authority. Moreover, the Company contends that Section 5607(d)(9) of the Municipal Authorities Act (MAA), 53 Pa. C.S.

§ 5607(d)(9), vests the Pennsylvania courts of common pleas with exclusive jurisdiction regarding rates and service provided by a municipal authority.[4] R. Exc. at 7 (citing *Graver v. Pa. PUC*, 469 A.2d 1154 (Pa. Cmwlth. 1984)).

Addressing the restoration of service claims of the Complainant, the Company asserts that the purported regulatory requirement cited by Ms. Kovarik, 52 Pa. Code § 56.421(7), is inapplicable. The Company states that Section 56.421(7) of our Regulations only applies to victims under a protection from abuse order and to wastewater, steam heating and natural gas distribution utilities. If the Complainant intended to reference the parallel provision at 52 Pa. Code § 56.191, the Respondent continues, that Regulation is also inapplicable to Ms. Kovarik's situation. PAWC asserts that Section 56.191 of our Regulations addresses circumstances where terminations occurred for nonpayment or failure to permit access and outlines the required process for restoration of service in those situations. In contrast, the Company contends it shut off the Complainant's water in April 2013 solely at the request of the Authority pursuant to

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[4] Section 5607(d)(9) of the MAA provides in relevant part:

> Any person questioning the reasonableness or uniformity of a rate fixed by an authority or the adequacy, safety and reasonableness of the authority's services, including extensions thereof, may bring suit against the authority in the court of common pleas of the county where the project is located or, if the project is located in more than one county, in the court of common pleas of the county where the principal office of the project is located. The court of common pleas shall have exclusive jurisdiction to determine questions involving rates or service. Except in municipal corporations having a population density of 300 persons or more per square mile, all owners of real property in eighth class counties may decline in writing the services of a solid waste authority.

53 Pa. C.S. § 5607(d)(9).

the Shut-Off Agreement and Section 3102.502 of the Water Services Act[5] and not for failure to pay or to permit access. PAWC reiterates that it is precluded from reconnecting service until the Authority authorizes the Company to do so, and the Authority has not given such an authorization. R. Exc. at 7.

Regarding the contention that PAWC's denial of service constituted a violation of 66 Pa. C.S. § 1502, the Company argues that the record does not support a conclusion of discrimination of service. Rather, the Company asserts that the Complainant's own filings clearly show that PAWC shut off her service at the request of the Authority and that the Company has not received the required authorization from the Authority to reinstate her service. R. Exc. at 12.

In her fourth Exception, Ms. Kovarik objects to Conclusion of Law No. 5 contending that it erroneously concludes that liability under the Complaint arose in April 2013. Instead, the Complainant argues the gist of her Complaint pertains to her efforts, this year, to establish restored or new water service. In support, Ms. Kovarik cites to a copy of her Amended Complaint which she attached to her Exceptions. The Complainant also objects to Conclusion of Law Nos. 1 through 4. Ms. Kovarik proffers that in applying the statute of limitations in 66 Pa. C.S. § 3314(a), the ALJ failed to consider 66 Pa. C.S. § 3301(b) pertaining to continuing offenses. The Complainant contends that the

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[5] If the owner or occupant of a premises served by a water utility neglects or fails to pay, for a period of 30 days from the due date, a rental, rate or charge for sewer, sewerage or sewage treatment service imposed by a municipality or municipal authority, the water utility shall, at the request and direction of the municipality, the authority or a city, borough or township to which the authority has assigned its claim or lien, shut off the supply of water to the premises until all overdue rentals, rates, charges and associated penalties and interest are paid.

53 P.S. § 3102.502(a)(1).

Commission should consider the Company's conduct in presently refusing to turn her water on, as recently reaffirmed in her affidavit to the Motion. Exc. at 4.

Additionally, the Complainant objects to Conclusion of Law No. 6 as incorrectly concluding that dismissal of the Complaint is in the public interest. Ms. Kovarik asserts that the statute of limitations should be considered in light of the general purpose of the Code to ensure that services are available to the public. The Complainant argues that the purported attempt to permanently disqualify her from obtaining water because of the 2013 incident turns the public interest concept "on its head." Exc. at 5.

In its Replies to the fourth Exception, PAWC argues that the Complainant's attempts to recharacterize her Complaint as being about her efforts to reestablish service in 2017 is unsupported by the record. Even if the Complainant had requested service prior to filing her Complaint, the Company reiterates that the lack of Authority consent prohibited the Respondent from restoring her service under the terms of the Shut-Off Agreement and 53 P.S. § 3102.502. Regarding the ALJ's purported failure to consider Section 3301(b) of the Code, the Company contends that Section 3301 does not change the statute of limitations for filing claims for violations of the Code. According to the Respondent, Section 3301 only states that each day of a continuing violation shall be treated as a separate and distinct offense for calculating civil penalties. R. Exc. at 8.

The Company also highlights that Ms. Kovarik does not cite to the entirety of Section 3314(a) of the Code, particularly the provision requiring prosecutions for matters under the Code to be maintained within three years from the date liability arose. PAWC adds that while the Complainant may not be seeking penalties, she is still prosecuting a Complaint under the Code, which requires the application of the three-year statute of limitation. Regarding the Complainant's equitable argument that the interests of justice outweigh enforcing the statute of limitation in this matter, the Company argues

that it is well-settled that the Commission does not have the power to waive the three-year statute of limitations. R. Exc. at 8-9.

In her final Exception, which is numbered seven, the Complainant indicates that she has attached her Amended Complaint and states that it is "to be substituted for the one on the record since the PUC format seems to be disapproved by both the ALJ and Respondent." Exc. at 7.

In its Replies, the Company argues that the Complainant is further attempting to reframe her claim against PAWC as a refusal to restore service rather than a claim regarding the termination of her service. The Company objects to Ms. Kovarik's attempt to submit an Amended Complaint into the record on several grounds. The Company contends that the unverified copy attached to the Exceptions was not validly filed. Additionally, PAWC submits that it would be improper and prejudicial to allow the Complainant to avoid an adverse Initial Decision by simply filing a new complaint with a different legal theory in connection with the Exceptions to that Initial Decision. The Respondent also contends that there is nothing in the Commission's Regulations permitting an Amended Complaint to be considered during the review of Exceptions to an Initial Decision granting summary judgment if the Amended Complaint was not in the record before the presiding officer. If the Complainant sought to provide additional documents or arguments regarding the summary judgment filing, the Company submits that she was obligated to provide such information in her Answer to the Motion. Here, Ms. Kovarik had the opportunity to file the information contained in her Amended Complaint with her Answer to the Motion but declined to do so, PAWC states. As such, the Company argues that no consideration should be given to the Amended Complaint. R. Exc. at 13.

Moreover, the Company objects to the Amended Complaint as an improper attempt to submit new evidence without petitioning the Commission and showing that the grounds for reopening the proceeding have been satisfied, pursuant to 52 Pa. Code § 5.571(b). Here, the Company notes that no hearing was held but that the Complainant failed to provide any basis for admitting new information into the record – such as the occurrence of material changes of fact or law – after the filing deadline for submitting an Answer to the Motion. As a final argument, PAWC states that even if the Commission were to consider the Amended Complaint it provides no basis for reversing the Initial Decision because it reinforces the conclusion that Ms. Kovarik is challenging the 2013 service termination. R. Exc. at 14.

Disposition

Based on our review of the pleadings and the applicable law, we find that the ALJ properly granted the Motion for Summary Judgment. Viewing the record in the light most favorable to the Complainant, the relief Ms. Kovarik is seeking falls outside of the statute of limitations period set forth in the Code. Section 3314(a) expressly provides that "no prosecutions on account of any matter or thing mentioned in this part shall be maintained unless brought within three years from the date at which the liability therefor arose, except as otherwise provided in [the Code]." The Complainant's allegations regarding PAWC's actions from approximately April 2013 are time-barred by the three-year statute of limitations in Section 3314(a) of the Code. In this case, the date on which PAWC's liabilities arose is more than three years prior to the filing of the Complaint on March 3, 2017. Accordingly, we agree with the ALJ that a review of the Company's actions in shutting off Ms. Kovarik's water service in April of 2013 is barred by the statute of limitations.

We cannot waive the statute of limitations period set forth in Section 3314(a) of the Code or make a determination that the three-year period does not apply to the Complainant in this case. As a creature of legislation, this Commission has only the

authority the legislature has granted to us in the Code. *Feingold v. Bell*, 477 Pa. 1, 383 A.2d 791 (1977). We have consistently determined that Section 3314 (a) of the Code is non-waivable because it terminates the right to bring an action as well as any remedy the Commission may order. Here, Section 3314(a) divests the Commission of jurisdiction to hear the Complainant's action brought more than three years from the date the alleged liability arose. *See, e.g., Tyrone Brown v. Philadelphia Gas Works*, Docket No. F-2018-2641015 (Initial Decision issued March 20, 2018; Final Order entered May 17, 2018); and *Sythierno Mansour v. Philadelphia Gas Works*, Docket No. C-2016-2528326 (Initial Decision issued August 19, 2016; Final Order entered October 25, 2016).

In her Exceptions, Ms. Kovarik attempts to characterize her cause of action as an ongoing request to restore service. However, it is undisputed that PAWC terminated the service at the request of the Authority in April of 2013 pursuant to 53 P.S. § 3102.502 and the Shut-Off Agreement between the Authority and the Company. As correctly noted by the ALJ, Ms. Kovarik's Complaint and her Applications for Subpoenas demonstrate that the allegations fundamentally relate to the 2013 service termination. For example, the Complainant's affidavit to her Motion included attachments confirming that the Company is precluded from restoring her water service until the Authority directs otherwise and that the Authority has not provided the authorization to restore service. Therefore, it is evident that the premise of the Complainant's cause of action is the termination of service which occurred in April of 2013. Indeed, Ms. Kovarik acknowledges this presumption in her Exceptions: "Complainant believes that the original shut-off agreement ... was defective, as the person who signed the shut-off order was not authorized to do so." Exc. at 6. Thus, the Complainant's attempt to re-characterize her Complaint as an ongoing attempt to restore service will not operate as a bypass to the statute of limitation.

Furthermore, even if Ms. Kovarik's cause of action could be deemed to survive the statute of limitations, the Commission would appear to lack the authority to grant the relief requested by the Complainant because the termination occurred pursuant to Section 3102.502 of the Water Services Act (*e.g.*, the Commission could not direct the

Company to restore service in derogation of 53 P.S. § 3102.502).[6] Rather, the Complainant's avenue for seeking relief would lie with the court of common pleas pursuant to Section 5607(d)(9) of the MAA, 53 Pa. C.S. § 5607(d)(9).[7]

As a final matter we note that after the issuance of the Initial Decision and on the same day that she filed her Exceptions, Ms. Kovarik filed an Amended Complaint. In the Amended Complaint, Ms. Kovarik again attempts to characterize her cause of action as an ongoing request to have her service restored. We note that our Regulations do not authorize the filing of an Amended Complaint during the review of Exceptions to an Initial Decision granting summary judgment and shall decline to consider the filing.

Accordingly, we shall deny the Complainant's Exceptions.

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[6] We note that under the terms of the Shut-Off Agreement PAWC "shall be required to comply with any existing regulations of the" Commission "relating to notice before termination, in addition to providing any notice that might otherwise be required under this contract or any applicable law or ordinance." Shut-Off Agreement, Sec. 8 at 5, PAWC Motion for Summary Judgment, Exh. 1. *See also* Docket No. U-2013-2346869, submission of Shut-Off Agreement to the Commission.

[7] The Pennsylvania Supreme Court has determined that the MAA provides the exclusive regulatory scheme to address rates and service provided by an authority and provides that the courts of common pleas are the exclusive forum in which to address issues arising under the MAA. *Petition of Central Bradford Progress Authority*, Docket No. P-2018-2642849 (Order entered July 12, 2018) at 6 (citing *Calabrese v. Collier Twp. Mun. Auth.*, 430 Pa. 289, 240 A.2d 544 (1968), and *Elizabeth Twp. v. Mun. Auth. of McKeesport*, 498 Pa. 476, 447 A.2d 245 (1982)).

Conclusion

For the reasons discussed herein, we shall: (1) deny the Complainant's Exceptions; (2) adopt the ALJ's Initial Decision; and (3) dismiss the Complaint, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed by Daria Kovarikova a/k/a Daria Kovarik, filed on July 31, 2017, are denied.

2. That the Initial Decision Granting Respondent's Motion for Summary Judgment of Administrative Law Judge Benjamin J. Myers, issued on July 13, 2017, is adopted.

3. That the Motion for Summary Judgment filed by Pennsylvania American Water Company on June 13, 2017, is granted.

4. That the Formal Complaint filed by Daria Kovarikova a/k/a Daria Kovarik on March 3, 2017, is dismissed.

5. That the proceeding at Docket No. C-2017-2592131 is marked closed.

BY THE COMMISSION,

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: August 23, 2018

ORDER ENTERED: August 23, 2018

Attachment 6

Ely v. Pa. American Water Company

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA. 17105-3265

Public Meeting held June 22, 2006

Commissioners Present:

Wendell F. Holland, Chairman
James H. Cawley, Vice Chairman
Bill Shane
Kim Pizzingrilli
Terrance J. Fitzpatrick

Lester Ely
v.
Pennsylvania American Water Company

Docket No. C-20055616

REMAND ORDER

BY THE COMMISSION:

On November 28, 2005, Lester Ely ("Complainant"), filed a formal Complaint alleging that Bulldog Construction Company, a contractor for Pennsylvania-American Water Company ("PAWC" or "Respondent") "tore up his asphalt driveway while replacing a water line to a house behind his." Complaint at 5. As relief, the Complainant asked that the Commission order Respondent to restore his driveway to its original condition.

In its Answer, PAWC admitted that work was done in the vicinity of the Complainant's property but denied that PAWC was responsible for any alleged problems. The Respondent, in New Matter, alleged that the formal complaint failed to state a cause of action for which relief could be granted and, in the alternative, that the formal Complaint was time-barred. Answer at 2.

By Initial Decision issued March 28, 2006, Administrative Law Judge (ALJ) Angela T. Jones determined that the Complainant's driveway was in fact damaged on December 18 and 19, 2001. Specifically Bulldog Construction Company, under the direction of PAWC, dug a six-foot deep hole in Complainant's driveway to get to a leak that was on the property in back of Complainant's property. FOF 5 and 7. Notwithstanding the ALJ's conclusion that it was unreasonable for PAWC to leave Complainant's property in a state of disrepair for over four years, and that PAWC's unreasonable service was a violation of section 1501 of the Public Utility Code ("Code"), 66 Pa. C.S. § 1501, the ALJ, pursuant to the 3-year statute of limitations set forth in 66 Pa. C.S. § 3314, dismissed the Complaint. We disagree with the dismissal and reverse.

The evidence of record clearly indicates that the *pro se* Complainant diligently pursued this matter both with PAWC and Bulldog Construction Company.[1] Shortly after the hole was dug in December 2001, Complainant was told by PAWC that the restoration of his driveway would be deferred until Spring 2002 because of cold weather. In the spring of 2002, Complainant received verbal assurances for inspection and repair of his driveway but nothing occurred. FOF 12. In 2003, Complainant received more phone calls and assurances from PAWC but no action to repair his driveway was taken. FOF 13.

This is a classic case for the application of equitable estoppel. The doctrine of equitable estoppel serves to toll the statute of limitations and is based on the theory of estoppel. It provides that a defendant may not invoke the statute of limitations if through fraud or concealment he causes the plaintiff to relax his vigilance or deviate from his right of inquiry into the facts. The doctrine does not require fraud in the strictest sense,

[1] Complainant called Bulldog Construction and was told they would not do anything until they received approval from PAWC. FOF 11.

but rather, fraud in the broadest sense, which includes an unintentional deception.[2] PAWC's repeated assurances that it would restore Complainant's driveway caused the Complainant to essentially "relax his vigilance." Indeed, under the apparent circumstances of this case, it is appalling that PAWC would raise such an affirmative defense against a *pro se* Complainant.

