Supplemental Report to the Judiciary Committee

State Senate of Pennsylvania

September 20, 2019

Bruce A. Antkowiak

Professor of Law

Saint Vincent College

September 20, 2019

Supplemental Report to the Judiciary Committee
State Senate of Pennsylvania
September 20, 2019

In May, 2016, the author of this report was requested by the Judiciary Committee of the State Senate of the Commonwealth of Pennsylvania to provide an analysis of proposed legislation (House Bill 1947 of 2015) which purported in various respects to alter statutes of limitations regarding sexual offenses committed against minors. A copy of that report is attached.

The conclusions of that report were as follows:

- A criminal statute of limitations may be extended as long as is does not operate to revive a prosecution regarding an incident for which an existing statute of limitations has already expired. Lengthening a current statute of limitations for an offense for which that statute has not run is permissible, but the revival of an expired one is not under both the Pennsylvania and United States Constitutions.

- A civil statute of limitations may also be extended on claims for which the current statute of limitations has not expired. Again, both the Constitution of United States and the Constitution of the Commonwealth would not prohibit the legislature from such an extension.

- However, an action by the Pennsylvania legislature that would purport to revive a civil claim time barred under an existing statute of limitations will not survive a challenge under the Pennsylvania Constitution. Long-standing precedent in the Commonwealth would require a finding that such legislation violates Article One, Sections 1, 9 and, more specifically, Section 11, (the Remedies Clause) of the Pennsylvania Constitution. The Constitution of the United States, however, would permit such legislative action.

Subsequent to the filing of this initial report, the author was asked to appear before the Senate Judiciary Committee to give testimony in this regard. On that occasion, the Honorable Bruce Castor, the Solicitor General of the Commonwealth of Pennsylvania (acting as the *de facto* Attorney General), also testified before the Judiciary Committee and confirmed the legal analysis set forth above.

Presently, the author has been requested to provide an update to the Senate Judiciary Committee on this matter. As part of that update, the Committee has requested comment on the

potential impact in this area of the decision of the Superior Court of Pennsylvania in Rice v. Diocese of Altoona-Johnstown, 212 A.3d 1055, 2019 Pa. Super. 186 (decided June 11, 2019). That decision permitted a suit against the Diocese of Altoona-Johnstown to proceed in the face of objections that the Pennsylvania statute of limitations otherwise prohibited it.

Part I of this supplemental report will address the subject matter of the initial report and Part II will discuss the implications of the Rice case.

I.

No new authority has been found to alter the conclusions set forth in the initial report.

Insofar as criminal prosecutions are concerned, the holding of cases such as Stogner v. California, 539 US 607 (2003) continue to dictate that a criminal statute of limitations may be extended as long as it does not revive a previously time-barred prosecution; such a revival would violate the Ex Post Facto provisions of Article 1, Sections 9 and 10 of the United States Constitution. See, United States v. Hano, 922 F.3d 1272, 1286 (11th Cir. 2019).

On the civil side, while the federal courts continue to disfavor the retroactive application of any legislation, and while such retroactive application will not be given unless Congress is explicit in its purpose to do so, see, Doe v. National Ramah Commission, Inc., 2018 US Dist. Lexis 153317, at *8 (Southern District of NY 2018), the principle announced in Campbell v. Holt, 115 US 620 (1885) that the revival of a civil statute of limitations by a state legislature does not create a federal Constitutional deprivation, continues to be the prevailing holding of the federal courts.

However, the Constitution of the Commonwealth, and rulings of our appellate Courts dating back to 1859, would cause such a retroactive revival in Pennsylvania to be declared unconstitutional.

The analysis of Pennsylvania law in this regard set forth in the May 16, 2016, report will not be repeated. Two Pennsylvania cases decided since that time, however, provide additional support for the analysis presented.

In City of Warren v. Workers Compensation Appeal Board, 156 A.3d 371 (Commonwealth Court 2017), the Commonwealth Court was presented with a circumstance in which an employer claimed that a new statute of limitations period giving firefighters an extended opportunity to file for worker's compensation benefits for cancer related maladies violated the Remedies Clause of the Pennsylvania Constitution.[1] The question in City of Warren was not whether the Legislature could prospectively extend the period of time in which firefighters could file such a claim, but whether the extension could be construed to apply retroactively to permit a firefighter who had otherwise allowed the time period to lapse to revive a claim in this regard.

The Court held that the statute could not be given that effect, as such an application would violate the Remedies Clause. In simple terms, "[l]egislation that purports to revive an expired claim violates the constitutional guarantee of "due course of law."" Id. 379. To support its analysis, the Court cited extensively from Lewis v. Pennsylvania Railroad, 69 A. 821, 823 (Pa. 1908) in holding that permitting the filing of a claim that would otherwise constitute a violation of

---

[1] The Remedies Clause of Article 1, Section 11 of the Constitution reads as follows:

> "All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts, and in such cases as the Legislature made by law direct."

The "due course of law" provision differs from the due process provisions of other sections of the Constitution in the important respect that due process provisions generally protect individuals against deprivations of liberty or property by the government, but the "due course of law" provisions provide guarantees of legal Remedies for private wrongs within the state's judicial system. See, Dana Holding Corp. v. Worker's Compensation Appeal Board, 195 A.3d 635, note 10 (Pa Cmwlth. 2018), *citing* Konidaris v. Portnoff Law Associates, 953 A.2d 1231, 1240 (Pa. 2008).

a statute of limitations or a statute of repose would conflict with a vested right of the party that would otherwise benefit from the expiration of the time period. It would amount to taking away "a legal defense available at the time" in a manner that would render that statute plainly unconstitutional. Id. [2]

In Dana Holding Corporation v. Workers Compensation Board, 195 A.3d 635 (Pa Cmwlth. 2018), the unique issue presented was whether a decision by the Pennsylvania Supreme Court that struck down as unconstitutional a statute affecting a procedure related to the assessment of claims in worker's compensation cases could be applied in a retroactive manner that would not offend Pennsylvania Constitutional principles. In assessing the impact of the Remedies Clause in this case, the Commonwealth Court (in part relying on its decision in City of Warren), held that

> the due course of law provision is invoked when a change in the legislation attempts to alter or eliminate a vested or accrued cause of action. [citation omitted] However, the principle also applies to protect a party's vested or accrued absolute defense from being extinguished. [citing cases] Id. at 643.

The Commonwealth Court declined to apply the Remedies Clause in the circumstance before it, however, because Pennsylvania Supreme Court decisions indicate that the Remedies Clause is a protection from "legislative action and to ensure a vested right is not eliminated by subsequent legislation." Id. at 644. Given that the subsequent action in the case before it was not legislation but a new ruling by the Supreme Court, the Commonwealth Court declined to apply the Remedies Clause.

---

[2] The distinction between a statute of limitations and statute of repose is of no consequence in this analysis. A statute of repose is one that not only forecloses a remedy in the way that a statute of limitations does, but it also extinguishes the underlying claim entirely. Weinar v. Lex, 176 A.3d 907, 915 (Pa. Super. 2017). See also, Yanakos v. UPMC, 175 A.3d 418 (Pa. Super. 2017) (unpublished). The difference becomes important only where the underlying claim could be pressed in a different venue and under a different statutory scheme where the statute of limitations would not be available to a defendant. The impact of the Remedies Clause in either case, however, is the same.

However, it must be noted that the Supreme Court of Pennsylvania has granted *allocatur* in the Dana Holding case. The Court will consider in part whether the failure of the Commonwealth Court to apply the Remedies Clause in that case (where the retroactive application involved a new Court opinion as opposed to new legislation) would, in fact, violate the employer's rights under Article 1, Section 11. See, 208 A.3d 461 (Pa. 2018). Similarly, the Supreme Court granted *allocatur* in the Yanakos case (see footnote 2 above) to determine whether a recently enacted statute of repose violated the plaintiff's rights under the Remedies Clause where that statute appeared to cut off the plaintiff's capacity to bring suit after a certain period of time. See, 183 A.3d 346 (Pa. 2017). In both cases, the Supreme Court may give even greater vitality to the Remedies Clause than current jurisprudence suggests.

In summary, no substantive changes in Pennsylvania law have occurred since the May 16, 2016 report to contradict the conclusions reached therein or dispute the opinion of the Solicitor General of Pennsylvania rendered in 2016 in that same regard.[3]

II.

On June 11, 2019, the Superior Court of Pennsylvania decided Rice v. Diocese of Altoona-Johnstown. 2019 Pa. Super. 186, 212 A.3d 1055 (Pa. Super. 2019). The opinion reversed the summary dismissal of a suit filed against the Diocese and two of its officials by a former parishioner who alleged that she was sexually abused by a priest (Charles Bodziak) assigned to her parish in the mid-1970's to the early 1980's. No claim was brought directly against Bodziak.

[3] Simply by way of notation, Utah and Missouri continue to adhere to the same principles as Pennsylvania regarding expired statute of limitations as creating vested rights in the defendants affected. See, Hyland v. Dixey State University, 2017 US District Lexis 74597 (District of Utah 2017) and Kumar v. Tech Mahindra Americas Inc., 2019 US District Court 49062 (Eastern District of Missouri 2019). Each state, of course, pursuant to its own Constitution, is free to permit or deny amendments to their civil statutes of limitations that have retroactive effect, particularly since, as noted above, the federal law does not impede that legislation.

The Court of Common Pleas had dismissed the suit on statute of limitations grounds and the plaintiff appealed.

While acknowledging that the statute of limitations would normally bar such a suit, a panel of the Superior Court nonetheless allowed the case to proceed. Subsequently, the Diocese unsuccessfully sought review by the entire Superior Court. The Diocese has now applied to the Supreme Court of Pennsylvania, asking it to invoke its discretionary jurisdiction and review the matter.

It is not the purpose of this report to offer a critique of the Rice decision or to support the position of either side in this dispute. It is important for policy makers, however, to understand what Rice has held and that, to the degree that the direction it takes is a departure from prior precedent, to withhold the assumption that it effects a permanent change in the legal landscape of Pennsylvania until the Supreme Court decides whether to review it.

a. The essential holding of Rice

In Rice, the plaintiff alleged that the statute of limitations bar in Pennsylvania could be overcome in her case by application of three principles of law which are generally acknowledged as part of Pennsylvania jurisprudence.

First, she alleged that the so-called discovery rule would permit her to proceed with the case since she was allegedly only fully informed of the nature of her claim when a 2016 grand jury report indicated a cover up by the Diocese regarding this and other cases. Id. *1-2.

Second, she alleged that the doctrine of fraudulent concealment would operate here. In this regard, she did not aver that the Diocese had lied to her about anything specifically pertaining to Bodziak, but instead she relied principally upon an allegation that she, unlike other average

parishioners, was in a confidential/fiduciary relationship with the Diocese that required it to affirmatively advise her of the pedophile tendencies of the priests they assigned to her parish.

Finally, the plaintiff filed a count against the Diocese defendants alleging that they conspired to commit fraudulent concealment and claiming that because the conspiracy lasted until early 2016 when Bodziak was removed from active ministry, her filing within two years of that date was timely. Id. *2-3.

