IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY
PENNSYLVANIA

CRIMINAL DIVISION

IN RE: COMMONWEALTH'S OMNIBUS REQUEST FOR MOTION IN LIMINE : NO. CP-38-MD-47-2013

ORDER OF COURT

AND NOW, this 1st day of February, 2013, and in accordance with the attached Opinion, the request of the Lebanon County District Attorney's Office for a Motion in Limine Hearing to be conducted jointly in eight separate Driving Under the Influence of Alcohol cases is denied.

BY THE COURT:

_____P.J.
JOHN C. TYLWALK

_____J.
SAMUEL A. KLINE

_____J.
BRADFORD H. CHARLES

_____J.
CHARLES T. JONES, JR.

cc: District Attorney's Office
Commonwealth v. Donna Donato – CP-38-CR-243-2012
Nicholas Sidelnick, Esquire// Public Defender's Office (Attorney for Donna Donato)
Commonwealth v. Steven Seyfert – CP-38-CR-399-2012
Steve Breit, Esquire//36 East King Street, 3rd Fl., Lancaster, PA 17602 (Attorney for Steven Seyfert)
Commonwealth v. Antoine Benson – CP-38-CR-537-2012
Kimberly Adams, Esquire// Public Defender's Office (Attorney for Antoine Benson
Commonwealth v. Todd Shaffer – CP-38-CR-604-2012
Bryan McQuillan, Esquire// 2080 Linglestown Rd., Ste 103, Harrisburg, PA 17110 (Attorney for Todd Shaffer
Commonwealth v. Kelvin Malave – CP-38-CR-742-2012
Jenna Fliszar, Esquire// 4807 Jonestown Rd., Ste 148, Harrisburg, PA 17109 (Attorney for Kelvin Malave)
Commonwealth v. Phillip Peck – CP-38-CR-854-2012
Timothy Barrouk, Esquire// 4807 Jonestown Rd., Ste 148, Harrisburg, PA 17109 (Attorney for Phillip Peck)
Commonwealth v. Jesse Smith - CP-38-CR-1206-2012
Scott Jocken, Esquire// Public Defender's Office (Attorney for Jesse Smith)
Commonwealth v. Michael Mavretic - CP-38-CR-1449-2012
Anthony McBeth, Esquire// 407 North Front Street, 1st Fl., Harrisburg, PA 17101

IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY
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IN RE: COMMONWEALTH'S OMNIBUS :
REQUEST FOR MOTION IN LIMINE :

APPEARANCES:

Scot Feeman, Esquire
Meaghan Shirk, Esquire
DISTRICT ATTORNEY'S OFFICE

For: Commonwealth of Pennsylvania

OPINION BY CHARLES, J., February 1, 2013 for the Court *En Banc*

Before us is an Omnibus Motion in Limine filed by the Commonwealth regarding multiple pending Driving Under the Influence of Alcohol (DUI) cases. The Commonwealth asks us to conduct a simultaneous hearing to approve the viability of the blood alcohol testing process conducted at the Lebanon Good Samaritan Hospital (GSH). For reasons that will follow, we decline the Commonwealth's request.

I. BACKGROUND

In a comprehensive Opinion authored by Judge Bradford H. Charles on April 27, 2012, this Court summarized the unfortunately inconsistent state of the law regarding blood alcohol testing that existed at the time. It is helpful to recall how we began the Opinion:

> Outside Lebanon County's ceremonial courtroom is an inscription that reads: "The known certainty of the law is the safety of all." As it relates to blood alcohol testing in Lebanon County, the law has been anything but certain. Today, we address the latest in a lengthy series of challenges raised by defense attorneys to blood alcohol testing conducted at the Lebanon Good Samaritan Hospital (GSH). As we do so, we implore the Pennsylvania Superior Court to issue a published, precedential opinion to provide "known certainty" to DUI litigants within Lebanon County.

Commonwealth v. Emilio Cortez, CP-38-CR-232-2011 (Charles, J., April 27, 2012). Unfortunately, it was not possible for the Superior Court to issue the opinion we sought because the Commonwealth withdrew its appeal on August 13, 2012.

Since we issued our Opinion in ***Cortez*** on April 27, 2012, several events have occurred that have provided a bit more clarity with respect to BAC testing at the GSH. First and foremost, the Pennsylvania Superior Court authored two published Opinions regarding blood alcohol content (BAC) testing. Although neither of these Opinions involved the precise testing machine and process utilized at the GSH, both provide precedential guidance with respect to supernatant testing similar to that performed at the GSH.