Accordingly, for the reasons set forth herein, the Initial Decision by ALJ Jones is reversed and the case is remanded to the Office of Administrative Law Judge (OALJ) for a hearing and a decision on the merits; **THEREFORE,**

IT IS ORDERED:

That the Initial Decision by Administrative Law Judge Angela T. Jones is reversed and the case remanded to the OALJ consistent with the decision in the body of this Order.

BY THE COMMISSION,

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: June 22, 2006

ORDER ENTERED: July 10, 2006

[2] *Mary Esther Battle v. PECO Energy Co.,* C-00003804 (order entered July 16, 2001).

Attachment 7

Battle v. PECO

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held July 13, 2001

Commissioners Present:

Glen R. Thomas, Chairman
Robert K. Bloom, Vice Chairman
Aaron Wilson, Jr.
Terrance J. Fitzpatrick

Mary Esther Battle C-00003804

v.

PECO Energy Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for consideration and disposition are the Exceptions filed on March 26, 2001, by PECO Energy Company (PECO), to the Initial Decision of Administrative Law Judge (ALJ) Herbert Smolen, issued on March 6, 2001, relative to the above-captioned proceeding. The ALJ recommended that the Complaint of Mary Esther Battle (Ms. Battle) be sustained. No Reply Exceptions were filed.

History of Proceeding

The instant proceeding was initiated by Ms. Battle on June 26, 2000, by the filing of a Complaint regarding PECO's treatment of an unpaid balance that appeared on

her account at the time a "foreign load"[1] was discovered. An Answer and New Matter was filed on July 21, 2000, and amended on September 7, 2000. Hearings were held on September 8, 2000, and November 29, 2000, during which Ms. Battle represented herself and PECO was represented by counsel. A post-hearing Memorandum of Law was submitted by PECO.

By Initial Decision issued March 6, 2001, ALJ Smolen recommended that we sustain the Complaint. Exceptions to the Initial Decision were filed by PECO on March 26, 2001. No Reply Exceptions have been filed.

Discussion

We note that we are not required to consider expressly or at great length each and every contention raised by a party to our proceedings. *University of Pennsylvania v. P.U.C.*, 485 A.2d 1217, 1222 (Pa. Commw. Ct. 1984). Accordingly, any exception or argument not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion.

PECO has filed three Exceptions in this case. The first two Exceptions relate to PECO's argument that Ms. Battle's claim was time-barred. PECO's first Exception alleges that ALJ Smolen erred when he concluded that Section 1530 of the Public Utility Code (Code), 66 Pa. C.S.A. §1530, prevents the statute of limitations found within Section 3314(a) of the Code, 66 Pa. C.S.A. §3314(a), from operating to bar the claim. In its second Exception, PECO alleges that ALJ Smolen also erred when he concluded that PECO was estopped from raising a statute of limitations defense. Finally, in its third Exception, PECO alleges that ALJ Smolen erred when he concluded that

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[1] The term "foreign load" describes a situation where a ratepayer's meter registers usage for utility service provided to a dwelling unit occupied by a person other than the ratepayer, or for use in a common area of a building.

PECO's failure to transfer to Ms. Battle's landlord arrearages appearing on her account at the time a foreign load was discovered violated Section 1529.1 of the Code, 66 Pa. C.S.A. §1529.1.

The facts in this case are not in dispute and are set forth in detail in the ALJ's Initial Decision. We hereby adopt and incorporate, to the extent that they are not inconsistent with our Opinion and Order, the eighteen Findings of Fact rendered by ALJ Smolen. Following, we summarize the facts pertinent to our discussion.

On December 7, 1994, a PECO representative discovered foreign load connected to a second floor apartment of a multi-unit rental property. At that time, Ms. Battle occupied the apartment as a tenant, and electrical service for the apartment was individually metered in her name. The representative explained to Ms. Battle and her landlord, who owned the property, that if the foreign wiring was not corrected, the billing for Ms. Battle's electrical service would be transferred to the landlord's name.

At this time, an outstanding balance of $4,763.64 appeared on Ms. Battle's account.

The landlord failed to correct the wiring. As a result, on April 3, 1995, a PECO representative contacted Ms. Battle and explained to her that the "billing [would] be placed in [the] owner's name." (PECO Exh. No. 2, p. 6). PECO then closed Ms. Battle's account and transferred the account for electrical service for the second floor apartment to her landlord's name, effective December 7, 1994. That was the date on which the foreign load was discovered. However, PECO did not, at that time, transfer the outstanding balance of $4,763.64 that existed on December 7, 1994, to the landlord. Instead, PECO placed the outstanding balance into an "uncollectible account" bearing Ms. Battle's name. This account was eventually sold to a collection agency.

Ms. Battle moved out of the second floor apartment in 1996. The outstanding balance was not transferred to the electrical service account opened in Ms. Battle's name at her new residence. Ms. Battle discovered that the outstanding balance remained in her name when she received a copy of her credit report. The outstanding balance appeared as an uncollected debt on the report. After receiving this information, Ms. Battle initiated the instant proceeding by the filing of a Complaint on June 26, 2000. Prior to receiving her credit report, Ms. Battle did not receive any collection notices and she "took it for granted" that PECO had transferred the outstanding balance to the landlord. (Tr., p. 38).

PECO filed an Answer and New Matter alleging that the claim was time-barred and PECO had no duty to transfer the outstanding balance to the landlord. ALJ Smolen rejected PECO's arguments and sustained the Complaint. PECO then filed the instant Exceptions.

PECO's first two Exceptions relate to the applicability of the three-year statute of limitations found within Section 3314(a) of the Code, 66 Pa. C.S. §3314(a). ALJ Smolen concluded that the three-year time limitation was not applicable in this case because PECO was estopped from raising the statute of limitations defense and, even if PECO was not estopped, Section 1530 of the Code, 66 Pa. C.S. §1530, prevents Ms. Battle from waiving her claim through inaction, therefore, the three-year time limitation is not applicable in this case. PECO excepts to both these conclusions.

Equitable estoppel is based upon the principle that "a person is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has in good faith relied thereon." (*Nesbitt v. Erie Coach Co.*, 204 A.2d 473, 476 (Pa. 1964)). For this reason, it is well-settled law in this Commonwealth that a party will be estopped from invoking a statute of limitations defense in cases where through fraud,

deception, or concealment, the party causes another to relax his or her vigilance and deviate from his or her right of inquiry. (*Walters v. Ditzler*, 227 A.2d 833 (Pa. 1967)).

In order for estoppel to bar a statute of limitations defense, fraud must be proved by clear and convincing evidence. However, the fraud that will "effect an estoppel need not be fraud in the strictest sense, i.e., inclusive of an intent to deceive, but it may be fraud in the broad sense, i.e., inclusive of an unintentional deception." (*Id.*, p. 834). This is so because it is not the intention of the party estopped which gives rise to an estoppel, rather it is the natural effect that the estopped party's actions or statements have upon another. (*Id.).* As explained by the Supreme Court, "if the circumstances are such that a man's eyes should have been open to what is occurring, then the statute begins to run from the time when he could have seen, but if by concealment, through fraud or otherwise, a screen has been erected by his adversary which effectually obscures the view of what has happened, the statute remains quiescent until actual knowledge arises." (*Nesbitt*, p. 477 (quoting *Schwab v. Cornell*, 160 A. 449, 450 (Pa. 1932)).

PECO claims that ALJ Smolen erred in finding estoppel in this case because there was allegedly no evidence that Ms. Battle's delay in initiating her Complaint was induced by PECO's actions. We disagree.

We note that during the relevant period PECO held itself out to the public, including Ms. Battle, as a public utility subject to the Public Utility Code. Pursuant to Sections 1529.1(b) and (c) of the Code, 66 Pa. C.S. §§1529.1(b)-(c), utilities such as PECO are required, upon discovery of a foreign load in a residential apartment that is individually metered, to switch the account into the name of the owner and bill the owner's account for any unpaid billing on the account. (*Santos v. Metropolitan Edison Company*, No. C-00967757, slip op., pp. 15-16 (Opinion and Order) (July 10, 1997)). Furthermore, there is undisputed evidence that PECO knew of the foreign load on Ms. Battle's meter. Consequently, when PECO, through its representatives, stated to

Ms. Battle that "the billing" would be transferred to the landlord/owner's name, Ms. Battle was led to believe that PECO would do as it said: transfer "the billing," meaning the entire billing.

We note further that following the transfer, PECO wrote-off the outstanding balance by selling it to a collection agency, but Ms. Battle did not know this. PECO did not send collection notices to Ms. Battle. PECO also did not transfer the outstanding balance to Ms. Battle when she opened a new account after changing residences in 1996. Thus, in its statements and actions prior to the transfer, PECO led Ms. Battle to believe that her entire bill had been transferred to the landlord/owner and PECO's actions following the transfer appeared to Ms. Battle to confirm that this had occurred.

Based on the above, ALJ Smolen correctly concluded that there was clear and convincing evidence that PECO's actions and statements caused Ms. Battle to unduly relax her vigilance and delay institution of her Complaint to a time beyond the statutory limitation period, thereby giving rise to an application of the estoppel doctrine in this proceeding.

PECO claims that ALJ Smolen erroneously concluded the three-year time limitation found within Section 3314(a) was inapplicable in this case.

Section 3314(a) of the Code provides:

> No action for the recovery of any penalties or forfeitures incurred under the provisions of this part, and no prosecutions on account of any matter or thing mentioned in this part, shall be maintained unless brought within three years from the date at which the liability therefor arose, **except as otherwise provided in this part.**

66 Pa. C.S.A. §3314(a) (emphasis added).

By using the phrase "except as otherwise provided in this part," the General Assembly clearly contemplated that the three-year limitation would be applicable only if another section of the Code did not provide for a different limitation. This means that if another part of the Code provides for a limitation shorter than three-years, the shorter limitation will control. Similarly, if another part of the Code provides for a limitation longer than three-years, the longer limitation will control. It also follows that if another part of the Code provides that there is no limitation, the three-year limitation will not be applicable.

ALJ Smolen concluded that Section 1530 provided that no limitation was applicable in this case. The language of Section 1530 of the Code supports this conclusion. Section 1530 provides that "Any waiver of a tenant's rights under this subchapter shall be void and unenforceable."

We note that Section 1529.1 is found within the subchapter referenced by Section 1530. Pursuant to Section 1529.1, utilities such as PECO are required, upon discovery of a foreign load in a residential apartment that is individually metered, to switch the account into the name of the owner and bill the owner's account for any unpaid billing on the account. (*Santos v. Metropolitan Edison Company*, No. C-00967757, slip op., pp. 15-16 (Opinion and Order) (July 10, 1997)). Therefore, Section 1530 provides tenants such as Ms. Battle with a non-waivable right to have unpaid billing transferred to the owner upon the discovery of foreign load.

For this reason, Section 1530 must be interpreted as providing that the three-year time limitation is inapplicable in this case. To do otherwise, would be to allow Ms. Battle to do, through inaction, that which she is clearly prohibited from doing through action – waive her right to have unpaid billing transferred to the owner upon the discovery of foreign load. The plain and unambiguous language of Section 1530

provides that "any" waiver is void and unenforceable. "Any" necessarily includes both a waiver by action, as well as one by inaction.

Furthermore, we note that in cases regarding other statutory provisions that modify application of a statute of limitations, courts find it appropriate to balance the public policy behind the limitations period with that of the provision that modifies it, taking the totality of the circumstances into consideration. (*See, e.g., Fanscsali v. University Health Ctr. of Pittsburgh*, 761 A.2d 1159 (Pa. 2000) (allowing a minor to discontinue without prejudice and bring claim beyond limitations period because protection of the minor's claim was in accordance with the purpose of a minor tolling statute and would not cause undue prejudice to the defendants, rendering the protection of the statute of limitations unnecessary); *Foti v. Askinas*, 639 A.2d 807 (Pa. Super. Ct. 1994) (denying minor's motion to discontinue without prejudice despite the existence of a minor tolling statute, finding that allowing claim to go forward would not serve purpose of tolling statute since the record established that minor would be unable to support his claim; and would contravene the purpose of the limitations period since defendants would be unduly prejudiced if they had to further defend against a claim that was already established as being deficient); *see also*, *Williams Studio Division of Photography By Tallas, Inc. v. Nationwide Mutual Fire Ins. Co.*, 550 A.2d 1333 (Pa. Super. Ct. 1988) (holding that a rule of civil procedure allowing for a voluntary non-suit could not enlarge a limitations period because such an extension would not further the purpose of the rule, which was to leave parties as if no action had been filed, and such an extension would allow a plaintiff, rather than the General Assembly, to determine the limitations period for a claim, in contravention of Constitutional principals); *Northampton County Area Community College v. Dow Chemical, U.S.A.*, 598 A.2d 1288 (Pa. 1991) (noting that as a matter of important public policy, statutes of limitation do not run against the Commonwealth when it acts in its governmental capacity)).

We hasten to point out that the purpose of the statute of limitations found within Section 3314(a) of the Code is to expedite litigation to ensure that undue delay by a complainant does not unduly prejudice the ability of a respondent to defend itself. (*See*, *In re Condemnation by the P.U.C.*, 557 A.2d 1109 (Pa. Commw. Ct. 1989) (discussing statutes of limitations in general)). The purpose of Section 1530, on the other hand, is to protect the right of tenants, such as Ms. Battle to have unpaid billing transferred to the owner of the building when foreign load is discovered. Furthermore, we note that the General Assembly has specifically provided that the limitations period may be modified by other sections of the Code. In contrast, the General Assembly has provided that all attempts to waive a tenant's rights under Section 1530 are to be deemed void and unenforceable. Therefore, it is clear that in balancing the interests of the two provisions, greater weight must be given to the interests protected by Section 1530.

In balancing the interests of the two provisions, we note that in its Exceptions, PECO asserts that it was prejudiced at the hearing in contravention of the public policy behind the limitations period. According to PECO, it is possible that it was not required to transfer the entire outstanding balance of $4,763.64 in this case because part of the balance may have actually been accrued by Ms. Battle at a prior address and transferred to her account when she moved into the second floor apartment. However, PECO claims that records which may have existed regarding the details of such a transfer would have been destroyed as part of PECO's regular record-keeping practice. PECO asserts that this establishes that its defense was prejudiced by Ms. Battle's alleged undue delay.

Our examination of the record does not reveal prejudice to PECO as a result of any undue delay on Ms. Battle's part. Rather, as noted in the previous discussion regarding the doctrine of estoppel, the record evidence establishes that it was PECO's own actions and statements upon which Ms. Battle relied that caused the delay in the initiation of the subject proceedings in this case. Therefore, it is apparent that any

prejudice to PECO's ability to defend itself in this proceeding was the result of PECO's own actions.

Additionally, we note that PECO did not dispute the amount of the outstanding balance or otherwise raise this issue until it filed its Exceptions. At the hearing, substantial and competent evidence was presented that established that an outstanding balance of $4,763.64 was accrued by Ms. Battle on her account for the second floor apartment as of December 7, 1994. That evidence included PECO's own records. PECO did not dispute the amount of the outstanding balance accrued by Ms. Battle at the second floor apartment or otherwise raise this issue at the hearing. Based on the evidence presented at the hearing, ALJ Smolen correctly found that the outstanding balance that had been accrued by Ms. Battle at the second floor apartment was $4,763.64.

Moreover, we note that the mere fact that one source of evidence was not available to PECO does not lead to the conclusion that all sources of evidence regarding the origin of the outstanding balance were unavailable. For instance, PECO had the opportunity at the hearing to inquire of Ms. Battle whether the $4,763.64 included charges from a previous address, but did not do so. Given that PECO did not present evidence regarding this issue at the hearing, we have no basis for concluding either that the records that were destroyed were the only source of this information or that PECO could access other sources of information only at great cost and hardship. Therefore, we have no basis for disturbing ALJ Smolen's findings in this regard.

Under these circumstances, we conclude that barring Ms. Battle's claim would not serve the purpose contemplated by Section 3314(a) of the Code, 66 Pa. C.S. §3314(a), which is to prevent prejudice to PECO caused by the undue delay of Ms. Battle. It would, however, be in contravention to the purpose of Section 1530, which is to protect the Complaint in this case. Therefore, both the language and the public

policy behind the statute at issue in this case support ALJ Smolen's conclusion that Section 1530 precludes the application of the limitations period to Ms. Battle's Complaint.

