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ALLEGHENY COUNTY COURT OF COMMON PLEAS

Appeal – Post-Trial Motions – Trade Secrets – Evidentiary Sufficiency

Plaintiffs and Defendant Premier are competitors in the pharmacy industry and provide similar services to hospitals and physicians' offices lacking in-house pharmacies. Plaintiffs allege that their former employees, Defendants Yerton and Weber, solicited the business of two entities while employed by Plaintiff and then took the business of those entities with them when they moved to work for Defendant Premier. Plaintiffs filed claims including breach of fiduciary duty, conversion of proprietary information, and tortious interference. A jury returned a verdict in favor of Plaintiffs for $2.1 million. Defendants filed an appeal alleging the trial court erred in four regards: in overruling Defendants' Preliminary Objections, in denying Defendants' Motion for Summary Judgment, in denying Defendants' Motion for Directed Verdict, and in denying Defendants' Motion for Post-Trial Relief. The Court held that there was no error in overruling Defendants' Preliminary Objections because the Plaintiffs' claims were not preempted by the Pennsylvania Uniform Trade Secrets Act ("PUTSA") because the claims made by Plaintiffs in their complaint are either contractual remedies, which are not preempted, or concern conduct entirely separate from the misappropriation of proprietary information. Under Pennsylvania law, preemption by PUTSA requires that plaintiff's tort claims involve only trade secrets and that the allegedly misappropriated information is properly categorized as a trade secret. Advanced Fluid Sys, Inc. v. Huber, 28 F.Supp 306, 324 (M.D. Pa. 2014). Neither requirement was met in the instant case. Defendants' Motions for Summary Judgment and Directed Verdict were too broad and vague to permit the Court to discern its alleged errors and so should be deemed waived. Defendants alleged that Plaintiffs failed to produce any evidence whatsoever to establish any element of their claims. While the Court did not state its reasons for denying Summary Judgment and J.N.O.V, it is not required to as the basis for those decisions is obvious – there was sufficient factual evidence for the jury to find in favor of the non-movant. The Court states that the Plaintiffs did provide sufficient factual evidence to support the jury verdict and notes that the jury may rely on any reasonable inference they may draw from the evidence presented. Plaintiffs produced sufficient evidence of past profits and profits made by others in similar business to provide a basis for the verdict award. The Court did not abuse its discretion in refusing to answer a jury question which would have required the Court to interrogate the jury.

Pa.R.A.P. 1925(a) Opinion – Petition to Set Aside Nomination Petition

Iren Evans, a candidate for Magisterial District Judge in District 05-2-10 filed a Petition to Set Aside Nomination Petition for Jeffrey Woodard based upon him not living in the at-issue district prior to November 7, 2022, which is required under 42 Pa.C.S. § 3101(a). Three hearings were held, the Petition to Set Aside Nomination was granted, and Jeffrey Woodard's name was struck from the ballot. Mr. Woodard then filed a timely appeal. The Court described at length in the 1925(a) opinion the reasons that it found that Mr. Evans met his burden of proof to show that Mr. Woodard did not live in the district prior to November 7, 2022. The Court initially noted that nomination petitions are presumed to be valid, and objectors bear the heavy burden to demonstrate that a candidate's nomination petition is invalid. Then, guided by the factors set forth in In re Shimkus, 946 A.2d 139 (Pa. Commw. Ct. 2008), the Court found through the evidence presented via Constable Jackson's testimony and photographic evidence that the at-issue residence was uninhabitable, as it was under construction, and it lacked furnishing, toiletries, clothing, or bedding to indicate it was being lived in. The inspection by the Constable took place on March 16, 2023. The Court also found it significant that the Landlord of the at-issue residence testified that he "did not know" if Mr. Woodard lived at the residence, and on the Landlord's last visit to the apartment in January of 2023, there was no furniture or anything else in the unit. Based upon this and further evidence, the Court found that Mr. Evans met his heavy burden of proof to show that Mr. Woodard did not reside at the at-issue residence prior to November 7, 2022.

Wrongful Termination – Appeal – Motions in Limine – Jury Charges – Public Policy

Plaintiff was employed by Defendant as a helicopter pilot providing emergency transportation services including LifeFlight. When Defendant transitioned to a smaller helicopter, flight nurses requested reconfiguration of the interior for better access to patients. Plaintiff allowed reconfiguration of his aircraft after confirming with an indirect superior that reconfiguration was safe. Plaintiff was accused of failing to follow the chain of command and of a policy/safety violation. Plaintiff was later terminated for failing to follow the pre-flight checklist. Plaintiff sued for wrongful termination. A jury verdict was returned for Plaintiff totaling $2,230,000.00. Both parties filed Motions for Post-Trial Relief which were denied; appeals followed. The Court did not err in denying Defendant's Motion for Summary Judgment because the AIR21 Act, a federal whistleblower statute, does not implicate Pennsylvania's state employment laws or preempt Pennsylvania's Emergency Medical Services System Act ("EMSSA"). J.N.O.V. was properly denied because Plaintiff provided sufficient evidence that the reconfiguration of his aircraft served the public interest of meeting urgent medical need and was done safely such that the jury could find that his firing was in violation of public policy. The Court properly denied Defendant's Motion in Limine to exclude evidence of an OSHA violation because the violation was relevant to Plaintiff's rebuttal that he was terminated to avoid further attention from OSHA on the Defendant. Evidence of another employee being permitted to resign for falsifying documentation was properly admitted to show the disparity with Plaintiff's termination. A video exhibit showing pre-flight preparation was properly excluded because it did not tend to make

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any fact at issue more or less probable. Plaintiff's failure to return to a pre-injury job at Home Depot was not relevant because such employment did "not afford virtually identical opportunities for a promotion, compensation and responsibilities" as employment as a pilot. Vladmirsky v. Sch. Dist. of Philadelphia, 206 A.3d 1224 (Pa. Commwlth. Ct. 2019). A proposed jury charge was properly denied because Plaintiff's allegations were not based on broad and general statements of policy violations but rather on the EMSSA, thus the proposed charge was not supported by the record. The Court's response to a jury question regarding public policy correctly stated the law and was necessary to clarify the jury's "doubt and confusion." Worthington v. Oberhuber, 215 A.2d 621 (Pa. 1966). The jury's award was not so "grossly excessive as to shock [the court's] sense of justice" and was supported by the evidence of record. Kane v. Scranton Transit Co., 94 A.2d 560 (Pa. 1953). Plaintiff's errors complained of stemmed from the Court's denial of a new trial on punitive damages. Plaintiff did not set forth evidence that Defendant acted or failed to act in conscious disregard of a risk to Plaintiff or acted maliciously to end Plaintiff's career, thus the omission of a jury charge for punitive damages did not constitute error warranting a new trial. Citing Johnson v. Hyundai Motor Am., 698 A.2d 631 (Pa. Super. 1997).