In ***Commonwealth v. Haight***, 50 A.3d 137 (Pa.Super. 2012), BAC testing was conducted using a device that appears similar to the Dade Dimension RXL device employed at the GSH. Like the testing process at GSH, the testing process addressed in ***Haight*** required centrifuging of whole blood in order to create supernatant. The supernatant was then tested for blood alcohol content. An expert chemist testified in ***Haight***

that "the community of clinical chemists and toxicologists accept that the ethanol concentration in supernatant is equivalent to the ethanol concentration in whole blood." ***Id.*** at 143. He then stated that gas chromatography testing of whole blood revealed a 0.997 correlation coefficient between testing on supernatant and testing on whole blood. The expert therefore testified that this coefficient correlation means the results are "essentially equivalent." ***Id.*** However, the Trial Court recognized that a correlation coefficient of 99 percent is not equal to a coefficient correlation of 100 percent. Based largely upon an expert called by the defense, the Trial Court determined that a supernatant testing result of .174 correlates to a whole blood alcohol result of .158.

The Superior Court in ***Haight*** began its analysis by emphasizing the difference between whole blood testing and supernatant testing. The Superior Court stated:

> The distinction between whole blood and blood serum is significant...The reason for this is because the denser components of whole blood, the fibrin and corpuscles, have been separated and removed from the whole blood, leaving the less dense serum upon which the alcohol level test is performed...Because the serum is less dense than whole blood, the weight per volume of the alcohol in the serum will be greater than the weight per volume in the whole blood. Thus, an appropriate conversion factor is required to calculate the corresponding alcohol content of the original whole blood sample.

Id. at 141 (citations omitted). The Court emphasized that "evidence of blood serum, plasma or supernatant testing, without conversion, will not suffice..." ***Id.*** at 141. Even though no expert testimony specifically

supported the Trial Court's finding of a .158 BAC, the Superior Court nevertheless affirmed that finding. The Superior Court reasoned that the Trial Court's decision to reduce the supernatant test result to a final finding of .158 constituted a viable "conversion factor." Thus, the Trial Court's decision was affirmed.

In ***Commonwealth v. Karns***, 50 A.3d 158 (Pa.Super. 2012), the BAC testing at a Bedford County hospital was challenged. In ***Karns***, a laboratory phlebotomist and a "medical lab scientist" employed by the hospital testified about the BAC testing process. Like the Commonwealth has so often proposed in Lebanon County, the Bedford County District Attorney argued that the dilution factor applied to the supernatant testing result constituted sufficient "converting evidence" to justify the admission of the test results. The Superior Court flatly rejected this argument and stated:

> [T]he Commonwealth failed to present evidence of a conversion factor that is generally accepted in the scientific community. As described above, [the laboratory technician] testified that the machine performs the conversion, that she did not know how the machine does the conversion, that the calculation performed on the raw results has nothing to do with conversion, and that three was a dilution factor unrelated to conversion. [The lab technician's] testimony never clearly identified what conversion factor was used with respect to [the Defendant's] blood sample, or whether the conversion factor used was generally accepted in the scientific community. Thus, the evidence presented by the Commonwealth was insufficient and [the Defendant's]conviction for DUI-highest rate of alcohol cannot stand.

Id. at 164-65.

The second event that occurred with respect to BAC testing at GSH in Lebanon County arose as a result of evidence presented in the courtroom of the Honorable Samuel A. Kline. In the case of ***Commonwealth v. Frank Edwards***, CP-38-CR-373-2012, the operating manual of the Siemens Dade Dimension blood testing machine was admitted in evidence. This operating manual required that testing be conducted on one milliliter of blood to which two milliliters of trichloroacetic acid (hereafter "TCA") should be added. However, testimony was presented that the blood sample technicians at the GSH reduced the testing sample so that only 250 microliters of whole blood was mixed with half a microliter of 6 percent TCA. Because the testimony presented at the ***Edwards*** trial revealed that GSH was not even properly employing the process required by the testing manual of its own device, Judge Kline completely rejected the BAC test result.

On December 24, 2012, the Commonwealth filed what we will classify as an Omnibus Motion in Limine seeking a Court declaration concerning admissibility of all BAC testing conducted at the GSH. Eight separate docket numbers were referenced in the Commonwealth's omnibus motion. The motion itself requested that we schedule a hearing that would apply to all eight pending cases. The Commonwealth indicated that it intended to call Dr. Jeffrey Shoemaker as a witness at this hearing and proposed: "[S]hould this court require that converting evidence is necessary, the Commonwealth will present evidence that the conversion

ratio is 1:1." (¶ 14 of Cmwlth.'s Motion). In addition, the Commonwealth stated: "The Superior Court's holding in ***Renninger*** conflicts with the accepted scientific view concerning the extent to which the alcohol concentration in supernatant reflects the alcohol concentration in whole blood." (¶ 13 of Cmwlth.'s Motion).

Several – but not all – of the Defendants to whom the Commonwealth's motion was forwarded have opposed the Commonwealth's request for an Omnibus Motion in Limine hearing. In addition to challenging the substantive arguments of the Commonwealth regarding BAC testing at the GSH, the Defendants argued that the Commonwealth's motion is procedurally misplaced because it essentially asks this Court to decide in advance whether sufficient evidence exists to sustain a conviction.

The four Jurists of this county have collectively met in order to review the Commonwealth's motion and the response of the defense. We issue this Opinion in order to speak with one voice regarding BAC testing at the GSH. Unfortunately, that "one voice" cannot provide the type of complete clarity that only an appellate court opinion could provide.