PECO excepts to ALJ Smolen's conclusion that it violated Section 1529.1 of the Code, 66 Pa. C.S. §1529.1, on three bases.

First, PECO asserts that Section 1529.1 allegedly does not require that unpaid balances be transferred to a property owner when foreign wiring is discovered. This argument was clearly rejected by this Commission in *Santos v. Metropolitan Edison Company*, No. C-00967757, slip op., pp. 15-16 (Opinion and Order) (July 10, 1997). We will repeat what we have previously stated:

> ... Section 1529.1(c) does explicitly require that the landlord "shall nonetheless be responsible for payment of the utility services" as of the effective date of the requirement to identify tenant occupied units, or September 1, 1993. The utility must switch the account into the name of the landlord and bill the landlord's account for any unpaid billing on the account.

(Id., p. 15).

Second, PECO argues that even if Section 1529.1 of the Code, 66 Pa. C.S. §1529.1, does contain such a requirement, PECO was not required to adhere to it prior to 1997, when this Commission issued *Santos*. This argument is also without merit. PECO has failed to cite any authority for its novel proposition that a party is only required to follow the mandates of the General Assembly if an opinion has been issued by this Commission that specifically confirms that it must do so. The reason for PECO's failure in this regard is clear, there is no authority for such a proposition. A statute is effective

upon enactment by the General Assembly. No further action by this Commission is required in order to effectuate or implement the provisions of a statute.

Finally, PECO contends that even if it had a duty in this case, it was only to transfer outstanding balances accrued at the second floor apartment, and since the record allegedly does not establish that the entire $4,763.64 balance was accrued at the second floor apartment, PECO claims it would be inequitable to allow transfer of the entire balance.

We note that the inequity alleged by PECO in this regard was caused by PECO's own actions in misleading Ms. Battle. Moreover, as noted in our previous discussion regarding Section 1530 of the Code, there was substantial and credible evidence presented at the hearing that the balance accrued at the second floor apartment was $4,763.64. PECO did not dispute the origin of the outstanding balance at the hearing, and no evidence was presented regarding PECO's ability or inability to establish the origin. Therefore, ALJ Smolen's finding in this regard will not be disturbed.

Conclusion

We conclude that ALJ Smolen's Initial Decision is supported by applicable statutory and case law as well as substantial and competent evidence. Accordingly, we will deny Applicant's Exceptions; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions of PECO Energy Company filed on March 26, 2001, to the Initial Decision of Administrative Law Judge Herbert Smolen, issued on March 6, 2001, are denied.

2. That the Initial Decision of Administrative Law Judge Herbert Smolen issued on March 6, 2001 is adopted to the extent consistent with this Opinion and Order.

3. That the Complaint of Mary Esther Battle against PECO Energy Company in the instant proceeding is hereby sustained.

4. That within thirty (30) days from the date of the entry of the Order in this matter, PECO Energy Company shall take all appropriate action and measures necessary to clear Mary Esther Battle's credit record with the agency to which PECO Energy sold her account and with all credit reporting agencies with respect to the disputed balance of $4,763.64 by, *inter alia*, advising the said collection agency and all of said credit reporting agencies that said balance was inadvertently or mistakenly sold and reported as being Mary Esther Battle's obligation and that Mary Esther Battle did not owe said balance at the time of its sale and referral and does not now owe said balance.

5. That within said thirty (30) day period, PECO Energy Company shall submit to the Commission's Bureau of Consumer Services and to Mary Esther Battle copies of all documents and all other evidence demonstrating compliance with Ordering Paragraph 3 of this Order.

6. That upon compliance by PECO Energy Company with all provisions of this Order, this matter shall be marked closed.

BY THE COMMISSION,

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: July 13, 2001

ORDER ENTERED: July 16, 2001

Attachment 8

Fine v. Checcio

Fine v. Checcio

Supreme Court of Pennsylvania

April 15, 2004, Argued ; March 30, 2005, Decided

55 EAP 2003, No. 68 WAP 2003

Reporter
582 Pa. 253 *; 870 A.2d 850 **; 2005 Pa. LEXIS 596 ***

ERIC FINE, Appellant v. MARY ANNE CHECCIO, D.D.S., Appellee; ROSEZETTA MARIE WARD, Appellee v. JEFFREY W. RICE, D.M.D. and JEFFREY W. RICE, D.M.D., P.C. Appellants

Subsequent History: On remand at *Fine v. Checchio, 2005 Pa. Super. LEXIS 6024 (Pa. Super. Ct., Oct. 27, 2005)*

Prior History: **[***1]** No. 55 EAP 2003

Appeal from the Judgment of Superior Court entered on May 22, 2003, at No. 2757 EDA 2002, reversing the Judgment entered on August 28, 2002 in the Court of Common Pleas of Philadelphia County at No. 315 August Term 2000. Appeal Allowed December 10, 2003 at 279 EAL 2003. Trial Court Judge: C. Darnell Jones, II. Intermediate Court Judges: Kate Ford Elliott, Richard B. Klein and Frank J. Montemuro, JJ.

No. 68 WAP 2003

Appeal from the Order of the Superior Court entered June 27, 2003 at No. 1242 WDA 2002, reversing the Order of the Court of Common Pleas of Clear County entered June 18, 2002 at No. 97-1192-CD. Appeal Allowed December 10, 2003 at 365 WAL 2003. Trial Court Judge: John K. Reilly, Jr. Senior Judge. Intermediate Court Judges: Richard B. Klein, Zoran Popovich and Justin M. Johnson, JJ. *2003 PA Super 248, 828 A. 2d 1118 (Pa. Super. Ct. 2003)*.

Fine v. Checchio, 829 A.2d 369, 2003 Pa. Super. LEXIS 2639 (Pa. Super. Ct., 2003)
Ward v. Rice, 2003 PA Super 248, 828 A.2d 1118, 2003 Pa. Super. LEXIS 1869 (Pa. Super. Ct., 2003)

Disposition: In Fine's appeal, Superior Court reversed, trial court's order reinstated, remanded; Dr. Rice's appeal, order of the Superior Court affirmed, remanded to trial court.

Core Terms

Fine, numbness, statute of limitations, discovery rule, surgery, fraudulent concealment, tolled, summary judgment motion, discovery, trial court, concealment, summary judgment, limitations, reasonable diligence, limitations period, ascertainable, cases, running of the statute, experiencing, prescribed, wisdom, nerve, pain, exercise of reasonable diligence, material fact, circumstances, deposition, diligence, extracted, discover

Case Summary

Procedural Posture
Plaintiffs, patients, sued defendants, dentists, in separate actions alleging dental malpractice. The trial court in the first action denied the dentists' motion for summary judgment, and the trial court in the second action granted the dentists' summary judgment motion. The Pennsylvania Superior Court reversed the trial courts in both cases. The appeals of the judgments were consolidated.

Overview

In both cases, the dentists recommended that the patients have impacted wisdom teeth removed. The patients suffered permanent numbness in their faces due to nerve damage from the procedures. Both dentists moved for summary judgment on the ground that the actions were time-barred under *42 Pa. Cons. Stat. § 5524(2)*. The issue in both cases was whether the discovery rule and the doctrine of fraudulent

concealment provided exceptions to the statute of limitations. When the discovery rule applied, the statute of limitations did not commence to run until the injured party discovered or reasonably should have discovered that the injury had occurred. The same rule applied to the doctrine of fraudulent concealment. The state supreme court found that in the first action, it was for the jury to decide when the patient knew or should have known of the injury. The record showed that the patient had every reason to believe that the numbness he was experiencing was merely a normal side-effect of the wisdom tooth extraction. As to the second action, the state supreme court held that the dentist was not entitled to summary judgment for the same reasons as in the first action.

Outcome

The order reversing the denial of summary judgment in the first action was reversed, and the order denying summary judgment in the second action was affirmed, and both actions were remanded for further proceedings.

LexisNexis® Headnotes

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Procedural Matters > Statute of Limitations > General Overview

HN1[] Statute of Limitations, Time Limitations

See 42 Pa. Cons. Stat. § 5524(2).

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN2[] Summary Judgment, Motions for Summary Judgment

The Pennsylvania Rules of Civil Procedure that govern summary judgment instruct in relevant part, that the court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery, *Pa. R. Civ. P. 1035.2(1)*. Under the rules, a motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law, *Pa. R. Civ. P. 1035.2*. In considering the merits of a motion for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Finally, the court may grant summary judgment only where the right to such a judgment is clear and free from doubt.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN3[] Standards of Review, De Novo Review

An appellate court may reverse the granting of a motion for summary judgment if there has been an error of law or an abuse of discretion. As the issue as to whether there are no genuine issues as to any material fact presents a question of law, the standard of review is de novo; thus, an appellate court need not defer to the determinations made by the lower tribunals. The scope of review, to the extent necessary to resolve a legal

question, is plenary, Pa. R. App. P. 2111(a)(2).

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

Governments > Legislation > Statute of Limitations > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

HN4[] Statute of Limitations, Time Limitations

42 Pa. Cons. Stat. § 5502(a) provides in pertinent part that limitations periods are computed from the time the cause of action accrued. In Pennsylvania, a cause of action accrues when the plaintiff could have first maintained the action to a successful conclusion. Thus, the statute of limitations begins to run as soon as the right to institute and maintain a suit arises. Generally speaking, in a suit to recover damages for personal injuries, this right arises when the injury is inflicted. Mistake, misunderstanding, or lack of knowledge in themselves do not toll the running of the statute. Once a cause of action has accrued and the prescribed statutory period has run, an injured party is barred from bringing his cause of action.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Discovery Rule

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Duty On Premises > Trespassers > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

HN5[] Tolling of Statute of Limitations, Discovery Rule

The purpose of the discovery rule has been to exclude from the running of the statute of limitations that period of time during which a party who has not suffered an immediately ascertainable injury is reasonably unaware he has been injured, so that he has essentially the same rights as those who have suffered such an injury.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Discovery Rule

Torts > Procedural Matters > Statute of Limitations > General Overview

HN6[] Tolling of Statute of Limitations, Discovery Rule

In the context of the discovery rule, reasonable diligence is not an absolute standard, but is what is expected from a party who has been given reason to inform himself of the facts upon which his right to recovery is premised. There are very few facts which diligence cannot discover, but there must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful. This is what is meant by reasonable diligence. Put another way, the question in any given case is not, what did the plaintiff know of the injury done him, but, what might he have known, by the use of the means of information within his reach, with the vigilance the law requires of him.

Torts > Procedural Matters > Statute of Limitations > General Overview

HN7[] Procedural Matters, Statute of Limitations

While reasonable diligence is an objective test, it is sufficiently flexible to take into account the differences between persons and their capacity to meet certain situations and the circumstances confronting them at the time in question. Under this test, a party's actions are evaluated to determine whether he exhibited those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interest and the interest of others.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Discovery Rule

Torts > Procedural Matters > Statute of Limitations > General Overview

HN8[] Tolling of Statute of Limitations, Discovery Rule

When a court is presented with the assertion of the discovery rule's application, it must address the ability of the damaged party, exercising reasonable diligence, to ascertain that he has been injured and by what cause. Since this question involves a factual determination as to whether a party was able, in the exercise of reasonable diligence, to know of his injury and its cause, ordinarily, a jury is to decide it. Where, however, reasonable minds would not differ in finding that a party knew or should have known on the exercise of reasonable diligence of his injury and its cause, the court determines that the discovery rule does not apply as a matter of law.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Discovery Rule

Governments > Legislation > Statute of Limitations > Judicial Review

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Procedural Matters > Statute of Limitations > General Overview

HN9[] Tolling of Statute of Limitations, Discovery Rule

When the discovery rule applies, the statute of limitations does not commence to run at the instant that the right to institute suit arises, i.e., when the injury occurs. Rather, the statute is tolled, and does not begin to run until the injured party discovers or reasonably should discover that he has been injured and that his injury has been caused by another party's conduct. Whether the statute of limitations has run on a claim is a question of law for the trial court to determine. However, the question as to when a party's injury and its cause were discovered or discoverable is for the jury.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Discovery Rule

Governments > Legislation > Statute of Limitations > General Overview

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

Torts > Procedural Matters > Statute of Limitations > General Overview

HN10[] Tolling of Statute of Limitations, Discovery Rule

It is not relevant to the discovery rule's application whether or not the prescribed period has expired; the discovery rule applies to toll the statute of limitations in any case where a party neither knows nor reasonably should have known of his injury and its cause at the time his right to institute suit arises.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Discovery Rule

Governments > Legislation > Interpretation

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Statutory Construction

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Procedural Matters > Statute of Limitations > General Overview

HN11[] Tolling of Statute of Limitations, Discovery Rule

A statute of limitations, like all statutes, must be read with reason and common sense. Its application to a given set of circumstances must not be made to produce something that the General Assembly could never have intended, and its interpretation must be guided by the presumption in the Statutory Construction Act that the legislature does not intend a result that is absurd, impossible of execution, or unreasonable, *1 Pa. Cons. Stat. § 1922(1)*.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

HN12[] Tolling of Statute of Limitations, Fraud

The doctrine of fraudulent concealment serves to toll the running of the statute of limitations. The doctrine is based on a theory of estoppel, and provides that the defendant may not invoke the statute of limitations, if through fraud or concealment, he causes the plaintiff to relax his vigilance or deviate from his right of inquiry into the facts. The doctrine does not require fraud in the strictest sense encompassing an intent to deceive, but rather, fraud in the broadest sense, which includes an unintentional deception. The plaintiff has the burden of proving fraudulent concealment by clear, precise, and convincing evidence. While it is for the court to determine whether an estoppel results from established facts, it is for the jury to say whether the remarks that are alleged to constitute the fraud or concealment were made.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Discovery Rule

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > General Overview

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

HN13[] Tolling of Statute of Limitations, Discovery Rule

The standard of reasonable diligence, which is applied to the running of the statute of limitations when tolled under the discovery rule, also should apply when tolling takes place under the doctrine of fraudulent concealment. This is the standard that will serve one of the overarching tenets in this area of Pennsylvania jurisprudence, the responsibility of a party who seeks to assert a cause of action against another to be reasonably diligent in informing himself of the facts upon which his recovery may be based. Moreover, because the doctrine captures even unintentional conduct on a defendant's part and the standard of reasonable diligence requires from a party only that knowledge which is reasonably attained under the circumstances, deviation from that standard to a higher threshold of knowledge is not warranted. Thus, a statute of limitations that is tolled by virtue of fraudulent concealment begins to run when the injured party knows or reasonably should know of his injury and its cause.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Torts > Procedural Matters > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN14[] **Jury Trials, Jury Instructions**

It is for the jury to determine what remarks a defendant made to a plaintiff, before a court can decide whether they amounted to fraudulent concealment.

Counsel: For Eric Fine, APPELLANT: Thomas F. Sacchetta, Esq. and Joe H. Tucker, Jr.

For Jeffrey W. Rice, D.M.D., P.C., APPELLANT: Allen Paul Neely, Esq.

For Mary Anne Checchio, APPELLEE: John Carleton Farrell, Esq. and Richard Bruce Morrison, Esq.

For Rosezetta Marie Ward, APPELLEE: Patrick John Loughren, Esq.

Judges: BEFORE: CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ. MR. CHIEF JUSTICE CAPPY. Madame Justice Newman did not participate in the consideration or decision of this case.

Opinion by: CAPPY

Opinion

[*259] [853] MR. CHIEF JUSTICE CAPPY**

These are consolidated appeals, in which Appellant Eric Fine ("Fine") sued Appellee Mary Anne Checcio, D.D.S. ("Dr. Checcio"), and Appellee Rosezetta Marie Ward ("Ward") sued Appellants Jeffrey W. Rice, D.M.D. and Jeffrey W. Rice, **[*260]** D.M.D., P.C. (collectively, "Dr. Rice"), for dental malpractice. Dr. Checcio and Dr. Rice each filed a motion for summary judgment based on the two year statute of limitations **[**854]** in 42 Pa.C.S. § 5524(2). [1] In their respective responses, Fine and Ward raised the discovery rule and the doctrine of fraudulent **[***2]** concealment. At the trial court level, Dr. Checcio's motion for summary judgment was denied, but Dr. Rice's motion for summary judgment was granted. The Superior Court reversed the trial court in both cases. We conclude that neither Dr. Checcio nor Dr. Rice was entitled to summary judgment. Accordingly, for the reasons that follow, we reverse the Superior Court's order in the appeal brought by Fine and affirm the Superior Court's order in the appeal brought by Dr. Rice.