Uniform Trade Secrets Act – Opinion Pursuant to Pa.R.A.P. 1925(a) – Reduction of Jury Verdict to Conform to Law – Customer List as Trade Secret – Unfair Competition Claim in Absence of Direct Competition – Conversion without Deprivation of Use – Wage Payment and Collection Laws – Attorney's Fees under the Wage Payment and Collection Laws – Request for a New Trial on Damages After an Excessive Jury Verdict

Third-Party Defendants, owners of Plaintiff company, a jewelry company, are the Mother and Step-Father of Defendants. Defendants worked for Plaintiff company, and were in discussions with Plaintiff company to buy the company from Third-Party Defendants. Defendants instead decided to open up their own jewelry company, Co-Defendant. When forming Co-Defendant company, Defendants used Plaintiff's customer list to jumpstart their business. After a jury trial on all issues, all parties sought an appeal over a multitude of issues, as addressed below. Plaintiff company was meritorious in bringing claims under the Uniform Trade Secrets Act, Common Law Unfair Competition, and Conversion, and were awarded $142,400.00, $41,300.00, and $41,300.00 respectively. The Court molded the Jury verdict, limiting recovery to $142,400.00, as the underlying facts and damages for the Unfair Competition and Conversion claims were the same as those for the Uniform Trade Secrets Act, and Plaintiff testified that actual damages for the theft of its customer list was $142,400.00. The Court ruled that customer lists fall are recognized as trade secrets, if maintained with a substantial level of protection and secrecy, and possess competitive value. The Court ruled that the jury's finding that Defendant's actions violated Common Law Unfair Competition conformed to law, even though Defendant company and Plaintiff were not doing business at the same time. In doing so, the Court cites testimony that the two companies had roughly 2 months of overlap, and the fact that Plaintiff had discussed selling the customer list prior to it being stolen. Because the customer list possess minimal to no value if it is not secret, competition existed between Plaintiff and Defendant over the use of the customer list. Defendants argued that the jury's finding of conversion was insufficient as a matter of law, as Defendants did nothing to actually hinder Plaintiff's use of the list. The Court rejected this argument, as the customer list lost substantial value due to Defendant's actions. Defendant, who was salaried and substantially part of the upkeep and decision making process for Plaintiff company, was not entitled to overtime compensation under the Wage Payment and Collection Laws. Co-Defendant, who worked for the company part time, was entitled to relief for unpaid wages sufficient to compensate him for work provided, and rate of pay, when not made clear through contractual language, is a rightfully a question for the jury. When claims that allow for recovery of attorney's fees and claims that do not allow for such recovery are brought together, attorney's fees may only be awarded for time spent working on the claims that allow for the recovery of attorney's fees. When actual calculation of attorney's fees are not presented to the Court, it is in the Court's power to determine what constitutes fair and reasonable attorney's fees. The Court ruled that, because the Court molded the jury verdict to limit the damages to conform with the law, no new trial on damages was required.

Pa.R.A.P 1925(a) Opinion – Denial of Statutory Appeal – Policemen and Firemen – Collective Bargaining Act – Violation of Collective Bargaining Agreement

The Fraternal Order of Police, Fort Pitt Lodge No. 1 ("Union") filed a class action grievance against the City of Pittsburgh ("City") alleging that the termination of a surviving spouse's health insurance coverage upon the death of a retired police officer was a violation of the collective bargaining agreement between the parties. Following a hearing and written argument, an arbitrator issued an award in favor of the Union. The City then filed a Statutory Appeal. Following written briefs and argument, the Court issued an order denying the City's appeal and upholding the arbitrator's award. The City then appealed to the Commonwealth Court, and following the filing of the Concise Statement of Errors Complained of on Appeal, the Court issued this order. This matter arose following the City denying health benefits to a surviving spouse of a recently deceased retired police officer. The CBA noted that the City was to be a health insurer of last resort for retired officers and their spouses. However, it also specifically listed terminating events for health insurance coverage, but the death of a retired

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officer was not one of those events. The arbitrator interpreted the CBA to mean that the surviving spouse was to maintain health insurance coverage until one of the specifically enumerated terminating events occurred. The Court noted that it gave extreme deference to the arbitrator's award as it is due under 43 P.S. § 217.7 in Act 111. The Court further noted that Act 111 appeals are limited to "narrow certiorari review," and where an Act 111 dispute depends on the interpretation of a collective bargaining agreement, the court is bound by the arbitrator's determination, even if incorrect. See P.S.P. v. PA State Troopers' Assoc., 840 A.2d 1059, 1062 (Pa. 2004). Addressing the errors complained of on appeal, the Court first held that the arbitrator's decision was not an "overt instance of reformation" of the CBA, but it was rather an interpretation of the CBA. The Court further held that neither side acted in bad faith, that the Arbitrator's award did not strip the City of its authority to bargain for the terms of health insurance for its police officers and retirees, and that health insurance benefits were bargained for and won by the Union. Here, the arbitrator simply interpreted the provisions related to health insurance coverage. For the above reasons, the Court found that it committed no error in upholding the arbitrator's award.