II. PROCEDURAL PROBLEMS CREATED BY AN OMNIBUS MOTION IN LIMINE

We understand that there are cost and efficiency benefits to the Omnibus Motion in Limine process proposed by the Commonwealth. Expert testimony by a chemist familiar with BAC testing is both expensive

and difficult to schedule. If we were to approve the Commonwealth's request for a collective hearing regarding blood alcohol testing, the taxpayers of this community would benefit. Unfortunately, we could find no statutory, rule-making, or appellate authority to support the type of Omnibus Motion in Limine that the Commonwealth has filed. Moreover, we perceive multiple problems inherent in a process that permits collective prosecution of multiple and unrelated defendants.

A Motion in Limine is a procedural device that can be employed to obtain a pre-trial ruling regarding an important anticipated evidentiary dispute at trial. See, e.g., ***Commonwealth v. Noll***, 662 A.2d 1123, 1125 Pa.Super. 1995). This Court has often entertained Motions in Limine. In most instances, we appreciate the fact that Motions in Limine afford us with the opportunity to make reasoned and researched evidentiary decisions instead of ones that must be made quickly within the context of an ongoing trial.

Even though we have routinely addressed Motions in Limine, we have never before encountered an Omnibus Motion in Limine by which we are asked to evaluate identical evidence applicable to multiple pending cases. While we stop short of concluding that the type of Omnibus Motion in Limine proposed by the Commonwealth should never be employed, the problems inherent in such a process causes us to conclude that collective Motions in Limine should not generally be entertained.

From a legal perspective, consolidation of criminal cases is governed by Pa.R.Crim.P. 582. That rule states:

> Defendants charged in separate indictments or informations may be tried together if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

Pa.R.Crim.P. 582(A)(2). This rule has been liberally applied when co-defendants are charged with Criminal Conspiracy. See ***Commonwealth v. Payne***, 760 A.2d 400 (Pa.Super. 2000); ***Commonwealth v. Lopez***, 739 A.2d 485 (Pa. 1999). However, none of the Defendants in this case are co-conspirators, nor has the Commonwealth alleged that any of the Defendants are charged as part of the same "transaction."

Practical problems also abound with the process proposed by the Commonwealth. For example, evidentiary disputes must be decided within the context of the specific case before the Court. It is nearly axiomatic that every case is different. Were we to undertake a one size fits all approach to an evidentiary dispute, we run the risk that what may work under the facts of one case could create an injustice under the facts of another.

In addition to the above, Omnibus Motions in Limine could in some cases contravene the precept of Pennsylvania law that prohibits advisory opinions. See, e.g., ***Buehl v. Beard***, 54 A.3d 412 (Pa.Cmwlth. 2012); ***Lowther v. Roxborough Memorial Hospital***, 738 A.2d 480 (Pa.Super. 1999); ***Gulnac by Gulnac v. South Butler School District***, 587 A.2d 699 (Pa. 1991). In the matter before us, the Commonwealth has presumed

that each of the eight Defendants listed in its Omnibus Motion in Limine will actually choose to contest the results of the BAC test. This presumption may or may not ultimately be accurate.

We also have concerns about the logistics of an omnibus pre-trial proceeding. Every Defendant has the right to be present with counsel at a proceeding such as the one proposed by the Commonwealth. If a witness were to be called, every Defendant would have the ability to cross-examine that witness. What happens if the questions of one Defendant end up hurting another? How would we rule if one defense attorney seeks to pursue a line of questioning to which other defense attorneys object? As we see it, the type of collective prosecution sought by the Commonwealth is a process fraught with peril.

III. LIMITED UTILITY OF A COLLECTIVE MOTION IN LIMINE HEARING

As it relates to BAC testing, we also question the purpose and utility of conducting the type of hearing proposed by the Commonwealth. To the extent that the Lebanon County District Attorney desires a definite pronouncement from this Court that it could rely upon as ongoing precedent, we are simply not able to provide that; only an appellate court could do so. Moreover, a hearing is not required for us to conclude that some previous questions regarding blood alcohol testing have now been answered, while others remain open. From a legal perspective, there is

nothing that we could declare after a hearing that could add to what we can and will now state.

A. Size Of Blood Sample To Be Tested

As Judge Kline correctly ruled in ***Commonwealth v. Edwards***, supra, compliance with the operating manual of the Seimens Dade Dimension® testing device is a necessary prerequisite to the admissibility of any results flowing from the use of the device. Even if the Commonwealth were to present testimony from a lab tech in support of the notion that the size of the blood sample can be reduced below what is set forth in the Siemens' operating manual, we would reject such testimony. If the Commonwealth wishes to employ test results using the Dade Dimension testing device at the GSH, the instruction manual for that device will have to be scrupulously followed.