The record on summary judgment in each of these cases may be summarized **[***3]** as follows:

Fine v. Dr. Checcio

In June of 1998, Dr. Checcio recommended that Fine's four wisdom teeth, three of which were impacted and one malaposed, be surgically extracted. Fine accepted Dr. Checcio's recommendation and signed a consent form, which set forth the complications and physical conditions that could follow the surgery. The consent form included: "Lip, tongue, chin, gums, cheeks, and teeth, Parasthesia/Anesthesia (Numbness may be permanent)". (R.198a). Dr. Checcio and Fine discussed the procedure and what Fine could expect. While Dr. Checcio testified in her deposition that she explained to Fine that the risk in his case for post-operative numbness was higher than usual because of the position of the inferior alveolar nerve in his mouth, Fine testified in his deposition that Dr. Checcio did not do so.

[*261] Dr. Checcio removed Fine's four wisdom teeth on July 17, 1998, cutting soft tissue and drilling bone. At that point, Fine had pain, bleeding, infection, swelling, and numbness on both sides of his face. As of July 17, 1998, Fine knew he was "hurt"; considered the conditions he was experiencing to be "normal"; believed the facial numbness to be one of several "after-surgery **[***4]** effects"; and found the numbness "significant" in scope. (R. 175a, 343a, 347a). Except for the numbness, these conditions disappeared entirely. From July 20, 1998 to October 9, 1998, Fine saw Dr. Checcio in her office on ten separate occasions. During each of the visits, Fine and Checcio discussed the lack of sensation that Fine continued to experience in his face. According to Fine, Dr. Checcio repeatedly told him that it would take about six months for the numbness to

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[1] It is undisputed in both appeals that 42 Pa.C.S. § 5524(2) controls. The statute states:

> § 5524. Two year limitation
>
> HN1[] The following actions and proceedings must be commenced within two years:
>
> ***
>
> (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

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42 Pa.C.S. § 5524(2).

subside. According to Dr. Checcio, she consistently gave Fine a balanced prognosis, informing' him that in the worst case scenario, she would refer him to an oral maxillofacial surgeon for an evaluation. While sensation returned to most of Fine's face, the numbness in an area approximately two fingers in width and an inch in length on the left side of his lip and chin persisted. On April 16, 1999, Fine signed an authorization that permitted his attorney to retrieve his medical records from the surgery. About a year after the surgery was performed, Fine came to believe that the persistent numbness was abnormal.

[855]** On August 8, 2000, Fine commenced an action in tort against Dr. Checcio. In his amended complaint, Fine alleged, **[***5]** *inter alia*, that Dr. Checcio was negligent in transecting his inferior alveolar nerve during the surgery and for failing thereafter to refer him to a neurosurgeon. Fine also alleged that the damage to the nerve caused him permanent facial numbness. Dr. Checcio raised the statute of limitations as an affirmative defense in her answer and new matter.

On November 5, 2001, Dr. Checcio filed a motion for summary judgment, asserting that Fine's action, filed on August 8, 2000, was time-barred under *42 Pa.C.S. § 5524(2)*, inasmuch as it was not filed within two years of July 17, 1998, the date of Fine's surgery. In response, Fine asserted that there **[*262]** existed material, disputed facts as to whether the limitations period was tolled under the discovery rule or the doctrine of fraudulent concealment. The trial court denied Dr. Checcio's motion for summary judgment, without opinion. The case proceeded to trial. On April 26, 2002, a jury returned a $ 500,000 verdict in Fine's favor. Dr. Checcio's post-trial motions were denied. A judgment was entered in Fine's favor on August 28, 2002. Dr. Checcio filed a timely appeal in the Superior Court.

On appeal, Dr. Checcio **[***6]** asserted, *inter alia*, that the trial court erred in denying her motion for summary judgment. In an unpublished opinion, the Superior Court agreed and reversed the judgment for Fine. [2] The Superior Court found that on July 17, 1998, when the surgery ended, Fine knew that he was hurt and that he was experiencing significant and unexpected numbness. Based on these facts, the Superior Court concluded that the discovery rule was inapplicable because Fine knew of his injury and its cause at the time the injury was inflicted. Determining that Fine failed to establish that Dr. Checcio either intentionally or unintentionally concealed the true nature of his injury from him, the Superior Court also concluded that the doctrine of fraudulent concealment was not triggered. Thus, the Superior Court ruled that the limitations period in *42 Pa.C.S. § 5524(2)* began to run on July 17, 1998, and held that Fine's action, having been commenced more than two years from that date, was time-barred.

[*7]** Fine filed a petition for allowance of appeal, which this court granted.

Ward v. Dr. Rice

On February 8, 1995, Dr. Rice recommended to Ward that her four impacted wisdom teeth be surgically removed and explained the surgical procedure he would perform. In Dr. Rice's experience, temporary paresthesias and anesthesias commonly followed the procedure. It was Dr. Rice's customary practice to inform patients like Ward that paresthesia and **[*263]** numbness to the lip were complications of wisdom tooth extraction. In his deposition, Dr. Rice testified that because Ward was older, he told her that the risk of numbness increases with age. Ward testified in her deposition that no such conversation with Dr. Rice took place. Dr. Rice's assistant provided Ward with a consent form, which she signed. In the consent form, Ward acknowledged that Dr. Rice had explained the nature, purpose, and results of the operation to her.

Dr. Rice surgically extracted Ward's four wisdom teeth on March 28, 1995, cutting tissue and drilling bone. Immediately following the surgery, Ward's face was **[**856]** sore and numb. When the hospital where the surgery was performed telephoned Ward the next day to inquire about her condition, **[***8]** Ward indicated that she was fine and did not mention the soreness or numbness. The numbness on the left side of Ward's face continued. Ward had numerous post-operative office visits with Dr. Rice, starting on April 5, 1995, and ending on January 22, 1996. During the visits, Ward and Rice discussed her facial numbness. Ward testified that Dr. Rice repeatedly told her that sensation would return in two months' time. Dr. Rice testified that he advised Ward that numbness is a complication of the operation he performed; that statistics show that feeling could return in about two months; and that because no one can know what the future holds, there was hope and a chance of recovery. At Ward's seventh office visit with

[2] Dr. Checcio raised two other issues on appeal. Given its decision in regard to Dr. Checcio's motion for summary judgment, the Superior Court did not reach these additional issues.

Dr. Rice on September 20, 1995, Dr. Rice referred her to Steven Kaltman, D.M.D. On October 11, 1995, Ward consulted with Dr. Kaltman, who outlined options for treating the numbness and pain. Ward returned to Dr. Rice for one last office visit on January 22, 1996. In March of 1997, Dr. Rice referred Ward to another oral surgeon for a consultation. At that point, Ward decided to sue Dr. Rice.

On September 26, 1997, Ward commenced an action in tort against Dr. Rice. Ward alleged **[***9]** that Dr. Rice committed a battery in performing the surgery without her informed consent, and was negligent in severing her inferior alveolar nerve and for failing to refer her to a neurosurgeon for repair. **[*264]** Ward also alleged that Dr. Rice's battery and negligence caused her nerve damage, severe pain, numbness, and discomfort. Dr. Rice raised the statute of limitations as an affirmative defense in his answer and new matter.

On February 15, 2002, Dr. Rice filed a motion for summary judgment, asserting that the limitations period in *42 Pa.C.S. § 5524(2)* expired on March 29, 1997, which was two years after the surgery, and that Ward's action, commenced on September 26, 1997, was barred under the statute. Ward responded that her action was timely insofar as the record showed that the statute of limitations was tolled under the discovery rule and the doctrine of fraudulent concealment.

On June 18, 2002, the trial court granted Dr. Rice's motion and ordered summary judgment in Dr. Rice's favor. The trial court determined that the discovery rule did not toll the statute of limitations on Ward's claims because Ward knew of her injury and its cause immediately following **[***10]** the surgery and knew that her condition was not improving. The trial court also determined that Ward did not sustain her burden of showing that Dr. Rice concealed Ward's condition from her inasmuch as she experienced pain and numbness as soon as the surgery was completed. Ward filed a timely appeal.

In a published opinion, the Superior Court reversed the judgment entered for Dr. Rice and remanded to the trial court for further proceedings. *Ward v. Rice, 2003 PA Super 248, 828 A.2d 1118 (Pa. Super. Ct. 2003)*. Observing that Ward remained under Dr. Rice's care after the surgery and relied upon his assurances that her pain and numbness would subside, the Superior Court determined that "a jury could conceivably conclude that [Ward's] failure to investigate the possible causes of her condition until the first referral to Dr. Kaltman on October 11, 1995, was reasonable...." *Id. at 1125*. The court also determined that Dr. Rice's assurances of full recuperation, which lulled Ward into a false sense of security, and Dr. Rice's failure to refer her at the optimum time to a neurosurgeon, which impeded her ability to rectify her condition, constituted "concealment." **[**857]** **[***11]** Id. & n.2. Based on the view that the statute of limitations begins to run when an injured person in Ward's position loses **[*265]** confidence in her doctor, the Superior Court next determined that Ward's office visit to Dr. Kaltman on October 11, 1995, was evidence of Ward's loss of confidence in Dr. Rice and was reasonable, such that the commencement of her action on September 26, 1997, was timely. Id.

Dr. Rice filed a petition for allowance of appeal, which this court granted. Because Dr. Rice's and Fine's respective requests for review covered the same issues; namely, whether the Superior Court erred in its determinations regarding the discovery rule and the doctrine of fraudulent concealment in connection with a motion for summary judgment that is based on the statute of limitations, we consolidated these appeals.

HN2[↑] The Pennsylvania Rules of Civil Procedure that govern summary judgment instruct in relevant part, that the court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. *Pa.R.C.P.1035.2(1)*. Under the Rules, a **[***12]** motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. Note to *Pa.R.C.P.1035.2*. [3] In considering the merits of a motion for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Jones v. SEPTA, 565 Pa. 211, 772 A.2d 435, 438 (Pa. 2001)*. Finally, the court may grant

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[3] *HN3*[↑] An appellate court may reverse the granting of a motion for summary judgment if there has been an error of law or an abuse of discretion. *Atcovitz v. Gulph Mills Tennis Club, Inc., 571 Pa. 580, 812 A.2d 1218, 1221 (Pa. 2002)*. As the issue as to whether there are no genuine issues as to any material fact presents a question of law, our standard of review is de novo; thus, we need not defer to the determinations made by the lower tribunals. Our scope of review, to the extent necessary to resolve the legal question before us, is plenary. *Buffalo Township v. Jones, 571 Pa. 637, 813 A.2d 659, 664 n.4 (Pa. 2002)*; *Pa.R.A.P. 2111(a)(2)*.

summary judgment only where the right to such a judgment is clear and free from doubt. Marks v. Tasman, 527 Pa. 132, 589 A.2d 205, 206 (Pa. 1991).

[*13]** **[*266]** Our analysis begins with the principles in this area of the law that are settled. HN4[] The Judicial Code provides in pertinent part that limitations periods are computed from the time the cause of action accrued. 42 Pa.C.S. § 5502(a). In Pennsylvania, a cause of action accrues when the plaintiff could have first maintained the action to a successful conclusion. Kapil v. Association of Pa. State College and Univ. Faculties, 504 Pa. 92, 470 A.2d 482, 485 (Pa. 1983). Thus, we have stated that the statute of limitations begins to run as soon as the right to institute and maintain a suit arises. Pocono International Raceway, Inc. v. Pocono Produce, Inc., 503 Pa. 80, 468 A.2d 468, 471 (Pa. 1983). Generally speaking, in a suit to recover damages for personal injuries, this right arises when the injury is inflicted. See Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788, 791 (Pa. 1959). Mistake, misunderstanding, or lack of knowledge in themselves do not toll the running of the statute. Nesbitt v. Erie Coach Co., 416 Pa. 89, 204 A.2d 473, 475 (Pa. 1964). Pocono International, 468 A.2d at 471. **[***14]** Once a cause of action has accrued and the prescribed statutory period has run, an injured party is barred from bringing his cause of action. Id.

[858]** There are exceptions that act to toll the running of a statute of limitations. The discovery rule and the doctrine of fraudulent concealment are such exceptions. As both are implicated in this appeal, we will discuss them seriatim.

The discovery rule originated in cases in which the injury or its cause was neither known nor reasonably knowable. See Lewey v. H.C. Frick Coke Co., 166 Pa. 536, 31 A. 261, 42 Pitts. Leg. J. 407 (Pa. 1895) (concluding that the statute of limitations did not bar the lawsuit of a plaintiff who could not know that a trespasser had subterraneously extracted coal from his land); Ayers, 154 A.2d at 788 (concluding that the plaintiff was entitled to present evidence that he did not and could not know that his pain was the result of a sponge left in his body during an operation performed nine years before). HN5[] The purpose of the discovery rule has been to exclude from the running of the statute of limitations that period of time during which a party who has not suffered an immediately ascertainable injury **[***15]** is reasonably unaware he has been injured, so that **[*267]** he has essentially the same rights as those who have suffered such an injury. Hayward v. Medical Center of Beaver County, 530 Pa. 320, 608 A.2d 1040, 1043 (Pa. 1992).

As the discovery rule has developed, the salient point giving rise to its application is the inability of the injured, despite the exercise of reasonable diligence, to know that he is injured and by what cause. Pocono International, 468 A.2d at 471. We have clarified thatHN6[] in this context, reasonable diligence is not an absolute standard, but is what is expected from a party who has been given reason to inform himself of the facts upon which his right to recovery is premised. As we have stated: "'There are [very] few facts which diligence cannot discover, but there must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful. This is what is meant by reasonable diligence.'" Crouse v. Cyclops Industries, 560 Pa. 394, 745 A.2d 606, 611 (Pa. 2000) (quoting Deemer v. Weaver, 324 Pa. 85, 187 A. 215, 217 (Pa. 1936) (citation omitted)). Put another way, "the question **[***16]** in any given case is not, what did the plaintiff know of the injury done him? But, what might he have known, by the use of the means of information within his reach, with the vigilance the law requires of him?" Scranton Gas & Water Co. v. Lackawanna Iron & Coal Co., 167 Pa. 136, 31 A. 484, 485, 36 Week. Notes Cas. 185 (Pa. 1895). HN7[] While reasonable diligence is an objective test, "'it is sufficiently flexible...to take into account the differences between persons and their capacity to meet certain situations and the circumstances confronting them at the time in question.'" Crouse, 745 A.2d at 611 (quotation omitted). Under this test, a party's actions are evaluated to determine whether he exhibited "'those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interest and the interest of others.'" Id.

Therefore, HN8[] when a court is presented with the assertion of the discovery rule's application, it must address the ability of the damaged party, exercising reasonable diligence, to ascertain that he has been injured and by what cause. Id. **[*268]** Since this question involves a factual determination as **[***17]** to whether a party was able, in the exercise of reasonable diligence, to know of his injury and its cause, ordinarily, a jury is to decide it. Hayward, 608 A.2d at 1043. See Smith v. Bell Telephone Co. of Pennsylvania, 397 Pa. 134, 153 A.2d 477, 481 (Pa. 1959). Where, however, reasonable minds would not differ in finding that a party knew or should have known on the exercise of reasonable diligence of his injury and its cause, the court determines that **[**859]** the discovery rule does

not apply as a matter of law. Pocono International, 468 A.2d at 471.

HN9[↑] When the discovery rule applies, the statute of limitations does not commence to run at the instant that the right to institute suit arises, i.e., when the injury occurs. Id. at 611; Ayers, 397 Pa. 282, 154 A.2d 788 at 791. Rather, the statute is tolled, and does not begin to run until the injured party discovers or reasonably should discover that he has been injured and that his injury has been caused by another party's conduct. Id. Whether the statute of limitations has run on a claim is a question of law for the trial court to determine; but the question as to when **[***18]** a party's injury and its cause were discovered or discoverable is for the jury. Hayward, 608 A.2d at 1043.

