



PITTSBURGH LEGAL JOURNAL

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PLJ

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OPINIONS

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**Mark W. Ambrose and
Ronald A. Kramer v.
Citizens National Bank
of Evans City, Pennsylvania**

*Pennsylvania Wage Payment and Collection Law—
Counsel Fees—Remand*

1. Plaintiffs sued defendant for past earnings. The trial court found for plaintiffs and awarded counsel fees. Following appeal, the Superior Court remanded the matter to the trial court. The only issues remanded were the recalculations or better justification of plaintiffs' trial counsel fees and the calculation of an appropriate amount of counsel fees for the appeal, and implicitly, for the remand.

2. The evidence showed that defendant, through its various employees, officers, and principals, had no good faith reason to withhold plaintiffs' earnings and further showed that defendant had no truthful basis for its refusal to pay, whether stated as a defense or as a counterclaim. Defendant's contentions in its counterclaims were frivolous and untruthful and were made solely for the vengeful purpose of discouraging plaintiffs' pursuit of Wage Act claims.

3. All of plaintiffs' counsel's work was directed at plaintiffs' need to destroy defendant's only defense to the wage claims, to-wit, that plaintiffs had committed the first breach of the employment contract at issue.

4. The sole limit placed on the fees the wronged employee may be awarded under the Wage Act is that the fees be "reasonable." Defendants admitted that the time plaintiffs' counsel spent on both the Wage Act claim and defendant's counterclaim was reasonable and that the hourly rates charged were also appropriate.

(William R. Friedman)

*Stacey F. Vernallis and Jake Lifson for Plaintiffs.
Ray Middleman and Michael McShea for Defendants.*

No. GD 04-21511. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**OPINION RE APPEAL OF ORDER
ENTERED ON REMAND**

INTRODUCTION

Friedman, J., July 31, 2009—Defendant has appealed from our Order entered on remand, which was intended to replace a Decision on Remand which we vacated because we concluded an Order was the procedurally appropriate vehicle for our rulings. Both raise the same issues and if necessary, this should be treated as one appeal. We believe that an Order was already entered to that effect by the Superior Court on July 20, 2009.

In the prior appeal, the Superior Court upheld the conclusion of the undersigned that Plaintiffs were entitled to counsel fees under the Wage Payment and Collection Law (hereinafter, "the Wage Act"), 43 P.S. §260.9a(f). However, the Superior Court did not affirm the amount we awarded and remanded the case with instructions either to explain more fully the justification for the amount awarded or, if that could not be done, to allocate the counsel fees charged between the work needed for the Wage Act claims (for which fees are mandated by the Legislature) and the work needed for defense of Plaintiffs' Counterclaims (for which the statutory mandate might not necessarily apply). The Superior Court clearly felt that a fee award that was double the amount of withheld wages needed more of an explanation than we

gave. We deeply regret our failure to state explicitly and in sufficient detail what our reasons were.

The Superior Court also referred a new issue to this Court—the determination of the amount of Plaintiffs' counsel fees for Defendant's appeal of the Wage Act claim, again as distinguished from Defendant's appeal of the denial of its Counterclaims. We have assumed the fees for the remand are also to be awarded and have included them as well. Another issue before us is whether Plaintiffs' counsel fees related to execution proceedings during the pendency of Defendant's appeal are also awardable and, if so, what is the appropriate amount. (Defendant had contended, unsuccessfully, that it was exempt from posting a bond in order to obtain a *supersedeas*. A bond was eventually posted, but Defendant put Plaintiffs to a good deal of work to prove that Defendant was not exempt.)

On remand, we again conclude that the full amount of the counsel fees was allocable to Plaintiffs' Wage Act Claims. This is because Defendant's Counterclaims were a complete sham, pled only as a bad faith tactic to force Plaintiffs to drop their Wage Act Claims. The efforts of Plaintiffs' attorney that might seem to be related to the Counterclaims were needed also to expose the weakness and illegitimacy of Defendant's defense. We felt, and continue to feel, that Plaintiffs' attorney's conduct of her clients' case was reasonable in the circumstances and skillful. She should not be blamed for deflecting every one of Defendant's tactics and reducing Defendant's sham defense and sham counterclaims to nothingness prior to and during the trial. Defendant is actually the party whose conduct during every phase of the litigation was unreasonable in the extreme. Defendant asserted meritless defenses and counterclaims, and then persisted in pursuing them when their lack of evidentiary support was undeniable.

Because the statute at issue, unlike others involving the award of counsel fees, does not require a finding of "bad faith," we refrained from making an express finding of bad faith but merely alluded to a few examples in passing. It was clear to the undersigned at the time of the trial that all of Plaintiffs' counsel's work was directed at Plaintiffs' need to destroy Defendant's only defense to the wage claims, to-wit, that Plaintiffs had committed the first breach of the employment contracts at issue by their "unfair competition and unfair trade practices" (Defendant's Answer, ¶4), thereby justifying Defendant's subsequent conduct in withholding wages.

By the end of the trial, it was obvious to the Court, as fact-finder, that Defendant had no credible evidence to support paragraph 4 of its Answer to the Complaint and that its counterclaims were even more spurious than its defense. The only counterclaim Defendant actually pursued at trial was that Plaintiffs wrongly competed with Defendant and supposedly used Defendant's trade secrets to do so. This is virtually identical to the "unfair competition and unfair trade practices" pled in Defendant's Answer. We note that Plaintiffs' attorney could not count on the Court perceiving the spuriousness on its own. Plaintiffs' attorney had the duty to her clients to do as she did, test Defendant's spurious claims and defenses by vigorous discovery and cross-examination.

The bad faith on the part of Defendant raises an unusual issue, how to address a finding by the Superior Court that is contrary to the trial court's unstated but implicit finding in that regard. The Superior Court made its own factual finding that the Defendant acted in good faith when it made its counterclaims. (See p. 14 of Slip Opn.) Ordinarily, such findings are to be made by the fact-finder, not by an appellate court, and would have been part of the

order on remand. Had we been asked either by Superior Court or by the Legislature via its statutory language, we would have expressly stated that we found that Defendant's entire defense and counterclaims were pled and pursued in bad faith, done solely to discourage Plaintiffs from continuing with their valid claims and without any basis in fact.

Had Defendant acted in good faith, from the beginning, Plaintiffs' counsel fees would not have been incurred at all. Instead, Defendant chose to fight a clearly meritorious wage claim without *any* evidence to back up its contention that it was justified in withholding Plaintiffs' wages earned. This is not the usual case, where the evidence supporting a good faith claim or defense may not be believed. Here, Defendant withdrew two of its three counterclaims shortly before trial and then failed to adduce *any* evidence of the crucial element of harm as to its remaining counterclaim, theft of trade secrets. Please note that the missing element of harm was not "missing" as the result of the Court, as fact-finder, *disbelieving* Defendant's evidence in favor of evidence presented by Plaintiffs. Proof of harm was missing because Defendant presented *no* evidence about the relevant harm, i.e. losses Defendant alleged it sustained after February 2004 when Plaintiffs left.

In addition, Defendant failed in its attempts to prove the other elements of its remaining counterclaim, such as the *existence* of a trade secret, the customer list Defendant claimed it owned but which the evidence unequivocally showed was owned by Commonwealth Equity Services, a non-party. Having failed to prove it even owned the trade secret it relied on, Defendant obviously had no claim against Plaintiffs for their supposed use of it nor could any use by Plaintiffs of Commonwealth's customer list establish the defense pled in Defendant's Answer, that the Plaintiffs were the ones who breached the employment contract at issue.

ISSUES ON APPEAL

Defendant raises five matters on appeal which are fully quoted below:

1. Did the trial court err as a matter of law in ruling that Plaintiff's attorneys' fees for defending counterclaims are awardable under the Wage Act if the counterclaims are [not] filed in bad faith?
2. Did the trial court err as a matter of law in finding that Defendant had acted in bad faith and was subject to sanctions under 42 Pa. C.S. §2503(9) for averring counterclaims?
3. When no express finding of bad faith was made prior to remand, did the trial court err as a matter of law in expressly finding on remand that Defendant had acted in bad faith?
4. Did the trial court err as a matter of law in ruling that the Wage Act allows for the award of attorneys' fees incurred for appellate proceedings, post judgment execution proceedings, lower court proceedings and expert witness services?
5. Did the trial court err as a matter of law in failing to apply the factors provided for in 41 P.S. §503 to determine what constitutes reasonable attorneys' fees?

We will discuss those matters in a somewhat different order, under the following nine topics:

1. Counsel fees under the Wage Act are mandatory, not discretionary, and do not require an express finding of bad faith.
2. Plaintiffs are entitled to the full amount of attorneys' fees incurred because Defendant's counterclaims were spurious from the beginning and duplicative of Defendant's defense.
3. The Court's original decision contained findings and discussions *implying* Defendant's bad faith although no *express* finding was made in writing.
4. Plaintiffs' counsel fees were also awardable under 42 Pa. C.S. §2503.
5. All of Plaintiffs' counsel fees for the entire trial were for work done under the Wage Act and were reasonable in the circumstances.
6. Application of the §503 factors does not require that the amount of counsel fees be solely dependent on the size of the underlying claim where the Wage Act is involved.
7. Plaintiffs' attorneys' fees related to the appeal and the remand are also fully awardable because Plaintiffs' appeal was successful on the merits.
8. Plaintiffs' attorneys' fees related to the execution proceedings are also fully awardable.
9. The issue of the awardability of expert witness fees was held to have been waived in the first appeal and was therefore finally decided and is *not* part of the remand.