Income Tax – Pennsylvania Constitution Uniformity Clause – Unconstitutional Distinction Based on Resident Status

Plaintiffs, Players' Associations for professional athletes in the NHL, MLB, and NFL, challenged the constitutionality of Defendant, the City of Pittsburgh's, Non-Resident Sports Facility Usage Fee (the "Facility Fee"), which is a tax imposed on non-Pittsburgh resident professional athletes in the NHL, MLB, and NFL for games played (or days worked) in Pittsburgh. The Facility Fee assesses 3% on personal income for nonresidents of Pittsburgh, while resident athletes of Pittsburgh are subject to the 1% tax assessed on all residents. Plaintiffs argued that the Facility Fee was unconstitutional on its face because it makes a facial distinction between classifications of taxpayers – residents and non-residents. The Court determined that the Facility Fee's distinction between taxpayers based on residency was unconstitutional and violative of the Pennsylvania Constitution's Uniformity Clause because the individuals – here, professional athletes – are engaged in the same professions. As such, the residency distinction was deemed arbitrary and unreasonable. The Court additionally noted that the Facility Fee was further unconstitutional because it created a lack of uniformity among professional athletes. For these reasons, the Court enjoined the City from further collecting the Facility Fee. Defendant argued that the Court should have severed the unconstitutional portion of the Facility Fee ordinance, resulting in the Facility Fee being assessed on both residents and nonresident, rather than issuing injunctive relief. The Court rejected that argument, determining that the Court did not have authority to effectively legislate a tax.

Damages – Attorney Fees Award – Unfair Trade Practices and Consumer Protection Law

Plaintiff, initially pro se, filed a Complaint for damages resulting from, among others, Defendant's failure to refund Plaintiff's security and utility deposits. When Defendants filed preliminary objections, Plaintiff obtained counsel and filed an amended complaint, including claims of breach of warranty of habitability and violation of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). Plaintiff was awarded $6,350 by the arbitration panel; Defendants appealed. At a non-jury trial, the Court awarded Plaintiff $8,970, which included $5,407.50 in attorney fees. Defendants argued that attorney fees award was disproportionate to the amount of the verdict. The Court determined the award was appropriate because the amount of time required for counsel to attend the half-day arbitration hearing and prepare for and attend the non-jury trial was reasonable. Further, the Court found that hourly rate charged was customary and that the amount in controversy was substantial to Plaintiff. Defendants also argued the attorneys fee award did not further the purposes of the UTPCPL because one of the Defendants died and, thus, could not be deterred from further UTPCPL violations. The Court rejected that argument, finding that the UTPCPL attorney fees provision intends to reduce deception of consumers by all businesses, not just Defendants.

Compulsory Arbitration – Contract – Intent to be Bound

Plaintiff field a seven-count complaint, including counts for breach of contract and unjust enrichment; various contracts and other documents were exhibits to Plaintiff's complaint. Defendant filed preliminary objections, including one requesting dismissal and to compel arbitration. Defendant's argument compelling arbitration was based on a provision in an operating agreement that was attached to Plaintiff's complaint. The operating agreement at issue applied to members of an LLC. On one hand, Defendant argued that the operating agreement should compel arbitration, but on the other hand, Defendant argued that, under the same operating agreement, Plaintiff was not a member of the LLC. As such, the Court noted that Defendant could not make two contradictory arguments under the same agreement. Because the Court determined there was no operating agreement signed by both Plaintiff and Defendant that demonstrated both parties intended to be bound to its terms, including the arbitration provision, the Court overruled Defendant's preliminary objection to dismiss and transfer to arbitration.

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The Pittsburgh Legal Journal Opinions *are published fortnightly by the*
Allegheny County Bar Association
400 Koppers Building
Pittsburgh, Pennsylvania 15219
412-261-6255
www.acba.org

Circulation 5,174

PLJ Editorial Staff

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HEALTHCARE VENTURES GROUP, LLC, PHYSICIANS Rx PHARMACY, LLC, its wholly owned subsidiary vs. PREMIER PHARMACY, INC. d/b/a PREMIER PHARMACY SERVICES, GOOD HEALTH, INC. d/b/a PREMIER PHARMACY SERVICES, JOEL YERTON, an individual, TODD WEBER, an individual

Appeal – Post-Trial Motions – Trade Secrets – Evidentiary Sufficiency

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Defendants' Motions for Summary Judgment and Directed Verdict were too broad and vague to permit the Court to discern its alleged errors and so should be deemed waived. Defendants alleged that Plaintiffs failed to produce any evidence whatsoever to establish any element of their claims. While the Court did not state its reasons for denying Summary Judgment and J.N.O.V, it is not required to as the basis for those decisions is obvious – there was sufficient factual evidence for the jury to find in favor of the non-movant. The Court states that the Plaintiffs did provide sufficient factual evidence to support the jury verdict and notes that the jury may rely on any reasonable inference they may draw from the evidence presented. Plaintiffs produced sufficient evidence of past profits and profits made by others in similar business to provide a basis for the verdict award.

The Court did not abuse its discretion in refusing to answer a jury question which would have required the Court to interrogate the jury.

Case No.: GD-16-023951. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Ward, J. November 30, 2022.

OPINION

I. BACKGROUND

This case arises out of dispute between Plaintiff, Physician Rx Pharmacy, LLC ("PRxP"); its former employees, Joel Yerton ("Yerton") and Todd Weber ("Weber"); and Defendant, Premier Pharmacy, Inc. ("Premier"). PRxP and Premier are competitors in the 340B pharmacy services industry, which provides services to certain "Covered Entities," such as hospitals and clinics, that lack in-house pharmacies and must outsource these services to companies like PRxP and Premier. At the time of the events at issue in this case, Yerton and Weber were employed by PRxP as part of its sales team to sell PRxP's services to, and enter contracts with, Covered Entities.