Supporting each of her theories to circumvent the statute of limitations were factual allegations that the Diocese kept secret archive files demonstrating its knowledge of the sexual interest of certain priests including the individual who had molested her. She alleged that the Diocese had deliberately concealed this from her. She claimed that in 1983 and 2003 the Diocese received reports claiming abuse by this priest of others, and Rice herself reported her abuse to the Diocese in 2006. She claimed, however, that it was not until the grand jury report in 2016 that she was aware that the Diocese had known for some time about the abusive propensities of this individual.

Rice specifically alleged that she had a confidential/fiduciary relationship with the parish and Diocese based on the fact that she was both an organist and cantor for the parish, that she did voluntary work within the parish offices, and that she had been given a key to the church in order to assist in her organist duties. From this, she argued that she was in a different position from other parishioners and that her position raised in the parish and Diocese the obligation to disclose to her information they had regarding the tendencies of the priest involved. This averment also supported her claim of civil conspiracy. Id. *4

The Superior Court addressed each of the reasons Rice asserted for avoiding dismissal on statute of limitations grounds in turn.

First, the Court noted that the "discovery rule" in Pennsylvania applies to commence the running of the statute of limitations whenever an individual of reasonable prudence is or should have been aware of the fact of an injury and the need to investigate the possible liability of others. In addressing the applicability of that rule to this case, the Superior Court is confronted with two prior Superior Court Opinions that suggested that a summary dismissal in such case was supported where an individual knew of the molestation, was aware of the identity of the perpetrator, and was aware that perpetrator's affiliation with the Diocese. Those cases are Meehan v. Archdiocese, 870 A2d 912 (Pa. Super. 2005) and Baselice v. The Franciscan Friars, 879 A2d 270 (Pa. Super. 2005).

The Rice Court, however, indicated that the more recent Pennsylvania Supreme Court opinion in Nicolaou v. Martin, 195 A.3d 880 (Pa. 2018), essentially abrogated Meehan and Baselice and set forth a Pennsylvania policy that the question of whether the discovery rule applies is a matter for the determination of a jury. Accordingly, the Court held that while the Diocese could still contend that the statute of limitations was expired, it would have to argue that issue to a jury. The Court rejected the idea that simply because Rice knew that she was injured, knew who the priest was who injured her, recognized that the abuse occurred at the church and recognized the priest's affiliation with the Diocese that those facts alone were sufficient to determine that she should have known that a further investigation was needed and that, therefore, the discovery rule exception did not apply. Id. *6-17.

The Rice Court then held that the doctrine of fraudulent concealment applies to hold off the running of the limitations period where the defendant did something to cause the plaintiff to "relax their vigilance" or deviate from their right of inquiry into the facts of the case. While acknowledging that mere silence is not normally enough to constitute a fraudulent concealment, Rice's claim that she was in a confidential/fiduciary relationship with the parish and Diocese again

made this a jury question other than one the court could determine on the pleadings. If Rice could show that she was a "parishioner-plus," then a duty to affirmatively disclose the cover-up would have been imposed on the Diocese such that the statute of limitations would not begin to run until Rice reasonably realized that a claim against the Diocese should be explored. *20-30.

Finally, the Superior Court held that if the Diocese was in fact guilty of a conspiracy to commit the tort of fraudulent concealment (a determination based largely on whether it had an affirmative duty to disclose their prior knowledge), a civil conspiracy adopts the statute of limitations of the underlying tort and would not begin to run until the last act of the conspiracy occurred. If that last act occurred in January, 2016, when the priest was removed from ministry, the filing of the lawsuit in 2016 would have been timely under the applicable two year statute of limitations. *39-42.

Accordingly, the judgment dismissing her claim was reversed.

b. The precedents of Rice

i. The discovery rule

While Rice places tremendous importance on the Nicolaou decision insofar as its interpretation of the discovery rule is concerned, particularly with respect to whether Meehan and Baselice have any continuing relevance to this discussion, a critical reflection on Nicolaou indicates that such reliance may be overstated.

A brief review of certain decisions regarding the discovery rule in Pennsylvania is useful for placing Nicolaou in context.

In a 2005 case regarding the discovery rule in a matter involving dental malpractice, the Supreme Court recited the long-standing rule that summary judgment is only appropriate when there is no genuine issue of material fact and only when the facts are clear and free from any

reasoned doubt. Fine v. Checcio, 878 A.2d 850, 857 (Pa. 2005). There the Court observed that the "salient point" about the discovery rule is that it may be invoked only where a plaintiff is able to prove that he was unable, despite reasonable diligence "to know that he is injured and by what cause." Id. at 267. Ordinarily, a jury must render such an assessment, but where reasonable minds could not differ about the facts, a Court is free to rule on the applicability or non-applicability of the discovery rule as a matter of law in summary fashion. Id. at 267 to 270.

Similarly, in Gleason v. Boro of Moosic, 15 A.3d 479 (Pa. 2010), the Supreme Court ruled that the "*sine qua non*" of the determination as to whether the discovery rule applies is whether the plaintiff was able by reasonable diligence to know that he was injured and by what cause. Id. at 485. In this case, involving a complex issue regarding mold occurring in a home that had been flooded sometime earlier through the negligence of a local municipality, the Court found that a jury determination of that issue was necessary (and that summary judgment was thus inappropriate) because a true factual dispute in that complex matter was presented. But here again, the Court held that where reasonable minds could not differ about the material facts, a Court was free to decide the issue. Id.

The Superior Court was equally aware of this principle in Lazarski v. Archdiocese, 926 A.2d 459 (Pa. Super. 2007) when it upheld a summary judgment claim, finding that the plaintiff knew the identity of the perpetrator, who they work for and where the abuse occurred. The Lazarski plaintiff, having made no further inquiry about the potential association of the Diocese to that abuse, could not invoke the discovery rule. Id., at *13.

Generally, prior to the time of Nicolaou, the discovery rule was the subject of a wide variety of decisions in Pennsylvania (in an additional to those already noted) but no categorical rule emerged that in every case in which the discovery rule was invoked, a jury would be called upon

to decide it. Lower courts were found competent to decide the matter summarily in some cases, but in others the grant of such judgment was deemed unfounded.[4]

In both Meehan and Baselice, the Superior Court applied the generally accepted proposition that a judgment on the pleadings was appropriate where the material facts were not in dispute with respect to the application of the discovery rule. In Meehan, the plaintiff made factual claims not dissimilar from those in the Rice case and invoked the discovery rule as a reason to avoid the application of the statute of limitations there. However, the Superior Court held that since the plaintiff clearly knew of the abuse, the identity of the abuser, and the relationship of the abuser to the Diocese, the discovery rule was not applicable. Id. at 920. The Court opined that the child abuse was the injury, not the alleged cover up, because if the alleged cover up was considered a secondary injury, any parishioner could have been allowed to sue and take advantage of the so-called discovery rule. Id. The Meehan Court acknowledged that the discovery rule is generally a question for the jury but where reasonable minds could not differ about that matter, the discovery rule could be determined by the Court. Id. at 921. The discussion and analysis in Baselice paralleled that in Meehan.

[4] See, Dalrymple v. Brown, 791 A2d 164 (Pa 1996)(the Supreme Court holds that there was no factual issue in dispute even though the plaintiff argued that repressed memory had caused them not to act sooner; the Court admonished that the discovery rule cannot be applied so loosely as to nullify the statute of limitations); Crouse v. Cyclops Industry, 745 A2d 606 (Pa 2000)(Supreme Court rejects a summary judgment determination in a complicated case involving a promissory estoppel claim between companies, holding that summary judgment is appropriate in such cases where reasonable minds cannot differ about the material facts but that where many issues of credibility needed to be determined before the facts could be established, summary judgment should not enter); Pocono Raceway v. Pocono Produce, 468 A 2d 468 (Pa 1983) (Supreme Court upholds the grant of summary judgment despite the claim that the plaintiff could not have discovered damage to their building sooner); Cochran v. GAF Corporation, 666 A2d 245 (Pa 1995) (Summary dismissal upheld since reasonable minds could not differ about the facts).

The Nicolaou case involved a circumstance in which a patient was bitten by a tick, but the actual diagnosis of Lyme disease did not occur for some time, during which she was treated for other conditions in a way that did not address her underlying condition. The plaintiff had been told repeatedly that Lyme disease was not necessarily the cause of her problems and certain tests had been run which did not reflect that the etymology of her condition was affiliated with that disease. It was only after other physicians treated her for Lyme disease that her condition improved. When the plaintiff brought suit against her initial doctors for the failure to properly diagnose her, the defendants raised the defense of statute of limitations.

The Supreme Court held that summary judgment in favor of the doctors in this case was not appropriate. As a basic principle, the Court held that the statute of limitations begins to run when an injury is inflicted, and a plaintiff is not excused from its operation by mistake, misunderstanding, or lack of knowledge. Id. at 891. The discovery rule, however, is an exception to this, where the plaintiff's "injury or its cause was neither known nor reasonably ascertainable." Id. The statute of limitations will not run "where the plaintiff is reasonably unaware that he has been injured and that his injury is caused by another party's conduct." Id. In articulating the rule, the Supreme Court acknowledged that Pennsylvania's application of it is more narrow than other states. Id. at 892. The reasonable due diligence standard is an objective one, and it is not judged by what the plaintiff knew but what they might have known had they exercised due diligence. To be sure, the Court noted that reasonable due diligence is a "fact intensive" inquiry and is ordinarily one for the jury's consideration. Id. at 893. However, the Nicolaou Court, as has every court determining the discovery rule prior to that time, held that trials courts may resolve the issue of the applicability of the discovery rule at summary judgment where reasonable minds could not differ on the pertinent facts that bear on that issue. Id. at 894.

In the case before it, the Nicolaou Court that a jury should decide the issue given the fact that the plaintiff was repeatedly told that she did not have Lyme disease, that tests administered by doctors did not reflect this condition initially and that numerous other factual conflicts existed in the record that made the case ripe for a jury's ultimate determination.

No passage in the Nicolaou Opinion suggests the conclusion that in all cases where the discovery rule is invoked, a jury determination must occur. Indeed, a panel of the Superior Court made this exact observation in the only case filed to date which cites Rice. In Clark v. Stover, 2019 Pa. Super. Unpub. LEXIS 2910 (decided August 1, 2019), the Court upheld a lower court's entry of summary judgment, finding that reasonable minds could not differ on the point. Id. at *18.[5] The plaintiff there asserted that Rice and Nicolaou changed this legal landscape and required a jury fining on the matter. In footnote 13 of the Opinion, this claim was soundly rejected:

> Contrary to the Clarks' suggestion, neither Nicolaou nor Rice establish a per se rule that whether the plaintiff met the discovery rule is always a question for the jury.

And a final observation about Nicolaou is that while the Rice Court indicates that Nicolaou abrogated the holdings in Meehan and Baselice, the Nicolaou Court does not ever mention those cases.