While these broad parameters of the discovery rule's operation are established, there is an aspect of the rule that has remained unsettled. Based on language in one of our cases, Schaffer v. Larzelere, 410 Pa. 402, 189 A.2d 267 (Pa. 1963), this court has been evenly divided as to whether there is a principle that further qualifies the discovery rule's application. See Murphy v. Saavedra, 560 Pa. 423, 746 A.2d 92 (Pa. 2000); Baumgart v. Keene Building Products Corp., 542 Pa. 194, 666 A.2d 238 (Pa. 1995). In Schaffer, we held that the plaintiff should have been allowed to amend his reply to defendants' motion for judgment on the pleadings, which was based on the statute of limitations, to add allegations that his knowledge of defendants' negligence was delayed by defendants' deliberate concealment. Id. at 270. In doing so, we observed that statutes of limitations may be tolled under different theories and then stated that "if the existence of the injury is not known to the **[*269]** complaining party **[***19]** and such knowledge cannot be reasonably ascertained *within the prescribed period*, the limitation does not begin to run until discovery of the injury is reasonably possible." Id. (emphasis added).

Relying on this language in subsequent cases, some Justices have indicated that the discovery rule requires that it first be determined whether the injury and its cause were reasonably ascertainable at any point within the prescribed statutory period. If they were, then the discovery rule does not apply and the statute of limitations is not tolled, even though a party did not know nor could have reasonably known of his injury and its cause at the time the injury occurred. See Saavedra, 746 A.2d at 93-95 (opinion in support of affirmance); Baumgart, 666 A.2d at 239-41 (same). Other Justices, however, have believed that the discovery rule is not restricted to those cases where an injury or its cause is not reasonably discovered until after the expiration of the limitations period, despite Schaffer's language. Rather, the discovery rule always applies to toll the statute of limitations if at the time the injury occurs, the injury or its cause is **[***20]** neither known nor reasonably knowable. See Saavedra, 746 A.2d at 98-101 (opinion in support of reversal); Baumgart, 666 A.2d at 241-45 (same).

Today, we hold that HN10[↑] it is not relevant to the discovery rule's application whether or not the prescribed period has expired; the discovery rule applies to toll the statute of limitations in any case where a party neither knows nor reasonably should have known of his injury and its cause at the time his right to institute suit arises.

We have several reasons for our holding. First, the observation made in Schaffer, to the extent that it was intended to limit the discovery rule's application, constitutes non-binding dicta inasmuch as our holding therein concerned whether the plaintiff was permitted to amend a pleading to **[**860]** assert that defendant had concealed the facts underlying his negligent conduct. Schaffer, 189 A.2d at 270. See Albert v. Zoning Hearing Bd. of North Abington Twp., 578 Pa. 439, 854 A.2d 401, 410 (Pa. 2004). Second, an interpretation of a statute of **[*270]** limitations that premises a party's access to the discovery rule on whether he knew or was able to know of **[***21]** his injury and its cause within the prescribed period would in many instances lead to unreasonable and arbitrary results and would be contrary to our long-standing approach in this area. Under such a conclusion, for example, a party who is reasonably diligent, but is unable to ascertain that he is injured until the day before the limitations period has run, must file suit within twenty-four hours or be time-barred by the statute of limitations. If that same party, however, reasonably discovers his injury the day after the prescribed period has expired, he has the full statutory period within which to commence an action. In Ayers, we stated that HN11[↑] a statute of limitations, like all statutes, must be read with reason and common sense; that its application to a given set of circumstances, must not be made to produce something that the General Assembly could never have intended; and that its interpretation must be guided by the presumption in the Statutory Construction Act that the legislature does not intend a result that is absurd, impossible of execution or unreasonable. Ayers, 154 A.2d at 789. See 1 Pa.C.S. § 1922(1) (formerly, 46 P. **[***22]** S. § 552). Third and finally, the recognized

purpose of the discovery rule--to see to it that persons who are reasonably unaware of an injury that is not immediately ascertainable have essentially the same rights as those who suffer an immediately ascertainable injury -- would be nullified if the rule were applied only to those persons who reasonably discover their injury and its cause after the limitations period has run. See Hayward, 608 A.2d at 1043. [4]

[*23]** In addition to the discovery rule, HN12[↑] the doctrine of fraudulent concealment serves to toll the running of the statute of limitations. The doctrine is based on a theory of **[*271]** estoppel, and provides that the defendant may not invoke the statute of limitations, if through fraud or concealment, he causes the plaintiff to relax his vigilance or deviate from his right of inquiry into the facts. Deemer, 187 A. at 215. The doctrine does not require fraud in the strictest sense encompassing an intent to deceive, but rather, fraud in the broadest sense, which includes an unintentional deception. Id. The plaintiff has the burden of proving fraudulent concealment by clear, precise, and convincing evidence. Molineux v. Reed, 516 Pa. 398, 532 A.2d 792, 794 (Pa. 1987). While it is for the court to determine whether an estoppel results from established facts, it is for the jury to say whether the remarks that are alleged to constitute the fraud or concealment were made. Nesbitt, 204 A.2d at 476.

As of yet, we have not directly considered and ruled upon the circumstances under which a defendant, once estopped under the doctrine of fraudulent concealment, **[***24]** may invoke the statute of limitations and commence its running. Inasmuch as the doctrine is premised on a defendant's obstructionist conduct, there is an argument **[**861]** that a plaintiff's actual knowledge, of his injury and its cause, as opposed to the knowledge that reasonable diligence would give him, should control. See e.g., Urland v. Merrell-Dow Pharmaceuticals, Inc., 822 F.2d 1268, 1277-83 (3d Cir. 1987) (Becker, J., dissenting) (arguing that under Pennsylvania law, the doctrine of fraudulent concealment requires a plaintiff's actual knowledge of his injury and its cause before the statute of limitations begins to run).

We are of the view, however, that HN13[↑] the standard of reasonable diligence, which is applied to the running of the statute of limitations when tolled under the discovery rule, also should apply when tolling takes place under the doctrine of fraudulent concealment. This is, we believe, the standard that will serve one of the overarching tenets in this area of our jurisprudence -- the responsibility of a party who seeks to assert a cause of action against another to be reasonably diligent in informing himself of the facts upon which his recovery may be **[***25]** based. Pocono International, 468 A.2d at 471. Moreover, because the doctrine captures even unintentional **[*272]** conduct on a defendant's part and the standard of reasonable diligence requires from a party only that knowledge which is reasonably attained under the circumstances, we do not believe that deviation from that standard to a higher threshold of knowledge is warranted. Thus, we conclude that a statute of limitations that is tolled by virtue of fraudulent concealment begins to run when the injured party knows or reasonably should know of his injury and its cause.

We now apply these exceptions to the running of the statute of limitations in each of the cases before us. We begin with Fine's appeal. With respect to the discovery rule's application, we must address what the record reveals as to Fine's ability, exercising reasonable diligence, to know of his injury and its cause. See Pocono International, 468 A.2d at 471. Dr. Checcio argues that the record established that Fine knew or was able to know, in the exercise of reasonable diligence, that he was injured by another's conduct at the time the injury was inflicted on July 17, 1998 as a matter of **[***26]** law, because on that date, he knew that his face was numb. Fine argues that such was not the case and that it was for the jury to decide whether he knew or should have known that he was injured at that point insofar as the record showed that he had every reason to believe that the numbness he was experiencing was merely a normal side-effect of the wisdom tooth extraction.

Viewing the summary judgment record as we must, in the light most favorable to the non-moving party, see supra, p. 8, we agree with Fine. It is important to keep in mind that in this case, the record revealed that facial numbness was indicative of two distinct phenomena. Facial numbness was either a temporary physical consequence that resulted from the very nature of the

[4] The language in Schaffer underlying this court's division as to the discovery rule's application has been repeated in many opinions in boilerplate fashion. See, e.g., Hayward, 608 A.2d at 1043; Bradley v. Ragheb, 429 Pa. Super. 616, 633 A.2d 192, 194 (Pa. Super. 1993). Any of this court's decisions in which the discovery rule was not applied merely because the injury and its cause were known or knowable within the prescribed period are overruled in that regard. Any such decisions of other courts are disapproved.

procedure that Dr. Checcio performed on Fine or it was a manifestation of Fine's injury, a permanent condition that resulted from underlying nerve damage. Until conflicts in the record were resolved, see supra, pp.2-3, and inferences from relevant facts were drawn, the issue of whether Fine knew, or should have known through the diligence that a reasonable person would have exercised **[*273]** under the circumstances, that the numbness he was experiencing **[***27]** on July 17, 1998, was a manifestation of injury, as, opposed to, or in addition to, the typical condition that dental surgery produces remained disputed. Therefore, to rule against the discovery rule's application, the Superior Court had to undertake these fact-resolution and inference-drawing functions. **[**862]** In doing so, the court erred. We emphasize that it is not the court's function upon summary judgment to decide issues of fact, but only to decide whether there is an issue of fact to be tried. See *Pa.R.C.P. 1035.2(1)*.

Turning to the doctrine of fraudulent concealment, while Fine argues that the issue had to be resolved at trial, Dr. Checcio argues that Fine failed to show that he could sustain his burden of proof on the doctrine's application. Here too, we agree with Fine. We conclude that the Superior Court's determination that Fine failed to establish that the statute of limitations was tolled by the doctrine disregarded the court's proper role when presented with a motion for summary judgment and was erroneous. Fine based his assertion for the application of the doctrine on post-surgery statements he attributed to Dr. Checcio. As is reflected in **[***28]** their respective depositions, however, the parties disputed what Dr. Checcio actually said. See supra, p. 3. As we have instructed,*HN14*[↑] it is for the jury to determine what remarks a defendant made to a plaintiff, before a court can decide whether they amounted to fraudulent concealment. See *Nesbitt, 204 A.2d at 476* (concluding that unless disputed facts as to what was said to the plaintiff are resolved, a fair and intelligent judgment by the court as to whether the defendant is estopped from asserting the statute of limitations due to concealment is impossible).

Therefore, we hold that Dr. Checcio was not entitled to summary judgment because there were genuine issues of material fact necessary to her statute of limitations defense. See *Pa.R.C.P. 1035.2(1)*. [5]

[5] Given our conclusion, we need not and do not address Fine's additional argument that the Superior Court erred in ignoring his argument concerning the effect of his claim that Dr. Checcio failed to make a timely referral to a neurosurgeon on the running of the statute of limitations.

[*29]** **[*274]** We now turn to Dr. Rice's appeal. With respect to the discovery rule, the arguments made by Ward and Dr. Rice reflect those made by the parties in Fine's appeal. Dr. Rice argues against the discovery rule's application, contending that since Ward knew immediately after the surgery on March 28, 1995, that she was numb, she also knew at the same time that she had suffered an injury. Ward responds that given the nature of the procedure that she underwent and what she understood the procedure to involve, the record does not establish that she knew or reasonably could have known on March 28, 1998 that her numbness was indicative of an injury, and not a temporary post-operative condition.

Ward is correct. For the same reasons we stated in Fine's appeal, the facts and inferences that are relevant to the discovery rule's application -- whether Ward knew or could have reasonably known that the numbness she admitted to experiencing upon the surgery's completion was a manifestation of an injury, as opposed to, or in addition to, the typical and temporary conditions that dental surgery produces -- are disputed and must be resolved at trial. See supra, p. 5. Therefore, as the Superior Court **[***30]** determined, Dr. Rice's motion for summary judgment should have been denied. See *Pa.R.C.P. 1035*; *Hayward, 608 A.2d at 1040*.

At this point, however, we observe that although we affirm the Superior Court's result, we do not embrace the court's analysis. The court focused on whether a jury could find Ward's failure to investigate the causes of her condition until some seven months after the surgery to be reasonable. See *Ward, 828 A.2d at 1125*. This is not **[**863]** the question that Dr. Rice's motion for summary judgment and Ward's response raising the discovery rule required the court to address. The court should have asked and answered whether there are genuine issues of material fact as to whether Ward knew or was unable to know, despite the exercise of reasonable diligence, that she was injured and by what cause at the time the **[*275]** injury was inflicted. See *Pocono International, 468 A.2d at 471*.

Likewise, with regard to the doctrine of fraudulent concealment, while we agree that the Superior Court correctly determined that the doctrine precluded the entry of summary judgment for Dr. Rice, we disagree with the court's **[***31]** approach. The court was in no position to base its ruling on the conclusion that Dr. Rice's post-surgery statements were "assurances" of

"full recuperation" that amounted to concealment. *Ward, 828 A.2d at 1125*. This is because the record shows that the statements that Dr. Rice made to Ward about the numbness during post-operative visits are disputed. See supra, p. 5. Thus, application of the doctrine cannot be resolved until the jury determines at trial what Dr. Rice said to Ward in this regard. See *Nesbitt, 204 A.2d at 476*. Finally, we also take issue with the Superior Court's conclusion that Dr. Rice's failure to refer Ward to a neurosurgeon in a timely fashion, which prevented her from securing corrective measures, constituted a second act of concealment. In doing so, the Superior Court usurped the province of the jury, finding facts regarding Dr. Rice's conduct that remain disputed, and misapprehended the inquiry that the doctrine of fraudulent concealment entails, which is whether a defendant's statements caused the plaintiff to relax his vigilance or deviate from inquiring into the facts. See *Deemer, 187 A. at 215*. [6]

[*32]** Therefore, we hold that Dr. Rice was not entitled to summary judgment because there are genuine issues of material fact as to his statute of limitations defense. See *Pa.R.C.P. 1035.2(1)*. [7]

[*276] For these reasons, in Fine's appeal, we reverse the order of the Superior Court reversing the order of the trial court denying Dr. Checcio's motion for summary judgment; we reinstate the order of the trial court; and we remand the case to the Superior Court for the resolution of any properly preserved outstanding issues. For these reasons, in Dr. Rice's appeal, we affirm the order of the Superior Court and remand the case to the trial court for further proceedings.

Madame Justice Newman did not participate in the consideration or decision of this case.

End of Document

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[6] Because we conclude that application of the doctrine of fraudulent concealment to toll the statute of limitations is an open question to be resolved at trial, we need not and do not address the Superior Court's determination that the tolled statute of limitations began to run in October 1995 when Ward consulted with another oral surgeon. See *id. at 1125 n.2*.

[7] Given our conclusion, we need not and do not address Dr. Rice's argument that Ward is prohibited from avoiding the statute of limitations by asserting a negligent failure to refer claim.

Docket No. C-2023-3038201
Michael Hillman v. Aqua Pennsylvania, Inc.

Attachment 9

Barra v. Rose Tree Media Sch. Dist.

Barra v. Rose Tree Media Sch. Dist.

Commonwealth Court of Pennsylvania

June 11, 2004, Argued ; September 17, 2004, Decided ; September 17, 2004, Filed

No. 2222 C.D. 2003

Reporter
858 A.2d 206 *; 2004 Pa. Commw. LEXIS 702 **

Ruth Barra, Appellant v. Rose Tree Media School District

Prior History: [1]** Appealed From No. 01-5202. Common Pleas Court of the County of Delaware. Judge PROUD.

Disposition: Reversed in part, and remanded for further proceedings.

Core Terms

harassment, constructive discharge, trial court, Technology, alleges, summary judgment, hire, affirmative defense, hostile work environment, employment action, cause of action, employees, tangible, sex, gender, summary judgment motion, material fact, discrete act, resignation, genuine, burden of proof, official act, discriminatory, survives, charges, hostile, occurs, cases

Case Summary

Procedural Posture
Plaintiff former employee appealed the order of the Delaware County Court of Common Pleas (Pennsylvania) granting defendant school district's motion for summary judgment dismissing the employee's claims of gender and racial discrimination.

Overview
The employee, an African-American female, was employed by the district. The employee asserted that she was required to perform tasks while white workers were not. She was allegedly excluded from meetings that impacted upon her job duties. She allegedly received humiliating e-mails from her supervisor that he published to others. The trial court improperly granted summary judgment as to the hostile work environment/constructive discharge claim. The district did not have an adequate discrimination policy in place, as it did not address invidious discrimination in the workplace. As a result, if the supervisor's conduct rose to the level of creating a hostile work environment, the district was possibly strictly liable to the employee under the doctrine of respondeat superior. The employee alleged that she suffered discrimination because of her race and gender, that it was pervasive and regular, that it detrimentally affected her, and that it would have a similar effect on a reasonable person of the same sex in her position. Because these claims, if credible, did not prohibit recovery for a hostile work environment, the district was not entitled to summary judgment on the issue.