The essence of PRxP's multiple causes of action is that Yerton and Weber made plans while employed by PRxP, and took steps in furtherance thereof, to divert certain business prospects and clients away from PRxP and to take those opportunities with them to Premier, a competitor, when Yerton and Weber left PRxP's employment. While employed by PRxP, Weber and Yerton worked to solicit the business of two Covered Entities at issue in this case: AIDS Connecticut, Inc. ("ACT") and Middletown Community Health Center ("MCHC"). Yerton and Weber conveyed to PRxP that ACT and MCHC were highly likely to close a deal with PRxP. Eventually, ACT signed a letter of intent to enter into a pharmacy services contract with PRxP.

During this time, Yerton and Weber sought employment at PRxP's competitor, Premier. Yerton and Weber developed a "project plan" for Premier which articulated their plans to bring clients and revenue to Premier. This project plan was similar to the one they had developed for PRxP to solicit MCHC and ACT. Soon after Yerton and Weber left PRxP and joined Premier, MCHC backed out of their discussions with PRxP and ACT reneged on their letter of intent. Shortly thereafter, both Covered Entities entered into agreements with Premier for pharmacy services.

Plaintiffs instituted the instant action claiming that the Defendants breached their fiduciary duties as employees, converted proprietary information, and tortiously interfered with PRxP's existing and prospective contractual relationships with MCHC and ACT. At trial, the jury returned a verdict for Plaintiffs and awarded $2.1 million in damages.

II. ERRORS COMPLAINED OF ON APPEAL

After the jury returned a verdict for Plaintiffs, Defendants appealed this Court's Order of August 16, 2022 which denied Defendants' Post-Trial Motion for relief and affirmed the verdict. Defendants then filed their Concise Statement of Errors, making the following assignments of error:

1. The Trial Court erred in denying Appellants' Preliminary Objection to Plaintiffs' Amended Complaint, dated February 21, 2017 seeking the dismissal of Plaintiffs' claims for breach of fiduciary duty/duty of loyalty, conversion, tortious interference with existing contract, tortious interference with existing or prospective contract, breach of contract, and commercial disparagement – which were preempted by the Pennsylvania Uniform Trade Secrets Act, 12 Pa. C.S. § 5308.

2. The Trial Court erred in denying Appellants' Motion for Summary Judgment dated February 9, 2022 despite Plaintiffs' failure to present any evidence to support Plaintiffs' causes of action.

3. The Trial Court erred by denying Appellants' motion for directed verdict and post-trial Motion for Judgment Notwithstanding the Verdict, and Motion for Remittitur, in light of Plaintiffs' failure to present evidence legally capable of

supporting Plaintiffs' claims, including but not limited to Plaintiffs' sole reliance upon speculation and facts not in evidence in an attempt to establish the existence, amount, and calculation of Plaintiffs' alleged damages as well as Plaintiffs' failure to present any evidence capable of establishing a causal connection between Plaintiffs' alleged damages and any of Appellants' alleged acts.

4. The Trial Court erred by denying Appellants' post-trial Motion for New Trial and erred by responding to the jury's question: "Did Premier revenue 1.9 million from Cornerstone over the five years of the contract?" with the answer "It is up to you to decide the answer to this question"–despite the facts that (1) this Court was admittedly confused as to the basis of the jury's question and (2) Plaintiffs admitted no evidence of Premier's revenue from Cornerstone.

III. ANALYSIS

A. Defendants' Preliminary Objections

This Court did not err in finding that that Plaintiffs' claims were not preempted by the Pennsylvania Uniform Trade Secrets Act ("PUTSA") and in overruling Defendants' preliminary objections. Preliminary objections "should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief." Adams v. Hellings Builders, Inc., 146 A.3d 795, 798 (Pa. Super. Ct. 2016). Moreover, "all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom." Id. Defendants' only contention to dismissing Plaintiffs' First Amended Complaint is that all counts[1] of the Complaint are preempted by the PUTSA.

Although the PUTSA preempts conflicting civil remedies for misappropriation of trade secrets, it provides that it does not affect "(1) contractual remedies, whether or not based upon misappropriation of a trade secret" or "(2) other civil remedies that are not based upon misappropriation of a trade secret." 12 Pa. C.S. § 5308(b). To begin with, many of the causes of action that Plaintiffs raise in their Complaint, as averred, are either contractual remedies, which are excluded from preemption, or concern conduct wholly apart from the misappropriation of proprietary information. Count VII is a breach of contract claim, and thus not preempted. Additionally, Plaintiffs' claims for tortious interference with contract are not based on the misappropriation of trade secrets. Those claims are based on the conduct of Defendants Yerton and Weber in undermining PRxP's consummation of a pharmacy services agreement with potential clients. Count VIII is a claim for commercial disparagement that alleges that Defendants publicized misleading information_to injure PRxP's reputation. This claim plainly has nothing to do with trade secrets.

While some of Plaintiffs' claims do involve the misappropriation of proprietary information, these claims are also not preempted by the PUTSA. Pennsylvania Federal Courts, applying the law of this Commonwealth, have held that preemption by the PUTSA requires "first, that plaintiffs tort claims only involve trade secrets, and, second, that the allegedly misappropriated information is properly classified as a trade secret." Advanced Fluid Sys., Inc. v. Huber, 28 F.Supp.3d 306,324 (M.D. Pa. 2014) (emphasis in original). Firstly, Plaintiffs did not aver in their Complaint that their proprietary information is a trade secret. As such, it is inappropriate to presume that such information is appropriately classified as a trade secret for purposes of ruling on a preliminary objection. See id. Without a factual finding that Plaintiffs' proprietary information is a "trade secret," this Court could not rule that Plaintiffs' claims were preempted by PUTSA.