Thus, if the Supreme Court agrees to hear the Rice appeal, it would require a significant shift in some rudimentary jurisprudence for the Court to announce a sweeping proposition that discovery rule matters are essentially outside a trial court's purview for summary judgment purposes. Nonetheless, the Court could decide that, after a "fact intensive" review of matters raised in Rice, while the facts are, in many respects, comparable to those in Meehan and Baselice, something different or additional in Rice made summary judgment not appropriate.

---

[5] Clark also noted that Pennsylvania has a "strong policy . . . favoring the strict application of the statute of limitations." Id. at *12-13

The Rice opinion suggests that, with respect to the application of the discovery rule and the other two bases upon which Court excused the statute of limitations violation that otherwise occurred, a key factor was the alleged foreknowledge of the Diocese about the abusive actions of Bodziak before he was assigned to the plaintiff's parish. The Court notes that Rice alleged that:

> as a child and teenager, she belonged to St. Leo's Church in Altoona. She attended the Catholic school associated with her parish, when the Diocesan Defendants assigned Fr. Bodziak to serve as St. Leo's pastor. They did this, despite knowing or having reason to know he had molested young girls. Id. *3

Rice claimed that the Diocese continued to hide its knowledge of Bodziak's proclivity through 2016 and that it was only upon the plaintiff's reading of the March, 2016, Grand Jury report that she realized this.

> From that report, Ms. Rice first learned that the Diocesan Defendants knew or should have known of Fr. Bodziak's pedophilia prior to assigning him to St. Leo's Church. The Diocesan Defendants kept the evidence about abusive priests in a secret archive, separate from other personnel files. Id. *4

A reading of the Rice case would suggest that a plaintiff could make an arguable case for application of the discovery rule when evidence existed that the Diocese both knew (or had specific reason to know) of the dangerous propensities of the subject priest *before* it assigned him to the plaintiff's parish and that, once the abuse occurred, it systematically covered up that foreknowledge thereafter. In cases where there is no evidence of such foreknowledge or a cover-up, however, it would be difficult for a plaintiff to raise a discovery rule exception to the statute of limitations principle, particularly if Meehan and Baselice are not, in fact, abrogated. At least, that would be a prime issue the Pennsylvania Supreme Court will need to decide if the Court decided to accept Rice for review.

ii. Fraudulent concealment/civil conspiracy

Independent of its discussion of the discovery rule, the Rice Court excused the otherwise clear violation of the statute of limitations based on the doctrine of fraudulent concealment. This is a well-recognized doctrine in Pennsylvania arising from the notion that a defendant is estopped from asserting a limitations defense where the defendant either intentionally (or otherwise) commits an affirmative, independent act that the victim reasonably relies upon and thereby relaxes their vigilance or deviates from pursuing their inquiry into facts that could disclose potential liability. When such an affirmative, independent act occurs, the statute of limitations will be tolled for the period in which reasonable reliance on the act occurred. See, discussion in Rice at *20. See also, Fine, *supra*. at 273.[6]

Rice recites, and other courts agree, that the requirement that the defendant engage in an affirmative independent act that induces a victim's reliance means that a defendant's mere silence or non-disclosure of some salient fact is not enough to trigger the fraudulent concealment doctrine unless the parties are in a relationship that imposes upon the defendant a duty to speak up or disclose. Such would occur if a confidential/fiduciary relationship existed. The Rice Court suggests that there was ample evidence in the case before it to indicate that such a relationship did exist and that the determination of whether those circumstances equal a confidential/fiduciary relationship was a jury question.

It is on this point that a number of cases were raised by the defendants to challenge that conclusion. In Meehan and Baselice, the victims there alleged the existence of a fiduciary relationship to the Diocese based on somewhat similar circumstances to those raised in Rice, but

[6] The Superior Court in Vogtasek v. the Diocese of Allentown, 916 A.2d 637 (Pa. Super. 2006) found fraudulent concealment applicable in that case but indicated that such a finding does not relieve the victim of the obligation to be diligent since after a period of time, the doctrine of fraudulent concealment will not excuse undue delay in filing suit.

the Superior Court found that, as a matter of law, the evidence was insufficient to sustain the existence of such a relationship. Meehan at 922 to 923, Baselice at 277 to 278. In these cases, and Aquillino v. Archdiocese, 884 A.2d 1269 (Pa. Super. 2005), the Superior Court determined that a critical factor was that the victim at no time made any inquiry of the Diocese about the prior sexual abuse history of the priest involved, and the Diocese never lied to the victims about any information that it had in its files on that critical matter. Meehan at 922; Baselice at 278; Aquillino at *19.

The case of Delaney v. the Archdiocese, 924 A.2d 659 (Pa. Super. 2007) is also instructive in this regard. The victim there was a student in the school, worked in the rectory and served as an altar boy. The abusive priest told the victim to keep quiet about the abuse and, when the priest was removed from the ministry, the explanation the Archdiocese gave was that the priest was on sick leave. Id., at 660-661. In 2005, the victim read in the newspaper that other acts of abuse had occurred regarding that priest.

In alleging fraudulent concealment, the victim cited a general systematic pattern of conduct by the Diocese to misrepresent that the abuser was a good priest and the specific allegation about the false attribution of sick leave to his absence. Id. 662. Nonetheless, the Superior Court found that the doctrine of fraudulent concealment did not apply. It found that the false allegation of sick leave did not mislead the victim into believing that the abuse did not occur or that the abuser was not a priest of the Diocese. The Court also found that the failure of the victim to make any direct inquiry of the Diocese about the status of the priest was a factor in leading it to conclude that fraudulent consumement did not occur here. Id. at 663.

The Delaney Court also made the point that even though the entire theory of a plaintiff's case may not be immediately apparent once the primary injury occurs, this does not automatically

support application of the fraudulent concealment doctrine. That the plaintiff was on notice of the injury inflicted by the priest and the priest's affiliation with the Diocese meant that further inquiry about the Diocese's foreknowledge of the priest's proclivities could have been made even though that aspect of a potential claim was not immediately apparent. Id. See also, Meehan at 922.

Again here, the allegation by Rice that the Diocese had knowledge of the abusive nature of the priest at the time it assigned him to the Plaintiff's parish is a critical underpinning to the fraudulent concealment issue since that is the fact the Diocese allegedly needed to reveal to the plaintiff, assuming that it was in a confidential/fiduciary relationship with her. In Meehan and Baselice claims that such a relationship existed were rejected. But whether the factors alleged by Rice (her volunteer work in the parish, her role as an organist, etc.) sufficiently create the sort of parishioner-plus relationship (akin to a counselling relationship) that would support the finding of a confidential/fiduciary relationship will be a central consideration. The Rice Court was satisfied that there was sufficient evidence on this point to require the jury to decide it but, again, there is no *per se* rule that any question regarding the existence of fraudulent concealment must be submitted to the jury for resolution. If the facts pertaining to that issue are such that reasonable minds could not differ, summary judgment is appropriate. See, Kingston Cole v. Felton Mining, 690 A.2d 284, 288 to 290 (Pa. Super. 1997); Lange v. Burd, 800 A2d 336, 340 (Pa. Super. 2002).

The question of application of the statute of limitations for civil conspiracy is a concurrent issue with the question of fraudulent concealment, as the conspiracy alleged was to commit a fraud by way of concealment of Bodziak's abusive history prior to his assignment to the plaintiff's parish. The issue of the presence of the fiduciary/confidential relationship would again be pertinent here.

c. Conclusion

The purpose of this analysis is not to suggest that the Rice case was correctly or incorrectly decided or to predict what the Supreme Court will do with it if *allocator* issues. The doctrines Rice discusses, the discovery rule, fraudulent concealment and civil conspiracy, are hardly new or radical concepts in the law of Pennsylvania. Those concepts have been analyzed in multiple contexts by Pennsylvania appellate courts for some time with results mostly turning on the particular facts in the case at hand. While Rice does appear to run contrary to some prior decisions by the Superior Court in similar cases, it may be that its unique facts account for that divergence.

Rice does not contradict the analysis of the Pennsylvania statute of limitations set forth in Section I above. It recognizes that under traditional analysis, the limitations period would be a bar to the suit but looks to doctrines that make exceptions to the running of the statute to justify rejecting a summary dismissal of the claim.

To the extent that the Rice case reframes the discussion of the question of whether a window should be opened to revive expired claims in Pennsylvania, it would be prudent to make that ultimate assessment only after the Supreme Court of Pennsylvania either has reviewed it or has declined to do so. That Court will need to confront several substantive and procedural questions raised by Rice and, in doing so, will provide significant guidance in a truly challenging area of the law.

The author hopes that the above analysis is of some assistance to the Senate in its further deliberations in these matters.

Respectfully submitted,

Bruce Antkowiak

Report to the Judiciary Committee

Pennsylvania State Senate

Re: Constitutionality of House Bill 1947 of 2015

Bruce A. Antkowiak
Professor of Law
Saint Vincent College
May 16, 2016

Table of Contents

I. OVERVIEW AND EXECUTIVE SUMMARY

The author[1] of this report has been asked to supply the Judiciary Committee of the Senate of Pennsylvania with a legal analysis of the constitutionality of House Bill 1947 of 2015 which, in various sections, amends the law of Pennsylvania as follows:

1. It extends the current criminal statute of limitations for various sexual assault offenses committed against victims under the age of 18 by removing any period of limitations and permitting a prosecution to be brought at any time.[2]
2. It extends the period under which a civil action arising from child sexual abuse may be brought by permitting such action to be filed at any time before the victim reaches 50 years of age. Currently, such an action may be filed at any time before the victim reaches 30 years of age.
3. It explicitly applies the amendment to the civil statute of limitations retroactively, meaning that, a) any claims not yet time-barred under the current statute may be filed under the new, extended period, and, b) claims which are currently time-barred by the existing statute of limitations would be revived.

This report analyzes the precedent affecting the power of the General Assembly to alter the current statutes of limitations in the way proposed. That analysis leads to the following conclusions:

1. The extension of the criminal statute of limitations is constitutionally permissible as long as it does not operate to revive a prosecution regarding an incident as to which the existing statute of limitations has already expired. A decision to effectively eliminate the

[1] The curriculum vita of the author of this document is attached for the Committee's review.
[2] Currently, a prosecution of this nature may be brought up until the day the victim reaches the age of 50. Title 42, Pa.C.S. §5552 (c)(3).

criminal statute of limitations as to offenses for which the current limitations period has not run is thus a legislative judgment to be made on the basis of the consideration of sound public policy.

2. A decision to extend the civil statute of limitations in cases where the cause of action is not currently time-barred is also constitutionally permissible under both the United States and Pennsylvania Constitutions. Thus, the decision to extend the statute of limitations in these cases is a legislative judgment to be made upon considerations of sound public policy.

3. That portion of House Bill 1947 that purports to make the civil statute of limitations retroactive and to thereby revive claims that have otherwise expired under the existing statute of limitations, however, will fail to survive a challenge under the Pennsylvania Constitution. In order to uphold this provision, the Supreme Court of Pennsylvania will have to reverse precedent that has existed since 1859 and which has been repeatedly reaffirmed thereafter. This Constitutional challenge will be founded under due process considerations that emanate from various provisions of Article I of the Constitution of the Commonwealth, including Section 1 (Inherent Rights of Mankind), Section 9 (The Law of the Land provision) and Section 11 (the so-called Remedies Clause).[3]

---

[3] "Section 1. All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Section 9. . . . nor can [an individual] being deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land. . .