Outcome
The order was reversed insofar as it granted the district's motion for summary judgment. The case was remanded for further proceedings.

LexisNexis® Headnotes

Civil Rights Law > Protection of Rights > Procedural Matters > Statute of Limitations

Governments > Legislation > Statute of Limitations > Time Limitations

Labor & Employment Law > ... > Constructive Discharge > Statutory Application > Title VII of the Civil Rights Act of 1964

Civil Rights Law > Regulators > Civil Rights Commissions > Complaints

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN1[] Procedural Matters, Statute of Limitations

Under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., a person claiming to be aggrieved by an alleged unlawful employment practice is required to file a complaint with the Equal Employment Opportunity Commission within 300 days after it occurred and, under the Pennsylvania Human Relations Act, Pa. Stat. Ann. tit. 43, § 951 et seq., is required to file a complaint with the Pennsylvania Human Relations Commission within 180 days after it occurred. Pa. Stat. Ann. tit. 43, § 959(h).

Civil Rights Law > Regulators > Civil Rights Commissions > Complaints

Governments > Legislation > Statute of Limitations > Time Limitations

Labor & Employment Law > Discrimination > Actionable Discrimination

HN2[] Civil Rights Commissions, Complaints

An employee has 300 days after the alleged unlawful employment practice occurred to file a complaint with the Equal Employment Opportunity Commission, if he/she initially instituted proceedings with a state or local agency such as the Pennsylvania Human Relations Commission. 42 U.S.C.S. § 2000e-5(e). If the employee files only with the Equal Employment Opportunity Commission, he/she must file the charge within 180 days. § 2000e-5(e).

Civil Rights Law > Protection of Rights > Procedural Matters > Statute of Limitations

Governments > Legislation > Statute of Limitations > Time Limitations

Labor & Employment Law > Discrimination > Actionable Discrimination

Civil Procedure > ... > Pleadings > Service of Process > General Overview

HN3[] Procedural Matters, Statute of Limitations

In the context of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., and the Pennsylvania Human Relations Act (PHRA), Pa. Stat. Ann. tit. 43, § 951 et seq., the date of service of the charge does not determine the appropriate limitations period. In fact, the service date is not relevant to this determination, as both Title VII and the PHRA refer exclusively to the date the charge was filed.

Civil Procedure > ... > Service of Process > Time Limitations > General Overview

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN4[] Service of Process, Time Limitations

Under 42 U.S.C.S. § 2000e-5, a filed charge shall be served upon the person against whom such charge is made within 10 days. 42 U.S.C.S. § 2000e-5(e)(1). The responsibility for serving the charge rests with the Equal Employment Opportunity Commission (EEOC). § 2000e-5(e)(1). However, courts are reluctant to deny "judicial redress" to a plaintiff because the EEOC failed to act within an allotted time period. If an individual meets the 42 U.S.C.S. § 2000e-5 prerequisites (timely filing of charges with the EEOC and receipt of and timely acting upon a right to sue notice from the EEOC), an individual is not jurisdictionally barred from suit in federal court merely because the EEOC failed to notify the employer of the charges against it within the time schedule proscribed in 42 U.S.C.S. § 2000e-5(b).

Governments > Legislation > Statute of Limitations > Time Limitations

Labor & Employment Law > ... > Equal Pay > Equal Pay Act > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN5[] Statute of Limitations, Time Limitations

In the context of a claim under the Equal Pay Act, each week's paycheck is considered a wrong actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq.

Governments > Legislation > Statute of Limitations > Time Limitations

Labor & Employment Law > Discrimination > Actionable Discrimination

HN6 **Statute of Limitations, Time Limitations**

A plaintiff may rely on the continuing violation doctrine to recover for discriminatory acts that fall outside the 300-day limitations period.

Governments > Legislation > Statute of Limitations > Time Limitations

Labor & Employment Law > Discrimination > Actionable Discrimination

HN7 **Statute of Limitations, Time Limitations**

In the context of the continuing violation doctrine in discrimination cases, the United States Supreme Court has explained how the doctrine is applied by describing the application and effect of the continuing violation doctrine on two types of discriminatory acts: discrete acts or those acts contributing to a hostile work environment. The Court has held that a discrete act "occurred" on the date that it "happened." Each discrete act, therefore, constitutes a separate actionable unlawful employment practice, and starts a new clock for filing charges alleging that act. Consequently, discrete acts are not actionable if time barred, even when related to acts alleged in timely filed charges.

Governments > Legislation > Statute of Limitations > Time Limitations

Labor & Employment Law > Discrimination > Actionable Discrimination

HN8 **Statute of Limitations, Time Limitations**

In the context of the continuing violation doctrine in discrimination cases, the very nature of hostile work environment claims involves repeated conduct that occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. Consequently, such claims are based on the cumulative affect of individual acts. Therefore, in determining whether an actionable hostile work environment claim exists, a court is to look to all circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Governments > Legislation > Statute of Limitations > Time Limitations

Labor & Employment Law > Discrimination > Actionable Discrimination

Governments > Legislation > Statute of Limitations > General Overview

Labor & Employment Law > ... > Title VII Discrimination > Statute of Limitations > Continuing Violations

HN9 **Statute of Limitations, Time Limitations**

In the context of the continuing violation doctrine in discrimination cases, in contrast to discrete acts of discrimination, it does not matter, for purposes of 42 U.S.C.S. § 2000e-5, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.

Civil Procedure > ... > Discovery > Methods of Discovery > Expert Witness Discovery

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary

Judgment > Entitlement as Matter of Law > Materiality of Facts

HN10[] Methods of Discovery, Expert Witness Discovery

Summary judgment is appropriate where 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 discovery or expert report. *Pa. R. Civ. P. 1035.2(1).*

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN11[] Summary Judgment, Entitlement as Matter of Law

In the context of a motion for summary judgment, a court is not to decide issues of fact, but merely to determine whether any such issues exist. Credibility determinations must be left to the jury.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN12[] Summary Judgment, Entitlement as Matter of Law

Summary judgment is warranted if, after 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 sufficient evidence of facts essential to the cause of action or defense to submit the question to a jury. *Pa. R. Civ. P. 1035.2(2).*

Labor & Employment Law > Discrimination > Actionable Discrimination

HN13[] Discrimination, Actionable Discrimination

An alleged victim in an employment discrimination case may have difficulty in meeting his or her burden of proof, as aptly described: There will seldom be "eyewitness" testimony as to the employer's mental processes. Discrimination victims often come to the legal process without witnesses and with little direct evidence indicating the precise nature of the wrongs they have suffered. Cases charging discrimination are uniquely difficult to prove and often depend upon circumstantial evidence. This is true in part because discrimination is often subtle. An employer who knowingly discriminates may leave no written records revealing the forbidden motive and may communicate it orally to no one. Direct evidence of an employer's motivation will often be unavailable or difficult to acquire.

Labor & Employment Law > Discrimination > Actionable Discrimination

HN14[] Discrimination, Actionable Discrimination

Courts must be increasingly vigilant in their efforts to ensure that prohibited discrimination is not approved under the auspices of legitimate conduct, and a plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled because of crabbed notions of relevance or excessive mistrust of juries.

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN15[] Appeals, Standards of Review

An appellate court's standard of review of a trial court's order granting summary judgment is limited to determining whether the trial court committed an error of law or abused its discretion.

Civil Procedure > ... > Summary

Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

HN16[] Appellate Review, Standards of Review

In reviewing a grant of summary judgment, an appellate court must view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

Labor & Employment Law > ... > Harassment > Sexual Harassment > Hostile Work Environment

HN17[] Sexual Harassment, Hostile Work Environment

To establish a prima facie case of hostile work environment under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., an employee must show harassing behavior sufficiently severe or pervasive to alter the conditions of her employment.

Labor & Employment Law > Wrongful Termination > Constructive Discharge > Burdens of Proof

Labor & Employment Law > ... > Gender & Sex Discrimination > Employment Practices > Discharges

Labor & Employment Law > ... > Evidence > Burdens of Proof > General Overview

Labor & Employment Law > ... > Evidence > Burdens of Proof > Employee Burdens

Labor & Employment Law > ... > Harassment > Racial Harassment > Hostile Work Environment

Labor & Employment Law > ... > Racial Discrimination > Employment Practices > Discharges

Labor & Employment Law > ... > Evidence > Burdens of Proof > Employee Burdens of Proof

Labor & Employment Law > Wrongful Termination > Constructive Discharge > General Overview

HN18[] Constructive Discharge, Burdens of Proof

An employee who seeks to demonstrate a constructive discharge must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response. In particular, a plaintiff must demonstrate that (1) she suffered intentional discrimination because of her race or gender; (2) the discrimination was pervasive and regular; (3) it detrimentally affected her; (4) it would have detrimentally affected a reasonable person of the same protected class in her position; and (5) there is a basis for respondeat superior liability.

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > Burdens of Proof

Business & Corporate Law > ... > Establishment > Proof of Agency > General Overview

Business & Corporate Law > Agency Relationships > Types > Employees & Employers

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN19[] Causes of Action & Remedies, Burdens of Proof

The threshold question to establish the burden of proof for an employer's liability for a supervisor's harassment is whether a plaintiff/employee suffered a tangible employment action. Tangible employment action is a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. If no tangible employment action is taken, the employer may still be liable, but may raise a two-prong affirmative defense: (a) that it exercised reasonable care to prevent and correct promptly any harassing behavior; and (b) that the plaintiff/employee unreasonably failed to take advantage

of any preventive or corrective measures provided by the employer or to otherwise avoid harm. However, if a tangible employment action is taken, this affirmative defense is not available because the agency relationship is clear and, thus, the employer becomes strictly liable to a victimized employee for the harassment or discrimination of its supervisors.

Business & Corporate Law > Corporations > Corporate Governance > General Overview

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Powers > General Overview

HN20[] Corporations, Corporate Governance

In the context of employer liability for a supervisor's harassment, tangible employment actions: fall within the special province of the supervisor, who has been empowered by the company as an agent to make economic decisions affecting other employees under his or her control. The tangible employment action is, in essential character, an official act of the enterprise, a company act. It is the means by which the supervisor brings the official power of the enterprise to bear on subordinates. Often, the supervisor will use the company's internal processes and thereby obtain the imprimatur of the enterprise. Ordinarily, the tangible employment decision is documented in official company records, and may be subject to review by higher level supervisors. In sum, when a supervisor takes a tangible employment action against a subordinate, it would be implausible to interpret agency principles to allow an employer to escape liability.

Business & Corporate Law > Agency Relationships > Types > Employees & Employers

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > Elements

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN21[] Types, Employees & Employers

In the context of an employer's liability for a supervisor's harassment because it resulted in a tangible employment action against the employee, when a supervisor's harassment of a subordinate does not culminate in a tangible employment action, it is less obvious that the agency relation is the driving force. A supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation. But there are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit, and there may be some circumstances where the supervisor's status would make little difference.

Labor & Employment Law > Wrongful Termination > Constructive Discharge > Burdens of Proof

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

Labor & Employment Law > Wrongful Termination > Constructive Discharge > General Overview

Labor & Employment Law > Wrongful Termination > Defenses > General Overview

HN22[] Constructive Discharge, Burdens of Proof

In the context of employer liability for a supervisor's discriminatory behavior, an employer does not have recourse to the Ellerth/Faragher affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a tangible employment action, however, the defense is available to the employer whose supervisors are charged with harassment. Absent an official act of the enterprise, as the last straw, the employer ordinarily would have no particular reason to suspect that a resignation is not the typical kind daily occurring in the work force.

Education Law > Faculty & Staff > Faculty & Staff Evaluations > Evaluation Criteria

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN23[] Faculty & Staff Evaluations, Evaluation

Criteria

In the context of an employer's liability for the harassing behavior of a supervisor, proof that an employer has in place, a policy suitable to particular employment circumstances, may demonstrate an employer's reasonable care under the first prong of the Ellerth/Faragher test.

Labor & Employment Law > ... > Equal Pay > Equal Pay Act > General Overview

HN24 **Equal Pay, Equal Pay Act**

See 29 U.S.C.S. § 206(d).

Labor & Employment Law > ... > Equal Pay > Equal Pay Act > General Overview

HN25 **Equal Pay, Equal Pay Act**

An employer may show that a pay differential is justified under one of the Equal Pay Act's four exceptions.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Memoranda of Law

Civil Procedure > Judgments > Summary Judgment > General Overview

HN26 **Supporting Materials, Memoranda of Law**

In the context of a motion for summary judgment, a motion is not required to be pled with specificity; there is no rule in either the local rules of Delaware County or the Pennsylvania Rules of Civil Procedure that requires a movant to state all of the issues in numbered paragraphs in its motion.

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN27 **Summary Judgment, Appellate Review**

An appellate court may affirm a grant of summary judgment only in cases that are free and clear of doubt.

Counsel: Edith A. Pearce, Philadelphia, for appellant.

Anne E. Hendricks, Huntingdon Valley, for appellee.

Judges: BEFORE: HONORABLE RENEE COHN JUBELIRER, Judge, HONORABLE ROBERT SIMPSON, Judge, HONORABLE CHARLES P. MIRARCHI, JR., Senior Judge. OPINION BY JUDGE COHN JUBELIRER.

Opinion by: RENEE COHN JUBELIRER

Opinion

[*207] OPINION BY

JUDGE COHN JUBELIRER

Ruth Barra appeals the order of the Court of Common Pleas of Delaware County granting Rose Tree Media School District's (School District) Motion for Summary Judgment and dismissing her claims of gender and racial discrimination. She bases her claims upon: (1) the District's failure to hire her for the position of Director of Technology, (2) its failure to pay her additional wages for performing extra duties and (3) her constructive discharge due to a hostile work environment. On appeal, we must determine: (1) whether Barra's **[**2]** claims are barred by the applicable statute of limitations; (2) whether Barra exhausted her administrative remedies; (3) whether the School District fulfilled its burden of proving that no genuine issue of material fact exists regarding any of Barra's claims; (4) whether the trial court applied the correct standard of review; and (5) whether the School District's motion for summary judgment was sufficiently detailed.

Barra was hired by the School District on March 23,

1998, as a Network Specialist, [1] at an annual salary of $ 37,000. Prior to accepting this position, Barra attended the Chubb Institute and received computer training for five months. Before that, **[*208]** from 1992-1997, she was employed as a customer service representative for Bell Atlantic. Barra was in the Navy from 1987-1992, where she was a cryptologic technician/operator and worked with satellite communications. Before enlisting in the Navy, Barra attended Bloomsburg University for approximately two years, although she did not declare a major and did not receive a college degree from either Bloomsburg or elsewhere.

[3]** About three months after Barra began working for the School District, the Director of Technology, Barra's supervisor, announced his resignation. Because no immediate replacement was available, the Director's duties were temporarily reassigned to other employees, including Barra. Barra's complaints against the School District began when she was not compensated for taking on these extra duties; she claims that the School District refused to pay her additional compensation because she is an African-American female.

While recruiting for a replacement, the School District decided to downgrade the Director's position to that of Supervisor. The qualifications for the Supervisor position were: (1) masters degree, preferred, with advance course work in a technology related field; (2) high degree of technical knowledge, required; (3) Pennsylvania certification in instructional technology, preferred; (4) at least 5 years experience in public education with experience in developing and delivering technology based integrated programs, preferred; and (5) ability to work in teams. Anne Callahan, Human Resources Administrator for the School District, testified that the search committee was particularly **[**4]** interested in a person who possessed, "[a] bachelor's degree and strong technical skills and experience in schools." (Callahan Dep. at 41.) Barra applied for the Supervisor of Technology position in October of 1998, although she admitted that she did not fulfill all of the requirements. [2] **[**5]** The successful candidate, Michael Norman, according to his resume--which later turned out to be falsified--had a Bachelor of Science degree in Library and Information Science, six years experience developing and delivering technology systems in public schools, several certifications, and other qualifications. [3] He had previously worked for the School District as a consultant. (Callahan Dep. at 42.) Norman was hired on November 16, 1998, as the Supervisor of Technology with a starting salary of $ 72,900. Barra argues that she should have been given this position or been paid the same as Norman prior to his hire, when, she alleges, she was performing the duties of that job.

