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OPINIONS

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PLJ

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Opinions

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Jory and Joeanna Rand, Husband and Wife v. Brian J. Young, an adult individual, and Win Realty Advisors, LLC, a Pennsylvania limited liability company, f/k/a Win Realty PA, LLC v. Barristers Land Abstract Co., a Pennsylvania Close Corporation and Capital Region Land Transfer, Inc., a Pennsylvania Corporation d/b/a Barrristers Land Abstract Company

Unfair Trade Practices and Consumer Protection Law (UTPCPL)—Vicarious Liability

Seller/Agent of residential property mislead buyers about structural problems and the lack of an occupancy permit for the new garage in disclosure statement and therefore violated the Unfair Trade Practices and Consumer Protection Law. Broker found vicariously liable.

No. GD 13-7617. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—December 15, 2017.

OPINION

I. Background

After graduating from Boston College and working in sales for a sportswear company, defendant Brian Young purchased a home in Pittsburgh. He had a contractor make some updates to it and placed it for sale with his mother, a real estate agent. It sold quickly, and Mr. Young said it was a successful project. He then decided to change careers and became a full time "real estate investor." Mr. Young's investments, however, are exclusively what is commonly called "house flipping" in which he will "buy cheap, rehab and sell for a profit…." Transcript of Non-Jury Trial ("T." hereafter), p. 18. Mr. Young's next project was the purchase of a home in Dormont Borough for $30,000 that he also said went well. He then purchased and quickly sold two more homes in Dormont. All three Dormont projects were minor renovations involving updating esthetics, with Brandon Colella serving as the contractor in charge of the renovations.

As Mr. Young was "flipping" the three homes in Dormont, he determined he could make a larger profit if he saved on sales commissions by becoming a licensed real estate agent. In 2009 Mr. Young took the required courses, passed the examination, and in March of 2010, became a licensed real estate agent. Mr. Young then turned his attention to the Southside of Pittsburgh and purchased a home on Fox Way that "was a gut job. [Brandon Colella] gutted the property and rewired it, replumbed it, installed new drywall, new floors, new kitchen. It was more extensive than the Dormont properties." T., p. 615. It also sold quickly, and Mr. Young said there were no complaints.

In the fall of 2010 Mr. Young purchased a three story home with a detached garage on the Southside of Pittsburgh known as 2315 Jane Street. The home was built over one hundred years ago, and Mr. Young purchased it for $152,000. Brandon Colella recommended that Mr. Young completely gut 2315 Jane Street, but Mr. Young instead decided to save money by limiting renovations to those that created a more attractive appearance, such as an "open concept" first floor. In October of 2011 Mr. Young listed the home for sale for over $400,000 with his broker, Win Realty Advisors. This broker catered to agent/investors with a commission split of 70-30 in favor of the agent and agents permitted to engage exclusively in transactions involving themselves as purchaser or seller. 2315 Jane, however, did not sell quickly at that price, hence Mr. Young reduced the price.

The price reductions were noticed by plaintiffs Jory and Joeanna Rand, who had outgrown the townhouse they occupied on the Southside. They were interested in finding another home on the Southside that was larger, had a garage and yard and needed minimal renovations. They found 2315 Jane Street had everything they were looking for and purchased it from Mr. Young for $315,000 on August 30, 2012.

On December 24, 2012, during a rain storm, water poured into the home from a leak in the roof. Early in January the Rands had a contractor named Tennis Roofing install a new roof. In creating the "open concept," a load-bearing wall that ran from the front to the rear of the home was removed and replaced with columns and beams. Almost immediately after the roof replacement the Rands began to feel "that the house was changing, the floors were sinking" (T., p. 529) and they saw cracks in the drywall that covered the mid-span support column on the first floor. It turned out the directive from the engineer who designed the columns and beams to "assure continuous load path to the footing in the basement" (T., p. 354) was not followed. The Rands then had to spend $70,126 to replace the system of beams and columns Mr. Young had installed and to repair other impacted components of the home.

In April of 2013 the Rands sued Mr. Young, Mr. Colella and Win Realty[1]. In September of 2014 Mr. Young filed a praecipe for a writ to join Barristers Land Abstract Co., the settlement agent that closed the real estate transaction, as an additional defendant. Prior to trial Mr. Colella reached a settlement with the Rands, and this Court excused him from further participation in the litigation. The dispute was assigned to me for disposition via non-jury trial, which was held on May 1, 2, 3 and 4, 2017. On May 9, 2017 I issued a verdict in favor of the Rands for $35,764.35, with $11,921.45 owed jointly by Mr. Young and Win Realty, $11,921.45 owed by Barristers Land Abstract and an additional $11,921.45 owed only by Mr. Young for violating the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL" hereafter). *See* 73 P.S. §201-1 *et seq*.

The Rands filed the first post-trial motions, requesting clarification of the award of damages, counsel fees and expenses of $53,419.30 under the UTPCPL and delay damages under Pennsylvania Rule of Civil Procedure no. 238. All the other parties then also filed post-trial motions, alleging I committed a multiplicity of errors in my verdict. I awarded the Rands counsel fees and expenses of $12,286.54 and delay damages of $3,161.57 but denied all other post-trial motions. Judgment was entered and appeals taken to the Superior Court of Pennsylvania by Mr. Young, Win Realty and Barristers. Each filed a concise statement of errors complained of on appeal. *See* Pennsylvania Rule of Appellate Procedure no. 1925. The balance of this opinion will address each error identified in the concise statements.

II. Errors Claimed by Mr. Young

In paragraph 1 of Mr. Young's concise statement, he contends my "Non-Jury Verdict and Verdict Explanation is uncertain and ambiguous…." The first parties that registered a problem with my verdict and explanation were the Rands in their post-trial motion request for "clarification" of the award of damages. Mr. Young, Win Realty and Barristers also then raised this issue in their

post-trial motions as well as in Mr. Young's and Barristers' concise statements. The Rands alleged a conflict existed between the verdict amounts of $11,921.45 against defendants Young and Win Realty and $11,921.45 against additional defendant Barristers because my explanation stated that these defendants and additional defendants were liable for damages of $23,842.90, with this amount "split equally between the remaining Defendants and the Additional Defendants." Because the defendants and additional defendants are comprised of three parties, the Rands construed the "split equally" language to call for division of the $23,842.90 equally among each of the three parties. However, that was definitely not what I intended in the verdict. I determined Win Realty was vicariously liable for Mr. Young's conduct, hence Win Realty could only be jointly liable with Mr. Young. On August 18, 2017 I attempted to clarify that the explanation "was intended to inform the parties that the amount of $23,842.90 was split equally between two groups, the Defendants and the Additional Defendants, with each group thus being responsible for an equal amount (the Defendants are responsible for $11,921.45 and the Additional Defendants are responsible for $11,921.45)." Apparently, this clarification is acceptable to the Rands and Win Realty but not acceptable to Mr. Young and Barristers. With several factors that made the verdict complicated (e.g., behavior attributable to a settling defendant and enhanced damages under the UTPCPL applicable to only one defendant), I hoped my "Verdict Explanation" would assist the parties in understanding the verdict. I apologize if the parties were not assisted, but am unaware of any authority for this constituting reversible error.

In paragraph 2 of Mr. Young's concise statement, he contends I made an error by finding Mr. Young failed to disclose material defects because there was no evidence he knew or should have known of the defects. Mr. Young, however, took the unusual step of having a home inspection done before he listed 2315 Jane Street for sale. Mr. Young was present for the August 30, 2011 inspection that exposed him to a support column in the center of the basement that was not secured to the floor. *See* T., pp. 116-120. The inspection report actually contains a photograph showing the inspector pushing the unsecured column with his foot along the floor. *See* Exhibit 29, p. 15. Under the headings "Summary of Areas Requiring Further Evaluation" and "General Information," the report also states:

> Amateur work-It appears that non professional or an unqualified person or persons attempted to perform repairs. The work is not to the typical building standards of the area. Repairs will generally be more expensive because of the amateur work.

Mr. Young did not disclose this inspection report to the Rands before they purchased 2315 Jane Street, and he did not voluntarily provide it to them when they requested it during discovery in this proceeding.