Section 11. All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such Courts and in such cases as the Legislature may by law direct."

II. THE CRIMINAL STATUTE OF LIMITATIONS

In Stogner v. California, 539 U.S. 607 (2003), the United States Supreme Court rejected an effort by California to revive criminal prosecutions of child sex abuse crimes for which the previous statute of limitations had expired. The Court based its decision on the *Ex Post Facto* Clause of the United States Constitution.[4] While the Court indicated that an extension of an existing statute of limitations where the matter was not already time-barred would not run afoul of the United States Constitution, Id. at 618 to 620, the Court concluded that longstanding judicial authority would not permit the revival of a moribund prosecution. Id. 633.

House Bill 1947 does not purport to revive criminal prosecutions in cases where the previous statute of limitations has expired. As long as it is not used in such a manner, no substantial challenge under either the federal or state Constitution is likely to succeed.

III. THE CIVIL STATUTE OF LIMITATIONS

As will be seen in the discussion below, while the Courts of Pennsylvania and the United States agree that a legislature may extend a civil statute of limitations where claims have otherwise not expired under existing statutes, these Courts diverge dramatically on the issue of whether a legislature may *revive* a civil claim that would otherwise be subject to a complete defense based upon an expired statute of limitations. The divergence of opinion is a reflection of the autonomy state courts enjoy to decide matters under their own Constitutions and reach conclusions that provide greater protection to citizens than may be afforded under the federal Constitution.

---

[4] Article 1, Section 9 and 10, United States Constitution. The Pennsylvania Supreme Court has held that, as the language of the *Ex Post Facto* clause of the Pennsylvania Constitution (Article 1, §17) is "virtually identical" to its federal counterpart, the standards by which to apply each provision are "comparable." Commonwealth v. Rose, 127 A. 3d 794, 798 n. 11 (Pa. 2015).

a. The Federal Standard

Federal law on the revival of expired claims generally derives from two leading cases that establish the standard that remains extant in the federal system and is emulated by a minority of the states.

In Campbell v. Holt, 115 U.S. 620 (1885), the Court dealt with a case in which a contract action that would otherwise have been barred by a statute of limitations was revived by subsequent action of the Texas legislature. The defendant put forth the position that depriving him of his statute of limitations defense was a taking of his property in violation of the Fourteenth Amendment due process principle. Id. 621.

The Supreme Court disagreed. While observing that certain types of cases (particularly those involving title to property) may involve a deprivation of property rights if a subsequent legislative action overturned a passage of title occurring by operation of existing law, the Court declined to extend that principle to cases involving the contract interest of debtors in expired statutes of limitations. Id. at 623 to 624. Specifically, the Court rejected the notion that the defendant enjoyed a vested right to a statute of limitations defense based on the law at the time of its expiration. Id. at 628. Statutes of limitations, the Court observed, "are founded in public needs and public policy-- are arbitrary enactments by the law making power." Id. They are matters that are within the legislative power until the "bar is complete" Id., that is, until adjudicated. Accordingly, the defendant has lost nothing and has no cause to complain of a due process violation when the legislature revives a claim that has not been pressed against him and once was time-barred.

In a dissenting opinion that would be much cited by later Courts, Justice Bradley (joined by Justice Harlan) vigorously argued that a statute of limitations defense meant much more than the majority recognized. The property defended by the Fourteenth Amendment, he wrote, "is not confined to mere tangible property, but extends to every species of vested right." Id. at 630. To be immune from prosecution in a lawsuit "is as valuable to the one party as the right to the demand or to prosecute the suit is to the other." Id. To say "that the one is protected by Constitutional guarantees and that the other is not, seems to me almost an absurdity." Id. at 631.

While ultimately convincing most state supreme courts, Justice Bradley's views never gained a majority position in the federal system. Moreover, in 1945, the United States Supreme Court reaffirmed the Campbell holding in Chase Securities Corporation v. Donaldson, 325 U.S. 304 (1945). In that case, Minnesota opened a window on its statute of limitations for a Blue Sky Law claim and the defendant raised a similar complaint to the one made by the defendant in Campbell. Id. at 307. He fared just as badly.

While the Chase Court held that, if a final adjudication on a previous claim had been upheld on a statute of limitations defense, a subsequent legislative action might not be able to overturn it, Id. at 310 to 311, the essential holding in Campbell was still a proper interpretation of the Fourteenth Amendment.[5] In upholding Campbell, the Chase Court reiterated the view that statutes of limitations are justified because of "necessity and convenience rather than in logic." Id. at 314. They are "practical and pragmatic devices to spare the Courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have

[5] The Court recognized that a number of state Courts had not followed Campbell in construing provisions of their own Constitutions. The Court acknowledged that "they are privileged" to so interpret "their own easily amendable constitutions to give restrictive clauses a more rigid interpretation than we properly could impose upon them from without by construction of the federal instrument which is amenable only with great difficulty and with the cooperation of many states." Id. at 312 to 313.

died or disappeared, and evidence has been lost." Id. As legal commodities, the Court described statutes of limitations as "arbitrary" representing only a public policy "about the privilege to litigate." Id. They did not lead to the creation of a fundamental right in an individual since they provide protection "only by legislative grace." Id. While agreeing that in some cases the deprivation of a statute of limitations defense could involve a substantial "hardship and oppression" none was found in the case before the Court and Minnesota was allowed under the federal Constitution to revive claims that had otherwise become stale. Id. at 315 to 316.[6]

While the federal Courts have thus permitted the retroactive application of a new statute of limitations to revive an expired claim, the federal Courts have with equal vigor pointed out that such retroactive application must not be the presumed state of affairs. To the contrary, the federal courts have established a strong judicial policy against retroactive applications of statutes (including statutes of limitations) recognizing, at least in a collateral way, the serious problems such retroactivity entails for a judicial system.

In Landgraf v. USI Film Products, 511 U.S. 244 (1993), the Supreme Court set out the general rule that:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i. e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. Id. at 261 to 262.

---

[6] A determination that an interest has acquired sufficient weight to be considered "property" deserving the protection of the Fourteenth Amendment is ultimately, of course, a question of federal constitutional law but the resolution of that issue "begins. . . with a determination of what it is that state law provides." Town of Castle Rock v. Gonzales, 545 U.S. 748, 757 (2005). See also, Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

Throughout, the Landgraf Court emphasizes that a presumption against retroactive legislation "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our republic." Id. at 252. The "anti-retroactivity principle" is expressed in multiple sections of the Constitution, including the *Ex Post Facto* clause, the section prohibiting legislation that impairs the obligation of contracts, the Takings Clause of the Fifth Amendment, the prohibition against bills of attainder and the due process clause itself. Id. at 253. These principles reflect a concern on the part of the Framers both to provide individuals with rights that may readily be asserted against arbitrary government action and, independently, to limit legislative power as an overall part of the Constitutional preference for limited government. Id. at 253. This clear preference for non-retroactive legislation led the Landgraf Court to emphasize that even though the Constitution's restrictions regarding retroactive civil legislation are generally limited, if Congress seeks to have its current statute apply retroactively, Congress should speak clearly to that intention. Id. at 254. [7]

Landgraf indicates that if Congress has not spoken clearly on the issue of retroactivity, a Court may still discern whether retroactive application was possible by determining if the new statute affected substantive matters or was procedural only. Where a legislature changes a rule that is simply of procedural import and does not affect any "substantive" interest, concerns about retroactivity are further minimized. Rules of procedure, the Court held, "regulate secondary

[7] "But while the Constitutional impediments to retroactive civil legislation are now modest, prospectively remains the appropriate default rule. Because it accords with widely held intuitions about how statutes ordinarily operate a presumption against retroactivity will general coincide with legislative and public expectations. Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive applications and determined that it is an acceptable price to pay for the countervailing benefits. Such a requirement allocates the Congress' responsibility for fundamental policy judgments concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate." Id. at 272 to 273.

rather than primary conduct" meaning that application of that rule to a given case does not create the same concerns about retroactivity that other statutes may.[8] Id. at 258.

Following Landgraf, the Ninth Circuit Court of Appeals addressed this procedural/substantive distinction in the context of an extension of a statute of limitations in Chenault v. United States Postal Service, 37 F.3d 535 (9th Cir. 1994). There, the Court recognized that while extending the statute of limitations term in a circumstance where the old one had not yet expired would simply be a procedural alteration otherwise permissible, in the absence of clearly stated Congressional intent, the revival of time-barred claims would not: "[w]e have recognized that a statute of limitations may not be applied retroactively to revive a claim that would otherwise be stale under the old scheme." Id. at 539. While stopping short of agreeing that a vested right existed in such circumstances the Court held that a change that revived a claim otherwise extinguished under the law "as it was at the time of the events in question" would have "substantive attributes." Id. And regardless of whether one called it a "procedural" change or something else, such a change would work a "manifest injustice" and application of retroactivity "should not be permitted." Id. In the Court's words:

> "A newly enacted statute that shortens the applicable statute of limitations may not be applied retroactively to bar a plaintiff's claim that might otherwise be brought under the old statutory scheme because to do so would be manifestly unjust. [Citation omitted]. Conversely, we hold that a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme because to do so would 'alter the substantive rights' of a party and 'increase a party's liability'. In this case the rights of the defendant would be altered and its liability increased because it would be forced to defend an action that was previously time barred." [Citations omitted]

[8] The Landgraf Court was specifically confronted with a question of whether the Civil Rights Act of 1991, which created a right to recover compensatory and punitive damages for certain violations of the previous Civil Rights Act, and which further provided that a jury trial was available if such damages were sought, could be applied retroactively. The Court ultimately held that they could not.

The ruling in Chenault was specifically endorsed by the United States Supreme Court in Hughes Aircraft v. United States, 520 U.S. 939, 950 (1997). There, a unanimous Court ruled that, in the absence of a specifically articulated intent to do so, Congressional action that subjects a defendant "to previously foreclosed. . . litigation, much like extending a statute of limitations after the pre-existing period of limitations has expired, impermissibly revives a moribund cause of action." Id In a similar fashion, in the absence of a specific Congregational finding to the contrary, the United States Court of Appeals for Third Circuit rejected the retroactive application of a provision purporting to revive an expired statute of limitations claim in Lieberman v. Cambridge Partners, 432 F.3d 482 (3rd Cir. 2005).