DISCUSSION

1. Counsel fees are mandatory, not discretionary, under the Wage Payment and Collection Law, 43 P.S. §260.9a(f), without there being any need for an express finding of bad faith and even if there is an express finding that the employer acted in good faith.

We first note that the language of the Wage Act regarding the extent of the mandatory counsel fees, 43 P.S. §260.9a(f), is as strong as the policy reasons behind it that were discussed by the Superior Court in this case:

§260.9a. Civil remedies and penalties.

....

(f) The Court in any action brought under this section *shall*, in addition to any judgment awarded to the Plaintiff or Plaintiffs, allow costs for reasonable attorneys fees of *any nature* to be paid by the defendant.

(Emphasis added.) The Pennsylvania Supreme Court discussed the mandatory attorneys fees provided by the Wage Act in *Oberneder v. Link Computer Corp.*, 548 Pa. 201, 696 A.2d 148 (1997).

In that case, which is virtually dispositive of the instant counsel fee dispute, the defendant/employer not only defended against the plaintiff/employee's Wage Payment Act claim, it also raised counterclaims for breach of contract and intentional interference with contract, and "also claimed that [the plaintiff/employee] breached the company's confidentiality [rights] and engaged in fraud." 696 A.2d at 149. It was further expressly found at trial that the employer's refusal to pay the wages "was made in good faith." (Here, we found the refusal was in bad faith.) In

Oberneder, the fact-finder found in favor of the employer on its counterclaims for breach of contract and intentional interference, but awarded no damages to the employer. (Here, Defendant dropped most of its counterclaims and offered no evidence sufficient to support all the elements of the one that remained.) Despite the finding of good faith in *Oberneder* and despite the trial court's finding there in favor of the employer on its counterclaim (albeit without awarding damages), the Supreme Court in *Oberneder* affirmed the full amount claimed under a contingent fee agreement, without deduction for fees attributable to the non-Wage Act aspects of the case. Although we do not have a contingent fee arrangement here, we do have the Defendant's admission that the time Plaintiffs' attorney spent on both the Wage Act claim and Defendant's counterclaim was reasonable, and that the hourly rates charged were also appropriate.

See Defendant's Brief on Remand where Defendant confirms this court's earlier understanding of its position on the total time spent and the hourly rate charged:

Further, Plaintiffs continuously notes [sic] that CNB did not object to counsel's hourly rate or the activity noted in the billing records. *This is true and establishes that CNB did not dispute that the amount of \$152,040.79 was a reasonable collective charge for both pursuing the [Wage Act] claim and defending the counterclaims.* Plaintiffs fail to grasp that this does not mean that CNB conceded that \$152,040.79 is a reasonable sum for pursuing the WPCA claim alone.

(Defendant's Brief in Opposition to Plaintiffs' Post-Remand Claim for Attorneys' Fees, p. 7.)

The issue in *Oberneder* was whether or not attorneys' fees under the Wage Act were *mandatory*. The Supreme Court presented the question as follows:

Appellants argue that the statute grants courts the authority to award attorneys' fees but that such an award is discretionary. They contend that before awarding fees courts should consider any employee misconduct, the verdict's size compared to the employee's demand, the employee's refusal to negotiate a settlement, and other unfavorable jury verdicts in the action.

Oberneder, on the other hand, argues that the use of the word "shall" in the provision on attorneys' fees dictates that fee awards are mandatory. He also argues that without an award of attorneys' fees, the employee only partially recovers and the statute's purpose to protect employees seeking compensation is defeated.

Oberneder 696 A.2d at 150.

It bears repeating that the Supreme Court held attorneys' fees were mandatory, even though there was an express finding by the fact-finder that the employer's refusal to pay was made in good faith. The Supreme Court expressly rejected the employer's contention that its good faith protected it from paying the employees' attorneys' fees:

...for example, the Third Circuit, while not compelling fee awards, held that an employer's good faith in disputing that it owed wages does not preclude awarding attorneys' fees to prevailing employees.

Id.

Not only is an award of reasonable counsel fees *mandated* by the Wage Act, a strong qualifier was included by the Legislature, "of any nature." This phrase was not discussed by the undersigned in its previous Opinion, nor was it expressly addressed in *Oberneder*, but, because it involves a matter of law, it merits further discussion.

Our investigation on remand confirmed our experience that we had not noticed that phrase "of any nature" in connection with other statutes that provided for an award of counsel fees. Using Westlaw's on-line research website we searched the Pennsylvania database "PA-ST-ANN" for all mentions of "fee...of any nature." Our search revealed only five instances where "fee or fees" and "of any nature" are mentioned in the same paragraph or sentence of the statutory text. Counsel for the parties were also unable to find any other instance of that phrase in Pennsylvania, although it was found to be in an Hawaiian statute that also addressed the wage collection problem. (H.R.S. §378-5.)¹

Of the five instances where the phrase "fee...of any nature" was found, one refers to "the payment of any offsite improvements or capital expenditures of any nature," (53 P.S. §10503, Municipal Capital Improvement); one refers to "materials or services of any nature," (71 P.S. §178, State Transportation Commission); one refers only to "liability of any nature" and includes "attorney fees" as an instance of liability (24 Pa.C.S.A. §9101, Miscellaneous Retirement Provisions for Retired Public School Employees); one refers to a promise or payment of "any fee, remuneration, privilege, or any consideration, of any nature whatsoever" (53 P.S. §4542, Employment Agencies in Cities of the First and Second Class); and last, but not least, the sole use of the phrase "attorneys' fees of any nature" in all of the Pennsylvania Statutes – the provision of the Wage Act at issue here.

It seems clear that the meaning of "fees of any nature" affects the meaning of "reasonableness" in connection with the mandated attorneys' fees. "Reasonableness" under the Wage Act, or any other statute for that matter, would depend on the circumstances of each case. The "circumstances," in fairness, would have to include the conduct of counsel for *both* sides. The Legislature's mandate is that an employee whose wages are wrongfully withheld be made *whole* and that his recovered salary not be the source of payment for his attorney's services. The sole limit placed on the fees the wronged employee may be awarded under the Wage Act is that the fees be "reasonable."

The Legislature also must have regarded the phrase "of any nature" to have an important meaning. We cannot assume the highly unusual phrase was included by accident. The only possible reason for its use is that the Legislature intended to give a plaintiff *whatever* fees the employer's conduct during the pendency of the case caused the plaintiff to incur. Just as plaintiffs' attorneys should not be allowed to dip freely into an employer's deep pockets for *unwarranted* fees, so should defendants' attorneys not be permitted to "paper to death" a plaintiff/employee with false defenses and sham counterclaims so as to force him or her to choose between fighting for recovery of wages earned or spending more than the potential recovery for litigation fees.

Regarding the phrase "of any nature" in the Wage Payment Act, Plaintiffs correctly point out that the word "any" is used in the English language to expand, not to restrict. The case which construes the Hawaiian wage claim statute mentioned earlier, is in accord with this view.²

Surely the Legislature recognized that attorneys for defendants can be as creative in their efforts to discourage plaintiffs from pursuing their claims as attorneys for plain-

tiffs can be in generating excessive fees when a statute provides for recovery of such fees. In drafting the Wage Act, the Legislature limited a successful plaintiff's fee award to those that were "reasonable," thereby addressing the possible excesses of counsel for both sides: plaintiffs' attorneys who might be tempted to pad the bill with excessive or unnecessary fees (such as charging for hours of research on an issue that is fairly elementary and which would merely require a 30-minute update of the state of the law), as well as defendants' attorneys who file frivolous defenses and unprovable counterclaims in an effort to bully the cheated employee into giving up his claim for wages earned. Where a *defendant's* strategy and tactics require more work on behalf of a plaintiff than the norm, the Legislature's use of "reasonable" and "of any nature" would indicate that fees for that extra work would and should be included in the mandatory award. This is consistent with the holding of the Pennsylvania Supreme Court in *Oberneder*.

Defendant cited the case of *Neal v. Bavarian Motors, Inc.*, 882 A.2d 1022 (Pa.Super. 2005) in support of its contention that Plaintiffs *must* apportion some of their fees to the counterclaims. However, *Neal* does *not* involve the Wage Act. In *Neal*, unlike the instant case, the plaintiff had stated *several* causes of action, all arising from the same underlying facts. Only one of those causes of action, under the Unfair Trade Practices and Consumer Protection Law (UTP/CPL), 73 P.S. §201-1, gave rise to the possibility of counsel fees. The other causes of action that plaintiff in *Neal* had asserted would require that plaintiff pay her own counsel fees (absent sanctionable conduct by Defendant or Defendant counsel under 42 Pa.C.S.A. §2503). *Neal* does not address at all the issue raised here, whether the fees incurred in addressing a *defendant's* spurious and purely tactical counterclaims are awardable *under the Wage Act*.