Pennsylvania's Real Estate Seller Disclosure Law required Mr. Young to include "Structural problems" (68 P.S. §7304 (b)(6)) in the Property Disclosure Statement provided to the Rands, but Mr. Young's disclosure statement answered "No" to the question "Are you aware of any past or present movement, shifting, deterioration, or other problems with walls, foundations, or other structural components." Exhibit 15, ¶ no. 6(b). Since Mr. Young was present for the inspection and was provided the report showing movement in the column, he knew of a past problem with a structural component but failed to disclose it. Hence, there was evidence Mr. Young knew of the defect and my determination that he failed to disclose it was correct.

Mr. Young testified Brian Colella told him he would repair all the problems in the inspection report, hence Mr. Young argues he is not liable for the omission in the property disclosure statement because the "omission was based on a reasonable belief that a material defect…had been corrected…." 68 P.S. §7309 (a)(2). This provision cannot be applicable to a seller's disclosure of a past defect because it would allow a seller to mislead a buyer to believe there never had been a past defect. Instead, the provision applies when a seller denies a defect currently exists because the seller reasonably believes it was corrected. Because Mr. Young's omission concerned the existence of a structural defect in the past, 68 P.S. §7309(a)(2) is not applicable.

Even if 68 P.S. §7309(a)(2) were applicable, it was not reasonable for Mr. Young to believe Brian Colella corrected the structural defect. The purchaser of the Fox Way home testified that Mr. Young was notified that Brian Colella failed to make repairs Mr. Young had assigned to him in the summer of 2011. T, pp. 703-710. Also, with Mr. Young's home inspector saying Brian Colella's work appeared to be done by "an unqualified person" and was below local building standards, it is not reasonable to expect he could correct the structural defect. Therefore Mr. Young did not have a "reasonable belief" that Brian Colella corrected the structural defect.

In paragraphs 3 and 11 of Mr. Young's concise statement, he contends I made an error by finding he violated the UTPCPL. The sale of residential property is subject to the UTPCPL (*see Gabriel v. O'Hara*, 368 Pa. Super. 383, 534 A.2d 488 (1977)), and misleading conduct by a seller is a violation of the "catchall provision" of the UPTCPL. *See Bennett v. A.T. Masterpiece Homes v. Broadsprings, LLC,* 2012 PA Super 60, 40 A.3d 145 and 73 P.S. §201-2(4)(xxi). The statement in the written disclosure provided to the Rands that Mr. Young was unaware of a past structural problem was misleading conduct. In addition, a City Building Inspector informed Mr. Young he needed to obtain an occupancy permit because the old garage had been demolished and a new one erected without fire-rated drywall. *See* T., pp. 194-196 and 205. Mr. Young, however, failed to obtain the occupancy permit, which resulted in the City issuing a citation to the Rands for violating the Building Code. The property disclosure statement mislead the Rands about the problem by indicating "final inspections/approvals" were obtained and Mr. Young was unaware of violations of local laws or building ordinances. Exhibit 15, ¶ nos. 7, 19(c) and 19(d). Since Mr. Young mislead the Rands about the structural problem and the lack of an occupancy permit for the new garage, my finding that he violated the UTPCPL was correct.

In paragraphs 4, 5, 6 and 8 of Mr. Young's concise statement, he contends I erroneously found him liable for repairs to items identified as defects in the Rands' home inspection. There is no merit to this contention because I held Mr. Young liable exclusively for repair costs related to the structural problem and other impacted components of the home, such as the floor and drywall. In the Verdict Explanation, I began my calculation of damages with $70,126.18, which is the total of the invoices admitted into evidence that relate to repair of the structural problem and other impacted components of the home.[2] I then reduced the damages by $46,283.28 for sixty-six percent of the behavior attributable to the settling defendant, to $23,842.90. The joint verdict against Mr. Young and Win Realty was for half of that amount, $11,921.45, with another $11,921.45 against Mr. Young alone for violating the UTPCPL. Since all damages against Mr. Young are from the cost of repairs necessary to resolve the structural defects, he was not found liable for the repair of defects identified in the Rands' home inspection. Hence, I did not make the error claimed by Mr. Young.

In paragraph 7 of Mr. Young's concise statement, he contends I erroneously held him liable for structural problems that were not visible to him prior to closing and that did not occur until after the closing. However, Mr. Young was present for the inspection of 2315 Jane Street on August 30, 2011 when the photograph was taken showing movement along the floor of the basement support column. *See* T., pp. 116-120. Hence, contrary to Mr. Young's contention, the structural problem was visible to him prior to closing.

Relative to Mr. Young's claim that the structural problems did not occur until after closing, the credible, uncontradicted opinion of Roy Kim, Jr., P.E. was that multiple deviations from his design caused the structural problems. *See* T., pp. 327-334. Since these deviations occurred during the renovation overseen by Brandon Colella, they did not occur after the closing. Therefore, I did not make the errors alleged by Mr. Young.

In paragraph 9 of Mr. Young's concise statement, he contends I made an error because a provision in the Agreement of Sale releases him from liability. This provision, paragraph no. 25, states:

> Buyer releases, quit claims and forever discharges SELLER, ALL BROKERS, their LICENSEES, EMPLOYEES and any OFFICER or PARTNER of any one of them and any other PERSON, FIRM or CORPORATION who may be liable by or through them, from any and all claims, losses or demands, including, but not limited to, personal injury and property damage and all of the consequences thereof, whether known or not, which may arise from the presence of termites or other woodboring insects, radon, lead based paint hazards, mold, fungi or indoor air quality, environmental hazards, any defects in the individual on-lot sewage disposal system or deficiencies in the on-site water service system, or any defects or conditions on the Property. Should Seller be in default under the terms of this Agreement or in violation of any Seller disclosure law or regulation, this release does not deprive Buyer of any right to pursue any remedies that may be available under law or equity. This release will survive settlement.

Clearly, the provision does not release Mr. Young from liability if he violated any seller disclosure law. Since Mr. Young did violate Pennsylvania's Real Estate Seller Disclosure Law, I correctly determined that he was not released from liability.

In paragraph 10 of Mr. Young's concise statement, he contends I made an error because the Rands waived their claims of defects to 2315 Jane Street by signing condition satisfaction documents at the closing and a release of escrow money after the closing. These documents do contain waivers, but none purport to waive unknown claims due to Mr. Young's concealment of defects. Instead, they indicate that the defects revealed by the Rands' home inspection have been repaired or they have waived their right to have them repaired, and with the release of escrow money, how the $15,000 escrowed at closing with Barristers due to unrepaired defects was to be disbursed. With the Rands not having waived unknown claims due to Mr. Young's concealment of defects, my decision was correct.

In paragraph 12 of Mr. Young's concise statement, he contends I erroneously failed "to determine whether Plaintiffs had a fee agreement with counsel, the amount of Plaintiffs' responsibility for paying their fees out-of-pocket, or whether there was a contingency recovery in total or in part for their attorney's fees." This contention is incorrect. The thirty-eight pages of detailed invoices provided to Mr. Young and I and the Rands' motion for attorneys' fees and costs contained the information I used to make the determinations Mr. Young alleges I did not make. These documents established that the Rands would pay their counsel at the rate of $175 per hour, that the Rands would pay their counsel no more than $30,000 in attorney fees and expenses (the invoices demonstrate receipt by counsel of $30,000 from the Rands), and that the amount over $30,000 ($53,419.30 was requested in the motion) would be contingent on an award from the court. Since I did determine the Rands' fee agreement with their counsel, there was no error in my attorney fee award.

In paragraph 13 of Mr. Young's concise statement, he contends I erroneously failed "to direct Plaintiffs to file of record invoices setting forth their counsel's professional services and time spent for each service performed, and the costs claimed, thereby causing the record to be incomplete, whether for review by the trial Court or for appellate review." This contention is disingenuous because the invoices would have been offered into evidence if I held an evidentiary hearing. I provided Mr. Young with the opportunity for an evidentiary hearing, but he declined to have an evidentiary hearing. *See* 6/23/17 Order of Court ("all of counsel having agreed during a telephone conference call held yesterday that there will be no evidentiary hearing on Plaintiffs' Motion for Attorneys Fees and Costs…."). The fact that the thirty-eight pages of counsel's invoices were provided to Mr. Young and I but were not either offered into evidence at a hearing or attached to the Rands' Motion had no effect on the ability of Mr. Young and I to review them. Hence, there is no prejudice to Mr. Young and no impact on "review by the trial Court." Relative to Mr. Young's argument that the record is incomplete for appellate review, a document with counsel's hours and hourly rate submitted at the end of trial with counsel's assertion that the hourly rate was fair and reasonable was held by the Superior Court of Pennsylvania to be sufficient information for the trial court's determination of an attorney fee award under the UTPCPL. *See Wallace v. Pastore*, 1999 PA Super 297, 742 A.2d 1090 at 1094. Since I possessed more information than the trial judge in *Wallace v. Pastore*, I was correct in not requiring the Rands to file of record their attorney's invoices.