The federal Constitution thus permits the revival of expired statutes of limitations claims if a legislature has explicitly made that determination in the matter before it. In an evident attempt to conform to the federal principle, House Bill 1947 contains language specifically purporting to allow the new civil statute of limitations to revive claims that would otherwise be time-barred by the existing statute. Were federal law the only law applicable, this statute would likely pass Constitutional muster. However, the Constitution of the Commonwealth has been consistently interpreted to reject the legitimacy of the revival of expired claims even where the General Assembly has specifically dictated that such a revival was its intent. Absent a dramatic reversal of established jurisprudence in the area, or the passage of a state Constitutional amendment to effectuate that reversal, the proposed statute will fail a Constitutional challenge in the Courts of the Commonwealth.

b. The Law of Pennsylvania

As the United States Court of Appeals for the Third Circuit has somberly observed:

> Dismissal of an action on the grounds of the statute of limitations is particularly anguishing when the victim is a minor, the injury grievous, and the alleged wrongful act repellent, if true. [citation omitted] Nonetheless, we are compelled to follow the applicable legal principles. Certainly, a federal court sitting in diversity is not free to impose its notions of equity on state courts or on a state legislative body.

Urland v. Merrell-Dow, 822 F.2d 1268, 1270 (3rd Cir. 1987). In Urland, the underlying wrongful act was the dispensation of a drug to a pregnant woman that caused serious birth defects to her child. House Bill 1947 addresses the even more compelling circumstance of a claim based on an allegation that a minor child was sexually abused by an adult perpetrator. While portions of this proposed legislation would, if passed, likely survive a Court challenge, the section that would permit the revival of claims that are already time-barred by the present of statute of limitations would not. Whatever anguish may accompany that realization, it is a realization that the jurisprudence of the Pennsylvania Constitution requires and, indeed, makes inescapable.

In Pennsylvania, the principles that control this determination were first articulated by the Courts in the middle of the 19th Century and continue through the current era.

In Menges v. Dentler, 33 Pa. 495 (Pa. 1859), the Supreme Court of Pennsylvania confronted a case in which a legislative act sought to undo a declaration in favor of one side in a will contest. The Court struck down the act, citing to the provisions of Article 1, §§ 9 and 11 of the Pennsylvania Constitution. Both the "law of the land" and Remedies Clause provisions, the Court observed, originated in Magna Charta, Id. at 498, and constitute "imperative limitations of legislative authority, and imperative impositions on judicial duties." Id. They speak in definite terms.

> To the judiciary they say: You shall administer justice to all men by due course of law, and without sale, denial, or delay; and to the legislature they say: You shall not intermeddle with such functions. In England, these words prohibited the

> King from interfering with judicial proceedings, so as to exclude all royal arbitrariness, and insure the cases should be decided by law. Here, they prohibit all legislative and executive interference, for the same reasons.

Id. at 498.

The Menges Court held that the law that "gives character" to a case and by which that case is to be decided "is the law that is inherent in the case, and constitutes part of it when it arises as a complete transaction between the parties. If this law be changed or annulled, the case is changed, and justice denied and the due course of law violated." Id. Thus, "a law that is enacted after the case has arisen can be no part of the case." Id. The "law of the land" and "due course of law" provisions mean "that the law relating to the transaction and controversy, at the time when it is complete, shall be an inherent element of the case, and shall guide the decision; and that the case shall not be altered, in its substance, by any subsequent law."Id. at 499.[9]

The rule of Menges, was directly applied in the context of a legislative attempt to extend a statute of limitations in a case in which the cause of action was otherwise time-barred in Lewis v. Pennsylvania Railroad Company, 69 A. 821 (Pa. 1908). In Lewis, the plaintiff's husband, a Pullman car conductor, was killed in an accident while in the employ of the defendant. By virtue of certain legislative enactments, the plaintiff was able to bring suit after the claim would have been time barred by the limitations period previously applicable.

While the Court acknowledged the power of the Legislature to change public policy in ways that would expose to liability entities that theretofore had been sheltered, definite Constitutional limitations on the nature of those changes are required.

> The repeal of the act of 1868 makes railroad companies liable under circumstances which before exempted them. It is entirely competent for the legislature to make such changes, and impose liability where none was before, but legislation of this kind cannot operate retrospectively, but must be confined to

[9] These principles were reaffirmed in Bogg's Appeal, 43 Pa. 512 (1863).

> future occurrences. A legal exemption from a demand made by another, is a **vested right** which the legislature may not interfere with. **Even an expressed purpose that an act shall have such retroactive effect, is without avail.**

Id. at 822. (Emphasis added)

The recognition of a "vested right" is a key point of departure for Pennsylvania jurisprudence from the rulings in parallel situations in federal courts since that recognition effectively invokes the protections of the Constitutional provisions of due process. Those protections, moreover, are not just for a plaintiff who could claim such a right in a cause of action that has properly accrued to them under existing law. The Lewis Court, citing Menges, held definitively that defendants also acquire a vested, protectable right when a statute of limitations has run:

> A legal exemption from liability on a particular demand, constituting a complete defense to an action brought, stands on quite as high ground as a right of action. If the law of the case at the time when it became complete is such an inherent element in it, that a plaintiff may claim it as a vested right, on what possible ground can it be said that a defendant has no vested right with respect to an exemption or defense? The authorities make no distinction between them.

Id. at 823. A right that is so vested right cannot be taken away by legislative *fiat* no matter how express the legislative intent may be to do so. Id.

The Lewis case is also instructive as it addresses how Pennsylvania deals with the dichotomy between substantive and procedural changes in the law that the federal system relies upon as a guide to statutory interpretation when a new law is not explicitly proclaimed to be retroactive.

> That a repealing statute, so far as it provides for a change in procedure, may and does apply to actions pending, is a proposition which admits of no dispute. No one can claim to have a vested right in any particular mode of procedure for an enforcement or defense of his rights. When a new statute deals with procedure only, prima facie, it applies to all actions -- those which have accrued or are pending, and future actions. If before final decision a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceeding: [citation omitted].

Id., at 822. But the determination that a statute goes beyond procedural boundaries and invades substantive rights means more in Pennsylvania than just that the Court should presume that the legislature did not intend retroactive effect and require a specific legislative declaration before applying the new law retroactively. To cross the line and affect substantive rights means that the Court cannot proceed to give the statute any retroactive effect at all (regardless of legislatively stated intentions) since to do so would impute "to the legislature a purpose to do something that is beyond its power." Id.

Accordingly, while Pennsylvania cases support the notion that a statute only having procedural effects may be given some retroactive effect even amidst a strong policy that disfavors such interpretation, [10] once the "substantive" nature of the new law is perceived, it cannot be applied in any circumstances in a retroactive manner. Bell v. Koppers, Inc. 392 A.2d 1380, 1382 (Pa. 1978) (finding that a new statute that limited the right of contribution of a tort-feasor "obliterates a cause of action" that had vested and could not be applied in the instant case); In re: Condemnation by Joint Sewer Authority 490 A.2d 30, 32-33 (Pa. Commw. 1985) (the extension of a statute of limitations in cases "which had not yet been concluded or barred under the former statute" is a permissible procedural change since no vested rights had accrued to the defendant); Crisante v. J.H. Beers, Inc. 443 A.2d 1150, 1153 (Pa. Super. 1982) (the legislative shortening of a statute of limitations before the bar takes effect is an allowable procedural change assuming that the plaintiff is still afforded a reasonable time in which to file).

The Lewis principle has been repeatedly reaffirmed by the Pennsylvania Courts. In Overmiller v. D.E. Horne and Company, 159 A.2d 245 (Pa. Super. 1960), the Court held that

[10] Title 1, PACS § 1926 states that no statute may be applied retroactively "unless clearly and manifestly so intended."

while an extension of a statute of limitation in a Worker's Compensation case was possible to actions that were not time-barred by the existing statute, Id. 248, "it is accepted, almost without exception or qualification, that after an action has become barred by an existing statute of limitations, no subsequent legislation will remove the bar or revive the action." Id. Importantly, the Court went on to hold that "[e]ven if the legislature by specific language had indicated its intention to accomplish such results, our Supreme Court has held that such statutory provisions should not be carried out." Id. at 249.

The reasoning in Overmiller was relied upon by the Third Circuit in Urland v. Merrell-Dow, supra. to invalidate the application of a tolling statute to minors. Id. at 1276. The Superior Court embraced it as well in Maycock v. Gravely Corporation, 508 A.2d 330 (Pa. Super. 1986) in which It held that where an action has not become time-barred by the existing statute of limitations, an extension of the statute is possible, but where the cause of action has expired, it cannot be revived by any subsequent legislation, legislative intention to the contrary notwithstanding. Id. at 334. See also, Rendez v. Rosenburg, 520 A.2d 883, 885 (Pa. Super. 1987).

It is of note that the cases cited to date, other than Menges, do not specifically relate the controlling rule to a specific provision of the Pennsylvania Constitution. Instead, the Courts have, in this instance and others, perceived various sections of the Pennsylvania Constitution as exuding a broad-based due process protection that provides for substantive and procedural coverage in cases not confined to any genre of litigation. As the Pennsylvania Supreme Court has held:

> The guarantee of due process of law, in Pennsylvania jurisprudence, emanates from a number of provisions of the Declaration of Rights, particularly Article I, Sections 1, 9 and 11 of the Pennsylvania Constitution. These provisions in turn enjoy a long history in the Commonwealth, tracing their way back to early documents, including the English Magna Charta.

Lyness v. State Board of Medicine, 605 A. 2d 1204, 1207 (Pa. 1992). See also Snyder v. PennDot, 977 A.2d 55, 58, n.5 (Pa. Commw. 2009). While, as we will see shortly, the Remedies Clause of Section 11 is itself sufficient to cause a statute that seeks to revive claims time-barred by a then-existing statute of limitations to be struck down, the Pennsylvania Courts have also given a wider berth to those "vested rights" protected under Its conception of due process than the 14th Amendment evidently provides. It is the Constitutional prerogative of the Pennsylvania Courts to do so, and they have done it in multiple contexts over time.[11]

Since the dawn of the 21st Century, the Pennsylvania Courts have more often considered cases involving retroactive statutes in the specific context of the Remedies Clause, although the results have been consistent with the rulings in the prior one hundred and fifty years.

In 2004, the Pennsylvania Supreme Court discussed the Remedies Clause extensively in Ieropoli v. AC&S Corporation, 842 A.2d 919 (Pa. 2004). There, the Pennsylvania Legislature had passed a statute that purported to limit the liability of certain Pennsylvania corporations which were successors to companies that otherwise had liability for asbestos claims. The statute was signed into law on December 17, 2001, but was expressly applied retroactively to mergers and consolidations which occurred prior to May 1, 2001, and to all existing asbestos claims, including all litigation concerning asbestos related matters. Id. at 922 to 923. The question was whether the new statute violated the Remedies Clause by extinguishing a cause of action that plaintiffs otherwise would have had against these corporations. The Court held that it did.