In December, 1998, the School District posted the position of Information Systems Specialist. Barra claims that she did not apply for that position because it would have been "futile," because she had been **[*209]** discouraged from applying. She alleges that she would not have been hired **[**6]** because she is a "black female." (Barra Dep. at 101, 116.) The School District awarded the position to Kim McCann on January 21, 1999, with a starting salary of $ 49,000. The qualifications for the position included a Bachelor of Science degree in Information Systems Technology or a related field, or equivalent on-the-job experience. (Barra Dep. at p. 106.) At the time of her hiring, McCann had a Bachelor of Science degree in computer science, had completed several courses towards her Masters of Education in Technology and had almost nine years of relevant job experience. [4]

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[1] Throughout her employment with the School District, Barra was the only Network Specialist employed. (Dep. Ruth Barra, 7/25/03, pp. 61-62).

[2] At the time of her application, Barra did not have an undergraduate degree; did not complete the required course work; did not have the preferred certification; and did not have the required experience in public education.

[3] Norman resigned from his position on October 26, 2000, after the School District's superintendent requested his resignation, when it was discovered, *inter alia*, that he was using a district phone line for personal use and that computer equipment for which he was responsible was missing. (Callahan Dep. at 19, 44-46.) Further investigation, after his resignation, uncovered the fact that **he had falsified information** on his resume; he had completed only 1 1/2 semesters at the University of Pittsburgh and had not completed his undergraduate degree; and he did not possess Microsoft or Novell experience. Anne Callahan, Human Resource Administrator for the School District, testified that Norman's educational background was not checked prior to his hire but that this is normal procedure. (Callahan Dep. at 34-35.)

[4] McCann had worked for the University of Pennsylvania from 1990 through 1997, in a position of the same name, and had worked the prior two years for Marple Newtown School District as the Coordinator of Instructional Technology. In that position, she was responsible for, *inter alia,* the acquisition, installation and maintenance of hardware and software, and the design, implementation and maintenance of the wide area network.

In addition **[**7]** to those items already mentioned, Barra complains about other aspects of her employment with the School District. She alleges, *inter alia,* that she was asked to perform tasks not required of her white co-workers, such as keeping a detailed log of her work day; that she was required to take employment proficiency tests that her white co-workers did not take; that she was required to produce a copy of her transcripts and certifications, while white co-workers were not; that her references were checked, although the references of white co-workers were not; that she was paid less than white males performing the same job duties; that she was excluded from meetings which impacted upon her job responsibilities and duties; that she was not issued new keys allowing entrance to a school building to which she had previously been given access; that she received humiliating emails including reprimands from Mike Norman which he subsequently published to others; that she was given no performance evaluation; and, that her complaints about her treatment were not addressed.

Barra argues that she did not follow the School District's complaint procedures to seek resolution of her concerns, although **[**8]** she read the policy, because it did not cover the types of discrimination she encountered at the School District. [5] **[**10]** (Barra Dep. at 295-98.) Barra also argues that the School District's racial/ethnic/religious harassment/intimidation policy (harassment policy), [6] which she did not recall seeing before the date of her deposition, (Barra Dep. at 299), does not apply to discrimination. Barra was aware that the School District had some personnel policies in place and did not ask anyone in the School District about whether a racial harassment or discrimination policy was in **[*210]** existence. (Barra Dep. at 300.) Barra alleges that she orally expressed her concerns to Anne Callahan, the Human Resources Director, and to Denise Kerr, the former Director of Curriculum for the School District. In her deposition, Barra explains that Anne Callahan refused to help her and describes one particular interaction:

> Anne specifically told me that there was nothing that she could do, that I needed to go back and resolve it with my supervisor, Mike Norman, and meet with Denise afterwards which I thought was completely inadequate assistance from her because those were the individuals that I was telling **[**9]** her were taking these actions against me.

(Barra Dep. at 185-87.) Barra also testified that she had a conversation with Denise Kerr, and "brought these issues forward . . . and [Denise] told me that she didn't feel that any action needed to be taken, that there was no issue." (Barra Dep. at 218.)

On May 27, 1999, Barra resigned from her position, alleging that the discrimination and hostile work environment made her physically sick. Barra alleges that she was "forced to resign from her employment and/or constructively discharged from her position." (Barra Second Am. Compl. P 19.) She then "dual-filed" charges of discrimination with the Equal Employment Opportunity Commission (EEOC) and with the Pennsylvania Human Relations Commission (PHRC). Her initial charge, dated November 4, 1999 and filed November 10, 1999 (November charge), sought a remedy for alleged discrimination taking place between 9/98 and 5/27/99. A charge dated March 10, 2000, filed on March 14, 2000 (March charge), seeking a remedy for alleged discrimination taking place between 2/10/99 and 5/27/99, was served on the School District. The EEOC and PHRC determined that there was no basis for concluding that any statutes **[**11]** had been violated, and provided Barra with a right to sue letter. (Barra Second Am. Compl. Ex. B, D.)

In April of 2000, Barra instituted suit against the School District in the Court of Common Pleas of Delaware County on three counts: (1) unlawful gender and race discrimination in violation of Title VII; [7] (2) unlawful

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[5] The School District's Board of School Directors approved a handbook, entitled "Rose Tree Media School District Administrators and Supervisors II Handbook on Compensation and Related Benefits, School Board Policy 3401.02," (Handbook), for the period from July 1, 1995 through June 30, 1999. (Barra Dep. at 295-96). The complaint procedure referenced in the text was identified as Section 14 of this handbook, pp. 7-8. Id. That procedure, *inter alia,* states that an employee "may avail himself/herself of the following procedure if initiated within ten (10) working days of the alleged violation." (Handbook § 14(A)) (emphasis added). It further states that "the Board does not intend to waive legal rights of the complainant. If the complainant elects to proceed by any other legal remedy, he/she shall waive his/her rights to proceed under this complaint procedure." (Handbook § 14(A)(7).

[6] The date of adoption of this policy, numbered 1050, was January 20, 1998. Attached to the written policy is a one-page form entitled "Racial, Ethnic, or Religious Harassment/Intimidation Complaint Form."

[7] Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.*

gender and race discrimination in violation of the Pennsylvania Human Relations Act [8] (PHRA); and (3) violations of the Equal Pay Act. [9] Barra alleged, *inter alia*, that the School District engaged in unlawful employment practices "by subjecting [her] to disparate treatment, racial and sex discrimination and harassment in the job place which created a hostile and offensive work environment for her as a black female . . . ." (Barra Second Am. Compl. P9.) Barra further alleged that the School District denied her other positions of employment [10] because of her gender and/or race, (Barra Second Am. Compl. PP16, 17), that she was forced to resign and/or was constructively discharged from her position, (Barra Second Am. Compl. P19), and that she was not paid commensurate with male employees in the School District engaged in "similar/comparable/equal work." (Barra **[**12]** Second Am. Compl. P24.)

[*211] On August 8, 2003, the School District filed a Motion for Summary Judgment, to which Barra responded on September 2, 2003. On September 4, 2003, the trial court entered an order granting summary judgment to the School District on all counts of Barra's Second Amended Complaint, finding no genuine disputed issues of material fact as to necessary elements of Barra's causes of action or the School District's defenses. Barra appeals that order to this Court.

Barra's first argument **[**13]** concerns the appropriate date to determine the applicable limitations period for filing charges of discrimination. HN1[↑] Under Title VII, a person claiming to be aggrieved by an alleged unlawful employment practice is required to file a complaint with the EEOC within 300 days after it occurred [11] **[**14]** and, under the PHRA, is required to file a complaint with the PHRC within 180 days after it occurred. [12] The trial court, however, determined that Barra's November charge could not be used to determine the applicable limitations period because it had not been "perfected," i.e., served on the School District, [13] and so the court used the date of the March charge. The court, therefore, concluded that any causes of action brought under Title VII for conduct prior to May 16, 1999 (300 days before March 14, 2000) were barred. [14] The trial court concluded that only the constructive discharge claim survived, and only under Title VII.

However, as noted above, HN3[↑] the date of service of the charge does not determine the appropriate limitations period. [15] In fact, the service date is not relevant to this determination, as both Title VII and the PHRA refer exclusively to the date the charge was filed. Here, the evidence supports a finding that Barra filed a charge that met all EEOC and PHRC filing requirements in November, [16] and, therefore, the trial court should have used the November filing date to calculate the appropriate limitations dates for Barra's causes **[**15]**

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[8] Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§ 951 - 963.

[9] 29 U.S.C. § 206(d)(1).

[10] Barra alleges she was denied the opportunity to interview and/or obtain three different positions: acting Director of Technology, Supervisor of Technology, and Information Systems Specialist. (Barra Second Am. Compl. P12.)

[11] HN2[↑] An employee has 300 days after the alleged unlawful employment practice occurred to file a complaint with the EEOC, if he/she initially instituted proceedings with a state or local agency such as the PHRC, as she did here. 42 U.S.C. § 2000e-5(e). If the employee files only with the EEOC, he/she must file the charge within 180 days. Id.

[12] See Section 9 of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. § 959(h).

[13] The word "perfected" is used by the School District and the trial court to mean "served upon" or "given notice to."

[14] The trial court, rather than counting beginning with the date of the alleged discriminatory conduct, effectively worked backwards, and determined the last possible date that discrimination could have occurred given the date that Barra filed her charge of discriminatory practices.

[15] HN4[↑] Under Section 2000e-5 of Title VII, a filed charge "shall be served upon the person against whom such charge is made within ten days." 42 U.S.C. § 2000e-5(e)(1). The responsibility for serving the charge rests with the EEOC. Id. However, courts are reluctant to deny "judicial redress" to a plaintiff because the EEOC failed to act within an allotted time period. McAdams v. Thermal Industries, Inc., 428 F. Supp. 156, 159 (W.D. Pa. 1977) (noting that if an individual meets the section 2000e-5 prerequisites (timely filing of charges with the EEOC and receipt of and timely acting upon a right to sue notice from the EEOC), "an individual is not jurisdictionally barred from suit in federal court merely because the EEOC failed to notify the employer of the charges against it within the time schedule proscribed in § 2000e-5(b)").

[16] See 42 U.S.C. § 2000e-5(b); 43 P.S. § 959(a).

of action. [17]

[16]** **[*212]** Initial correspondence between EEOC personnel and Barra's attorney indicate that the EEOC required Barra to complete additional forms before her complaint would be docketed and investigated. [18] (School District Br., Ex. A). On March 2, 2000, Barra received a letter from Genevieve Delaney, an Investigator with the EEOC, which stated:

> Enclosed is a "perfected" draft charge **prepared by me on the basis of your/your attorney's recent correspondence to the [EEOC]**. . . . If the charge accurately reflects your allegations, please sign and date the charge where indicated and return it to this office to my attention. Upon receipt of your signed charge, it will be docketed and a copy sent to the [School District]. . . .

(School District Br., Ex. A) (emphasis added). On July 6, 2000, the EEOC sent another letter to Barra concerning Charge Number 170A01000, which stated:

> Our records reveal that on November 10, 1999, initial correspondence was received from your attorney. On March 14, 2000, the Commission received your signed charge and the charge was docketed.

(R.R. at 1228a.) The EEOC then advised Barra that, in order to file a timely charge of discrimination **[**17]** under Title VII, "all claims on or before January 14, 1999 are time-barred for the purpose of the instant investigation." (R.R. at 1228a.) Thus, it is clear that the EEOC used the date the November charge was filed to calculate the 300-day statutory limitation period. With this date, Barra's causes of action under Title VII would be barred for conduct prior to January 14, 1999 (300 days before November 10, 1999), and under PHRA for conduct prior to May 8, 1999 (180 days before November 10, 1999).

The cases cited by the parties and the trial court involve complaints that, when initially filed, did not meet the statutory filing requirements, unlike the complaint Barra filed here. For example, **[**18]** in *Murphy v. Commonwealth, 506 Pa. 549, 486 A.2d 388 (1985)*, when an appellant filed a complaint that was defective, the Supreme Court held that appellant's second pleading could not correct the first in an attempt to convey ex post facto jurisdiction for a period beyond the statutory limit. Also, in *Commonwealth Bank and Trust Company, N.A. v. Winterberger, 136 Pa. Commw. 216, 582 A.2d 730 (Pa. Cmwlth. 1990)*, petition for allowance of appeal granted, *527 Pa. 619, 590 A.2d 759 (1991)*, an employee filed a complaint beyond the statutory time limit. However, the Court determined that the delay was caused by administrative errors within the EEOC when trying to obtain the employee's notarized verification that had been missing and, thus, advised the Commission to treat the employee's complaint as having been timely filed. Likewise, in *Vintage Homes, Inc. v. Pennsylvania Human Relations Commission, 135 Pa. Commw. 590, 581 A.2d 1014 (Pa. Cmwlth. 1990)*, petition for allowance of appeal denied, *527 Pa. 660, 593 A.2d 429 (1991)*, the PRHC permitted a complainant to amend a complaint to change the name of the **[**19]** party designated as the respondent. The **[*213]** Court did not consider this an amendment to enlarge the statutory time limit. Thus, these cases do not apply here.

While Barra's claim for failure to hire her as Supervisor accrued in November of 1998, and is untimely, her equal pay claim is viewed as beginning anew with each paycheck and survives the statute of limitations defense. [19] In addition, her claim for constructive discharge on May 27, 1999, alleged in the March charge and occurring subsequent to the cutoff dates of January 22, 1999 for Title VII and May 8, 1999 for the PHRA, also survives that defense.

Barra characterizes her next argument as one asserting that she has exhausted her administrative **[**20]** remedies. This is a misnomer; what she is really arguing is that the District's continued failure to hire her for various positions constituted a "continuing violation," an

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[17] Pursuant to its rights under the *Freedom of Information Act*, the School District requested that the EEOC provide it certain documents relating to Barra's charges of discrimination. The EEOC complied with the School District's request, but the documents were received *after* the filing of the appeal with the trial court. Therefore, the documents were not presented to the trial court. However, both parties refer to information contained in these documents in their briefs.

[18] The EEOC included, with its letter, questionnaires regarding allegations, hiring/promotion, performance and forced resignation, which the letter advised were to be completed by Barra within thirty-three days. There is no evidence in the record of when or if Barra completed the questionnaires and returned them to the EEOC.

[19] Barra's claim for violation of the *Equal Pay Act* is within the statute of limitations period because *HN5*[↑] each week's paycheck is considered a wrong actionable under Title VII. See *Bazemore v. Friday, 478 U.S. 385, 92 L. Ed. 2d 315, 106 S. Ct. 3000 (1986)*; *Cardenas v. Massey, 269 F.3d 251 (3d Cir. 2001)*.

assertion that actually goes to her argument against the applicability of the statute of limitations defense. Barra seeks to relate the School District's alleged failure to pay her for performing the duties of what she calls the Acting Director of Technology position, to the School District's later failure to hire her for the positions of Supervisor of Technology or Information Systems Specialist. Thus, she contends that any discriminatory acts related to the "Acting Director position" were part of a continuing violation.

HN6[] A plaintiff may rely on the continuing violation doctrine to recover for discriminatory acts that fall outside the 300-day limitations period. National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 153 L. Ed. 2d 106, 122 S. Ct. 2061 (2002). In National Railroad, HN7[] the Supreme Court explained how this occurs by describing the application and effect of the continuing violation doctrine on two types of discriminatory acts: discrete acts or those acts contributing to a hostile work environment. The Court **[**21]** held that a discrete act "occurred" on the date that it "happened." Id. at 110. Each discrete act, therefore, constitutes a separate actionable unlawful employment practice, and starts a new clock for filing charges alleging that act. Id. at 113-14. Consequently, discrete acts are not actionable if time barred, even when related to acts alleged in timely filed charges. Id.

On the other hand, HN8[] the very nature of hostile work environment claims involves "repeated conduct" that "occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may *not* be actionable on its own." Id. at 115. Consequently, "such claims are based on the cumulative affect of individual acts." Id. Therefore, in determining whether an actionable hostile work environment claim exists, the Court is to look to "'all circumstances,' including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" Id. at 116 (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993)). **[**22]** Furthermore, HN9[] in contrast to discrete acts of discrimination,

> It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. **Provided [*214] that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.**

Id. at 117 (emphasis added). Thus, because of the effect of the statute of limitations in this case, Barra can only ultimately recover for claims of discrimination that are encompassed in a successful hostile work environment claim. She can be successful only if the claim survives the summary judgment motion, which we now address.