The GSH can certainly make whatever business decision it deems appropriate regarding use of its BAC testing device. If the GSH wishes to save money by proportionally reducing the size of the blood sample and the TCA dilution, that is certainly its prerogative. If the GSH believes that reduction of a blood sample and TCA will yield an appropriate test result for diagnostic and treatment purposes, it can certainly consider the test results for those purposes. All we declare today is that if the GSH or the Lebanon County District Attorney's office wishes to utilize a BAC test result using the Siemens Dade Dimension machine to convict a criminal defendant, then it must show that the Siemens machine was employed in

accordance with its designed specifications. This is not a decision about which we will compromise. Moreover, it is a decision that no hearing would cause us to change.

B. Necessity Of Converting Evidence

By now, it should be patently obvious to everyone that the Superior Court will require "converting evidence" as a predicate to admitting supernatant test results. In the 1996 case of ***Commonwealth v. Renninger***, 682 A.2d 356 (Pa.Super. 1996), the Pennsylvania Superior Court stated:

> Although our courts have not specifically considered the validity of supernatant testing, we do not hesitate to find that [prior cases] render such testing invalid unless converting evidence is provided to establish the alcohol content of whole blood. Since all three tests are performed on only a portion of whole blood, they require conversion to establish the correlative whole blood test results, and we now hold that supernatant testing also requires such "converting evidence."

Id. at 362 (internal citations omitted). Even if the Superior Court's decision in ***Renninger*** could have been called into question by subsequent non-precedential unpublished Superior Court Opinions that affirmed the GSH test results in ***Commonwealth v. Shannon Williams***, CP-38-CR-000169-2009 and ***Commonwealth v. Thomas Lutz***, CP-38-CR-001208-2010, any lingering questions should have now been put to rest by virtue of the Superior Court's published Opinions in ***Commonwealth v. Karns***, supra, and ***Commonwealth v. Haight***, supra. Stated simply, no one should now seriously dispute that "converting evidence" is a

necessary predicate to the admissibility of supernatant testing such as was conducted by the GSH.

C. Dilution Factor Is Not "Converting Evidence"

In ***Commonwealth v. Cortez***, supra, this Court declared that the dilution calculation applied at the GSH was designed simply to counterbalance the addition of TCA to the blood sample prior to centrifuging. We concluded: "We do not view [a dilution factor] as the type of 'converting evidence' that ***Renninger*** required." ***Id.*** Notwithstanding our conclusion in ***Cortez***, we acknowledge the possibility that some confusion could have been caused by the unpublished Opinion of the Superior Court in ***Commonwealth v. Valentin Contreras***, CP-38-CR-1289-2006, where the Superior Court referenced the lab technician's testimony about dilution and stated: "This testimony indicates the application of a conversion factor."

To the extent that any confusion still existed after our April 2012 decision in ***Commonwealth v. Cortez***, that confusion has now been put to rest by the Superior Court's published Opinion in ***Commonwealth v. Karns***, supra. ***Karns*** specifically and definitively declared that a dilution calculation is not "converting evidence." No hearing should be necessary for everyone to realize that TCA dilution will not satisfy the Superior Court's requirement that converting evidence be presented.

D. What Constitutes "Converting Evidence"?

In ***Commonwealth v. Hector Pagan***, CP-38-CR-373-2010 (Charles, J., April 7, 2011), and again in ***Commonwealth v. Cortez***, supra, we declared that the phrase "converting evidence" did not necessarily require a mathematical formula. In ***Pagan***, Dr. Jeffrey Shoemaker testified at trial that the supernatant testing conducted by the GSH was experimentally verified as being accurate. We recognized Dr. Shoemaker as a "preeminent authority on blood alcohol testing"[1] and declared that his testimony constituted "converting evidence" sufficient to support reliance upon the test result generated by the GSH. Following ***Pagan*** and ***Cortez***, it should have been clear in Lebanon County that expert testimony from a chemist supporting a 1:1 correlation between supernatant and whole blood testing would be sufficient to support the GSH testing result.

Unfortunately, the Superior Court's more recent decision in ***Commonwealth v. Haight*** has called into question our analysis in ***Pagan*** and ***Cortez***. In ***Haight***, an expert similar to Dr. Shoemaker provided testimony at the Defendant's trial. Like Dr. Shoemaker, the Commonwealth's expert in ***Haight*** testified that "the ethanol concentration in supernatant is equivalent to the ethanol concentration in whole blood." ***Id.*** at 143. The Commonwealth's expert further testified that the alcohol concentration in supernatant was verified by gas chromatography to be relatively equivalent to the alcohol content in whole blood. However, the

[1] Dr. Shoemaker led the Commonwealth department responsible for certifying and licensing blood alcohol laboratories within the Commonwealth of Pennsylvania.

Commonwealth's expert acknowledged a study that revealed "a ratio of 1.05:1 in terms of ethanol concentrations in [supernatant] as determined by gas chromatography compared to ethanol concentrations in whole blood as determined by gas chromatography." ***Id.*** at 142-43. The Commonwealth's expert also described a "correlation coefficient of .997" between whole blood testing and supernatant testing. In response to the Commonwealth's expert, the Defendant presented his own expert. Without specifying a mathematical formula, the defense expert rendered an opinion that the supernatant test result of .181% could be converted to a whole blood test of .166%. Ultimately, the Trial Court employed its own "conversion factor" that was modeled upon the testimony of the defense expert in order to render an opinion that the Defendant's blood alcohol level was .158.[2] The Superior Court affirmed this decision by the Trial Court.