Mr. Young's final contention, set forth in paragraph 14 of his concise statement, is that I erroneously failed to consider the factors for assessing the reasonableness of Plaintiff's counsel fees set forth in *Boehm v. Riversource Life Ins. Co.* (2015 PA Super 120, 117 A.3d 308). The factors are:

> (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly 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 clients from the services; and (4) The contingency or certainty of the compensation.

Id. at 335. Mr. Young, once again, makes an incorrect contention because I, in fact, considered these four factors in assessing the $12,286.54 counsel fee award. I determined attorney James spent more time than another attorney with more experience would have spent and allowed only 6.5 of the 276 hours he devoted to the dispute in 2013 and 2014. Most of the time I credited to attorney James thereafter involved his attendance at witness and party depositions and preparation for the lengthy trial, which either was not within his control or was reasonable. Attorney James charged $175 per hour, a rate Mr. Young did not complain about,[3] and that I believe is customary for similar services. I considered the approximately $109,000 the Rands spent repairing 2315 Jane Street and that attorney James' representation was successful in producing a $50,000 settlement from Brandon Colella plus a verdict of $35,764. In doing so, I awarded a smaller percentage of the counsel fees credited to attorney James before the Colella settlement, 17 percent (based on 6 defendants), than the 50 percent I awarded afterwards. I considered that payment for attorney James' services from September of 2015 to the May, 2017 trial was contingent on my award and not yet paid, but I still eliminated 25 of the 111 hours he spent during that time period because they were not necessary. Having considered the appropriate factors and awarding attorney James 23 percent of the fees and expenses he requested, my counsel fee award was reasonable and not erroneous.

III. Errors Claimed by Win Realty

In paragraph 1 of Win Realty's concise statement, it contends I made an error by holding it vicariously liable for the misleading property disclosure statement prepared by Mr. Young. Win Realty admits that a broker is vicariously liable for the misleading conduct of its agent committed in the course of his or her employment. *See Aiello v. Ed Saxe Real Estate, Inc.*, 508 Pa. 553, 499 A.2d 282 (1985). But, Win Realty argues that preparation of the property disclosure statement was done by Mr. Young in his capacity as the seller, not as a real estate agent, therefore the misleading conduct was not committed in the course of his employment. However, Pennsylvania's Real Estate Seller Disclosure Law plainly establishes that a real estate agent is liable when he or she knows the property disclosure statement prepared by the seller is misleading. *See* 68 Pa. C.S. §§7308 and 7310. While Mr. Young acted in the capacity of seller and real estate agent, it would be impossible for his knowledge as a real estate agent to be different from his knowledge as the seller. Since real estate agent Young knew the property disclosure statement was misleading, I correctly found broker Win Realty vicariously liable.

In paragraph 2 of Win Realty's concise statement, it contends I made an error by finding it vicariously liable for Mr. Young's negligent remodeling activities. However, all remodeling activity was performed under the direction of Brandon Colella, and I found Win Realty was vicariously liable based on Mr. Young's knowledge that the property disclosure statement was misleading. Hence, there is no merit to this allegation of error.

In paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 of Win Realty's concise statement, it makes the same contentions that I previously addressed under the errors claimed by Mr. Young.

IV. Errors Claimed by Barristers

In paragraph 1 of Barrister's concise statement, it contends my verdict was erroneous because there was no evidence that it owed a duty to Mr. Young or that it was negligent. While the Agreement of Sale between Mr. Young and the Rands places the obligation on Mr. Young to obtain an occupancy permit and/or zoning certificate, this obligation routinely is assumed by Barristers and its competitor title companies as part of the services title companies are paid to perform when serving as settlement agents in charge of closing a real estate transaction.[4] *See* T., pp. 612-617 and 654-655. In assuming this obligation, Barristers had a duty to Mr. Young to use reasonable care. *See Pearson v. Central Nat. Bank of Philadelphia*, 102 Pa. Super 111, 156 A. 560 (1931) (holding settlement agent liable to purchaser, who did not purchase title insurance, for delinquent water rents). The evidence of Barristers' negligence essentially was by admission of its vice president and general manager that it should have, but failed to notify Mr. Young or the Rands, when the zoning certificate provided to it by the City of Pittsburgh stated that no occupancy permit had been issued and the proposed use "is illegal." *See* T., pp. 671-680. Since there was undisputed evidence of a duty owed by Barristers to Mr. Young and Barristers' negligence, my verdict against Barristers was correct.

In paragraph 2.a. of Barristers' concise statement, it contends I erroneously imposed a contractual duty when it was not a party to the Property Disclosure Statement or the Agreement of Sale. However, Barristers admitted that it agreed to obtain the occupancy permit and zoning certification. Hence, Barristers had a contractual duty.

In paragraph 2.b. of Barristers' concise statement, it contends it was released from liability under the terms and conditions of the Property Disclosure Statement and the Agreement of Sale. However, there is no statement in either document that releases the settlement agent from negligent conduct or breaching its agreement to provide settlement services. Therefore, Barristers was not released from liability.

In paragraph 2.c. of Barristers' concise statement, it contends "no evidence was presented at trial that Barristers was required to obtain an occupancy permit." To the contrary, there was uncontradicted evidence presented at trial that Barristers was required to obtain an occupancy permit.

In paragraph 2.d. of Barristers' concise statement, it contends there was no evidence that the lack of an occupancy permit adversely affected the title to the property. While this is true, liability was not premised on Barristers title insurance responsibility. Instead, Barristers liability was premised on performance of its settlement agent duties.

In paragraph 2.e. of Barristers' concise statement, it contends there was no evidence that lack of an occupancy permit resulted in any damage to Mr. Young or the Rands. To the contrary, the Rands credibly testified that they would not have closed on the purchase of 2315 Jane Street if Barristers had informed them there was no occupancy permit and their proposed use "is illegal." Hence, the damages sustained as a result of the purchase of the property would have been avoided had Barristers done its job properly. These damages include not only the $70,126.18 the Rands spent to repair the structural problem, but the additional amount they spent to remove the drywall in the garage and replace it with fire rated drywall after being cited for violating the City Code.[5]

Paragraph 3 of Barristers' concise statement makes the same contention about the alleged inconsistency in the Verdict and Verdict Explanation that I previously addressed under the errors claimed by Mr. Young.

In paragraph 4 of Barristers' concise statement, it contends I erroneously calculated damages by failing "to deduct set-offs from the gross amount claimed by the Plaintiffs." The only argument for deducting set-offs that was not addressed under the errors claimed by Mr. Young is that rent received and the higher sale price obtained when the Rands relocated to California should have been deducted from the calculation of damages. However, it would be improper to deduct either of these items for at least two reasons. First, receiving rent and appreciation in the value of real estate over time typically accrue to any purchaser of realty, and the Rands hoped for these benefits before they purchased the home. Second, if they could be deducted from the damages, numerous collateral issues would have become relevant (e.g., any offsetting cost of rent the Rands paid when they relocated, whether rent received was offset by the mortgage payment and other expenses and whether the cost of any new home purchased by the Rands exceeded the sale price obtained for 2315 Jane Street). Therefore, not deducting the rent received and higher sale price obtained was appropriate and not erroneous.

Barristers' final contention, set forth in paragraph 5 of its concise statement, is that my verdict was erroneous because the title insurance policy excludes claims relating to zoning and occupancy permits. Since Barristers' liability was not premised on the title insurance policy, my verdict was correct

BY THE COURT:
/s/Hertzberg, J.

[1] The Rands also sued Mr. Young's parents, who signed the deed, but they were dismissed from the case before trial.