Lastly, we also note the significance of the Legislature's inclusion of officers and directors of a corporate employer who have decision-making roles as being *personally* liable for the corporation's failure to pay wages.³ Ordinarily the officers and directors of a corporation would be shielded from such personal liability except in the most extraordinary circumstances involving abuses of the corporate form. The fact that personal liability was included at all in the Wage Act is indicative of how strongly the Legislature felt about the unjustified withholding of wages earned. This is a statute for the benefit of employees, designed to strike fear into the hearts of those real human beings who fail to pay their workers the wages earned, whether they act on their own behalf or on behalf of a corporation.

2. Plaintiffs are entitled to the full amount of the counsel fees for trial without deduction for Defendant's Counterclaims which were not pled in good faith, raised the same issues as were raised by its Answer and were merely a frivolous attempt to discourage Plaintiffs from pursuing their valid Wage Act claims.

As mentioned earlier, the Pennsylvania Supreme Court has held that even a finding of a good-faith dispute does not preclude or limit an award of counsel fees *under the Wage Act*. See *Oberneder, supra*. However, the issue of bad faith vs. good faith was nevertheless important to the Superior Court in the instant case, and its belief in Defendant's good faith appears to have been an important reason why the case was remanded. As previously indicated, we had concluded, without clearly explaining, that the separation of fees attributable to the Counterclaims was unnecessary because the Counterclaims were merely a bad faith re-casting of Defendant's equally spurious defense. In our Opinion dated October 20, 2006, for the first appeal, we described this sim-

ply as being "inextricably intertwined."

We have already pointed out that Defendant's *defense* to Plaintiffs' Complaint was that Plaintiffs had engaged in "unfair competition and unfair trade practices." A review of the pleadings of Defendant's Counterclaims shows that, after incorporating its answers to the allegations of the Plaintiffs' Complaint, Defendant alleged the following in support of its Counterclaim:

1. That Plaintiffs while employed by Defendant "failed to use their best efforts in furtherance of their employer's business." (§39)
2. That "Plaintiffs accepted employment with [another bank] while still in the employ of [Defendant], thereby failing to use their best efforts for the benefit of Citizens." (§40)
3. That "Plaintiffs, while employed by [Defendant], took confidential and proprietary information in the form of customer lists and customer account information to use for the benefit of [the other bank]." (§41)
4. Under Count I of the Counterclaim, that those "customer lists and customer information constituted a 'trade secret' under the Laws of the Commonwealth of Pennsylvania." (§44)
5. That as a result of these acts and others, Defendant "*suffered harm...including but not limited to, the loss of customers and the revenue generated therefrom.*" (§49)
6. Under Count II of the Counterclaim, that "Plaintiffs owed a fiduciary duty to protect the confidential and trade secret information of their employer, [Defendant]." (§52)
7. That the fiduciary duty "survived the termination of their employment with [Defendant]." (§53)
8. That they breached that duty by taking and using the "trade secrets" described in Count I.
9. That Defendant suffered *the same harm as set forth in Count I*.
10. Under Count III, that Plaintiffs "acted with a common purpose to take and use [Defendant's] confidential and trade secret information for [their own] benefit and to the detriment of [Defendant]."
11. That as a result, Defendant suffered *the same harm as set forth in Count 1*.

In its Answer to ¶4 of the Complaint, Defendant stated "It is specifically denied that there were no restrictions or limitations on Ambrose's activities after termination of separation from Citizens, *as the laws of the Commonwealth prohibit acts of unfair competition and unfair trade practices.*" This portion of the Answer raised in *defense* of Plaintiffs' Complaint is also the chief basis for its Counterclaim, as outlined above, which required the same evidence and inquiry as the defense proffered in support of paragraph 4 of its Answer. Certainly as to Ambrose, and by implication, as to Kramer, Plaintiffs' counsel would have been remiss if she had not dealt with that part of the defense proffered by Defendant in its own pleadings. She is entitled to all the fees charged.

Defendant's contentions regarding counsel fees, at best, depend on the non-spurious nature of its Counterclaims. By the conclusion of the trial, it was clear that Defendant's contentions in its Counterclaims were frivolous and untruthful

and made solely for the vengeful purpose of discouraging Plaintiffs' pursuit Wage Act claims. The evidence showed the Counterclaims were bereft of merit *ab initio*. The evidence showed that Defendant, through its various employees, officers, and principals, had no good faith reason to withhold Plaintiffs' earnings and further showed that Defendant had no *truthful* basis for its refusal to pay, whether stated as a defense or as a counterclaim. Furthermore, Defendant's evidence of its alleged damages was more than woefully insufficient, it was *nonexistent*. Yet all counts of the counterclaim cited the same harm, "loss of customers and the revenue generated therefrom." This should be conclusive as to the bad faith of Defendant in filing any counterclaim at all. Had this been a jury trial, the remaining Counterclaim would not even have been submitted to the jury since the indispensable element of harm was supported by no evidence, as discussed immediately below.

Defendant's *only* exhibit dealing with the money damages it supposedly suffered was Exhibit H. That exhibit contained only transactions for 2003 by customers who in 2004 were alleged to have followed Plaintiffs to their new location; there was no testimony, nor even argument, to suggest how the 2003 transactions while Plaintiffs were still at the bank would be a measure of Defendant's losses during the *relevant* period of 2004 or later. In fact, when Defendant's sole witness with knowledge (Pamela Howryla) was expressly asked how the 2003 transactions would translate to the 2004 time period, she admitted there was no way to do that. For the convenience of the reader, we have included below substantial excerpts from the testimony of Defendant's CEO, Donald Shamey, and Pamela Howryla, which relate to the element of harm; emphasis has been added to some portions of their testimony:

Direct testimony of Donald Shamey, CEO of Defendant since 2001, on direct examination by Defendant's attorney.

Counsel for Defendant: What did you do when you were made aware that these letters, such as Exhibit 5, were being sent to Citizens customers?

Mr. Shamey: I contacted legal counsel.

Counsel for Defendant: What action did the bank take in response to these letters specifically, if any?

Mr. Shamey: Again, I believe we contacted legal counsel and legal counsel's advice was to send a letter to Nat City suggesting that that was not a permissible thing to do.

Counsel for Defendant: What action, if you know, did the bank take with respect to contacting its customers in the time period immediately after the resignation of the plaintiffs?

Mr. Shamey: Well, we felt certainly a responsibility to let our customers know that Mr. Ambrose and Mr. Kramer had left and we were notifying them that they would be assigned a different rep from the bank to handle their accounts.

Counsel for Defendant: Did you request or did the bank undertake to track customers and accounts – customers lost and accounts moved during this immediate

time period after the departure of the plaintiffs?

Mr. Shamey: Yes, we did.

Counsel for Defendant: And as a result – strike that. What did you request be done?

Mr. Shamey: Well, we requested that we track where these accounts went, whether they actually went to Mr. Ambrose or Mr. Kramer, whether they went elsewhere, not staying with the bank and not going to Mr. Ambrose and Mr. Kramer, they are just lost to all of us. Which stayed without a registered rep assigned to them, these so-called house accounts of Commonwealth, and then which stayed with Citizens National Bank.

Counsel for Defendant: Who did you direct to do this?

Mr. Shamey: Pamela Howryla.

Counsel for Defendant: Let me show you what has been marked as Defendant's Exhibit H and ask if you recognize that document?

Mr. Shamey: Yes, I do.

Counsel for Defendant: Can you tell the Court what it is?

Mr. Shamey: This is, in fact, the accounting of the various accounts that were transferred to Mr. Ambrose and Mr. Kramer or transferred out to others. We had some that were unknown and then, of course, what the total of lost commissions were as a result of that.

Counsel for Defendant: And, again, was this compiled by Ms. Howryla?

Mr. Shamey: Yes.

Counsel for Defendant: And presented to you at some point?

Mr. Shamey: Yes.

Counsel for Defendant: What actions, if any, did you take with respect to this document?

Mr. Shamey: What actions?

Counsel for Defendant: Yeah. Did this – did the document cause you to undertake any further action?

Mr. Shamey: Well, this – as a result of this – and this was updated periodically – I figured that was a reason for us to file a counterclaim in this suit.

Counsel for Defendant: So if we look at Exhibit H, the front page is – is the front page kind of –

Mr. Shamey: Summary.

Counsel for Defendant: -- a summary?

Mr. Shamey: Yes.

Counsel for Defendant: Fair enough. With respect to the accounts that

went to Mr. Ambrose and Mr. Kramer, it looks like 52 accounts went that had a total commission in - strike that.
Do you know what year these numbers would reflect?

Mr. Shamey: This would have been commission earned in 2003 on these accounts.

Counsel for Defendant: Okay. Obviously you wouldn't have had 2004 numbers for accounts that were no longer being -

Mr. Shamey: That's correct.

Counsel for Defendant: So in 2003, the 52 accounts that left to go to Mr. Ambrose and Mr. Kramer generated \$63,245.37?

Mr. Shamey: That's correct.

...