Additionally, Plaintiffs' claims involving misappropriation do not "only involve trade secrets." Id. Where the claims allege conduct beyond mere misappropriation of trade secrets, those claims are not preempted. Id.; see also Cunningham Lindsey US., Inc. v. Bonnani, Civil No. 1:13-cv-2528, 2014 WL 1612632, *3-4 (M.D. Pa. 2014). The claims before the court in Cunningham are very similar to the claims in this case. There, plaintiff made claims for breaches of fiduciary duty and unfair competition in addition to misappropriation of proprietary information, arising out of an attempt by the plaintiffs employees to leave the plaintiffs employment and take clients and business with them. The court explained that this type of tortious conduct was not preempted by the PUTSA. Cunningham, 2014 WL 1612632, at *4. In the same respect, Plaintiffs here claim breach of fiduciary duty and unfair competition that arises out of tortious conduct that goes beyond merely the misappropriation of proprietary information. Plaintiffs also allege that the Defendants took steps against their employers' interest and planned to undermine their potential contractual relationships. As such, these claims were not preempted by the PUTSA and should not have been dismissed on preliminary objections.

B. Defendants' Motion for Summary Judgment and Post-Trial Motions

Next, Defendants challenge the evidentiary sufficiency of Plaintiffs' claims at both the summary judgment and directed verdict stage. Because the standards to be applied by the trial court at both stages are very similar, this Court will address both of these assignments of error together. Additionally, both assignments of error suffer from the same deficiency, because they are too broad and vague to permit this Court to discern its alleged errors.

i. Assignments of Error 2 and 3 of Defendant's Concise Statement of Errors Are Waived Because Overly Broad and Vague.

Rule 1925 of the Pennsylvania Rules of Civil Procedure directs the appealing party to file a concise statement of the trial court's errors, and any error not concisely stated will be waived. Defendants, however, were overzealous in their attempt at brevity. Where an appellant's concise statement of errors is so vague as to prevent a court from identifying the issues to be raised on appeal, the appellant has effectively waived those issues on appeal. Lineberger v. Wyeth, 894 A.2d 141, 148 (Pa. Super. Ct. 2006). In their second assignment of error, the Defendants astonishingly claim that none of the evidence presented at trial is capable of establishing any of the elements of Plaintiffs' claims. Their third assignment of error merely reiterates the second, in that it argues Plaintiffs failed to produce any evidence to support their claims. This contention is so lacking in merit and sincerity that it does not warrant a substantive response from this Court.

The Defendants attempt to avoid this obvious deficiency by citing to Rule 1925: "If the appellant in a civil case cannot readily discern the basis for the judge's decision, the appellant shall preface the Statement with an explanation as to why the Statement has identified the errors in only general terms. In such a case, the generality of the Statement will not be grounds for finding waiver." Pa. R.C.P. 1925(b)(4)(vi). However, a trial court's failure to state the reasons for its ruling is not a free license to make unspecified and impermissibly vague assignments of error. See Keystone Specialty Servs. Co. v. Ebaugh, 267 A.3d 1250, 1255 (Pa. Super. Ct. 2021) ("The fact that the trial court did not state its reasoning in its order did not prevent Plaintiff from specifying why it contended that summary judgment could not be granted in this case."). In Keystone, the Superior Court held that the basis for the trial court's order granting summary judgment, though not stated by the trial court in its order, was nevertheless readily discernible where summary judgment was sought on only one ground. Id. Compare that situation with the one in Hess v. Fox Rothschild, LLP, 925 A.2d 798, 804 (Pa. Super. Ct. 2007), where the trial court sustained preliminary objections, dismissing the complaint. In Hess there could have been various independent bases for finding the complaint legally insufficient, leaving appellants to guess upon which basis the court sustained preliminary objections. Id. On the other hand, in Keystone the basis for the court's order was clear because there was only one.

Here, although this Court did not state the reasons for denying summary judgment or j.n.o.v., the basis for those decisions is readily discernible, as there can only be one basis for denying summary judgment or j.n.o.v.; namely, that there was a sufficient factual basis for a jury to make a finding in favor of the non-movant. This is not a situation like the one presented in Hess where there may be multiple independent grounds for the trial court's ruling. As the movant, it was therefore incumbent upon the Defendants – and not this Court – to specify which, if any, of the facts viewed in the light favorable to the Plaintiffs would have rendered their claims legally insufficient. Instead, the Defendants have left this Court to guess at which of the innumerable alleged facts, presented through hours of testimony and documentation at trial, were insufficiently proven to have allowed a jury to find them.

The absence of a stated reason for this Court's orders denying summary judgment and j.n.o.v. did not, therefore, prevent the Defendants from identifying specifically which allegations, legal elements, or facts they believe to be lacking adequate evidentiary proof. Their contention that none of the evidence supports Plaitniffs' claims is overly broad, vague, and disingenuous. Accordingly, the Defendants have effectively waived their right to appeal these issues.

ii. Plaintiff presented sufficient evidence for a jury to find in its favor.

Assuming, arguendo, that the Defendants have not waived these issues, this Court will attempt to respond. Due to the sweeping generalization of Defendants' assignments of error, however, this Court can only respond with generalizations. On summary judgment, the movant must show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Summers v. Certainteed Corp., 997 A.2d 1152, 1159 (Pa. 2010). Similarly, there are two bases for j.n.o.v.: "one, the movant is entitled to judgment as a matter of law and/or two, the evidence is such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant." Capital Care Corp. v. Hunt, 847 A.2d 75, 81 (Pa. Super. Ct. 2004). Contrary to Defendants' contention, Plaintiffs produced sufficient evidence, both for summary judgment and at trial, to permit the jury to find in their favor.

Defendants assert that the Plaintiffs' claims and damages were proven through "speculation" and "facts not in evidence." Without any further specificity, this Court is left to assume that by "speculation" Defendants mean to refer to inferences drawn from the facts presented. Not only may a jury rely on any reasonable inference they may draw from the evidence presented, the standard for summary judgment andj.n.o.v. requires the court to draw any such inferences in the favor of the non-movant. Summers, 997 A.2d at 1159; Capital Care Corp., 847 A.2d at 81-82. For example, the undisputed facts show that Defendants Yerton and Weber, while employed for PRxP, solicited business from MCHC and ACT, and that ACT signed a letter of intent to enter a contract with PRxP for pharmacy services. The undisputed facts further show that Defendants Yerton and Weber planned to seek employment with Premier, that Yerton and Weber were in contact with MCHC and ACT up until they left PRxP, and that soon after their resignation these potential clients cut their relationship with PRxP and signed on with Premier. Of course, there is no smoking gun evidence, but a clear inference may be drawn in favor of the Plaintiffs that the actions of the Defendants caused PRxP to lose potential business, resulting in damages. It was not an error, therefore, to allow the jury to draw this inference.