[2] *See*, in exhibits 38, 39 and 40, NYCE INC invoices for $2,000, $54,474, $5,378, $1,200, Roy Kim, Jr., P.E. invoices for $700, $600, $1,600 and $600 and Lumber Liquidators invoice for $3,574.18 for a total of $70,126.18.

[3] In fact, near the end of Mr. Young's answer to plaintiff's motion for post-trial relief, Mr. Young seems to indicate $175 per hour is lower than the customary charges, averring "that rate reflects the lack of experience of Plaintiffs' attorney in handling civil litigation matters."

[4] The "HUD-1" Settlement Statement from the 8/30/12 closing shows Barristers charging $2,215 for title insurance, $175 for deed preparation and $15 for notary fees and being reimbursed $202.70 for lien letters, which included $100 Barristers advanced to the City of Pittsburgh for the zoning certificate.

[5] The Rands paid for this work in the garage but were unable to locate an invoice that itemized the cost of material and labor for the garage.

Catherine A. Conley v. County of Allegheny

Tree Removal—Police Power

Where two professional engineers credibly testified that trees on plaintiff's property were a roadside hazard, court permitted county to enter plaintiff's property under its police power to remove trees.

No. GD 17-13552. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—April 2, 2018.

OPINION

Thompson Run Road, located in Ross Township, is owned and maintained by Allegheny County. Some time around 2016, Allegheny County received funding approval for a "betterment project" on 2.3 miles of Thompson Run Road. A "betterment project" is not a reconstruction of the road. It involves milling and paving of the road and its shoulders, drainage repairs and safety upgrades. Allegheny County hired M.S. Consultants to provide design services for the Thompson Run Road betterment project.

In April of 2017 the County sent a letter to Plaintiff Catherine Conley, the owner of 327 Thompson Run Road, notifying her that the County's consultant engineer identified three trees near her home and the Vilsack Road intersection that should be removed to improve safety. The letter indicated that Ms. Conley could remove the trees or the County would have its contractor remove them as part of the road project. Ms. Conley contacted the County and said she objected to the removal of the trees, and in August of 2017 County and M.S. Consultants representatives had a site meeting with Ms. Conley. In September of 2017 the County sent Ms. Conley another letter notifying her that there was no alternative than removal of the three trees. By this time the County had removed twenty-eight other trees also found to be unsafe along the 2.3 mile project.

In early October of 2017 Ms. Conley filed a complaint in equity and a motion for preliminary injunction in an effort to enjoin the County from removing the trees. I presided over the preliminary injunction hearing, and on October 25, 2017 I signed an order denying it. On November 16, 2017, the County's contractor went to remove the three trees, but a dispute ensued with Ms. Conley. When the contractor advised Ms. Conley that it would need temporary access to her property for no more than two days to safely cut and remove the trees, she informed the contractor it could work only within the right-of-way and could not cross its boundary on to her property. In an attempt to resolve the dispute, on December 8, 2017 the County filed a motion requesting modification of the order denying the preliminary injunction by permitting the contractor temporary access to Ms. Conley's property for removal of the trees. After Ms. Conley filed an answer to the motion, on January 8, 2018 I signed an order permitting the County's contractor to enter Ms. Conley's property for the purpose of removing the trees.

On February 7, 2018 Ms. Conley filed a notice of appeal to the Commonwealth Court of Pennsylvania from my January 8, 2018 order. She thereafter filed a concise statement of matters complained of on appeal ("Concise Statement" hereinafter), which this opinion addresses. *See* Pennsylvania Rule of Appellate Procedure no. 1925(a).

Ms. Conley first contends that I erroneously denied the preliminary injunction because she satisfied each prerequisite. *See* Concise Statement, ¶ 1. Ms. Conley, however, has not appealed from my October 25, 2017 order denying the preliminary injunction. Therefore, she has waived her ability to take issue with the correctness of my decision to deny the preliminary injunction.

Even if there were not a waiver, Ms. Conley failed to establish three of the prerequisites needed for a preliminary injunction to issue. During the preliminary injunction hearing, two professional engineers credibly testified that the trees were a roadside hazard because they are within the "clear zone" that is required to allow errant vehicles to safely return to the roadway and because they impair the sight distance required for vehicles to safely negotiate the curve in the road. Ms. Conley provided no evidence, in the form of an expert opinion or otherwise, that it is safe to allow the trees to remain within the right-of-way. Therefore, she did not establish "the injunction will not substantially harm other interested parties…success on the merits is likely…and an injunction will not adversely affect the public interest." *Summit Town Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 573 Pa. 637, 646-647, 828 A.2d 995, 1001 (2003). Hence, my decision to deny the injunction was correct.

Ms. Conley next contends that I made an error by allowing the County to enter her private property under "its police power." Concise Statement, ¶ 2. However, "police power involves the regulation of property to promote health, safety and general welfare…." *Redevelopment Authority of Oil City v. Woodring*, 498 Pa. 180, 186, 445 A.2d 724, 727 (1982). In addition, "police power controls the use of property by the owner, for the public good, its use otherwise being harmful…." *Northeast Outdoor Advertising, Inc. Appeal*, 69 Pa. Commonwealth 609, 612, 452 A.2d 83, 85 (1982). Entering MS. Conley's property promoted safety as it was necessary for removal of the hazardous trees and controlled the use of her property for the public good, with its use otherwise being harmful. Hence, I correctly permitted the County to enter Ms. Conley's private property under its police power.

Ms. Conley next contends that I erroneously denied the preliminary injunction because there was no evidence any vehicle has crashed into the trees. *See* Concise Statement, ¶ 3. Even if Ms. Conley has not waived her ability to make this argument by failing to appeal from the denial of the preliminary injunction, there is no requirement for the County to provide evidence a vehicle crashed into the trees. *See* transcript of Preliminary Injunction, October 23, 2017("T." hereinafter), pp. 29-31. In addition, Ms. Conley admitted "it's a bad, bad intersection…," and there was unrebutted evidence that a car once ended up in Ms. Conley's front yard, and that there was a pedestrian injury at the intersection T., pp. 13, 41 and 81-82. It would be foolish to wait for an injury

or fatality from a collision with the trees before taking preventive action. Therefore, it was proper for me to deny the preliminary injunction without evidence of a crash into the trees.

Ms. Conley next contends that I made an error by not conducting a hearing when the County filed its motion requesting temporary access to her property. *See* Concise Statement ¶ no. 4. However, Ms. Conley never requested that I conduct a hearing in her formal, written answer to the motion. In addition, since one of the trees is large, approximately four feet in diameter, temporary access to Ms. Conley's adjoining property to safely cut the tree should have been anticipated by her as a consequence of my denial of the preliminary injunction. Therefore, not conducting a hearing on the motion was appropriate.

Ms. Conley next contends I erroneously disregarded Allegheny County's failure to establish the trees "constituted a road hazard requiring removal." Concise Statement, ¶ 5. Since Ms. Conley's motion for a preliminary injunction is premised on the trees not being a danger, by not appealing my order denying the preliminary injunction, Ms. Connelly waived this argument. Even if the argument has not been waived, as I explained above, two professional engineers credibly testified the trees are a roadside hazard. Therefore, my determination that the trees were a roadside hazard was correct.

Ms. Conley next contends I erroneously allowed the County to enter her private property because the "entry constitutes a de facto taking…." Concise Statement, ¶ 6. Ms. Conley, however, is wrong as a de facto taking does not occur when government uses police power to control the use of property to preserve the safety of the people. *See Ristvey v. Com., Dept. of Transp.*, 52 A.3d 425 (Cmwlth. Ct. 2012). Since the County's entry onto Ms. Conley's private property is a proper exercise of police power and not a taking of the property for public use, my decision allowing it was correct.[1]

Ms. Conley's final contention is that I erroneously failed to order the County to define, survey and stake its right of way "prior to ruling on Plaintiff's request for preliminary injunction." Concise Statement, ¶ 7. Clearly this argument involves my denial of the preliminary injunction which has been waived by Ms. Conley's failure to appeal from that decision. Even if the argument has not been waived, at the hearing a survey defining the right-of-way was admitted into evidence (*see* survey attached to Exhibit E) and my January 8, 2018 Order requires Allegheny County to stake the boundary line of the right of way before removal of the trees. Hence, there was no error relative to the County defining, surveying and staking the right of way.

BY THE COURT:
/s/Hertzberg, J.