HN10[] Summary judgment is appropriate where "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 discovery or expert report." *Pa. R.C.P. No. 1035.2(1).* HN11[] The court is not to decide issues of fact, but merely to determine whether any such issues exist. Boring v. Erie Insurance Group, 434 Pa. Super. 40, 641 A.2d 1189 (Pa. Super. 1994). **[**23]** Credibility determinations must be left to the jury. Larsen v. Philadelphia Newspapers, Inc., 411 Pa. Super. 534, 602 A.2d 324 (Pa. Super. 1991). HN12[] Summary judgment is also warranted "if, after 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 sufficient evidence of facts essential to the cause of action or defense" to submit the question to a jury. *Pa. R.C.P. No. 1035.2(2).*

We are cognizant that HN13[] an alleged victim in an employment discrimination case may have difficulty in meeting his or her burden of proof, as aptly described:

> As the Supreme Court has noted, "there will seldom be 'eyewitness' testimony as to the employer's mental processes." We have recognized that "discrimination victims often come to the legal process without witnesses and with little direct evidence indicating the precise nature of the wrongs they have suffered." Cases charging discrimination are uniquely difficult to prove and often depend upon circumstantial evidence. "This is true in part because ... discrimination ... is often subtle. **[**24]** " "An employer who knowingly discriminates ... may leave no written records revealing the forbidden motive and may communicate it orally to no one." "Direct evidence of an employer's motivation will often be unavailable or difficult to acquire."

Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1071 (3d Cir. 1996) (citations omitted), cert.

denied, *521 U.S. 1129, 138 L. Ed. 2d 1031, 117 S. Ct. 2532 (1997)*. Therefore, HN14[↑] "courts today must be increasingly vigilant in their efforts to ensure that prohibited discrimination is not approved under the auspices of legitimate conduct, and 'a plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled . . . because of crabbed notions of relevance or excessive mistrust of juries.'" *Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1082 (3d Cir. 1996)* (quoting *Riordan v. Kempiners, 831 F.2d 690, 698 (7th Cir. 1987)*).

HN15[↑] This Court's standard of review of a trial court's order granting summary judgment is limited to determining whether the trial court committed an error of law or abused its discretion. *Irish v. Lehigh County Housing Authority, 751 A.2d 1201 (Pa. Cmwlth. 2000),* **[**25]** petition for allowance of appeal denied, *567 Pa. 732, 786 A.2d 991 (2001)*. HN16[↑] In reviewing a grant of summary judgment, an appellate court "must view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved **[*215]** against the moving party." *State Farm Mutual Automobile Insurance Company v. Universal Underwriters Insurance Company, 549 Pa. 518, 701 A.2d 1330 (1997)* (citation omitted).

Barra claims that the School District failed to meet its burden of proof that no genuine issue of material fact exists as to her substantive claims and, therefore, that the School District was not entitled to summary judgment as a matter of law. We need consider this issue only with regard to the two, thus far, surviving claims: hostile work environment/constructive discharge and denial of equal pay.

HN17[↑] To establish a prima facie case of hostile work environment under Title VII, an employee must show harassing behavior "sufficiently severe or pervasive to alter the conditions of [her] employment." *Pennsylvania State Police v. Suders, 542 U.S. 129, 159 L. Ed. 2d 204, 124 S. Ct. 2342, 2347 (2004)* **[**26]** (citations omitted). In addition, HN18[↑] an employee who seeks to demonstrate a constructive discharge, as does Barra, must also show that "the abusive working environment became so intolerable that her resignation qualified as a fitting response." Id. In particular, the plaintiff must demonstrate that (1) she suffered intentional discrimination because of her race or gender; (2) the discrimination was pervasive and regular; (3) it detrimentally affected her; (4) it would have detrimentally affected a reasonable person of the same protected class in her position; and (5) there is a basis for respondeat superior liability. *Bonenberger v. Plymouth Township, 132 F.3d 20, 25 (3d Cir. 1997)*. Here, the trial court eliminated the constructive discharge as a cause of action, having found that Barra "has not proven, and cannot prove, the existence of respondeat superior liability on the part of the defendant." (Trial Ct. Op. at 13.)

HN19[↑] The threshold question to establish the burden of proof for an employer's liability for a supervisor's harassment, is whether the plaintiff/employee suffered a tangible employment action. *Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998)*; **[**27]** *Faragher v. City of Boca Raton, 524 U.S. 775, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998)*. These two cases, decided the same day, define tangible employment action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth, 524 U.S. at 761*. [20] The **[*216]** Supreme Court determined

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[20] HN20[↑] Tangible employment actions:

> "Fall within the special province of the supervisor," who "has been empowered by the company as . . . [an] agent to make economic decisions affecting other employees under his or her control." The tangible employment action, the Court elaborated, is, in essential character, "an official act of the enterprise, a company act." It is "the means by which the supervisor brings the official power of the enterprise to bear on subordinates." Often, the supervisor will "use [the company's] internal processes" and thereby "obtain the imprimatur of the enterprise." Ordinarily, the tangible employment decision "is documented in official company records, and may be subject to review by higher level supervisors." In sum . . . "when a supervisor takes a tangible employment action against a subordinate[,] . . . it would be implausible to interpret agency principles to allow an employer to escape liability." (citations omitted).
>
> HN21[↑] When a supervisor's harassment of a subordinate does not culminate in a tangible employment action, . . . it is "less obvious" that the agency relation is the driving force. We acknowledged that a supervisor's "power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation." But we also recognized that "there are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit, and there may be some circumstances where the supervisor's status [would]

that if no tangible employment action is taken, the employer may still be liable, but may raise a two-prong affirmative defense: (a) that it exercised reasonable care to prevent and correct promptly any harassing behavior; and (b) that the plaintiff/employee unreasonably failed to take advantage of any preventive or corrective measures provided by the employer or to otherwise avoid harm. *Pennsylvania State Police v. Suders, 542 U.S. 129, 159 L. Ed. 2d 204, 124 S. Ct. 2342, 2354 (2004)*. However, it also held that if a tangible employment action is taken, this affirmative defense is *not* available because the agency relationship is clear and, thus, the employer becomes *strictly liable* to a victimized employee for the harassment or discrimination **[**28]** of its supervisors.

[29]** The Third Circuit subsequently decided *Suders v. Easton, 325 F.3d 432 (3d Cir. 2003)*, a case cited here by both parties, [21] **[**31]** which expanded the breadth of Ellerth and Faragher by holding, *inter alia*, that a constructive discharge, if proved, constitutes a tangible employment action that renders an employer strictly liable and precludes reliance on the Ellerth/Faragher affirmative defense. [22] The Supreme Court granted certiorari in that case, [23] "to resolve the disagreement among the Circuits on the question whether a constructive discharge brought about by supervisor harassment constitutes a tangible employment action and, therefore, precludes assertion of the affirmative defense articulated in Ellerth and Faragher." *Pennsylvania State Police v. Suders, 542 U.S. 129, 159 L. Ed. 2d 204, 124 S. Ct. 2342, 2350 (2004)* (Suders II). Suders II, which was decided on June 14, 2004, three days after this Court held argument in the case sub judice, vacated the Third Circuit's judgment and remanded the case for further proceedings, holding:

> *HN22*[↑] An employer does not have recourse to the Ellerth/Faragher affirmative defense when **[**30]** a supervisor's official act precipitates the constructive discharge; absent **[*217]** such a "tangible employment action," however, the defense is available to the employer whose supervisors are charged with harassment.

Id. at 2351. The Court explained that "absent 'an official act of the enterprise,' ... as the last straw, the employer ordinarily would have no particular reason to suspect that a resignation is not the typical kind daily occurring in the work force." *Id. at 2355* (citation omitted).

In this case, Barra does not allege a single event that could be termed a "supervisor's official act" that precipitated her discharge. She alleges that she was given a heavier workload than others; she was required **[**32]** to maintain a daily log of her work and work locations; she was not invited to meetings with vendors; her office keys were taken when the locks were changed on the Education Center; she was not given a performance evaluation; and she received numerous critical, insulting e-mails from her supervisor. However, none of these actions rise to the level of an "official act" of a supervisor, and Barra has not alleged that any individual event caused her alleged constructive discharge. Without reference to a "supervisor's official act" as the cause of her discharge, Barra is unable to claim the constructive discharge as a tangible employment action, under *Suders II*, that would

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make little difference." (citations omitted).

Pennsylvania State Police v. Suders, 542 U.S. 129, 159 L. Ed. 2d 204, 124 S. Ct. 2342, 2353 (2004).

[21] Barra relied on Suders for the proposition that "a constructive discharge, when proved, constitutes a tangible employment action within the meaning of Ellerth and Faragher. Consequently, when an employee has raised a genuine issue of material fact as to a claim of constructive discharge, an employer may not assert, or otherwise rely on, the affirmative defense in support of its motion for summary judgment." *Suders, 325 F.3d at 435*. The School District relied on Suders for the proposition that "a plaintiff claiming constructive discharge must demonstrate that the alleged discrimination surpasses 'a threshold of "intolerable conditions."'" *Id. at 444*. It claims that Barra failed to allege any conduct that comes near the level necessary and/or alleged in Suders to be considered a constructive discharge. (Barra Br. p. 52.)

[22] In Suders, a female employee was subjected to a continuous barrage of sexual harassment by three male supervisors, which ceased only when she resigned her position with the state police. The supervisors conversed about people having sex with animals anytime the employee would enter the room. They opined in front of her that young girls should be given instruction as to how to gratify men with oral sex. One supervisor sat in front of the employee wearing spandex shorts and spread his legs apart. Another made obscene gestures in the employee's presence, as many as five-to-ten times per night, by grabbing his genitals and shouting out a vulgar comment inviting oral sex. Another supervisor would "rub his rear end in front of [the employee] and remark 'I have a nice ass, don't I?'" *Suders, 325 F.3d at 437*.

[23] See ***157 L. Ed. 2d 692, 124 S. Ct. 803 (2003)***.

bar the School District from raising the affirmative defense available under *Ellerth/Faragher*.

HN23[↑] Proof that an employer has in place, a policy suitable to particular employment circumstances, may demonstrate an employer's reasonable care under the first prong of the Ellerth/Faragher test. *Faragher, 524 U.S. at 807*. In pleading the affirmative defense, the School District alleges that it had a discrimination policy and complaint procedures in place that were either given to or readily available **[**33]** to all employees. However, following our evaluation of the policy and procedures presented by the School District, we must disagree for the following reasons.

First, the School District's policy, entitled "Racial/Ethnic/Religious Harassment/Intimidation" policy, by its own terms, does not address discrimination and does not address gender. Rather, the policy states that it was written to address "hate-based conduct that either directly or indirectly causes intimidation, harassment or physical harm to another member of the school community, or disrupts the educational process . . . ." (R. at 227a.) Notably, it is telling that the word "discrimination" is not used once in the policy. We note also that the School District failed to provide any other policy to this Court.

Further, the policy states that it was "intended to be in compliance with *Title VI of the Civil Rights Act of 1964*, and the guidelines adopted by the Pennsylvania Human Rights Commission [and] the 1982 *Ethnic Intimidation and Institutional Vandalism Act*," (R. at 227a.) rather than Title VII and the Pennsylvania Human Relations Commission, as is relevant to Barra's case.

In addition, the policy describes unacceptable **[**34]** conduct as including the following:

> 1. Making remarks directly or indirectly, such as name-calling, fighting words, racial slurs or "jokes," that demean individuals or groups.
> 2. Physically threatening or harming individuals or groups.
> 3. Damaging, defacing or destroying the private property of any person because of that person's race, ethnicity, or religious affiliation.
>
> 4. Harassment is defined as a repeated pattern of unprovoked aggressive behaviors of a physical and/or psychological **[*218]** nature carried out by an individual or group against an individual or a group with the effect of causing harm or hurt. Harassing behaviors are all those behaviors that are unwelcome, unwanted and uncomfortable in the view of the recipient.

(R. at 227a.) These behaviors are all active, aggressive manifestations of bias or hate and, while they can be considered discriminatory conduct, they do not include what is commonly considered invidious discrimination in the workplace.

Because the School District failed to prove that it has an applicable policy in place, it cannot meet the requirements of the first prong of the affirmative defense, and it is then unnecessary to evaluate **[**35]** its proof regarding the requirements of the second prong. Therefore, unable to rely on the affirmative defense, the School District may be found strictly liable to Barra under the doctrine of respondeat superior for the actions of her supervisor, if they rise to the level of creating a hostile work environment. Barra alleges, *inter alia*, that she suffered discrimination because of her race and gender, that it was pervasive and regular, that it detrimentally affected her, and that it would have a similar effect on a reasonable person of the same sex in her position. Evaluating all of these allegations in the light most favorable to her, if found credible, we cannot say as a matter of law that she would be unable to recover on a claim for a hostile work environment. Accordingly, the trial court erred when it concluded that the School District was entitled to summary judgment on this issue.

Barra further contends that the trial court erred when it dismissed her claim for a violation of the *Equal Pay Act*. We agree.

The *Equal Pay Act* provides, in pertinent part:

> *HN24*[↑] (d) Prohibition of sex discrimination.
>
> (1) No employer having employees subject to any provisions of this section **[**36]** shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .

29 U.S.C. § 206(d). HN25[↑] An employer may show that a pay differential is justified under one of the Act's four exceptions. Corning Glass Works v. Brennan, 417 U.S. 188, 41 L. Ed. 2d 1, 94 S. Ct. 2223 (1974).

Here, we find that Barra has raised issues of fact as to whether the School District discriminated against her with regard to her wages on the basis of sex. Barra claims that: (1) she has been employed by the School District doing substantially equal work on a job or jobs, the performance **[**37]** of which requires substantially equal skill, effort and responsibility as jobs held by men; (2) the job or jobs are performed under similar working conditions; and (3) she has been paid a lower wage than a member of the opposite sex doing equal work. See 29 U.S.C. § 206(d); Corning Glass Works, 417 U.S. at 195-96. These issues of fact must be resolved before the cause of action can be dismissed. Therefore, the trial court **[*219]** should not have granted summary judgment on Barra's claim regarding the School District's alleged violation of the Equal Pay Act.

Finally, Barra argues that the School District's motion for summary judgment was insufficient because it is "boilerplate," and consists of a single statement requesting summary judgment, with no supporting facts, argument or exhibits other than those referenced in its memorandum of law. She also alleges that this prevents the Court from obtaining a clear understanding of the exact theories advanced and the facts allegedly supporting such theories. We disagree. HN26[↑] A motion is not required to be pled with specificity; there is no rule in either the local rules of Delaware County or the Pennsylvania **[**38]** Rules of Civil Procedure that requires the School District to state all of the issues in numbered paragraphs in its motion. [24] Furthermore, as the preceding analysis shows, the Court was fully able to obtain a clear understanding of the theories and the facts from the motion as presented.

HN27[↑] We may affirm a grant of summary judgment only in cases that are free and clear of doubt. State Farm. Because our analysis has uncovered the existence of genuine issues of material fact, the order of the trial court must be reversed and this case remanded for further proceedings consistent with this opinion. [25]

[39] RENEE COHN JUBELIRER, Judge**

ORDER

NOW, September 17, 2004, the order of the Court of Common Pleas of Delaware County in the above-captioned case is hereby reversed to the extent it granted the School District's motion for summary judgment and this case is remanded for further proceedings.

Jurisdiction relinquished.

RENEE COHN JUBELIRER, Judge

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[24] Although ***Pa. R.C.P. No. 208.2*** now requires numbered paragraphs, Rule 208.1 specifically excludes motions for summary judgment from the requirements of ***Rule 208.2***. In addition, ***Rule 208.2*** was not effective at the time the motion for summary judgment was filed.

[25] Barra also claims that the trial court applied an incorrect method of evaluating the evidence. She argues that the School District's actions constitute direct evidence of discrimination. The School District and the trial court assert that the pretext method should be applied. Because of our disposition of this case, we need not reach that issue.