As far as Plaintiffs' damages are concerned, Plaintiffs also presented sufficient evidence. Defendants again regard this evidence as "speculative." Without any greater specificity, this Court assumes that Defendants refer to Plaintiffs' attempt to calculate their lost future profits as damages. As the Supreme Court has said of prospective profits, "[w]here substantial damage has been suffered, the impossibility of proving its precise limits is no reason for denying substantial damages altogether." Massachusetts Bonding & Ins. Co. v. Johnston & Harder, 22 A.2d 709, 714 (Pa. 1941). Permissible evidence to prove prospective profits includes "[e]vidence of past profits in an established business" or "[p]rofits made by others or by the plaintiff himself in a similar business or under a similar contract." Id. Here, the Plaintiffs presented such competent evidence, using what little evidence they had of Premier's profit from its contracts with MCHC and ACT as well as PRxP's own profits in similar and past contracts to calculate its future profits. Whether Defendants find such evidence too speculative is of no moment, as the evidence was competent enough for a jury to give appropriate weight and decide for themselves.

Thus, the Plaintiffs presented sufficient evidence to permit a jury to find in their favor. The evidence was not such that no two reasonable minds could differ. As such, this Court did not err in denying summary judgment or j.n.o.v.

C. Defendants' Motion for New Trial

Finally, Defendants argue that this Court erred by refusing to answer the question put forth by the jury during deliberation: "Did Premier revenue 1.9 million from Cornerstone over the five years of the contract?" When the jury asks a question, it is committed to the sound discretion of the trail court "the scope of such additional instructions as he or she decides to give to a jury" Smick v. City of Phila., 638 A.2d 287, 291 (Pa. Commw. Ct. 1994). Additionally,

There may be situations in which a trial judge may decline to answer questions put by the jury, but where ajury returns on its own motion indicating confusion, the court has the duty to give such additional instructions on the law as the court may think necessary to clarify the jury's doubt or confusion.

Worthington v. Oberhuber, 215 A.2d 621 (Pa. 1966). A new trial will only be ordered if it can be shown that any such confusion was to the detriment of the losing party. Id.

Here, it was within this Court's discretion to refuse to answer the question, or rather, to instruct the jury that this factual question was for them to find. After receiving this Court's response, the jury did not "return on its own motion indicating confusion." See id. Although counsel and this Court were admittedly confused by the question, this confusion stems primarily from the fact that this Court and counsel could not participate in the jury's deliberation to determine what they were thinking. To answer the question would have required an interrogation of the jury.

Defendants argue that this Court should have answered the jury's question with "no" because there was no evidence that Premier received any money from Cornerstone (MCHC). However, as indicated by the transcript, this Court refused to answer with "no" because that would require questioning the jury about the basis of their question to determine if there was or was not evidence to support the finding. As explained above, the Plaintiffs presented evidence of their damages, which the jury was entitled to believe in whole, in part, or not at all. Neison v. Hines, 653 A.2d 634, 637 (Pa. 1995). In fact, the Plaintiffs attempted to prove damages in excess of $10 million. As such, given the jury's finding that the Defendants are liable, it cannot be said that any confusion about damages on the part of the jury worked to the Defendants' detriment as the awarded damages were significantly lower than $10 million.

As such, this Court committed no abuse of discretion in refusing to answer the jury's question. In any event, any error made by this Court did not prejudice the Defendants.

IV. Conclusion

This Court committed no errors of law and did not abuse its discretion. To the extent that Defendants' concise statement of errors are overly broad and vague, those issues should be deemed waived on appeal. Therefore, this Court's order denying post-trial relief should be affirmed.

BY THE COURT:
/s/The Hon. Christine A. Ward

[1] Plaintiffs set forth the following causes of action in their First Amended Complaint: (I) Preliminary and Permanent Injunction, (II) Breach of Fiduciary Duty, (111) Misappropriation and Unfair Competition, (IV) Conversion, (V) Tortious Interference with Existing Contract, (VI) Tortious Interference with Prospective or Existing Contract, (VII) Breach of Contract, (VIII) Commercial Disparagement.

IN RE NOMINATING PETITION OF JEFFREY WOODARD FOR THE OFFICE OF MAGISTERIAL DISTRICT JUDGE, DISTRICT 05-2-10, Objection of Iren Evans

Pa.R.A.P. 1925(a) Opinion – Petition to Set Aside Nomination Petition

Iren Evans, a candidate for Magisterial District Judge in District 05-2-10 filed a Petition to Set Aside Nomination Petition for Jeffrey Woodard based upon him not living in the at-issue district prior to November 7, 2022, which is required under 42 Pa.C.S. § 3101(a). Three hearings were held, the Petition to Set Aside Nomination was granted, and Jeffrey Woodard's name was struck from the ballot. Mr. Woodard then filed a timely appeal. The Court described at length in the 1925(a) opinion the reasons that it found that Mr. Evans met his burden of proof to show that Mr. Woodard did not live in the district prior to November 7, 2022. The Court initially noted that nomination petitions are presumed to be valid, and objectors bear the heavy burden to demonstrate that a candidate's nomination petition is invalid. Then, guided by the factors set forth in In re Shimkus, 946 A.2d 139 (Pa. Commw. Ct. 2008), the Court found through the evidence presented via Constable Jackson's testimony and photographic evidence that the at-issue residence was uninhabitable, as it was under construction, and it lacked furnishing, toiletries, clothing, or bedding to indicate it was being lived in. The inspection by the Constable took place on March 16, 2023. The Court also found it significant that the Landlord of the at-issue residence testified that he "did not know" if Mr. Woodard lived at the residence, and on the Landlord's last visit to the apartment in January of 2023, there was no furniture or anything else in the unit. Based upon this and further evidence, the Court found that Mr. Evans met his heavy burden of proof to show that Mr. Woodard did not reside at the at-issue residence prior to November 7, 2022.