Counsel for Defendant: With respect to trans - accounts that were transferred out to others, do you know what we're talking about others? Is this other brokerage, other registered reps outside of Citizens?

Mr. Shamey: That would be outside of Citizens and outside of Mr. Ambrose and Mr. Kramer.

Counsel for Defendant: Okay. And that number was 45,100.90 generated by 17 accounts?

Mr. Shamey: That's correct.

Counsel for Defendant: And unknown is 19,273 related to 50 accounts?

Mr. Shamey: Yes.

Counsel for Defendant: And the unknown, as you were advised, refers to accounts that were house accounts?

Mr. Shamey: I think those were accounts that they did not know the final disposition.

The Court: "They" being?

Mr. Shamey: I'm sorry, our securities area.

Counsel for Defendant: Ms. Howryla?

Mr. Shamey: Ms. Howryla did not know the position of those accounts.

Counsel for Defendant: And obviously the total 127,619.37 related to 119 accounts?

Mr. Shamey: Correct.

(Trial Transcript, Vol. III, pp. 214-218, emphasis added.)

Testimony of Pamela Howryla, Defendant's Wealth Management Coordinator (on cross-examination by Plaintiffs' attorney).

Counsel for Plaintiffs: Now, Exhibit H, this is merely a snapshot of what happened with those accounts in 2003, correct?

Ms. Howryla: Commission-wise, yes.

Counsel for Plaintiffs: Commission-wise. And for that same number to be generated in say 2004, 2005, you would have to have the same number of new accounts, new

commission and the same amount of recurrent commission, correct?

Ms. Howryla: Correct.

Counsel for Plaintiffs: And so there's no way to be able to accurately predict. For example, the new commission might drop significantly and the recurrent commission might be the only thing that stays static or -

Ms. Howryla: There's no way.

Counsel for Plaintiffs: There's no way to predict it?

Ms. Howryla: No.

Counsel for Plaintiffs: And that's not an average of what has happened over the past [four to five] years or merely a snapshot of 2003?

Ms. Howryla: Right.

(Trial Transcript, Vol. III, pp. 408-409, emphasis added.)

The above testimony contains *no* proof of harm, and Defendant presented *no* additional evidence beyond that presented as to Plaintiffs' claim to make out any other of the elements of its counterclaims.

We also note that the "2004 numbers" for the accounts allegedly taken wrongfully by Plaintiffs was *discoverable* had Defendant cared to follow up. A review of Defendant's Discovery requests reveals no efforts to ask for such information. See e.g. Subpoenas Duces Tecum filed May 3, 2005, and directed to each Plaintiff. Even the narrative portion of Defendant's Pre-Trial Statement omits any mention of Defendant's Counterclaims. Defendant itself spent little or no effort to prove its Counterclaims; this is further support for our conclusion that they were a patent sham.

3. Although no express finding of bad faith was made, the implication of bad faith is clear from our contemporaneous Memorandum.

Our prior allusions to Defendant's bad faith conduct are discussed below, chiefly to counter the suggestion that we only recently reached our finding rather than having made it tacitly during the course of deciding the case.

In the Memorandum in Support of Order entered December 22, 2005 (hereinafter, "the First Memorandum"), filed after the non-jury trial was concluded, we noted that we were incorporating most of Plaintiffs' proposed findings of facts and conclusions of law and further noted that our own discussion, which followed, would duplicate many of those proposed findings. We even specified which findings were not incorporated. We then gave our own narrative findings of fact and conclusions of law related to the Wage Act claim and directed the parties to follow our usual procedure for handling the issue of the *reasonable* amount of counsel fees.

Footnote No. 1 on page 2 of the First Memorandum referred to the Court's finding regarding Defendant's apparent view of its arrangement with the Plaintiffs:

At times it seemed that Defendant's arguments suggested that this arrangement was an avoidance of the federal regulations and that the Court should therefore look at the real intent of the deal, which from Defendant's point of view was chiefly to allow Defendant to sell securities and earn a commission from doing so. The Court cannot countenance such an approach, of course.

This was the first hint to the reader that the Court considered Defendant's conduct to be less than honest. Defendant, in fact, took umbrage at the footnote and professed bewilderment, demonstrating that it understood the Court was alluding to bad faith on Defendant's part. (See Defendant's Brief in Support of Post Trial Motions, p. 3.) This is not, however, the only example of Defendant's tendency to disregard any law or principle that is not compatible with its desires.

The next mention of a finding that relates to the unstated finding of bad faith on the part of Defendant is found on pages 3 and 4 of the First Memorandum:

Ambrose accepted the new arrangement and was paid in accordance with Plaintiff Exhibit 3A for 2001 and 2002. His rough computations and those of Mr. Haines showed each of them that Ambrose did not generate enough commissions to earn the incentive part of his 2001 or 2002 salary, so the matter was a non-issue. However, in 2003 the Oberg 401(k) Plan switched its investments to Commonwealth, generating substantial commissions for Commonwealth and also a substantial increase in Commonwealth's payments to Defendant. As a result, Ambrose did earn the incentive portion of his wages in 2003. *Defendant, however, did not want to pay Ambrose what he had earned.*

When Haines realized that Ambrose would be owed that 2003 payment, he belatedly tried to get Ambrose to sign the Non-Solicitation Agreement that he had presented for the first time a year or so earlier (after an OCC audit revealed that none of Defendant's employees had signed such agreements)¹. The Agreement presented to Ambrose in late 2003 or early 2004 is in evidence at Plaintiff Exhibit 1. During this time (2001-2003) a consultant, Mr. Dorsett, had been evaluating Defendant's various operations and by the end of 2003 rumors were spreading about reorganization plans. Mr. Haines did not offer any new consideration in late 2003 for the Non-Solicitation Contract and he had not previously made it a condition of the salary and incentive proposal Ambrose accepted for 2001 and which remained unchanged for 2002 and 2003.

¹These do not seem to be required by any federal regulations. The auditors just relayed their observations.

(Emphasis added.)

In other words, Defendant tried to change its agreement with Plaintiff Ambrose as soon as Ambrose became entitled to payment. Defendant's insistence through trial and two appeals that this was *justified* is reprehensible and demonstrates its unrepentant bad faith. (See, e.g., Defendant's Statement of Matters Complained of on Appeal, Item No. 6.)

Defendant's bad faith was not limited to Plaintiff Ambrose, but also was directed at Plaintiff Kramer. As stated on pages 4-5 of the First Memorandum:

However, unlike the discussion with Ambrose regarding Plaintiff Exhibit 3A, where the issue of a Non-Solicitation Contract was never raised, it was raised with Mr. Kramer. Mr. Kramer was willing to consider signing one if there were appropriate carve-outs for Kramer's prior customers, referrals from those customers, and referrals from Kramer's "centers of influence," such as certain lawyers and accountants who were referral sources to Kramer.

Defendant never followed up on this and never presented Kramer with an appropriate draft agreement. Kramer then worked for Defendant for approximately 18 months before Mr. Haines asked him to sign an inappropriate form draft of a Non-Solicitation Contract. (Plaintiff Exhibit 1.)

(Emphasis added.)

Keep in mind that, as one of its defenses to the Wage Act claims, Defendant maintained that the reason Plaintiffs were not entitled to the commissions at issue was that they failed to sign a non-solicitation agreement that was *nonexistent*. Plaintiffs therefore had to demonstrate to the Court that the non-solicitation agreement alleged by Defendant did not exist at all.

Another finding contained in the First Memorandum and indicative of Defendant's bad faith is found at pages 5-6:

It should be noted that Defendant appears to have retained possession of the Commonwealth customers' files, which Plaintiffs, and especially Ambrose, were required to maintain under their agreements with Commonwealth as well as under certain securities regulations. *Defendant has no right, under either the contract with Commonwealth or any securities regulations to retain those confidential customer records.*

(Emphasis added.) In fact, Defendant was *prohibited* by law from engaging in the securities business at all – that is why Plaintiffs were hired in the first place to run a Commonwealth office on Defendant's premises. Yet Defendant chose to break the law by retaining Commonwealth customers' files, rather than turning them over to Plaintiffs and Commonwealth. This is conduct typical of a petulant child. Since Defendant is presumed to be a fictitious *adult* person, such conduct meets the definition of bad faith.

4. Plaintiffs' counsel fees were also awardable under 42 Pa. C.S. §2503.

The courts generally look at counsel fees claimed to be sure a plaintiff's attorney has not inflated them. That is indeed *one* aspect of reasonableness. In the instant case, we see another factor to be considered – a defendant employer's strategy of asserting sham defenses and counterclaims that are violative of 42 Pa.C.S.A. §2503(6), (7) and (9) because they have no good faith basis but are intended only to discourage the employee from continuing with his or her claim.

§2503. Right of participants to receive counsel fees

The following participants shall be entitled to a reasonable *counsel fee* as part of the taxable costs on the matter:

....

(6) Any participant who is awarded counsel fees as a sanction against another participant for violation of any general rule which expressly prescribes the award of counsel fees as a sanction for dilatory, obdurate or vexatious conduct during the pendency of any matter.

(7) Any participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter.

....

(9) Any participant who is awarded counsel fees because the conduct of another party in commencing

ing the matter or otherwise was arbitrary, vexatious or in bad faith.