The Court specifically relied on the Remedies Clause, recalling Its treatment of it in the Menges case and Its recognition of its historical roots in English common law. Id. at 925 to 926. The Court also reaffirmed its holding in the Lewis case, noting that both plaintiff's rights of action

[11] See discussion in Commonwealth v. Molina, 104 A.3d 430, 444 (Pa. 2011).

and defendant's defenses to the plaintiff on the cause of action were matters covered by the Remedies Clause; once the law of the case became complete, an inherent element of the matter arises which the legislature cannot change even with a specifically designed retroactive statute. Id. at 927. As to both the cases of causes of action and defenses, a vested right accrues which cannot be extinguish by mere legislation. Id. at 929. The Remedies Clause thus required that the statute be struck down despite the expressed intent of the legislature to give it retroactive effect. Id. at 930-31.[12]

In Konidaris v. Portnoff Law Associates, 953 A.2d 1231 (Pa. 2008) the Supreme Court found the Remedies Clause inapplicable in a case where a new statute permitted a municipality to collect a reasonable attorney's fee from a delinquent tax payer at the time the delinquent tax payment was secured. The Court once again provided an extended history of the Remedies Clause and reaffirmed the notion from the older cases that the Clause protects both causes of action and defenses that have matured into a vested right. Id. at 1241. As the Court noted, "the date the law is frozen for a case is the date the injury occurs, and thus the date the cause of action and relevant defense accrue." Id. In the case before it, however, the Court acknowledged that while there was a "superficial resemblance" between an asserted "right" not to pay attorney's fees and the accrued defenses protection in Lewis, the Court found that resemblance to be "illusory." Id. at 1243. In summarizing the failure of the taxpayers to make a valid Remedies Clause claim in the case, the Court noted:

---

[12] By contrast, the Ieropoli Court discussed situation in Bible v. Commonwealth, 696 A. 2d 1149 (Pa. 1997) in which a Remedies Clause attack failed. In that case, the Legislature had not extinguished a cause of action or suppressed an otherwise accrued defense; instead, it provided a new sort of remedy for hearing loss under the Workers Compensation Act that represented a proper exercise of legislative authority. Id. at 931.

> The Delinquent Taxpayers have not demonstrated that the retroactive validation of attorney fees incurred in the collection of taxes is a denial of "a remedy by due course of law" for "an injury done" or even a denial of an accrued defense to a cause of action for such injury. Accordingly, the Delinquent Taxpayers fail to demonstrate that the retroactive amendment of [Section] 3 of the MCTLA "clearly, plainly and palpably" violates the Pennsylvania Constitution. [citing Ieropoli].

Id. As there was no vested right, neither the Remedies Clause nor the more general due process provisions were invoked.[13]

In Hospital Systems v. Commonwealth, 77 A.3d 587 (Pa. 2013), a fund contributed to by healthcare providers to insure that medical malpractice coverage was available to doctors in the Commonwealth was found to potentially create a vested right in the healthcare companies such that the Legislature's invasion of that fund to transfer $100 million dollars of its assets to the general fund could be considered an act in violation of the Remedies Clause. In generally discussing the Clause, the Court once again noted that "we have often considered the Remedies

---

[13] In Abrams v. Pneumo-Abex Corporation, 981 A.2d 198 (Pa. 2009), the majority of the Court found no violation of the Remedies Clause in the application of the so called "two disease rule" in asbestos litigation since that rule allows for the arising of a new cause of action for which no defenses had effectively accrued. It is interesting to observe that, in dissent, Justices Saylor and Castille again recited the long standing notion that "defendants and potential defendants also become vested in the defenses available to them" at the time the cause of action arises, Id. at 213, and argued that the "two disease rule" did not create a separate cause of action for which a new statute of limitations would begin to run. Overall, the case does not dispute the long-standing Pennsylvania principle that if an accrued statute of limitations has run, legislation to revive it will not survive a Constitutional challenge.

In McDonald v. Re-Development Authority, 952 A.2d 1713 (Pa. Comm. 2008), the Legislature had shortened a statute of limitations but still provided the plaintiff with a reasonable time in which to file. The Commonwealth Court thus did not face a situation in which a Remedies Clause claim could be made and upheld the new statute.

And in a recent but currently unreported decision by the United States District Court for Eastern District of Pennsylvania, the previous amendment to the statute of limitations regarding child sex abuse civil claims in Pennsylvania was upheld as Constitutional only insofar as it applied to a case in which the original statute had not yet run at the time the period of limitations was extended to 12 years following the attainment of majority by the victim. K.D. v. Jewish Family Children Services, Civil Action Number 15-05740 deciding April 7, 2016. The Court drew a careful distinction in this case between the situation before it and one in which the original statute of limitations would have already lapsed.

Clause as being directed to protecting causes of action (and defenses) from impairment after they have accrued." Id. at 600.

Thus, while interpretations of the Remedies Clause and general due process protections have arisen in multiple contexts in Pennsylvania, no line of precedent would permit the conclusion that an attempt by Legislature to revive a time-barred claim will be upheld. Without overruling Menges, Lewis, and their progeny, it is difficult to see how the Pennsylvania Supreme Court could reconcile the claim reviving language of House Bill 1947 with its existing precedent. Where a revival of a time-barred claim is attempted, neither an argument about substantive versus procedural considerations nor the existence of a clear intention on the part of the General Assembly to revive the claim will suffice to overcome the due process/Remedies Clause barrier that will be presented. The more liberal allowance for such statutes in the federal system simply finds no support under the Pennsylvania scheme.[14]

---

[14] In addition to the cases cited herein, the following is a summary of certain other Pennsylvania cases that favorably cite *Lewis* or its progeny:

Pennsylvania Supreme Court Cases

Bershefsky v. Commonwealth, 418 A.2d 1331, 1333–34 n.6 (Pa. 1980) (citing and quoting Lewis with approval); Gibson v. Commonwealth, 415 A.2d 80, 83 (Pa. 1980) (citing and quoting Lewis with approval); Cheltenham & Abington Sewerage Co. v. Pennsylvania Pub. Util. Comm'n, 49 A.2d 707, 709 (Pa. 1946) (citing Lewis with approval); Rudy v. McCloskey & Co., 35 A.2d 250, 252 n.4 (Pa. 1944) (citing Lewis with approval); Rebel v. Standard Sanitary Mfg. Co., 16 A.2d 534, 537 (Pa. 1940) (citing Lewis with approval); Commonwealth ex rel. Kelley v. Brown, 193 A. 258, 261 (Pa. 1937) (citing Lewis with approval); In re Chester Sch. Dist. Audit, 151 A. 801, 804 (Pa. 1930) (citing Lewis with approval); Commonwealth v. Central Nat. Bank, 143 A. 105, 107 (Pa. 1928) (citing Lewis with approval); Regan v. Davis, 138 A. 751, 754 (Pa. 1927) (citing Lewis with approval).

Pennsylvania Commonwealth Court Cases

Iacurci v. County of Allegheny, 115 A.3d 913, 914–18, 917 n.5 (Pa. Commw. Ct. 2015) (citing Konidaris with approval); Friends of Pennsylvania Leadership Charter School v. Chester Cty. Bd. of Assessment Appeals, 61 A.3d 354, 358–61 (Pa. Commw. Ct. 2013) (citing Ieropoli, In re

IV. CONSIDERATION OF THIS ISSUE BY OTHER STATES

The Pennsylvania view that a new statute of limitations section cannot revive a claim that has otherwise expired is the majority rule among states in the United States.[15] Like Pennsylvania, the grounds applied by the states in the majority are various and reflect that this is a distinctive judicial judgment made by the state's highest court on a matter which involves both specific Constitutional provisions and general due process reliance.

By way of a few examples, the Utah Supreme Court ruled, as has Pennsylvania, that the expiration of the statute of limitations creates a vested right in a defendant such that a subsequent legislative change would constitute a due process violation. Roark v. Crabtree, 893 P.2d 1058, 1062 (Utah, 1995). A similar due process treatment was applied by the Florida Supreme Court in

---

Collegium, Gibson, Lewis, and Menges with approval); In re Collegium Charter School, No. 2354 C.D. 2010, 2011 WL 10858434, at *3 (Pa. Commw. Ct. 2011) (unreported, non-precedential opinion, but cited and quoted extensively in Friends of Pennsylvania Leadership Chart School) (citing Ieropoli, Gibson, Lewis, and Menges with approval); Society Created to Reduce Urban Blight (SCRUB) v. Zoning Bd. of Adjustment, 908 A.2d 967, 973 (Pa. Commw. Ct. 2006) (citing and quoting Ieropoli and Lewis with approval); Nelson v. City of Philadelphia, 613 A.2d 674, 677 (Pa. Commw. Ct. 1992) (citing and quoting *Lewis* with approval but finding it inapplicable because the injury—a fatal shooting by city police—to the plaintiff occurred when a statute was in effect that precluded recovery); Brungard v. Hartman, 405 A.2d 1089, 1094 (Pa. Commw. Ct. 1979) (citing Lewis with approval).

Pennsylvania Superior Court Cases

Stackhouse v. Stackhouse, 862 A.2d 102, 107–08 (Pa. Super. Ct. 2004) (citing Lewis, Menges, and Gibson with approval); Stroback v. Camaioni, 674 A.2d 257, 261–62 (Pa. Super. Ct. 1996) (citing and quoting Lewis with approval); Sanders v. Loomis Armored, Inc., 614 A.2d 320, 323 (Pa. Super. Ct. 1992) (citing and quoting Gibson and Lewis with approval); Jenkins v. Hosp. of Med. Coll. of Pennsylvania, 585 A.2d 1091, 1097 (Pa. Super. Ct. 1991) (citing Lewis with approval); Borough of Huntingdon v. Dorris, 78 Pa. Super. 469, 475 (Pa. Super. Ct. 1921) (citing Lewis with approval); Towanda Borough v. Fell, 69 Pa. Super 468, 473 (Pa. Super. Ct. 1916) (citing Lewis with approval); Waynesburg Borough v. Ray, 59 Pa. Super. 640, 644 (Pa. Super. Ct. 1915) (citing and quoting Lewis with approval).

[15] A recent tally by the Connecticut Supreme Court in Doe v. Hartford Diocese, 119 A.3d 462, 509 - 510 (Conn. 2015) indicates that eighteen states follow the federal approach of the Campbell and Chase cases and twenty-four, like Pennsylvania, hold such a revival invalid.

Wiley v. Florida. 641 So.2d 66, 67-68 (Florida, 1994). The Wiley Court held that immunity from suit is as valuable a right as the right to bring suit itself and that the law does not prioritize one over another; once the defense of statute of limitations has accrued, it is a protected property interest which renders a statute that violates it unconstitutional. Id.

Like Pennsylvania, other state courts agree that no vested rights are infringed where a new law extends a statute of limitations in cases where the old statute has not yet expired, but a revival of moribund claims is not an action that the state Constitution will uphold. See Doe v. Roman Catholic Diocese, 862 S.W.2d 338, 341 (Missouri, 1993); Kelly v. Marcantonio, 678 A.2d 873, 883 (Rhode Island, 1996).

The fact that a state has a Constitutional provision like our Remedies Clause does not guarantee that the state's Supreme Court will interpret it the same way. While our Supreme Court has consistently read our Remedies Clause to support the notion that a legislative change purporting to revive a time-barred claim infringes on a vested right, opposite views have been taken in cases like Doe v. Hartford Diocese, 119 A.3d 462 (Connecticut, 2015) and Sheehan v. Oblates of St. Francis, 15 A.3d 1247 (Delaware, 2011).