Case No.: GD-23-3476. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. McVay, J. April 10, 2023.

OPINION

Procedural History

On March 14th, 2023, Iren Evans, a candidate for Magisterial District Judge in District 05-2-10 filed a Petition to Set Aside Nomination Petition for Jeffrey Woodard (Democrat and Republican). Jeffrey Woodard is running for the office of Magisterial District Judge for District 05-2-10, in the Court of Common Pleas of Allegheny County. Evans alleges that Woodard did not live at 434 Ross Avenue, Wilkinsburg, Pittsburgh, Allegheny County, Pennsylvania 15221 prior to November 7th, 2022, which is required under 42 Pa.C.S. § 3101(a). I held hearings on March 22nd, 27th, and 28th to establish a record and ensure that the candidate had at least some time to adequately respond as his counsel argued that Evan's Challenging Petition did not provide specific notice of facts regarding residency. At the March 28th hearing Mr. Woodard presented a motion to dismiss the challenging petition which I took under advisement and dismissed on March 30th. My order on March 29th granted Evan's Petition to Set Aside Nomination Petition for Jeffrey Woodard and struck Woodard's name from the ballot. Mr. Woodard then appealed my March 29th Order on April 6th, 2023. Pursuant to Pa.R.A.P. 1925, my reasons for granting Evan's challenging petition are stated in my March 29th, 2023, order and attached as Exhibit A. I also will expand upon my findings in this opinion.

Discussion

My March 29th order found that Mr. Evan's had met his burden of proof establishing that Mr. Woodard did not live at the 434 Ross Avenue address prior to November 7th, 2022.

"Nomination petitions are presumed to be valid, and objectors bear the heavy burden of demonstrating that a candidate's nomination petition is invalid." In re Shimkus, 946 A.2d 139, 141 (Pa. Commw. Ct. 2008) citing In re Nomination Petition of Pippy, 711 A.2d 1048, 1057 (Pa.Cmwlth.1998). "[A]n objector has the burden of proving that a candidate's affidavit is false with regard to statements about residency." Id. In other words, Evans must prove that Mr. Woodard is not a resident of the district in question and Mr. Woodard does not have to prove that he is.

Pursuant to In re Shimkus, 946 A.2d 139 (Pa. Commw. Ct. 2008), some factors for me to consider when determining a candidate's residence, are 1) the candidate's presence or absence at the address, 2) where members of the candidate's household reside, 3) whether candidate pays rent or has a lease for the property he claims as his residence, 4) where the candidate sleeps, 5) what belongings and personal effects the candidate keeps at the address, and 6) whether the candidate owns another home to which he appears more permanently attached.

Testimony and exhibits presented at the hearing provided me with enough facts to find that Mr. Evans had met his burden of proof and established pursuant to Shimkas that Mr. Woodard did not live at the 434 Ross Avenue address prior to November 7th, 2022, as required by 42 Pa.C.S. § 3101(a).

In addition to my previous Shimkas analysis and findings, I found that the rebuttal witness (Constable Acrie) was credible, but his testimony did not convince me that Mr. Woodard had lived at the 434 Ross Avenue address prior to November 7th, 2022.[1] I still found Constable Jackson's testimony credible regarding the photo exhibits taken at the 434 Ross Avenue apartment that had Mr. Woodard's name on the mailbox. Those photos showed an uninhabitable apartment that was listed as Mr. Woodard's Wilkinsburg address.

The lease listed the first-floor apartment as Mr. Woodard's and Constable Jackson had testified that there was no where on the first floor that he did not go into. March 27th Trial Transcript P. 11 ("27th TT").

I want to emphasize that I found it telling that Woodard's witness, Mr. Mazzanti, who was the landlord at 434 Ross Avenue, testified at the March 22nd hearing that he "did not know" if Mr. Woodard lived at the address or if he had moved in. 27th TT P. 47.

Mr. Mazzanti further testified that the apartment Woodard rented was being renovated which would apply to the first-floor apartment. The photos of the basement apartment did not look like there was any work being done to it other than some new paint and carpet. Also, Mr. Mazzanti testified that the last time he was in Woodard's apartment was two months ago, which would be January 2023, and there was no furniture or anything else in the unit. I found this testimony more relevant that Mr. Acrie's testimony that the apartment was occupied on March 27th, 2023.

Given this testimony, the testimony of Constable Jackson, and the photo exhibits taken by Constable Jackson, I found that Mr. Evans had met his burden of proof and established that Mr. Woodard did not reside at 434 Ross Avenue prior to November 7th, 2022.

Conclusion

In conclusion, I found that Mr. Evan's met his burden of proof in demonstrating that Mr. Woodard did not live at the Wilkinsburg address prior to November 7th, 2022, and I granted Mr. Evan's challenging petition based on the testimony and exhibits.

Exhibit A
ORDER OF COURT

AND NOW, this 29th day of March 2023, after a hearing on March 22nd, 27th, and 28th, it is ORDERED, ADJUDGED, and DECREED, that the Nominating Petition Challenge to Jeffrey Woodard for Magisterial District Judge, District 05-2-10, is GRANTED. Mr. Woodard's name is stricken from the ballot.

"Nomination petitions are presumed to be valid, and objectors bear the heavy burden of demonstrating that a candidate's nomination petition is invalid." In re Shimkus, 946 A.2d 139, 141 (Pa. Commw. Ct. 2008) citing In re Nomination Petition of Pippy, 711 A.2d 1048, 1057 (Pa.Cmwlth.1998). "[A]n objector has the burden of proving that a candidate's affidavit is false with regard to statements about residency." Id. In other words, the Petitioner must prove that Mr. Woodard is not a resident of the district in question and Mr. Woodard does not have to prove that he is.