Even without an express finding of bad faith, it was evident from our First Memorandum that the Court regarded Defendant's handling of every aspect of the case from the beginning dilatory, obdurate, vexatious, and in bad faith, under 42 Pa.C.S.A. §2503(6), (7) and (9).

5. All of Plaintiffs' counsel fees were for work done under the Wage Act and were reasonable in the circumstances.

As previously discussed, Defendant had *no* legitimate defense and was not *truly* pursuing *any* counterclaim. All its pleadings, all its tactics, indeed its entire strategy had one goal – to bully Plaintiffs into giving up the pursuit of their wage claims.

Defendant's position was without any justification – every reason it gave for not paying Plaintiffs' wage claims was a pretense, made up of whole cloth. This was not a case where Defendant and Plaintiffs had a good faith difference of opinion as to the significance of certain events. This was a case where Defendant took positions that had no evidentiary basis. Defendant's defenses were shown at trial to be *fictional*. The Court rarely is subjected to such blatant disregard for truth by witnesses under oath.

Furthermore, Defendant itself never took seriously the *merits* of its counterclaims; rather it dropped two at the last minute and failed to produce evidence, credible or not, as to the crucial element of harm, for the one that remained. In Defendant's own closing there is *no* mention of an *amount* for its supposed counterclaim, with reason: there was *no evidence* to suggest any dollar figure for the alleged harm, indeed, there was barely an attempt by Defendant to adduce such evidence. Everything in the trial boiled down to Defendant's naked refusal to pay Plaintiffs' wages. Nothing was truly related to the supposed setoff.

Lawyers well know that it is rarely easy to demonstrate that contentions are untrue. Intense discovery is often the only way to find the smoking gun. With less diligent attorneys Plaintiffs might not have been able to show how totally meritless Defendant's defenses were. Had Plaintiffs themselves been easily intimidated they might not have been able to persist and would have given up claims that were otherwise unassailable.

6. Application of the §503 factors does not require that the amount of counsel fees be solely dependent on the size of the underlying claim where the Wage Act is involved.

In the Opinion that accompanied the remand, the Superior Court discussed another attorneys' fee provision, at 41 P.S. §503. Section 503, according to the Superior Court, addresses “two competing concerns – the legislature's intent to make the pursuit of certain rights economically feasible to consumers [and, by analogy, to wage-earners] and *mitigating the threat that overzealous attorneys would exploit statutory provisions that allow for the recovery of attorneys' fees.*” Super. Ct. Slip Opinion (September 27, 2007) at page 13, emphasis added.

In the instant case, the trial court's unstated but implicit finding was that *Plaintiffs'* counsel did not “exploit” the Wage Act's fee provision. Rather, *Defendant* caused Plaintiffs to incur the legal bills at issue by filing a baseless defense and a duplicative and duplicitous counterclaim that were bereft of evidentiary support, were filed in bad faith, were pursued in bad faith, and were dilatory and vexatious.

On remand we were directed in the alternative to apply §503, taken from the state usury laws. We believe our expla-

nation that the Wage Act makes the counsel fees here mandatory renders the alternative direction on remand moot. However, in the event we misunderstood the scope of the remand, we will discuss those factors. The factors in §503 are not markedly different from those that were previously applied, but without discussion:

- (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to conduct the case.
- (2) The customary charges of the members of the bar for similar services.
- (3) The amount involved in the controversy and the benefits resulting to the client or clients from the services.
- (4) The contingency or certainty of the compensation.

Although, in effect, we did apply the four §503 factors in our initial evaluation of the fees awardable, we did not discuss them, even perfunctorily, because the other issues (which Defendant later waived on appeal) seemed to need more attention, being matters of law rather than matters of legislative mandate and judicial discretion or matters of fact and credibility. We will discuss the four factors now.

(i) Defendant conceded that the actual time and labor spent (Factor 1, above) was appropriate for the Wage Act Claims and the Defendant's Counterclaims. Defendant also stated that it had no objection to the rates charged by Plaintiffs' attorney (Factor 2, above).

Defendant's admission that the time spent and hourly rates charged are *reasonable* has been discussed earlier at Topic No. 1. In addition, we note that Defendant never even attempted to counter Plaintiffs' contention that *all* fees were related to the Wage Act claim by showing the Court how the work *could* be separated. Defendant also argues that *Plaintiffs* have the burden of separating out their fees for the Counterclaim. However, the burden of producing *contradictory* evidence would shift to Defendant.

Plaintiffs sustained their burden of proving that *all* their counsel fees were attributable to attacking the Defendant's Answer and duplicative Counterclaims. Defendant made no attempt to show the Court *how* the trial fees *could* be separated out and continues on remand to argue that Plaintiffs must do that work and that it, Defendant, has *no* duty to *produce* evidence. As we said, Defendant is correct about not having the ultimate burden of proof, but Defendant is wrong when it contends that it need not put forth its own calculation of an appropriate allocation.

The “Burden of Production in Civil Cases” is discussed clearly in §322 of Pennsylvania Evidence, 2nd Ed., by Leonard Packel and Ann Bowen Poulin. Packel and Poulin cite the Pennsylvania Supreme Court for the longstanding proposition that

[T]he “burden of proof” rests throughout the trial on the party affirming the facts in support of his case against a defendant, while the “burden of coming forward with evidence” may shift from side to side during the progress of the trial.

In other words, Defendant complained on appeal that this Court erred when it failed to separate out the trial fees attributable to Plaintiffs' defense against Defendant's Counterclaim. Yet Defendant has not been able to break those

trial fees down either, even though Defendant *has* made an attempt, albeit unsuccessfully, to carve out some of Plaintiffs' appellate fees. (See Defendant's Brief on Remand, pp. 20-24.)

(ii) The "novelty and difficulty" aspect of Factor No. 1 is very strong.

Because Defendant had no real defense to Plaintiffs' claims, the case should have been easy, close to a slam-dunk. Nevertheless, counsel for Plaintiffs had to be able to *prove* the baselessness of Defendant's accusations that Plaintiffs were the breaching parties. Defendant's choice of defense, indeed its choice *to* defend, is what made this case difficult and costly. Plaintiffs not only had to prove their claims (easy), they had to be able to prove that Defendant's defense and counterclaims were a mere tactic without merit (much more time consuming). Once the defense was shown, as it was, to be a sham, the remaining counterclaim was revealed to be equally false. The *effort* of Plaintiffs' counsel was necessary primarily to respond to Defendant's sham defense; that her effort also disposed of the sham counterclaim was serendipitous. In any case, Defendant created the difficulty by *pleading* things it had to know it could not *prove*.

(iii) As to Factor No. 3, the amount involved was large to each Plaintiff and the benefit each received was two-fold.

As a result of their counsel's skill and persistence, Plaintiffs were finally paid their wages and a bullying employer with little regard for the truth was not allowed to intimidate them into surrender. The Legislature intended exactly this result when it included the mandatory award of counsel fees in the Wage Act.

(iv) While Factor no. 4 seems to refer to whether there was a contingency fee arrangement with the client or an hourly one, it would also involve the legislative goal of the statute at issue.

Factor 4 probably is intended to address a large contingency fee that results from a small amount of work. Here, given Defendant's choice of defense and its strategy and tactics, it was clear that even a 100% contingency fee would not cover the legal work necessary to disprove Defendant's contention that Plaintiffs were the breaching party and were not entitled to the incentive pay earned. Does this mean that Plaintiffs should have given up and gone home? The public policy reason for the mandatory attorneys' fee provision in the Wage Act was based on situations like this. The Pennsylvania Legislature has determined that persons such as Plaintiffs should be given the power to recover *all* wrongfully withheld wages from a vengeful employer, without having to reduce their recovery by the counsel fees incurred, so long as those fees were reasonable in the circumstances.

7. Plaintiffs' attorneys fees under the Wage Act for Plaintiffs' Response to Defendant's Appeal and for this remand are also fully awardable because Plaintiffs' appeal was successful on the merits.

Defendant continues to insist that attorneys' fees under the Act are limited to those incurred *at trial*. Defendant bases this on a supposedly literal reading of the Wage Act and an insistence that the word "action" applies only through the trial. We reject this argument as being contrary to the overwhelming authority that an appeal is a post-trial continuation of the action. See *Seibel v. Paolino*, 249 B.R. 384 (Bankr. E.D. Pa. 2000).

Defendant also contends that Plaintiffs' appeal was not successful. To the contrary, as to the merits of their Wage Act claim, Plaintiffs were completely vindicated on appeal. In addition, Plaintiffs' defeat of Defendant's counterclaims was

also upheld on appeal. The only issues remanded were the recalculation or better justification of Plaintiffs' trial counsel fees and the *calculation* of an appropriate amount of counsel fees for the appeal, and, implicitly, for the remand.

Defendant was "successful" regarding the question of allocation of counsel fees only because the undersigned had been too circumspect in its earlier Memoranda and Opinion about the issue of good faith vs. bad faith. Defendant itself did not and presumably could not object either to the amount of time Plaintiffs' counsel spent nor the hourly rates charged for the entire trial. This is virtually an admission that, if the counterclaim is a sham, as we found, then the entire amount is awardable and *nothing* is allocable to the counterclaim.