Haight strongly implies that a mathematical formula of some sort must be employed to convert a supernatant test result to one reflecting whole blood BAC.[3] On the other hand, the two Judge majority in ***Haight*** eschewed a broad proclamation that could have provided precedential

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[2] According to the Superior Court Opinion, the Defendant's blood was tested twice. The first test resulted in a BAC of .181 and the second test resulted in a BAC of .174. The defense expert testified that the .181 result should be converted to a .166. Using this same ratio, the Trial Court apparently decided to reduce the .174 blood alcohol result to .158. Still, no specific expert testimony was presented to support this decision.

[3] In his dissenting Opinion, Judge Bowes stated that the Trial Court employed a "conversion rate of .91" and that this conversion rate was supported by a study described by the Defendant's expert. Judge Bowes did not think this went far enough. However, a fair reading of Judge Bowes' dissenting Opinion leads us to conclude that neither he nor the majority of his panel would have viewed the Commonwealth's expert's "rough equivalency" testimony as sufficient "converting evidence."

assistance in favor of a relatively narrow holding that merely stated: "We conclude the trial court's determinations are supported by the record."

We do not know what the Superior Court would have done had the Trial Judge in ***Haight*** accepted the testimony of the Commonwealth's witness. Would the Superior Court have upheld a .997 "conversion factor?" We are not sure. *A fortiori,* we cannot predict how the Superior Court would rule if we were to adopt the converting ratio of 1:1 that Dr. Shoemaker proffered in ***Pagan***. Suffice it to say that we will not know the answer to this question until or unless the issue is presented to an appellate court.

As of this point in time, the Superior Court has clearly declared that "converting evidence" is necessary whenever supernatant testing is proffered. Moreover, we know from ***Haight*** that use of a .91 conversion factor will suffice in terms of converting evidence. What we do not know is whether the Superior Court would support a lesser mathematical conversion or even a non-conversion ratio of 1:1. Unfortunately, no Omnibus Motion in Limine proceeding will enable us to answer that question. Only an opinion from the Superior Court will do that.

E. Is Expert Testimony From A Chemist Necessary?

As of yet, neither this Court nor any appellate court has declared that expert testimony is mandatory to support a supernatant test result. However, in a similar context, our Commonwealth's highest court has declined to mandate expert testimony to establish the crime of driving

while under the influence of a controlled substance. ***Commonwealth v. Griffith***, 32 A.3d 1231 (Pa. 2011). In reaching this decision, the Supreme Court referenced the crime of Driving While Under the Influence of Alcohol and stated:

> We have made clear that Section 3802 neither specifies nor limits the type of evidence that the Commonwealth may proffer to prove its case under [Driving Under the Influence of Alcohol statute]. Although the Commonwealth *may* proffer evidence of alcohol level and/or expert testimony to establish that the defendant had imbibed sufficient alcohol to be rendered incapable of driving safely, it is not required to do so...

Id. at 1238 (citations omitted). Even though ***Griffith*** did not specifically involve the application of a conversion factor, we view ***Griffith*** as an expression of the Supreme Court's desire to avoid arbitrary mandates for expert testimony.

More pertinent to the question at hand is the Pennsylvania Superior Court's decision in ***Commonwealth v. Michuck***, 686 A.2d 403 (Pa.Super. 1996). In ***Michuck***, a blood testing laboratory centrifuged the Defendant's whole blood. The Superior Court stated: "If whole blood is centrifuged, the clear liquid which appears in the upper half of the centrifuge tube is *serum*. The heavier corpuscles sink to the bottom of the tube." ***Id.*** at n. 3 (internal citations omitted). Therefore, the Court declared the test of the Defendant's blood to be a "blood serum test." This test resulted in a blood alcohol content of .184%. Without calling any chemist, the Commonwealth introduced into evidence a conversion factor of 1.18 and applied that conversion factor to derive a BAC of .15%.

The witness in ***Michuck*** who ascribed the 1.18 conversion ratio was a medical technologist employed by hospital laboratory. The Superior Court described this testimony as follows:

> The lab technician who conducted the blood serum test on Michuck's blood, Cynthia Emmert, testified that use of the 1.18 conversion factor was standard policy and procedure of the lab. Emmert explained that this particular conversion factor was an average within the acceptable range and was also used in reputable medical literature. Dr. Dennis Sharkey, the pathologist and director of the lab, testified that 1.18 was a generally accepted conversion factor within the scientific community and has been used at Andrew Kaul Memorial Hospital in conducting serum blood alcohol content tests for the past 15 years.

Id. at 406-07. Based upon this testimony, the Superior Court rejected the Defendant's argument that the conversion factor as "arbitrary" and accepted the converted BAC test result.