[1] Even if temporary entry to Ms. Conley's property to safely sever the tree from the adjoining right-of-way and remove it from her property is a de facto taking, Ms. Conley's remedy is to file a Petition for Appointment of a Board of Viewers (*see* 26 Pa. C.S. §502(c)) for determination of just compensation.

In Re: Estate of Herman Edward Rawlings

Orphans Court—inter vivos waiver—Dead Man's Act

Wife's execution of an inter vivos waiver to her elective share of deceased husband's estate did not bar wife's claim for the return of unused funds that were invested to be used for living expenses. Wife's testimony regarding her intent not precluded under the Dead Man's Act because Decedent did not have a right or interest in the money at issue.

No. 4373 of 2015. In the Court of Common Pleas of Allegheny County, Pennsylvania, Orphans' Court Division.
O'Toole, A.J.—April 11, 2018.

OPINION

This matter came before the Court on the Claim for $1,000,000 filed by Mary Belle Rawlings (hereinafter, "Mrs. Rawlings") against the estate of her late husband. As the parties were unable to resolve the matter, a hearing was held on December 13, 2017.

Findings of Fact

Through testimony at the hearing on December 13, 2017, the Court made the following findings of fact:

(1) The Decedent died on June 23, 2015. (N.T. 12/13/17, p. 11)

(2) The initial death certificate listed the cause of death as "dementia". At the request of the Decedent's son. Edward Rawlings, Jr., a replacement certificate was issued changing the cause to death to "abdominal aortic aneurysm". (Exhibits 3 and 7) (N.T. 12/13/17, pp. 33, 46)

(3) The Decedent and Mrs. Rawlings were married for 42 years. Each of them had three children from previous marriages and they had no children together. (N.T. 12/13/17, p. 11)

(4) When they got married, the Decedent and Mrs. Rawlings agreed "he would stay out of my stuff and I would stay out of his stuff". They had one joint account (the bill paying account) into which they each deposited the same amount of money on the first day of each month. (N.T. 12/13/17, p. 16)

(5) At the time of his death, the Decedent and Mrs. Rawlings were residing at Longwood at Oakmont, which is a retirement community. (N.T. 12/13/17, p. 10)

(6) Mrs. Rawlings inherited a sum of money in 2010 when her Stepmother died. (N.T. 12/13/17, p. 18)

(7) Mrs. Rawlings gave the Decedent a check for $1,000,000 on or about February 22, 2011. (Exhibit 1) (N.T. 12/13/17, p. 19)

(8) The check was deposited into the Decedent's PNC Bank Premium Money Market Account on February 22, 2011. (Exhibit 6) (N.T. 12/13/17, p. 42)

(9) In October, 2014, the Decedent gave each of his children a gift of $100,000. They had not received any large gifts prior to that date. (N.T. 12/13/17, p. 55)

(10) In addition to giving the Decedent the check for $1,000,000, Mrs. Rawlings gave the Decedent $250,000, which was deposited into his PNC Bank Premium Money Market Account on September 8, 2011. (N.T. 12/13/17, p. 57)

Cross appeals have been filed by the Executor and Mrs. Rawlings.

Issues to be Raised on Appeal by the Executor

The first issue claims that the Court erred in finding that Mrs. Rawlings had filed her claim in a timely fashion.[1] The testimony from Mrs. Rawlings was that she did not realize that the "Longwood Fund" had not been created until she was having a conversation with the Decedent's son in early 2015. She filed her claim seeking return of the $1,000,000 on July 28, 2015, which was approximately five (5) weeks after the Decedent's death. The argument that Mrs. Rawlings should have filed a breach of contract action within four (4) years after she gave the money to the Decedent on February 22, 2011 is without merit. Initially, the Court finds that this is not a breach of contract matter. Mrs. Rawlings trusted her Husband of forty plus years and she assumed that when she gave him the funds, he would use them as they had agreed (i.e., to pay for their living expenses). When she discovered in early 2015 that he had not done so, she confronted him and then filed a timely claim against his estate when the remaining funds were not returned to her.

The second issue claims that Mrs. Rawlings' testimony should be barred under the Dead Man's Act, 42 Pa.C.S.A. §5930. The purpose of the Dead Man's Act is to prevent injustice by unfairly permitting a surviving party to a transaction to testify favorably to himself and adversely to the interest of a Decedent, who is in no position to refute the testimony; however, the Decedent must have an actual right or interest in the matter at issue. *In re Estate of Hall*, 535 A. 2d 47 (a. 1987). In this case, the Decedent did not have a right or interest in the money. Mrs. Rawlings did not gift the money to the Decedent; rather, she entrusted it to him for the sole purpose of paying for their living expenses at Longwood. Mrs. Rawlings was entitled to testify as to her intent when she gave the funds to the Decedent. Such testimony does not violate the Dead Man's Act.

The third issue claims that the Court erred in permitting Mrs. Rawlings any recovery as she had executed an *inter vivos* waiver to her elective share of the Decedent's estate. Mrs. Rawlings is not seeking an elective share of the Decedent's estate; rather, she is seeking return of the unused portion of the funds that were to be invested in the "Longwood Fund". Thus, this argument fails.

The fourth issue claims that Mrs. Rawlings failed to meet her burden to produce clear and convincing evidence of the validity of her claim. This case turned entirely on the credibility of the witness's testimony. While the Court did not find any of the witnesses to be completely incredible, it did find certain aspects of the testimony to be more logical and believable and other aspects to be suspect. Specifically, the Court found that Mrs. Rawlings' testimony regarding the purpose for giving the Decedent a check for $1,000,000 to be credible. The funds were to be used to pay for the monthly cost at Longwood and for the aides that assisted them and any remaining funds were to be returned to her when her husband died. She did not follow up with her husband to make sure that he opened a separate account, as she trusted her husband and he took care of those matters during their marriage. (N.T. 12/13/17, pp. 19-25) This testimony was sufficient for Mrs. Rawlings to meet her burden of proof.

Issues to be Raised on Appeal by Mrs. Rawlings

The first issue claims that the Court erred in finding that the $1,000,000 was significantly depleted as of the Decedent's death. As the testimony regarding the expenses incurred by Mrs. Rawlings and the Decedent to reside at Longwood, along with the testimony regarding the deposits into the joint account was minimal, the Court had no choice but to assume that over the fifty-two (52) month period between February 2011 (when the check was given to the Decedent) and June 2015 (when the Decedent died) the funds had been greatly depleted. It was incumbent upon counsel to provide the Court with details as to the expenses and deposits. Counsel did not do so, which resulted in the Court making its own calculations and concluding that the remaining funds would be $300,000.

The second issue claims that the Court erred in directing only the estate to pay the claim to Mrs. Rawlings and not granting the Petition requesting that the adult beneficiaries return the funds that were improperly distributed to them, during the Decedent's lifetime, to the estate. As this specific issue was not addressed to the Court at the time of the hearing, the Court was not aware that the funds in the estate would be insufficient to satisfy the claim. Assuming *arguendo* that such is true, with the Court having no independent knowledge of such, the case should be remanded on this sole issue to permit the Court to amend the Order to direct the adult beneficiaries to return the improperly distributed funds to the estate.

BY THE COURT:
/s/O'Toole, A.J.

[1] Initially, the Court notes that the Motion for Summary Judgment that raised this issue and the second issue regarding the Dead Man's Act was not filed in a timely manner, as it was filed on November 8, 2017 and the hearing was already scheduled for December 13, 2017.

Zokaites Properties, LP v. Nicholas Nickolich and Nickolich Towing & Salvage

The Tow Act—Unfair Trade Practices—Consumer Protection Law (UTPCPL)—Motor Vehicle Code

Alleged violations of the Tow Act by defendant towing company do not constitute violations of the UTPCPL where both parties were engaged in commercial operations at the time of incident. Municipal action by way of towing services was justified under the Motor Vehicle Code where a commercial tri-axle truck was overturned with a ruptured and leaking fuel tank.

No. GD 16-018926. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Della Vecchia, J.—April 25, 2018.

OPINION

I. BACKROUND

This action arises out of a single vehicle accident occurring on September 28, 2016, in which Plaintiff's 2001 Mack Tri-axle dump truck rolled out of control and into the backyard of a private resident in Jefferson Hills Borough, Allegheny County, Pennsylvania. At the time of this incident, Plaintiff was engaged in performing site related construction activities ancillary to the construction of residential homes at Jefferson Estates, a residential community within Jefferson Hills Borough.