The Superior Court had refused to deal with all but four of Defendant's nine issues because of Defendant's noncompliance with Pa.R.A.P. 2116(a). Plaintiffs, of course, would have had to prepare for all nine issues. The four issues that were considered on appeal were stated as follows:

1. Did the trial court err in ruling that the Appellant must prove that customers are exclusively Appellant's customers in order to enforce any contractual and common law protections against Appellees' copying of customer information and soliciting customers?
2. Did the trial court err in ruling that the Appellees' status as securities brokers relieved them of their contractual and common law obligations not to make use of Appellant's customer list and to not solicit Appellant's customers?
3. Did the trial court err in awarding Appellees \$152,040.79 as reasonable attorneys fees in this Wage Payment Collection action where compensatory damages of only \$72,105.39 were awarded?
4. Did the trial court err in failing to make any distinction between attorneys fees related to the wage payment claims and fees related to defending Appellant's claim against the Appellees?

Superior Court Opinion at pages 6-7.

In order to determine what the remaining five issues were that Defendant waived, we look to Plaintiffs' Brief on Remand, pp. 22-23, and Defendant's Rule 1925 Statement, filed with the trial court, of only eight matters. It appears that the remaining five issues which were held to have been waived, but for which Plaintiffs would have had to have prepared, must have involved the following:

Issues 5 and 6: Whether expert fees were erroneously awarded as part of the Wage Act counsel fees. WAIVED.

Issue 7: Whether Plaintiff Ambrose had rejected the offer of incentive wages which he was nevertheless awarded under the Wage Act. WAIVED.

Issue 8: Whether Plaintiff Kramer was not eligible for incentive wages because he never signed a non-solicitation agreement. WAIVED.

Issue 9: Whether the trial court erred in barring Defendant's expert's testimony. WAIVED.

The Superior Court's Opinion states that "[t]he first two issues raised by [Defendant] constitute challenges to the trial court's finding that appellees did not engage in unfair competition, breach their fiduciary duties, or engage in an illicit conspiracy by informing customers from Commonwealth's account list that they would be leaving to work for a competitor." (Slip Opn, p. 7, emphasis added.) The Superior Court ruled *against Defendant* on those issues. The only dispute that remains in question on remand is *ancillary*

to Plaintiffs' action: the *amount* of counsel fees which Defendant owes under the Wage Act. Plaintiffs' *right* to counsel fees under that Act was affirmed and is not an issue on remand.

The *amount* of fees for the appeal that should be *added* to the amount attributable to the trial of Plaintiffs' wage claims has been left to this trial court to decide. A review of the affidavits and briefs on this issue revealed that Defendant's arguments that appellate fees are not awardable under the Wage Act is without merit and is a continuation of its frivolous, vexatious, and bad faith conduct previously discussed at length.

8. Plaintiffs' attorneys' fees related to Defendant's appeal of decision concerning execution and the belated posting of an appeal bond are also fully awardable.

The Rules of Court grant an automatic *supersedeas* to any appellant who posts the appropriate amount of security to assure that the appellee will not be harmed during the pendency of the appeal by its inability to execute on the judgment. This is an integral part of the appeal itself. Defendant sought to avoid execution without providing the necessary bond. It sought an unfair advantage over Plaintiffs during the pendency of the appeal. The fees Plaintiffs incurred to overcome this frivolous tactic were awardable.

9. Defendants' inclusion in its Statement of its objection to expert witness services is improper, and may have been inadvertent, as that issue was finally decided in the first appeal.

We previously listed the issues raised by Defendant in its earlier appeal. See Topic 7 of this Opinion, above. Among those issues raised by Defendant in its first appeal and held to have been waived is the issue of "expert witness services." This issue has again been raised, perhaps inadvertently, in item no. 4 of Defendant's current Statement of Matters Complained of on Appeal. Since it has already been *finally* decided by the Superior Court, we have no need to discuss it further.

CONCLUSION

In the trial and appeal, Plaintiffs' attorney did nothing that was not necessitated by Defendant's tactics in asserting spurious defenses and duplicative and equally spurious counterclaims *for which Defendant had no proof*. Although Defendant acted in bad faith, that is immaterial since under the Wage Act, even *good* faith will not excuse an employer from withholding wages earned.

We properly awarded Plaintiffs all the counsel fees incurred for the appeal, this remand, and the execution proceedings as well as for the trial. Defendant does not object to either the time spent nor the hourly rate charged. There was no error in awarding fees that are undisputedly reasonable for *all* the work done, since *all* the work done was to prosecute Plaintiffs' claims under the Wage Act and to destroy Defendant's sham defense duplicated by its spurious counterclaims.

BY THE COURT:
/s/ Friedman, J.

¹ This had not been addressed prior to remand, but, given the direction of the remand that we make a careful analysis, we gave counsel an opportunity to weigh in on the meaning of the phrase.

² *Nelson v. University of Hawaii*, 99 Hawaii 262, 54 P.3d 433 (2002).

³ See 43 P.S. §260.2a, definition of employer, and *Hirsch v. EPL Technologies, Inc.*, 910 A.2d 84 (Pa.Super. 2006).

**Gustine Uniontown Associates, LTD., et al. v.
Anthony Crane Rental, Inc., et al. v.
Gustine Uniontown, Inc., et al.**

*Settlement—Joint Tortfeasor—Attendance at Trial—
Preliminary Objections*

1. Plaintiff, owner of shopping center, sued more than one dozen defendants following construction of the shopping center when the earth moved causing severe damage to the buildings, parking areas, and sidewalks. The parties that Plaintiff sued joined other entities as additional defendants. Plaintiff and GeoMechanics entered into a *pro rata* joint tortfeasor release after which GeoMechanics presented a motion to amend its answer and new matter to assert release to which there was no opposition. GeoMechanics also presented a Motion to Excuse Attendance at Trial which is the subject of this Opinion and Order of Court. GeoMechanics recognizes that it continues to be a party to the lawsuit. Pennsylvania rules governing discovery apply to GeoMechanics as well.

2. Under settled Pennsylvania law, nonsettling defendants may pursue pending claims against a settling defendant based on allegations that the settling defendant is a joint tortfeasor.

3. If a settling defendant is ordered to have counsel present throughout the trial, in all likelihood counsel will not participate, thus the proceedings may be even more confusing for the jury than if counsel for the settling defendant is not present.

4. There is no Pennsylvania appellate case law directly addressing the issue of whether a court may compel a settling defendant to be present throughout the trial of the plaintiff's claims against the nonsettling defendant(s), just as there is no case law addressing the issue of whether a defendant who did not settle can be compelled to be present at trial.

5. Even assuming that a court has the authority to compel a party to be present at trial, there is no justification for the adoption of a rule compelling a settling defendant to attend a trial in which it has no interest in the outcome of the case.

(William R. Friedman)

Edward B. Gentilcore for Gustine Uniontown Associates, LTD., a Pennsylvania Limited Partnership, by and through Gustine Uniontown, Inc. General Partnership.

Jeffrey S. Proden and *Daniel D. Taylor* for Anthony Crane Rental, Inc. and Penn Transportation Services, Inc.

Chad A. Wissinger for Architectural Services Group, Inc.

Thomas J. Lowery for Construction Engineering Consultants, Inc.

Bethann R. Lloyd for GeoMechanics, Inc.

Chad A. Wissinger for Jabille Developments Corporation.

Rochelle R. Koerbel and *Robert Blumling* for Mascaro, Inc.

Steven P. McCloskey for McMillen Engineering, Inc.

William D. Clifford for P.C. Yezbak & Son, Inc.

Peter Newberry and *Jeffrey S. Proden* and *Daniel D. Taylor* for Penn Transportation Services, Inc.

Ray F. Middleman for Ruprecht, Schroeder, Hoffman Architects.

James B. Lieber and *John M. Tedder* for Additional Defendant, Gustine Uniontown, Inc.

David Raves for BSW Architects.

Kevin J. McKeon for Thor Concrete Construction, Inc.

No. GD 99-012166. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION AND ORDER OF COURT

Wettick, J., June 24, 2009—A Motion to Excuse Attendance at Trial filed by defendant GeoMechanics, Inc. is the subject of this Opinion and Order of Court. The issue which this Opinion addresses is whether a settling defendant is required to attend the trial of the plaintiff's claims against the defendants who did not settle.

This is a lawsuit brought by the owner of a shopping center built on land above a former coal mine. Following the completion of construction, the earth has moved causing severe damage to the buildings, parking areas, and sidewalks.

Plaintiff has brought tort and breach of contract claims against more than a dozen defendants including GeoMechanics. Parties that plaintiff sued have joined other entities as additional defendants.

In February of 2009, plaintiff and GeoMechanics entered into a *pro rata* joint tortfeasor release. Subsequently, GeoMechanics presented a motion to amend its answer and new matter to, assert the defense of release. There was no opposition to this motion.