For reasons unrelated to the viability of the blood alcohol test results, the Superior Court in ***Michuck*** vacated the Defendant's conviction. Perhaps for this reason, ***Michuck*** has not been regularly cited as authoritative precedent. However, we have not found any appellate case that has criticized or overturned the ***Michuck*** Court's decision to apply a conversion factor without expert testimony from a chemist. Therefore, we find the reasoning in ***Michuck*** to be applicable to BAC cases in Lebanon County.

IV. CONCLUSION

We have reviewed the tortuous evolution of the law pertaining to BAC testing in Lebanon County. We have also reviewed all available

Pennsylvania Superior Court precedent on the topic. Finally, we have evaluated and discussed the potentiality and peril of conducting an Omnibus Motion in Limine hearing that would simultaneously affect eight cases. Based upon everything, we reach the following conclusions:

(1) It would not be appropriate for us to conduct a collective Motion in Limine hearing that would govern eight separate and unrelated cases.

(2) For any BAC test at the GSH to be admissible, the amount of the blood sample and amount of TCA utilized must comply with the operating manual for the Siemens Dade Dimension® machine used at the GSH.

(3) Converting evidence is required to support any BAC testing conducted by the GSH.

(4) The dilution factor that is often described by GSH lab technicians does not constitute converting evidence sufficient to support the GSH testing result.

(5) A mathematical conversion application of .91 would constitute sufficient "converting evidence" to support a test of supernatant at the GSH.

(6) Testimony from an expert chemist is not required in each and every case. If an appropriately trained pathologist and/or lab technician can provide testimony regarding a scientifically accepted conversion factor to be applied to the GSH supernatant testing result, the

conversion factor can be applied without the need for testimony from an expert chemist such as Dr. Shoemaker.

To be sure, open questions remain in Lebanon County regarding the BAC testing process. We still do not know for sure whether a mathematical reduction of the GSH supernatant testing result will be required. Likewise, we do not know if testimony from an expert chemist such as Dr. Shoemaker in support of a 1:1 ratio between supernatant testing and blood alcohol results will be deemed viable. We have already touched upon these issues in ***Commonwealth v. Pagan***, supra, and ***Commonwealth v. Cortez***, supra. However, we freely acknowledge that a definitive answer to these questions must await a published proclamation from the Pennsylvania Superior Court and we still anxiously desire that either the Commonwealth or some Defendant will provide the Superior Court with the opportunity to issue a binding published Opinion.

Still, BAC testing in Lebanon County does not have to remain a tenuous proposition. We cannot imagine that it would be onerous for a laboratory supervisor and/or pathologist to receive training regarding supernatant testing and conversion formulas applicable to that supernatant testing. Under ***Michuck***, testimony from trained laboratory personnel as to conversion would be sufficient and would obviate the necessity for presenting an expert chemist. Moreover, if in fact the expert testimony presented in ***Haight*** is truly representative, then even defense experts appear to acknowledge that the conversion factor could be .91. It

seems to us that the consequences of routinely reducing the GSH supernatant testing results by only a minimal amount would pale in comparison to the consequences that would result if all BAC testing at the Good Samaritan Hospital were to be rejected.[4]

We will end this Opinion as we began it – by observing that "known certainty of the law" is a laudable goal to be sought. When we authored ***Commonwealth v. Cortez*** in April of 2012, we freely acknowledged the inconsistent judicial decisions on BAC testing that were presented by both this Court and the Pennsylvania Superior Court. It was with empathy for the Commonwealth and DUI defendants that we so overtly implored the Superior Court to author a published binding decision on the topic.

Today, we do not have nearly as much empathy. We were not pleased to learn that the GSH was not even following the operating manual of its own BAC testing device. Moreover, both ***Karns*** and ***Haight*** have provided precedential guidance from the Superior Court regarding BAC testing. While we still do not have complete answers to all questions, enough is now known about the law and supernatant testing for the Commonwealth to develop a protocol to try BAC cases in Lebanon County without the need for expert testimony from chemists such as Dr. Shoemaker. Moreover, the development of such a protocol does not

[4] In addition, a reduction of the supernatant test result would resolve the intellectual dilemma that Judge Charles extensively addressed with charts in the case of ***Commonwealth v. Henry Lutz***, CP-38-CR-1314-2009 (Charles, J., July 8, 2010). A copy of the charts contained in the ***Lutz*** opinion are attached hereto as Exhibit A.

require us to engage in a procedurally spurious Omnibus Motion in Limine hearing process such as that urged by the Commonwealth.

BAC testing has been a problem in Lebanon County for several years. We conclude that the Commonwealth now has the necessary tools to fix this problem and we urge it to do so sooner rather than later. It is with this observation that we will enter an Order denying the Commonwealth's request for an Omnibus Motion in Limine proceeding.