On the above-referenced date, the operator failed to set the parking brake before exiting the truck. The Tri-axle slid approximately two-hundred (200) feet, falling on its side and coming to rest in a weeded area where the terrain flattened just short of a child's playset. At the time of this occurrence the playset and surrounding area was unoccupied. There were no injuries reported as a result of this accident.

The Defendant, Nickolich Towing and Salvage, Inc., is the appointed towing contractor for Jefferson Hills Borough. Zokaites Properties, LP first attempted to upright and remove the vehicle with its own equipment and with its own employees. Following some initial and apparent problems in accomplishing same, the 'up righting' and removal of the vehicle was accomplished by Nickolich Towing and Salvage. Said services generated a bill by Defendant that Plaintiff refuses to pay.

II. PROCEDURAL HISTORY

This litigation was initiated with a replevin action filed by Zokaites Properties, LP, (hereinafter "Plaintiff") following Nickolich Towing and Salvage's refusal to release Plaintiff's truck following the incident of September 28, 2016. At said time, a bill by Nickolich Towing was presented to Plaintiff in the amount of $19,435, but remained unpaid.

The Plaintiff filed a Complaint on October 4, 2016, immediately followed by an Amended Complaint filed on October 5, 2016; alleging the vehicle was improperly and illegally towed, possessed through an illegal trespass, and that said actions were causing Plaintiff irreparable harm. On October, 11, 2016, Plaintiff appeared before the Allegheny County Motions Court and presented a Writ of Seizure in regards to the Mack Truck, at said time the vehicle was still in the possession of the Nickolich Towing.

On that same date, the Honorable Timothy Patrick O'Reilly issued an Order granting Plaintiff's motion, ordering the Department of Court Records to issue a Writ of Seizure and directing Plaintiff to seize the Mack truck. Plaintiff was further ordered to post a $20,000 bond; a hearing as to the Motion was scheduled before the Motions Court for November 29, 2016. On October 26, 2016, the Plaintiff filed a Praecipe to Reinstate Complaint.

On November 17, 2016, the Defendant filed Preliminary Objections, Brief and Order of Court objecting to Plaintiff's complaint which names Defendant Nickolas Nickolich, individually, in addition to his towing business, Nickolich Towing and Salvage. The Defendant maintained that all alleged acts were the acts of the corporate Defendant, Nickolich Towing and Salvage.

On November 21, 2016, an Order of Court was issued granting the parties' consented to Motion to Reschedule the Replevin action and further setting a hearing date for January 19, 2017. A motion further postposing the hearing was granted by this writer by Order of Court dated December 27, 2016, rescheduling the matter before the motions judge on February 22, 2017.

On January 13, 2017, the Honorable Michael McCarthy overruled the preliminary objections filed by Defendant and ordered the Defendant to file an answer within the thirty (30) days of the docketing of said Order. Said docket entry was made on January 17, 2017. On February 17, 2017, an Answer, New Matter and Counterclaim was filed by the Defendant, alleging, *inter alia*, that Plaintiff owed the "fair and reasonable charges" associated with the up-righting, recovery, removal, towing and storage of the tri-axle involved in this incident. Again, said claim was for $19,435.00.

On February 22, 2017, this writer issued an Order placing this matter on the September 2017 trial List, with the bond to remain in effect. A reply to the Defendant's new matter was filed on April 28, 2017, with an answer to the Defendant's counterclaim filed on May 3, 2017. On June 28, 2017, a docket entry was recorded, relisting this matter until the November trial list, with a date certain of November 6, 2017.

Following a non-jury trial on December 4, 2017, this writer found in favor of the Defendant and against Plaintiff on the issue of the counterclaim in the amount of $17,491.50, plus costs (Order, 12/6/17). The replevin matter was no longer an issue and moot by the time of trial as the tri-axle was by then back in the possession of the Plaintiff (additional Order, 12/6/18).

A Motion for Post-Trial Relief was timely filed by the Plaintiff on December 18, 2017. On receipt of same, this writer scheduled an argument date to address the Plaintiff's Post-Trial Motion for February 14, 2018. By Order dated January 24, 2018, this Court continued the Post-Trial Argument until February 22, 2018, further ordering the parties to file their respective briefs one (1) week prior to said argument date.

On February 27, 2018, Plaintiff's Motion for Post-Trial Relief was denied. On March 2, 2018, Plaintiff appealed this matter to the Pennsylvania Superior Court. In response thereto, this Court directed the appellant to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. § 1925(b). Said statement was timely filed on March 13, 2018, placing this matter properly before the Superior Court of Pennsylvania.

III. ISSUE RAISED ON APPEAL

The Plaintiff presents the following claims of error with this Court's determinations:

1. Whether the Court committed errors of law and fact in failing to find that the Defendants violated the Towing and Storage Facility Standards Act, 73 P.S. § 1971.1, et. seq. (the "Tow Act").

2. Whether the Court committed errors of law and fact in failing to find that the Defendants were subject to damages under the Unfair Trade Practices and Consumer Protection Laws as a result of its implication from Section 1971.4 of the Tow Act.

3. Whether the Court committed errors of law and fact in failing to award treble damages and attorney's fees to Zokaites under the Unfair Trade Practices and Consumer Protection Laws.

4. Whether the Court committed errors of law and fact in failing to find that the Defendants violated the Pennsylvania's Rules of the road sections under the Motor Vehicle Code 75 Pa.C.S.A. § 3352 such that the tow of the Plaintiff's Mack Truck was unauthorized.

5. Whether the Court committed errors of law and fact in denying Zokaites' Motion to Strike Defendant's invoice based on Defendant's destruction of evidence.

6. Whether the Court committed errors of law and fact in finding that Defendants' tow bill was fair and reasonable.

7. Whether the Court committed errors of law and fact in making an award to defendants on their tow bill in spite of being instructed by Zokaites to not upright nor tow Zokaites' Mack Truck.

8. The evidence at trial was that after the Jefferson Borough Police said that defendants would perform the tow of the

Mack Truck, that the parties made an uncontroverted agreement in which defendants would return the next morning and use Zokaites equipment and personnel to upright the Mack Truck and move it to another part of the property owned by Zokaites.

a. Defendants breached this Agreement and recovered and towed the Mack Truck in the middle of the night.

b. Had the Defendants honored the Agreement, the only cost they would have incurred was the time for Mr. Nickolich or one of his employees in appearing and advising the Zokaites equipment and personnel.

c. Instead the Court ignored the Agreement and its award it entered in favor of the Defendants included costs for equipment and labor which would not have been incurred had the Defendants honored the Agreement they made with Zokaites.

d. Therefore, the issue is whether the Court committed errors of law and fact in failing to find there was an agreement between the parties as detailed above and whether the Court committed further errors of law and fact in its award that awarded Defendants money beyond the cost of Mr. Nickolich or an employee appearing and advising the Zokaites equipment and personnel.

IV. DISCUSSION

The Plaintiff's first three (3) claims of error allege a failure of the trial court to recognize violations of the 'Tow Act'. Plaintiff believes that said violations should severely reduce Defendant's bill for services, if not serve as a bar from any payment for the services rendered. Plaintiff asserts that this writer's refusal to find so was reversible error. This writer disagrees. The relevant sections of the Tow Act state:

(a) General requisites: A tow truck operator and, where applicable, the operator of a towing storage facility, shall:

(1) maintain a physical street address;

(2) properly register the tow truck with the Department of Transportation;

(3) display the name, address and telephone number of its tow truck business on the tow truck; and

(4) post the towing fees and the storage and related service fees and hours of operation at the towing storage facility.

(b) Time of notice: At the scene of an accident, a tow truck operator shall provide the owner or operator of the vehicle if the owner or operator is at the scene with a notice containing the name, address and telephone number for a point of contact to be informed where the vehicle is to be stored.

(c) Accident: A tow truck operator shall undertake towing at the scene of a motor vehicle accident only if summoned to the scene by the vehicle owner or vehicle operator, or law enforcement personnel or authorized municipal personnel, and is authorized to perform the towing as follows:

(1) The owner or operator of the vehicle being towed shall summon to the scene the tow truck operator of the owner's or operator's choice in consultation with law enforcement or authorized municipal personnel and designate the location where the vehicle is to be towed.