At the same time, GeoMechanics presented a Motion to Excuse Attendance at Trial that is the subject of this Opinion and Order of Court. This motion is opposed by certain defendants and additional defendants.¹

While many attorneys and judges believe that it may be reversible error for a judge to excuse a settling defendant from attending the trial, no one has cited, and I am not aware of, any authority that would permit me to require a party to be present throughout the trial.²

I begin with the situation in which there has been no settlement. The plaintiff is a passenger in a car driven by A that collides with a car driven by B. The plaintiff sues A and B. A files a crossclaim against B. Prior to trial, B sends a letter to the court stating that she will not be participating at trial. In this situation, there is no case law even hinting that a court may compel B to be present throughout the trial.

I know of no reason why a different result would be reached where B has chosen not to participate because she had settled with the plaintiff through a joint tort-feasor release and, thus, has no interest in the outcome of the case. The law favors settlements so, as an incentive to settle, a settling party should not incur any additional litigation expenses.³

Under settled Pennsylvania law, nonsettling defendants may pursue pending claims against a settling defendant based on allegations that the settling defendant is a joint tort-feasor. This is accomplished by continuing to include the settling defendant in the caption and by including the settling defendant as a defendant on the jury verdict slip in order that the jury may determine the issues of joint or sole liability. *Herbert v. Parkview Hospital*, 854 A.2d 1285 (Pa.Super. 2004).

I recognize that appellate court opinions addressing the issue of whether a settling defendant should remain on the jury verdict slip have framed the issue in terms of whether a court shall require "the continued participation at trial of a settling codefendant." See *Herbert v. Parkview Hospital*, *supra* at 1289 (emphasis added), where the Court said:

More recently, under the present formulation of the UCTA, this Court reaffirmed *Davis* in requiring the continued participation at trial of a settling codefendant. See *Nat'l Liberty Life Ins. Co. v. Kling P'ship*, 350 Pa.Super. 524, 504 A.2d 1273, 1276-77 (1986) (relying on *Davis*, and citing other cases from our Supreme Court, this Court, and the United States Court of Appeals for the Third Circuit.

Also see *Noecker v. Johns-Manville Corp.*, 513 A.2d 1014, 1018 n.5 (Pa.Super. 1986) (emphasis added):

FN5. Although we do not address appellant's claim, we wish to point out that the principle established by *Davis v. Miller*, 385 Pa. 348, 123 A.2d 422 (1956), *i.e.*, that a defendant settling on a *pro rata* release is required to participate in the trial so that its joint tortfeasor status can be determined and the reduction in the verdict be accomplished, has been reaffirmed in numerous cases. *E.g.*, *Slaughter v. Pennsylvania X-Ray Corp.*, 638 F.2d 639 (3d Cir. 1981); *National Liberty Life Ins. Co. v. Kling Partnership*, 350 Pa.Super. 524, 504 A.2d 1273 (1986); *Charles v. Giant Eagle Markets*, 330 Pa.Super. 76, 478 A.2d 1359 (1984).

This requirement of the settling defendant's continued participation at trial, discussed in the case law, refers only to the principle established by *Davis v. Miller*, 123 A.2d 422 (Pa. 1956), that the nonsettling defendant may keep the settling defendant in the case. In *Davis*, the three plaintiffs were passengers in an automobile driven by Richardson. *Id.* at 423. The Richardson car collided with a car driven by Miller. The passengers sued Miller alleging the accident was caused by his negligence. Miller filed a complaint joining Richardson as an additional defendant alleging that she was alone liable or jointly liable with him. Subsequently, Richardson obtained a release from Miller covering all claims Miller might have against her. Richardson also obtained releases of liability from the three plaintiffs. *Id.* at 423.

The trial court discharged Richardson from the case. Miller appealed. The Pennsylvania Supreme Court reversed. It stated that Miller was entitled to a determination of whether Richardson was a joint tort-feasor with Miller:

Therefore, although Miller cannot recover contribution from the additional defendant, he does have an extremely valuable right in retaining her in the case, because, if the jury should find her to be a joint tortfeasor, his liability to plaintiffs would be cut in half. Her continuance in the case is therefore necessary, even though no recovery can be had against her either by plaintiffs or by defendant, in order to determine the amount of damages that defendant may be obliged to pay plaintiffs in the light of the situation created by their releases of the additional defendant's liability. *Id.* 424.

The only issue addressed in *Davis* was whether Richardson's continuance in the case was necessary. The Court never said that Richardson must be present at trial. Consequently, subsequent case law based on the principle established by *Davis* is addressing only the question of whether the nonsettling defendant may retain the settling defendant in the case.

It appears to be the position of the nonsettling defendants that unless counsel for the settling defendant is required to be present at trial, a jury will not consider the contention of the nonsettling defendants that the evidence supports a finding that the settling defendant is solely liable, or at least partially liable, for the plaintiffs' injuries. I disagree.

Beginning with its opening instructions, the court will explain to the jury that this case involves the plaintiffs' claims against the defendants who are present to offer a defense and the defendant who is not present, and that it will be the responsibility of the jury to determine the percent of causal negligence of both the defendants who are presenting a defense and the defendant who is not doing so. In addition, counsel for the nonsettling defendants will advise the jury in their opening and closing statements that in deciding who is responsible for the accident, the jury

should take into account evidence that these defendants will offer (or did offer) showing that the defendant on the jury slip who was not present was solely, or partially, responsible for the accident. The defendants will also be describing (and will probably show to the jury) the verdict slip that includes the name of the defendant who was not present. Consequently, there is no reason to believe that the jurors cannot understand or will ignore the Court's instructions that the jury must allocate liability as to both the defendants who presented a defense and the defendant who was not present.

If a settling defendant is ordered to have counsel present throughout the trial, the proceedings may be even more confusing to the jury than if counsel for the settling defendant is not present. If the attorney for a settling defendant must be present at the counsel table throughout the trial, in all likelihood he or she will never participate. He or she will decline to open, will not cross-examine any witnesses, will not present any evidence, and will not make a closing argument. No explanation will be given to the jury by the court or by the other attorneys as to why the settling defendant's counsel did not present a defense.

In summary, there is no Pennsylvania appellate case law directly addressing the issue of whether a court may compel a settling defendant to be present throughout the trial of the plaintiffs claims against the nonsettling defendant(s), just as there is no case law addressing the issue of whether a defendant who did not settle can be compelled to be present at trial. The explanation for the lack of case law is that this is a nonissue because there is no authority by which a court may compel a party to expend its resources to be present at a trial at which that party has no interest in the outcome of the case. Furthermore, even assuming that a court has the authority to compel a party to be present at trial, there is no justification for the adoption of a rule compelling a settling defendant to attend a trial in which it has no interest in the outcome of the case.

For these reasons, I enter the following Order of Court:

ORDER OF COURT

On this 24th day of June, 2009, it is hereby ORDERED that:

- (1) GeoMechanics, Inc.'s Motion to Excuse Attendance at Trial is granted;
- (2) GeoMechanics, Inc. is not required to be present at any trial conducted in these proceedings;
- (3) for purposes of discovery, GeoMechanics, Inc. continues to be a party to this litigation; and
- (4) this court order does not prevent any party from calling GeoMechanics, Inc.'s representatives to testify as a witness at trial through service of a subpoena or a notice to attend.

BY THE COURT:
/s/Wettick, J.

¹ GeoMechanics recognizes that it continues to be a party in this lawsuit because of the outstanding cross-claims: Thus, the Pennsylvania rules governing discovery applicable to parties, apply to GeoMechanics.

² A corporation may not be represented by a person who is not an attorney. *Walacavage v. Excell 2000, Inc.*, 480 A.2d 281 (Pa.Super. 1984). Thus, if there is such a requirement, courts would be requiring corporations to hire attorneys to sit through a trial.

³ This case does not involve the situation in which the release between the plaintiff and the settling defendant provides that the settling defendant must participate at trial.

Commonwealth of Pennsylvania v. Morris Haley

*Court Interference with Defendant's Case-in-Chief—
Sequestration Violation—Sentencing Errors*

1. There is no merit to the allegation that the Court pressured defense counsel into presenting testimony from its investigator when there was no time to prepare. Defense counsel had many months to prepare and the investigator was a known witness.

2. The Court did not err in allowing two Commonwealth witnesses to remain in the courtroom during the trial. One witness was the first to be called to the stand by the Commonwealth and the second only testified in rebuttal regarding a collateral matter.

3. The Court did not err in imposing a sentence, which included one count above the sentencing guidelines, because the individualized facts of this case warrant such a sentence.

(Robert A. Crisanti)

Jennifer DiGiovanni for the Commonwealth.
Scott Coffey for Defendant.

No. CC-2006-8842 and CC-2007-1416. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

McDaniels, P.J., June 22, 2009—The Defendant has appealed from the judgment of sentence entered by this Court on May 13, 2008. A review of the record reveals that the Defendant has failed to present any meritorious issues for review and, therefore, the judgment of sentence should be affirmed.

The Defendant was charged with Rape,¹ Involuntary Deviate Sexual Intercourse,² Aggravated Indecent Assault,³ Incest,⁴ Statutory Sexual Assault,⁵ Rape of a Child,⁶ Indecent Assault of a Person under 13,⁷ Endangering the Welfare of a Child⁸ and Corruption of Minors.⁹ Prior to trial, the Aggravated Indecent Assault counts at CC 200608842 were withdrawn, and at the conclusion of trial, the Defendant's Motion for Judgment of Acquittal was granted as to the IDSI counts at CC 200608842. The jury returned verdicts of guilty at all remaining charges.