The Doe case is particularly instructive since the Connecticut Court, while acknowledging that it was adopting a minority view, nonetheless concluded that the Campbell and Chase line of reasoning was consistent with other Connecticut jurisprudence on the point. Accordingly, Connecticut rejected the idea that a vested right accrues when the original statute expires, thereby avoiding any further consideration of due process implications that an attempted revival of the

claim would require. Id. at 509 to 510. In Connecticut, unlike Pennsylvania, the state Constitution is no impediment to such legislation.[16]

There is no objectively critical way for anyone to proclaim that the Pennsylvania approach is "right" and the Connecticut approach is "wrong" or vice versa. State Supreme Courts, in interpreting their own Constitutions are autonomous entities free to reach divergent opinions from courts of other states and, as long as they do not *lessen* the protections afforded by the federal Constitution to citizens, diverge from federal standards as well. See Commonwealth v. Molina 104 A.3d 430, 444 (Pa. 2014), *and cases cited therein.* This is simply an incident of federalism that must be embraced, no matter how frustrating it may be to those who seek uniformly definitive answers to questions they believe must exist.

V. Conclusion

Those sections of House Bill 1947 that operate to extend the statute of limitations for criminal and civil cases in which the current statute has not yet expired will be subject to Constitutional attack only if some radically new argument is fashioned that has not heretofore been accepted. Those provisions may be debated on the issue of whether they represent a sound public policy judgement in light of the problems that may be presented by allowing prosecutions and claims that are even older than the current statutes permit, but on purely Constitutional grounds, they are viable.

The proposed legislation that would revive time-barred claims is in an entirely different posture. Unless the Supreme Court of Pennsylvania abandons a line of precedent reaching back to a time before the Civil War, that section of House Bill 1947 will fall. Certainly, the Supreme

[16] Doe correctly notes that Pennsylvania declares invalid an attempt to revise a time-barred claim but incorrectly characterizes the Commonwealth's position as one that does not "cite a source for the vested right or otherwise perform[s] a constitutional analysis in support of [its] holding." Id., at 511.

Court may change its mind about the matter and join a minority of other states that embrace a more liberal rule in this area. But Courts are generally reluctant to make such a dramatic change particularly in a line of precedent that is well developed, long standing and currently reinforced.

In the absence of such a profound reversal by the Pennsylvania Supreme Court, the alternative to permitting retroactive legislation of this kind lies in the process of Constitutional amendment. Such was the course of these matters in Virginia.

In 1992, the Supreme Court of Virginia decided Starnes v. Cayouette, 419 S.E. 2d 669 (Virginia, 1992). In that case, the Virginia Supreme Court rejected the Campbell majority reasoning in favor of the views of the Justice Bradley's dissent and struck down a statute which sought to have the same retroactive effect that House Bill 1947 now seeks to achieve in Pennsylvania.

The law of Virginia today, however, would permit such a statute but not because the Virginia Supreme Court has changed its mind. Rather, subsequent to the Starnes decision, a Constitutional amendment was passed in Virginia which permits a statute of this specific nature. Article IV, §14 of the Virginia Constitution now reads:

> The General Assembly's power to define the accrual date for a civil action based on an intentional tort committed by a natural person against a person who, at the time of the intentional tort, was a minor shall include the power to provide for the retroactive application of a change in the accrual date. No natural person shall have a constitutionally protected property right to bar a cause of action based on intentional torts as described herein on the ground that a change in the accrual date for the action has been applied retroactively or that a statute of limitations or statute of repose has expired.

Unless an amendment of this type became part of the Constitution of Pennsylvania, the retroactivity portion of House Bill 1947, if enacted, will be subject to a compelling legal challenge. For the past century and one half, the overwhelming precedent interpreting Article I of

the Constitution of the Commonwealth would support the argument that such retroactive legislation is inconsistent with the limitations on legislative authority contained therein.

Respectfully submitted,

Bruce A. Antkowiak
May 16, 2016

Appendix

St. Vincent College
300 Fraser Purchase Road
Latrobe, PA. 15650
724-805-2940
bruce.antkowiak@email.stvincent.edu

Bruce A. Antkowiak

Education

1974-1977 *Harvard Law School, Cambridge, Massachusetts*
Juris Doctor, 1977
Graduated Magna Cum Laude
Felix Frankfurter Scholarship Recipient

1970-1974 *St. Vincent College, Latrobe, PA*
B.A. in Political Science
Graduated Summa Cum Laude
Distinctions: John J. Maloney Award for "Most Outstanding Member of the Senior Class"; Award for Academic Excellence in Political Science; Student Government Award; Graduated First in Class of 235; 4.0 Cumulative G.P.A.; Four Year Academic Scholarship and Class President four years

Professional Positions

July, 2011 – Present:
Counsel to the Archabbey and College: St. Vincent College, Latrobe, Pennsylvania

Professor of Law and Director of the Program in Criminology, Law, and Society: St. Vincent College, Latrobe, Pennsylvania

Pre-law Advisor: St. Vincent College, Latrobe, Pennsylvania

August, 2008 - Present –Associate Professor of Law, Duquesne University School of Law, Pittsburgh, Pennsylvania

August, 2002:
Assistant Professor, Duquesne University School of Law
Pittsburgh, Pennsylvania

Courses Presented 2002 -Present:

Criminal Law (2008- present), Constitutional Law (2002 – present), Criminal Process (2004 – present), Trial Advocacy (2004 – 2008), Labor Law (2002 -2003), Federal Criminal Law (Summers 2002 – present); Director: First Year Legal Research and Writing Program (2002 – 2007); Advisor: Innocence Project (2004); Clinical Advisor – Criminal Law Clinic (2005 - present); Forensic Science Institute Course on Expert Witnesses (2007 - present). Advisor/Coach: Law School National Trial Moot Court Programs (2002 – Present).

August, 1989 to 2002:

Adjunct Professor - Duquesne University, School of Law
Pittsburgh, Pennsylvania

Courses Presented:

Federal Criminal Law (1989 to 2002)

Legal Research and Writing (Day and Evening Sessions 2001/2002)
Trial Advocacy Advisor: Moot Court Program (2001-2002)

January, 1981 to 2002:
Lecturer / Adjunct Professor - Saint Vincent College, Latrobe, Pennsylvania

Courses Presented:

Constitutional Law (1989 to 2001)
Labor Law (1991 to 1995)
State and Local Government (1993)

September, 1987 to 1995:
Lecturer - Seton Hill College, Greensburg, Pennsylvania
Courses Presented: Labor Law; Business Law

Publications

A. Law Review Articles

The Pinkerton Problem, 115 Penn State Law Review 607 (Winter 2011)

The Rights Question, Vol. 58, No. 3 Kansas Law Review 615 (2010)

The Irresistible Force, 18 Temple Political & Civil Rights Law Review 1 (2008).

The Art of Malice, 60 Rutgers Law Review 437 (2008): This article criticized the jury instruction of the permissible inference of malice from the use of a deadly weapon and was cited by the Supreme Court of South Carolina in reversing its traditional position on the validity of that instruction. See, *State v. Belcher*, 685 S.E.2d 802 (S.C. 2009).

Picking Up the Pieces of the Gordian Knot: Towards a Sensible Merger Methodology: Jointly published in: International Journal on Punishment and Sentencing, Vol. 3, no. 1 (2007); New England Law Review, Vol. 41, Number 2 (2007). This article was cited by the Supreme Court of Wyoming in *Snow v. State*, 216 P.3d 505 (Wyo. 2009) and by the Superior Court of Pennsylvania in *Commonwealth v. Jones*, 2010 PA Super 140, *6, n.3 (Pa. Super. 2010) and *Commonwealth v. Wade*, 2011 PA Super.246 (November 11, 2011).

Courts, Judicial Review and the Pursuit of Virtue, 45 Duq. L. Rev. 467 (2007)

Saving Probable Cause, 40 Suffolk University Law Review 569 (2007). This article was cited by the Supreme Court of Tennessee in *State v. Meeks*, 262 S.W.3d 710 (Tenn. 2008).

Contemplating Brazilian Federalism: Reflections on the Promise of Liberty, 43 DUQ. L. REV. 599 (2006)

Judicial Nullification, Vol. 38, No.3, Creighton University Law Review, (April, 2005).

Five Hot Topics: Issues of Pressing Importance in Pennsylvania Appellate Courts, 42 Duquesne University Law Review, No. 3 (Spring 2004)

The Ascent of an Ancient Palladium: The Resurgent Importance of Trial by Jury and the Coming Revolution in Pennsylvania Sentencing, 13 Widener Law Journal 11 (2003)

B. Books / Treatise

- Editor and Principal Author, *Pennsylvania Suggested Standard Jury Instructions–Criminal*, Second Edition, (Pennsylvania Bar Institute), 2005 -2016; supplemented in 2007, 2008, 2010, 2012, 2014 and 2015.

- Editor and Author, *Pennsylvania Criminal Procedure: Elements, Analysis, Application*, Fourth Edition, Pennsylvania Bar Institute, (January, 2015)

- Chapter, *Criminal Law and Procedure*, Wecht Institute Publication, Textbook on Forensic Science and Law (CRC Press, 2006)

C. Other publications

- *Law Schools Must Reform,* Pittsburgh Post-Gazette, January 4, 2011.
- *Suppressing the Sound of Incrimination: A Passage Through the Pennsylvania Wiretap Act*, Pennsylvania Bar Quarterly (2003)

D. Older publications

"Balancing Employment Opportunities And Job Hazards for Pregnant Employees", Hospital Law Newsletter, October, 1984

"Bargaining Units In Hospitals After St. Francis II", Hospital Law Newsletter, February, 1985

"Stately Champions", Pittsburgh, Press (Alle-Kiski Division), March 20, 1988

Awards

Honorary Doctor of Laws Degree, St. Vincent College, Latrobe, Pennsylvania, May 7, 2011. Delivered Commence Address at the 2011 Graduation Ceremony

Excellence in Teaching Award, 2011: Presented by the Student Bar Association of Duquesne University School of Law

Duquesne Law School Teacher of the Year--- Association of American Law Schools, January 3, 2008

Excellence in Teaching Award, 2007: Presented by the Student Bar Association of Duquesne University School of Law

AV Preeminent Peer Review Rating – Martindale Hubbell

Alumnus of Distinction Award, St. Vincent College (2002)

Director of the Office of the United States Attorneys, United States Department of Justice, Award for Superior Performance as an Assistant United States Attorney (May, 1980)

Special Achievement Award, United States Department of Justice (May 1980)

Special Achievement Award, United States Department of Justice (February, 1983)

Letters of Recognition and Commendation: Drug Enforcement-Administration, Pittsburgh; Federal Bureau of Investigation; Allegheny County, Police, Narcotics Division; City of Pittsburgh Police, Narcotics Section (July, 1983)

Professional Activities & Presentations

A. Scholarly Presentations

Libel in the Age of the Internet, Saint Vincent College CLE, April, 2016

An Investment of Faith, Allegheny County Courthouse, CLE, January, 2016

Pennsylvania State Senate Committee Regarding Removal of Attorney General, Expert Witness presentation, November 2015

Automobile Searches Juvenile Law Conference CLE, Harrisburg, PA, October 2015

Unreasonable Suspicion, Allegheny County CLE, October, 2015

Equal Protection After Obergfefell, Saint Vincent College CLE, August, 2105

Automobile Searches in Pennsylvania, Pennsylvania State Trial Judges Association, Hershey, Pa., July 2015

The Year in Review, Pennsylvania Bar Association Criminal Justice Conference, June, 2015

Raising the Bar of the Bar, Jerimiah S. Black American Inn of Court, CLE, April 14, 2015

Firearms: A Policy of Rights, Saint Vincent College CLE, April 12, 2015

Cases You Love; Cases You Hate, Allegheny County Courthouse CLE, March 2015

Truth: Evidence and Rules of Confidentiality, PBI 2015

The Ethics of Advocacy, PACDL, December, 2014

Evidence, CLE, Allegheny County District Attorney's Office, August 2014

Guilty Pleas and IAC, CLE, presented in Allegheny County March 2, 2014, and Saint Vincent College, March 19, 2014

Jury Instructions, Presentation to Pennsylvania State Trial Judges Association, Philadelphia, Pennsylvania, February, 2014

Crime and Punishment, CLE, Saint Vincent College, December 15, 2013

The Frontiers of Free Exercise and Establishment: the Religion Clauses of the First Amendment, CLE, Saint Vincent College, August 18, 2013.