(2) The provisions of paragraph (1) shall not apply when the owner or operator is incapacitated, otherwise unable to summon a tow truck operator or defers to law enforcement or authorized municipal personnel.

(3) The authority provided to the owner or operator in paragraph (1) may be superseded by the law enforcement officer or authorized municipal personnel if the tow truck operator of choice cannot respond to the scene in a timely fashion and the vehicle is a hazard, impedes the flow of traffic or may not legally remain in its location in the opinion of law enforcement or authorized municipal personnel.

(d) Repair and storage: As a condition of towing a vehicle at the scene of an accident and prior to the towing, a tow truck operator shall not:

(1) secure the signature of the vehicle owner or vehicle operator on a document that requires authorization to repair the vehicle; or

(2) secure the signature of the vehicle owner or vehicle operator to authorize storage of the vehicle for more than 24 hours.

(e) Release of towed vehicle: Upon a request from the vehicle owner or a person authorized by the owner to regain possession, a tow truck operator or operator of a towing storage facility shall not refuse during the posted hours of operation to release a towed motor vehicle unless law enforcement has requested that the vehicle be held. Release shall be conditioned on the payment for towing, storage and related services. All charges shall be itemized and in writing. Payment may be made with cash, a credit card from a common issuer or a check from an insurance company or authorized tower or salvor acting on behalf of the insurance company.

(f) Access to vehicle: A tow truck operator or towing storage facility shall provide hours of operation that reasonably allow access to a towed vehicle and shall grant reasonable access to the towed vehicle during its posted hours of operation for the purpose of inspection and retrieval by law enforcement officials or authorized municipal personnel, the vehicle owner or a person authorized by the owner under this act.

(g) Storage fee prohibited: Unless law enforcement has requested that a vehicle be held, a tow truck operator or towing storage facility shall not charge a storage fee for any period during which it has refused reasonable access during posted normal business hours as required in subsection (e) or has refused to allow authorized inspection of the vehicle under inspection rights in 75 Pa.C.S. § 1799.4 (relating to examination of vehicle repairs) or section 11 of the act of December 29, 1972 (P.L. 1713, No. 367), known as the Motor Vehicle Physical Damage Appraiser Act.

73 Pa. Stat. Ann. § 1971.3

Plaintiff asserts that Defendant's perceived or technical violations of the Tow Act constitute violations of the Unfair Trade Practices and Consumer Protection Laws (UTPCPL). This writer strenuously disagrees. The language of the statute clearly states the intended purpose of the Act is to protect a class that Plaintiff simply was not a part:

> (a) Any person who purchases or leases goods or services ***primarily for personal, family or household purposes*** and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 31 of this act, may bring a private action to recover actual damages or one hundred dollars ($100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars ($100); and may provide such additional relief as it deems necessary or proper. The court may award to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorney fees.

73 Pa.S.A. § 201-9.2 (emphasis added).

This writer finds these claims of err misplaced as the testimony at trial was consistent and uncontroverted; at the time of this incident, the tri-axle Mack truck owned and operated by Plaintiff was engaged in a commercial purpose. John Zokaites, the owner's brother and operator of the Mack tri-axle engaged in this accident, testified that on the day in question he was employed by Plaintiff, Zokaites Properties L.P.; that he was engaged in his 'business purpose' on the day in question and "hauling fill from lot 38" (Tr. at 114).

This writer finds the claims alleged by Plaintiff outside the protections afforded by the UTPCPL. At the time of this incident; both parties were engaged in commercial operations, that the parties' transaction was clearly that of a commercial nature and not one "primarily for personal, family or household purposes" as necessitated by the plain language of the statute (*See* 73 P.S. § 201-9.2).

Despite this writer's finding of inapplicability and in the event that the Superior Court finds reason in Plaintiff's first several claims of err; the appropriate standard of review affords the prevailing party (in action for alleged violations of towing ordinance and Unfair Trade Practices and Consumer Protection Law (CPL)) to the benefit of all favorable facts and inferences that could be reasonably drawn from evidence, and all conflicts in evidence have to be resolved in his favor upon review (73 P.S. §§ 201–1 to 201–9.2, *see also, Hammer v. Nikol*, 659 A.2d 617 (Pa. Cmlth. Ct. 1995).

To be successful in their claim of violations of the UTPCPL, the Plaintiff would have needed to prove fraud to the trial court. In order to prove a claim for common law fraud, Plaintiff needed to prove: (1) a representation; (2) material to the transaction at issue; (3) made falsely, with either knowledge or reckless disregard of its falsity; (4) with the intent of misleading another person or inducing justifiable reliance; and (5) an injury caused by the reliance (*DeArmitt v. New York Life Ins. Co.*, 73 A.3d 578, 591 (Pa. Super.2013)). Even if the Tow Act and UTPCPL were triggered by the nature of the parties' relationship, this Plaintiff failed to prove the elements necessary to entitle itself to relief. This writer finds these claims meritless and believes the rulings considering same should not be disturbed on appeal.

The Plaintiff next raises err with this writer's failure to recognize the Defendant's violations of Pennsylvania's Rules of the Road, codified by the Motor Vehicle Code at 75 Pa.C.S.A. § 3352. Specifically, the Plaintiff asserts that the vehicle was not categorized as any of the following requirements that would necessitate municipal action by way of tow services:

a. The truck was not blocking traffic

b. There was no property damage

c. There [were] no personal injuries

d. The truck was not abandoned

e. The truck was not unattended

f. The truck was not in any a danger……

This writer finds that a commercial tri-axle truck, overturned on its side with a ruptured fuel tank, leaking fuel on private property, not owned by the truck owner is worthy of government intervention in regards the safe removal. The owner of Plaintiff's company, Frank Zokaites, testified that the police on scene requested Defendant to remove his vehicle (Tr. at 80). The Defendant's tow service has enjoyed a service contract with Jefferson Hills Borough for generations (Tr. at 12). This writer finds the characterization of the tow as "unauthorized" as contrary to the evidence and testimony elicited at trial (*See* entire Transcript).

The testimony of Zokaites Properties, L.P.'s owner, Frank Zokaites, revealed that Mr. Zokaites failed to tell either the property owner or the police that he wanted the opportunity to tow his own truck, that Plaintiff was not a licensed towing contractor and that he did not own the appropriate equipment (a "wrecker") necessary to safely up-right and tow the truck (*See*, Tr. at 90-91). This writer finds Plaintiff's arguments of an unauthorized trespass by Defendant without merit as it has remained unsupported by the evidence.

The remaining matters are focused on the bills for services rendered and the legitimacy of same, which will all be discussed collectively. Plaintiff testified that he believed the appropriate charge for the services rendered by Defendant should have been approximately four hundred and fifty dollars ($450), (Tr. at 96). This was following the credible testimony and exhibits proffered without objection showing charges to the Defendant from third party contractors enaged during this recovery, including charges from:

Gill Hall Fire Department in the amount of $1,050,
Dom Folino Construction in the amount of $5,640, and
Jefferson Hills Ambulance Association in the amount of $800.

At trial, Nick Nickolich credibly testified that he was the second generation of Nickolich Towing, and that both he and his father had been personally serving the residents of Jefferson Hills Borough since the 1980s (Tr. at 12). That on the date of this incident, Defendant was requested by the Jefferson Hills Police to effectuate the recovery after concerns arose during the Plaintiff's own recovery efforts. Specifically, onlookers believed, "they had too light of chains" (Tr. at 12-13).

At said time, the tri-axle was laying on its side with a ruptured fuel tank in a residential community on a slight downgrade. Nickolich testified that upon meeting with neighbors and police, "they were scared it could have slid down more. And the way they were recovering the vehicle, it could have ended up either going into the property owner's house, or it could have bypassed that and gone down the street into another house" (Tr. at 13).

Through Nick Nickolich, the Plaintiff introduced and admitted bills by third parties engaged to assist in this recovery. Exhibit 2, marked and admitted at trial was a bill submitted by Dom Folino Construction in the amount of $5,640 (Tr. at 31). Nickolich testified that Folino's services were necessary due to the neighbor's concerns of further property damage to their yard in the up righting and recovery of the vehicle. Nickolich testified that based on these concerns it was necessary to rent a winch dozer, an excavator and lights from Dom Folino Construction (Tr. at 16). The bill showed that Folino charged for an excavator, a dozer, a light plant, and a service truck (Tr. at 27).