The Defendant appeared before this Court on May 13, 2008, at which time he was sentenced to an aggregate term of imprisonment of 32 ½ - 64 years. A timely Post-Sentence Motion was filed and was denied by this Court on June 11, 2008. His Motion to Reconsider was denied on June 21, 2005. This timely appeal followed.

1. Defense Investigator

The Defendant initially argues that this Court erred in "pressur[ing] defense counsel to present Investigator Jack Mullins in five minutes so there was no time to prepare." This claim is meritless.

At trial, the victim testified that the Defendant took her to several area hotels to have sex with her. The Commonwealth presented receipts showing that the Defendant paid for a room at each of two (2) hotels identified by the victims during the approximate time frames she identified. During his testimony, the Defendant attempted to explain the receipts by saying that he had been having an extra-marital affair with a woman named Natasha Murphy, and that the receipts represented trysts he and Ms. Murphy had had at various area hotels. On cross-examination, the Defendant testified that his investigator was in possession of numerous receipts (more than those introduced by the Commonwealth) for

those trysts. (T.T. p. 189).

Defense counsel then called investigator Jack Mullins. Mr. Mullins testified that he was only able to confirm those hotel visits for which the Commonwealth had introduced receipts. (T.T. p. 219).

The Defendant now asserts that this Court erred in forcing his counsel to present Mr. Mullins' testimony "in five minutes so there was no time to prepare." This claim is meritless.

Reference to the record reveals that the initial charges were filed in May, 2006 and trial did not commence until February 25, 2008. Although the Defendant was initially represented by another attorney, trial counsel appeared of-record in a Motion for Postponement on October 2, 2007. Inasmuch as the record reflects that counsel had many months to prepare for trial and further that Mr. Mullins was a known witness, there is no reasonable argument that this Court did not allow counsel time to prepare his testimony. The conduct of trial and timing of witnesses is within this Court's discretion, and this Court cannot be found to have abused its discretion in making efforts to keep the trial moving and stave off unnecessary delay.

The record suggests that the Defendant's true claim of error lies not with this Court's attempts to keep the trial moving, but rather with counsel's decision to call Mr. Mullins at all. Whether Ms. Phillips was ineffective for failing to properly prepare for Mr. Mullins' testimony, or for calling him at all, is a matter properly reserved for collateral review, *see Commonwealth v. Grant*, 812 A.2d 726 (Pa. 2002), and will not be addressed at this time. This claim must fail.

2. Sequestration

Next, the Defendant argues that the Commonwealth violated this Court's sequestration order by allowing two witnesses, the victim's mother and stepfather, to remain in the courtroom. Careful review of the record reveals that this claim is meritless.

Generally, "the question of sequestering witnesses is left to the discretion of the trial judge and [her] decisions in such matters will be reversed only for a clear abuse of discretion." *Commonwealth v. Bellacchio*, 442 A.2d 1147, 1152 (Pa.Super. 1982). With regard to rebuttal witnesses present in the courtroom for all or part of the trial, no error will be found when the witness' testimony is "limited in scope and of a nature that could not realistically be conformed to the testimony of a prior witness." *Id.*

Betty Gordon, the victim's mother, was the first witness to testify and per standard practice, was allowed to remain in the courtroom after her testimony had concluded. She did not take the stand again, and so this Court is at a loss to explain how her presence caused the Defendant prejudice.

The record further reveals that Reuben Gordon, the victim's stepfather, was not a witness for the Commonwealth's case-in-chief, but was called in rebuttal to offer extremely limited testimony regarding his presence at the children's custody exchanges with the Defendant. During his testimony, the Defendant testified that when he had visitation with his children (the victim and her younger sister, Tajah), he always took them together. (T.T. p. 170). On rebuttal, the Commonwealth called Mr. Gordon, who testified that he was the adult present at the custody exchanges and that the Defendant took the victim alone 90% of the time. (T.T. p. 228).

While certainly contrary to the Defendant's testimony, Mr. Gordon's testimony was extremely limited in scope and only peripherally related to the charges. He did not offer substantive testimony about the incidents of abuse and therefore his presence in the courtroom for the duration of trial did not preclude his rebuttal testimony. This claim

must fail.

3. Sentencing Issues

The Defendant also raises a number of challenges to his sentence, arguing alternatively that the term of imprisonment imposed was excessive and that this Court failed to place its reasons for deviation from the guidelines on the record. These claims are meritless.

Initially, we note that "[s]entencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent an abuse of discretion. *Commonwealth v. Hardy*, 939 A.2d 974, 980 (Pa.Super. 2007). "An abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable or the result of partiality, prejudice, bias or ill-will. In more expansive terms...an abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness or partiality, prejudice, bias or ill-will, or such lack of support as to be clearly erroneous." *Commonwealth v. Dodge*, 957 A.2d 1198, 1200 (Pa.Super. 2008).

The Defendant initially argues that the wrong victim age guidelines were used for each of the informations, resulting in unnaturally high Offense Gravity Scores (OGS). However, his claims are incorrect. The charges at CC 200608842 pertained to the incident which occurred on May 20, 2006, after Mina had already turned 13 years old. The Rape charge was appropriately graded as a 12 OGS for a victim over 13. The only other charge for which age was an issue was Statutory Sexual Assault, but careful examination of the record reveals that no sentence was imposed at that charge.

The charges at CC 200701416 all pertained to a victim under the age of 13, and were graded as such. At trial, Mina testified that the offenses which formed the basis of these crimes began when she was 10 years old and continued until she was 13, thus, the age enhancement was appropriate.

The Defendant also argues that this Court inappropriately exceeded the guideline ranges in formulating its sentence. He points out that the Sentencing Guideline forms submitted by the Commonwealth are not a part of the record and questions the calculation of various charges. This Court concurs that the Guideline forms are not a part of the record and can only speculate that their absence is due to a clerical error. However, the guidelines are easily recreated here:

CHARGE	Mitigated	Standard	Aggravated	Imposed
Rape (CC 200608842)	48	60-78	90	8-16 years
Incest (CC 200608842 and CC 200701416)	12	24-36	48	3-6 years (each offense)
Rape of a Child (Under 13 years) CC 200701416	84	96-SL		8-16 years
IDSI w/a Child (Under 13 years) CC 200701416	84	96-SL		8-16 years
Aggravated Indecent Assault CC 200701416	24	36-48	60	2½ - 5 years

With the exception of the Rape charge at CC 200608842, all of the sentences imposed were within the standard range.¹⁰ The sentence at the Rape charge did represent a slight departure – that of only six (6) months – from the aggravated range of the guidelines, and this Court placed its

reasons for the sentence imposed on the record:

THE COURT: The destruction you have caused to the persons in this matter is just something that will never go away. I wish I could say that it will. I know that it will not. The fact that it happened over and over and over again.

Sir, you are a danger to the community. The damage you caused to others is something that you cannot even measure.

(Sentencing Hearing Transcript, p. 18).

This Court reminds the Defendant that “[a]lthough the sentencing guidelines are an important factor in sentencing, they are but only one factor when determining individualized sentences. ‘The guidelines have no binding effect, create no presumption in sentencing and do not predominate over other sentencing factors – they are advisory guideposts that are valuable, may provide an essential starting point and that must be respected and considered; they recommend, however, rather than require, a particular sentence.’” *Commonwealth v. Holiday*, 954 A.2d 6, 12 (Pa.Super. 2008). Inasmuch as the guidelines are not mandatory in nature, this Court was well within its discretion in imposing a sentence only just slightly outside the aggravated range. This claim must fail.

4. Ineffective Assistance of Counsel

Finally, the Defendant raises a number of claims directed to the ineffectiveness of trial counsel. As those claims are properly deferred until collateral review, see *Grant*, *supra*, this Court declines to address them at this time.

Accordingly, for the above reasons of fact and law, the judgment of sentence must be affirmed.

BY THE COURT:
/s/McDaniel, P.J.

¹ 18 Pa.C.S.A. §3121

² 18 Pa.C.S.A. §3123 and §3123(a)(1) at CC 200608842 and §3123(b) at 200701416

³ 18 Pa.C.S.A. §3125 – 2 counts at CC 200608842 and 1 count at CC 200701416

⁴ 18 Pa.C.S.A. §4302 – 1 count each at CC 200608842 and CC 200701416

⁵ 18 Pa.C.S.A. §3122.1

⁶ 18 Pa.C.S.A. §3121(c)

⁷ 18 Pa.C.S.A. §3126(a)(7)

⁸ 18 Pa.C.S.A. §4304

⁹ 18 Pa.C.S.A. §6301(a)(1)

¹⁰ It bears mention that had this Court sentenced at the top of the standard range for just the charges listed here, the Defendant would have been subject to a total of 96.5 years (and to a total of 100.5 years if this Court had used the aggravated range). The aggregate sentence actually imposed—32.5 - 65 years—was well within the standard guideline range for these charges.