Figure 1

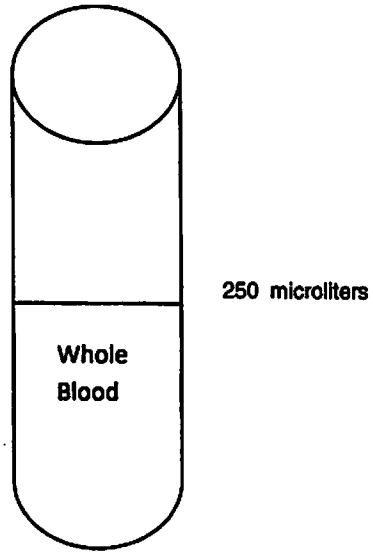
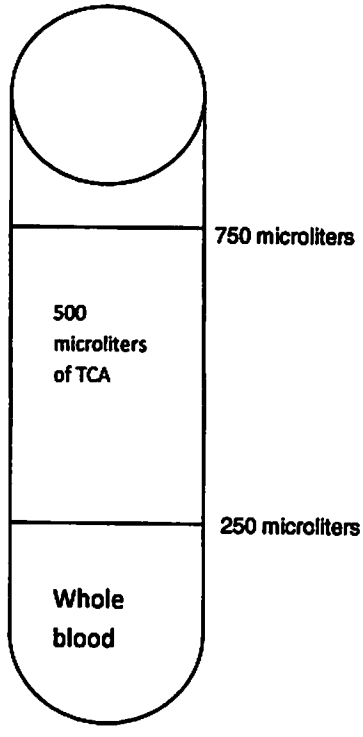


Figure 1 to the right represents 250 microliters of the Defendant's whole blood within a diagram of a vial. This is how the GSH testing process starts.

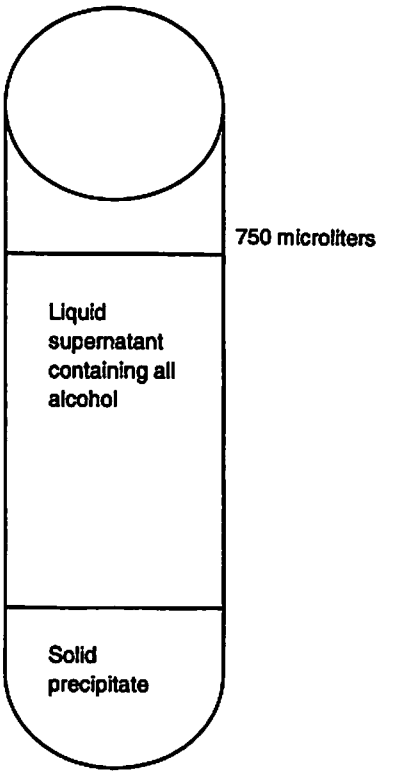
Figure 2



To the original sample of 250 microliters of whole blood, the GSH adds 500 microliters of an anti-coagulant solution described by Ms. Webster as "TCA". This mixture is then placed in a centrifuge for 5 minutes.

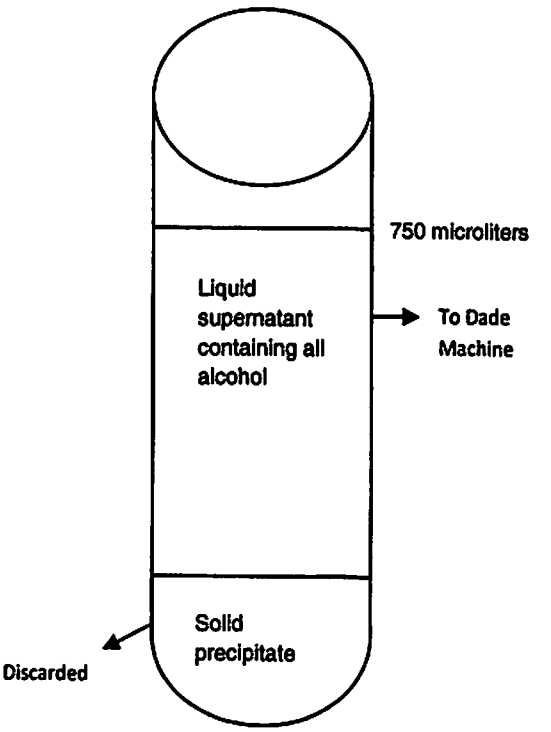
Following the centrifuge of the whole blood/TCA mixture, blood cells and other solid particles fall to the bottom of the vial becoming a solid substance known as "precipitate". The liquid portion of the mixture migrates to the top of the vile and becomes "supernatant". Ms. Webster testified that <u>all</u> of the alcohol rises to the liquid top "supernatant" layer.