Nickolich testified as to bills received from the Gill Hall Fire Department for services provided. Specifically, a charge of $1050, for services associated with the incident of September 28, 2016. At said time they were called to the recovery site due to the fact that the Plaintiff's vehicle was on its side leaking fuel (See Tr. at 19). Additionally, Nickolich testified to a bill for $800 he had received from the Jefferson Hills Ambulance Association. The situation, diagnosed as a ruptured fuel tank leaking fuel into a residential community, required ambulance service personnel on stand-by during the recovery effort in the event of an emergency (Tr. at 20-21).

In addition to the charges submitted by Don Folino Construction, the Jefferson Hills Ambulance Association and the Gill Hall Fire Department, Nickolich testified to additional costs he expended by way of his own personal and equipment. Nickolich testified that the up righting and recovery required him to engage the services of multiple pieces of equipment and employees. Said costs, as purported by Nickolich, included a charge of $1000 for 'Assessment of Recovery by Supervisors", a Service Truck (also referred to as a "wrecker" in later testimony) at a cost of $500, with two additional "wreckers" employed at a charge of $350 per wrecker (See Tr. at 30-33).

Nickolich testified that the call for assistance was received at 4:09 p.m. and that the recovery was not completed until 2:30 a.m., and that his and employs services were engaged for over ten (10) hours on the evening, night, and early morning of September 28th and 29th of 2016. To reach to the total reflected in his bill submitted to the Plaintiff and later admitted at trial as Exhibit A, the Defendant testified that he added an additional 30% to the then accrued costs to reach his bill of $19,436.00 (Tr. at 22-23). Nickolich further testified that it was his customary procedure to charge a premium of 30% over and above the costs of such services as his profit margin. (*Id.*)

Frank Zokaites testified that he believed the appropriate markup on the services rendered by the Defendant should have been 10% percent for overhead and an additional 10% profit, but that it was his belief that the Defendant failed to expend any resources for overhead associated with the job in question (Tr. at 91).

Despite the fact Plaintiff concedes that the vehicle was towed and stored by the Defendant, that the Defendant did expend time and equipment in his recovery efforts, that the tri-axle's fuel tank was ruptured, that the incident required time expended by both the fire department and ambulance service, the Plaintiff maintains that the cost of said services should amount to approximately four hundred fifty dollars ($450). This Court found that $17,491.50 (less than the amount claimed) was reasonable.

V. CONCLUSION

This writer finds that the services billed by the Defendant were in fact provided to the Plaintiff. That said charges were within reason and absent of fraud. For the aforesaid reasons, this writer respectfully requests the Superior Court of Pennsylvania to affirm this Court's Order of February 27, 2018.

BY THE COURT:
/s/Della Vecchia, J.

Date: April 25, 2018

Eric Hanchey v. Fancy Fox, LLC, a Pennsylvania Limited Liability Company

Restrictive Covenant—Employment Agreement

The change from subcontractor to salaried employee constituted a new job which was sufficient consideration to make a restrictive covenant enforceable.

No. GD-17-009483. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, J.—December 8, 2017.

OPINION

This matter involves an "Agreement Not to Compete" (the "Agreement") between Appellant Eric Hanchey and Appellee Fancy Fox, LLC. The Agreement was executed on January 1, 2015. Mr. Hanchey had since July 6, 2013 been an independent contractor with Fancy Fox, LLC first as a salesman and then as Distribution Manager. In that role he oversaw sales, screen-printing and embroidery operations. Mr. Hanchey was originally hired as an independent contractor salesman on July 6, 2013 and paid by Fox's Pizza Distribution.

Fancy Fox, LLC was formed in August of 2014 to engage in printing materials for use in the pizza business of Fox's Pizza Den and also for sale to any user in need of print or embroidered items.

James Fox, the managing member of Fancy Fox, LLC testified that Fancy Fox, LLC was incorporated on August 17, 2014. He explained that Mr. Hanchey signed the Agreement on January 1, 2015 although they did not begin operations until March of 2015. Mr. Fox testified that he purchased the new equipment in reliance on Mr. Hanchey becoming an employee under the non-compete Agreement. He explained that had Mr. Hanchey not signed that Agreement, he would not have purchased new equipment and

would not have expanded operations. T.T. 56-57. He explained that the Agreement prohibited Mr. Hanchey from "operating within all of Westmoreland County and Allegheny County, Pennsylvania, and elsewhere to the extent located within a 25-mile radius of 4425 William Penn Highway, Murrysville, Pennsylvania." Prior to March of 2015, Mr. Hanchey was an independent contractor with Fox Pizza Distribution.

Mr. Fox stated that after termination, Mr. Hanchey started a new business and started soliciting many of Fancy Fox, LLC's customers in July of 2017 including A&L Motors, Joe Bass, John Denning, Jeffrey Stahl and Conco. T.T 26-33.

Mr. Hanchey testified that he started managing the business in January of 2014 after the prior manager Rich Grimes left. Mr. Hanchey stated that the machines were already there and new machines were not purchased until July of 2016. T.T. 64- 65. Mr. Hanchey stated that when he signed the non-compete Agreement in January of 2015 nothing changed and he did not get a raise. He testified that he signed it as a subcontractor and not an employee of Fancy Fox, LLC. However, he also stated that in 2015, he received both a 1099 form and a W-2 from Fancy Fox, LLC. T.T. 70. Mr. Hanchey testified that machines were being added all the time. T.T. 82. Mr. Hanchey admitted that he began to solicit Fancy Fox, LLC's customers after he was fired in May of 2007. T.T. 86. After he was fired, he immediately began violating the Agreement. Fancy Fox, LLC filed a Complaint seeking injunctive relief and damages.

On August 30, 2017, after testimony and argument in open court, I issued an Order granting a Preliminary Injunction against Mr. Hanchey for a period of two years. I also ordered Mr. Hanchey to provide a full and complete accounting of his activities to Fancy Fox, LLC within 30 days of the Order. I ordered Mr. Hanchey to pay Fancy Fox, LLC an amount equal to the sum of the net sales and value of the services. Finally, I ordered Mr. Hanchey to post bond in the amount of $5,000.

In Pennsylvania, restrictive covenants are enforceable if they are: (1) ancillary to an employment relationship between and employee and an employer; (2) supported by adequate consideration; (3) the restrictions are reasonably limited in duration and geographic extent; and (4) the restrictions are designed to protect the legitimate interests of the employer. *Hess v. Gebhard & Co. Inc.*, 808 A.2d 912, 917 (Pa. 2002).

I find that Mr. Hanchey breached his obligations under the contract with Fancy Fox and Fancy Fox will continue to suffer damages as a result. The non-compete Agreement is valid and enforceable under *Socko v. Mid-Atlantic Systems of CPA. Inc.*, 126 A.3d 1266 (Pa. 2015). In that case, the Court considered whether a non-compete agreement was supported by sufficient consideration. "Without new and valuable consideration, a restrictive covenant is unenforceable." *Maintenance Specialties Inc. v. Gottus*, 314 A.2d 279, 281 (Pa. 1974). In *Socko*, the court noted that "[i]f a noncompetition clause is executed at the inception of the employment, the consideration to support the covenant may be the award of the position itself." *Id.* at 1275. I find that Mr. Hanchey's employment in 2014 was as a subcontractor with Fox Distribution. He became a salaried employee in 2015 when he was hired by a separate and distinct entity to manage Fancy Fox LLC. That new job constitutes sufficient consideration under *Socko* for the non-complete.

I have found that Fancy Fox, LLC was a new and independent entity. Thus, the restrictive covenant applied to new employment and the new job was the valuable consideration. Further, equitable principles, apart from *Socko*, cry out for relief. Here, Hanchey, not even a shareholder, made off with trade secrets – customer lists – which he had acquired as a manager for Fancy Fox. To my mind, a modicum of employee loyalty requires that he not use the insider information to the detriment of Fancy Fox. Hence, the injunction and the accounting.

BY THE COURT:
/s/O'Reilly, J.

Date: December 8, 2017