Pennsylvania Criminal Law and Procedure, Kaplan PMBR Review, June, 2013.

The State of Miranda, Pennsylvania Bar Institute Annual Criminal Law Symposium/CLE, Harrisburg, Pennsylvania June 6, 2013

The Year In Review, Pennsylvania Bar Institute Annual Criminal Law Symposium/CLE, Harrisburg, Pennsylvania June 6, 2013

Vehicle Searches in Pennsylvania, PACDL, March, 2013

Seven For A Sunday, Cutting Edge Topics in Criminal Law, Saint Vincent College CLE, February, 2013

Criminal Law Update, Pennsylvania State Trial Judges Conference, February, 2013

Seven Ways in Which Mental Defenses Affect Criminal Cases – Ethical Considerations, Saint Vincent College CLE, September 27, 2012

Expert Witnesses in Pennsylvania: A Legal and Ethical Overview, March 18, 2012 (CLE Board approval pending)

Vehicle Stops and Searches in Pennsylvania, PBI, March 23 and 30, 2012.

Criminal Law Symposium, PBI – Harrisburg, May 31- Junel, 2012.

National Business Institute CLE: Criminal Law, August 11, 2011

Hot Topics in Criminal Law, Washington County Bar Association, August 6, 2010.

Pennsylvania Criminal Law and Procedure, PMBR, Philadelphia, Pennsylvania, July 5, 2010.

Pennsylvania Superior Court Conference: New Issues on the Horizon, Pennsylvania Superior Court Annual Meeting, June 16, 2010.

Criminal Law Symposium, Pennsylvania Bar Institute, June 4, 2010

Jury Trial Management Conference, Administrative Office of Pennsylvania Courts, April 29-20 and May 6-7, 2010

Rights and the Role of the Supreme Court, Supreme Court Institute, March 29, 2010

The Complexity of Conspiracy, (Substantive and ethical issues in conspiracy cases), Allegheny County District Attorney's Office, March 5, 2010

Great Defenses, (Presented on malice, use of expert testimony, identification issues and ethics), Pennsylvania Association of Criminal Defense Lawyers, December 4, 2009

Enlightened by the Scots: The Search for American Constitutional Rights, CLE, Duquesne University, October 17, 2009.

Stopping and Searching Automobiles in Pennsylvania, June 5, 2009, Pennsylvania Bar Institute Statewide Criminal Law Symposium, Harrisburg, Pennsylvania

Searching for the Soul of the American Constitution, paper presented to University of Glasgow Seminar, *The Scottish Enlightenment and Scottish History,* conducted by Professor Colin Kidd, November 24, 2008, University of Glasgow.

Principles of Direct Examination, Federal Bar Association CLE, Wilmington, Delaware, June 12, 2008

Joint Defense Agreements, CLE, Pennsylvania Bar Institute, April 17, 2008

Malice, Automobile Searches, Ethics and Judicial Recusal, CLE, Duquesne University School of Law, March 15, 2008

Guilty Pleas and Closing Arguments, Allegheny County District Attorney / Public Defender CLE, January 18, 2008.

Searches of Automobiles, Pennsylvania Association of Criminal Defense Attorneys CLE, Pittsburgh, PA December 7, 2007

Jury Selection, Duquesne University School of Law CLE, jointly presented with Elizabeth More Ventura, November 3, 2007.

Constitutional Criminal Procedure: Crawford/Burdens of Proof/Ethics, Duquesne University Law School, April, 2007.

Substantive Law Update & Ethical Considerations, Allegheny County District Attorney/Public Defender's Office CLE, March 2, 2007.

Pennsylvania State Trial Judges Association:

- *Constitutional Issues Beyond Search and Seizure,* Pittsburgh, Pennsylvania, February 21, 2003
- *Disclosure of Documents Subject to Privilege,* July 23, 2004
- *Confrontation Clause & the Doctrine of Merger,* February, 2007

Probable Cause in a Nervous Age, Oxford University Round Table, on Criminal Law and Procedure, March 2006, Lincoln College, Oxford University: (2006).

The En Banc Arguments of the Superior Court of Pennsylvania, March 9, 2006, PCN Television.

Judicial Review in the Americas and Beyond, Duquesne University School of Law, November 10-11, 2006.

Bar Examination Preparation Lectures given on *Criminal Procedure, Constitutional Law, Evidence* and the *Pennsylvania DUI Statute* (2003-2007)

Constitutional Criminal Procedure, Duquesne University Law School CLE Program, 2005-2007.

Pittsburgh Council for International Visitors: hosted meeting of Russian local government officials including presentation on *The United States Constitution*, October, 2005.

Role of the Criminal Defense Counsel, Allegheny County Office of the Public Defender, October, 2005

Theories of Punishment, Classic Law Film Series, Washington County Bar Association, Washington and Jefferson College, October, 2005.

Federalism in the Americas, Conference, Duquesne University School of Law, November 13 – 14, 2004.

Presentation: Pennsylvania Superior Court Judges Association:

- *Topics of Current Concern*, June 4, 2003
- *Legal Déjà Vu: Jeopardy Implications for the Courts*, June 16, 2004

The New Criminal Jury Instructions, CLE: District Attorney/Public Defender Offices of Allegheny County, March 17, 2006.

Expert Testimony at Trial, Mid-Atlantic Association of Forensic Scientists, May 18, 2005.

Pretrial Motions in Federal Criminal Cases, CLE: Federal Public Defenders, Pittsburgh, PA, May 2, 2003

Trial Advocacy CLE, Westmoreland Bar Association, April 23, 2003

US Sentencing Guidelines CLE and Certification Seminar, US District Court, Erie, Pennsylvania, January 6, 2003

Keynote Speaker, Lawrence County Bar Association Law Day, May 2, 2005

Conducting An Effective Cross-examination, CLE, Pittsburgh, Pennsylvania, April 26, 2002.

Keynote Speaker, Johns Hopkins University Center for Talented Youth, Duquesne University, 2003-2007; Panelist: 1999-2002.

B. Law School / Civic Service

Advisor, Duquesne Law School Criminal Law Journal (2009)

Law School Committees (2008-2009): Research Assistants, Special Ad Hoc Committee on Law Librarian Status, Community Committee

Summer Bar Review: presented review sessions for graduates preparing for the Bar on Constitutional Law, Criminal Law, Criminal procedure and Evidence every summer for the past several years

Keynote Speaker, Mercer County Law Day, May 5, 2009

Chair, Committee to Review Reappointment of Federal Public Defender in the Western District of Pennsylvania, appointed by Chief Judge Anthony Scirica, United States Court of Appeals for the Third Circuit, 2008

President's Faculty Awards for Excellence Committee, 2008

Supervising Attorney: United States Court of Appeals for the Armed Forces Amicus Brief/Argument, March 15, 2007.

Law School Orientation Chairperson: 2003-7

Member: United States Association of Constitutional Law

Assisted in obtaining grants for the Law School in excess of $30,000 from PBI and Allegheny County for Clinical Programs and Publications

Curriculum Committee: Helped Revise Criminal Law Curriculum (2003-2005)

Chairman, Third Circuit Commission for the Selection of the Federal Public Defender, 2003

Instituted Carol Los Mansmann Appellate Advocacy Competition for First Year Students 2003, 2004

Moderator: David Gergen Lecture Student Q&A 2003

Committee on Legal Ethics and Professional Responsibility to Pennsylvania Bar Association, 1993 to Present

Diocese of Greensburg: Lay Representative to Pennsylvania Catholic Conference, 1988 to 1993.

Board Of Directors: St. Anne's Home, Greensburg, Pennsylvania, 1993-1999

Basketball Coach: St. Joseph High School, Natrona Heights, Pennsylvania, 1992-2000

Professional Practice

May 1988 and following:
Antkowiak Law Office
Westmoreland County, Pennsylvania
Practice Concentration in Criminal Defense in State and Federal Courts Representing Private and Indigent Clients

1986 to 1999:
Special Solicitor for Court Administrator
Westmoreland County Courthouse
Greensburg, Pennsylvania

July, 1983 to May, 1988:
Mansmann, Cindrich & Titus
Pittsburgh, Pennsylvania
Associate - Litigation

June, 1978 to July, 1983:
Assistant United States Attorney
Western District of Pennsylvania
Pittsburgh, Pennsylvania
Chief, Narcotics and Organized Crime Section (1978 –1983)
Supervision of staff attorneys; prosecution and supervision of cases involving loan-sharking, contract murder, public corruption, and local, state, national and international narcotics violations

October, 1977 to June, 1978:
Assistant United States Attorney
Western District of Pennsylvania
Pittsburgh, Pennsylvania - Appellate Division

Summer, 1976; August-October 1977:
Law Clerk: Office of the United States Attorney
Pittsburgh, Pennsylvania

Summer, 1975:
Neighborhood Legal Services Association
Legal Assistant: Homewood/Tarentum Offices

Special Appointments

Special Counsel: Judicial Conduct Board Commonwealth of Pennsylvania (1995-1996)

Special Criminal Court Master at the appointment
of the Honorable John Zotollo, Court of Common Pleas

of Allegheny County (2001)

Special Deputy Attorney General,
Commonwealth of Pennsylvania (1997-1998)

Special Outside Investigative Counsel,
Pittsburgh Water Authority (1997)

Special Master, Court of Common Pleas of Allegheny County (2012, 2013)

Accepted as Expert Witness on Criminal Procedure

Commonwealth v. Maple, 2013 Westmoreland County Court of Common Pleas

United States v. Marjorie Diehl-Anderson, United States District Court for the Western District of Pennsylvania, 2010

Admitted to Practice Supreme Court of Pennsylvania, 1977
Supreme Court of the United States, 1984
United States Court of Appeals for the Third Circuit, 1985
United States District Court: Western District of Pennsylvania, 1977
United States District Court: Middle District of Pennsylvania 1991