Figure 3



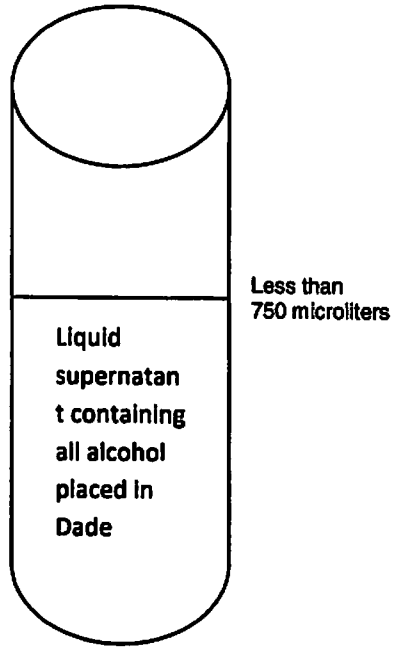
The liquid supernatant portion of the vile is placed into the Dade machine. The precipitate is discarded. As a result, the total volume of material is reduced by the percentage of solid precipitate that is discarded.

Figure 4



The supernatant is tested by the Dade Dimension machine and a raw result is issued.

Figure 5



The result of the Dade Dimension machine is multiplied by 3, which represents a "dilution factor" necessitated by the addition of the TCA substance as illustrated in Figure 2. This multiplication effectively "backs out" the volume addition of TCA.

Figure 6

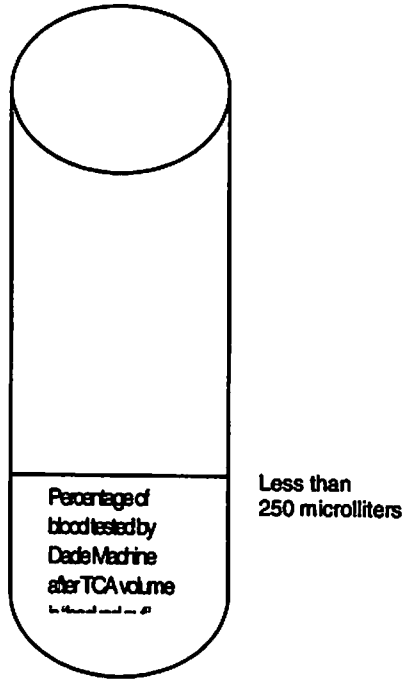


Figure 1

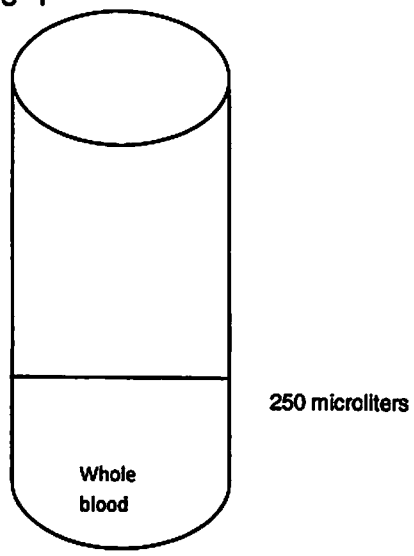
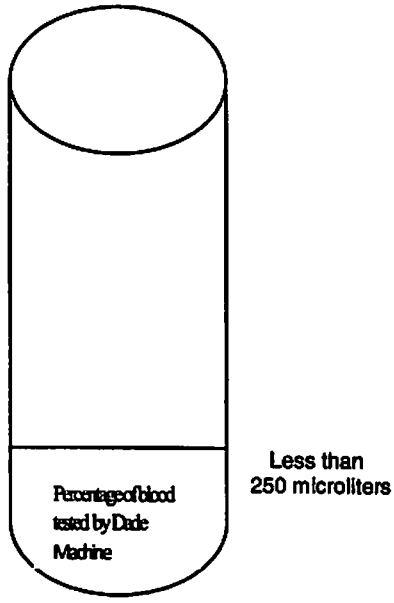


Figure 6



A comparison of Figure No. 1 and Figure No. 6 illustrates our dilemma. Figure No. 1 represents the volume of the Defendant's whole blood before the testing cycle began. It is the percentage of alcohol in this sample that is ultimately important. Figure 6 represents the volume of the Defendant's supernatant from which the test result was generated. The volume of Figure 6 is less than the volume of Figure 1 because the solid precipitate was removed and discarded. Ms. Webster stated that all of the alcohol that was in the Defendant's whole blood (Figure 1) is also contained in Figure 6 (supernatant). Because the volume of Figure 6 is less than the volume of Figure 1, the percentage of alcohol inside the lesser volume of Figure 6 would be mathematically higher than the percentage of alcohol inside the greater volume of Figure 1. Without "converting evidence", the percentage of alcohol inside Figure 6 cannot represent the percentage of alcohol contained in Figure 1.

As an example, assume that the volume of blood in Figure 1 constitutes 100 hypothetical "units" and that 5 units of alcohol exist. In the sample, this would mathematically equate to a blood alcohol percentage of Figure 1 totaling 5%. Assume that the volume of supernatant tested in Figure 6 totals 75 hypothetical "units". According to testimony, the same 5 units of alcohol would exist in the supernatant. However, the volume of the supernatant is less than 100 units. Therefore, the percentage of alcohol would be mathematically higher – 13% in the hypothetical example used above. Our dilemma is that nothing was done by the Commonwealth to explain away this apparent mathematical discrepancy.

Exhibit "A"