I find that the Petitioner has met his heavy burden of demonstrating that Mr. Woodard does not live at 434 Ross Avenue, Wilkinsburg, Pittsburgh, Allegheny County, Pennsylvania 15221, prior to November 7th, 2022. At the hearings, I was provided photo exhibits, a lease, and testimony that evidenced that Mr. Woodard was not a resident at 434 Ross Avenue. Pursuant to In re Shimkus, 946 A.2d 139 (Pa. Commw. Ct. 2008), some factors to consider when determining a candidate's residence, are 1) the candidate's presence or absence at the address, 2) where members of the candidate's household reside, 3) whether candidate pays rent or has a lease for the property he claims as his residence, 4) where the candidate sleeps, 5) what belongings and personal effects the candidate keeps at the address, and 6) whether the candidate owns another home to which he appears more permanently attached.

Here, the photo exhibits do not evidence that the candidate lives at the 434 Ross Avenue residence and show that it is uninhabitable. Constable Jackson ("Jackson") testified that he served Mr. Woodard at his apartment in Oakland which was on the first floor at 1:00 p.m., and that the location was a home and not an office or anything else. Trial Transcript ("TT') P. 6. Mr. Jackson also testified that where he served Mr. Woodard on March 16, 2023, appeared to be a residence and Mr. Woodard's name was on the mailbox outside the door. Jackson was let into the first floor of the 434 Ross Avenue home which had Mr. Woodard's name on the mailbox for apartment one. TT P. 11. Jackson testified he was let in by the landlord after four attempts to serve Mr. Woodard. TT PP. 7-9. He further testified that there was no place on the first floor that he did not go in when taking the pictures. TT P. 11. Jackson testified he took the pictures at 12:00 p.m. on Thursday, March 16th, in apartment one. TT P. 12. Constable Jackson affirmed in his testimony that the pictures reflected the apartment that he observed. TT P. 13. I find that the photographs showed an apartment under construction and there was no evidence that Mr. Woodard was living in apartment one at 434 Ross Avenue. The photos show there were no furnishings, toiletries, clothing, or bedding, which would indicate that the apartment was lived in prior to November 7th, 2022.

I also found that the challenger, Iren Evans, was credible. Evans testified that Mr. Woodard had voted at Saint Stevens using the Wilkinsburg address for the February 2023 Special Election, and that in the November 8th, 2022, General Election, Woodard voted using the Coltart address which is in the Fourth Ward of Pittsburgh in Oakland. TT PP. 20-23. The Coltart Street address in Oakland is where he was served in March 2023.

Mr. Mazzanti, the property manager for 434 Ross Street testified on behalf of Woodard, and testified that Woodard had a lease that was in effect in October of 2022, but under that lease, the first month's rent and security deposit were not due until May 1st, 2023. TT PP. 46-49. The property manager further testified that the units were undergoing major renovations and would not be completed until May 2023, and Mr. Woodard was not obligted to pay rent or a security deposit unti the apartment was fully livable. TT PP. 49-50. Mr. Mazzanti had no knowledge whether Mr. Woodard occupied the apartment. TT PP 46-50.

Given these findings, I find that Mr. Woodard did not reside at the challenged residence prior to November 7, 2022.

I reserve the right to find further facts and supplement my order in an opinion should one be necessary.

It must be emphasized that filing a document with the Department of Court Records ("DCR") is NOT notice to anyone. All filings should be docketed with the DCR, and then served on the opposing party, AND emailed to the judicial staff at cfejko@alleghenycourts.us and amcvay@alleghenycourts.us. The DCR does NOT independently notice judges or parties when something is filed. Please do not mail anything to Judge McVay's chambers unless it is the only means of providing Judge McVay with a copy.

Additionally, all parties are to review Judge McVay's Operating Procedures that are located on the Fifth Judicial District's Website.

BY THE COURT:
/s/The Hon. John T. McVay Jr.

[1] I received the Trial Transcript for the hearings on March 27th and 28th on March 30th which was a day after I had filed my Exhibit A Order. I incorporated my further findings from those transcripts into this Opinion.

PATRICK DEVORE vs. METRO AVIATION, INC.

Wrongful Termination – Appeal – Motions in Limine – Jury Charges – Public Policy

Plaintiff was employed by Defendant as a helicopter pilot providing emergency transportation services including LifeFlight. When Defendant transitioned to a smaller helicopter, flight nurses requested reconfiguration of the interior for better access to patients. Plaintiff allowed reconfiguration of his aircraft after confirming with an indirect superior that reconfiguration was safe. Plaintiff was accused of failing to follow the chain of command and of a policy/safety violation. Plaintiff was later terminated for failing to follow the pre-flight checklist. Plaintiff sued for wrongful termination. A jury verdict was returned for Plaintiff totaling $2,230,000.00. Both parties filed Motions for Post-Trial Relief which were denied; appeals followed.

The Court did not err in denying Defendant's Motion for Summary Judgment because the AIR21 Act, a federal whistleblower statute, does not implicate Pennsylvania's state employment laws or preempt Pennsylvania's Emergency Medical Services System Act ("EMSSA"). J.N.O.V. was properly denied because Plaintiff provided sufficient evidence that the reconfiguration of his aircraft served the public interest of meeting urgent medical need and was done safely such that the jury could find that his firing was in violation of public policy.

The Court properly denied Defendant's Motion in Limine to exclude evidence of an OSHA violation because the violation was relevant to Plaintiff's rebuttal that he was terminated to avoid further attention from OSHA on the Defendant. Evidence of another employee being permitted to resign for falsifying documentation was properly admitted to show the disparity with Plaintiff's termination. A video exhibit showing pre-flight preparation was properly excluded because it did not tend to make any fact at issue more or less probable. Plaintiff's failure to return to a pre-injury job at Home Depot was not relevant because such employment did "not afford virtually identical opportunities for a promotion, compensation and responsibilities" as employment as a pilot. Vladmirsky v. Sch. Dist. of Philadelphia, 206 A.3d 1224 (Pa. Commwlth. Ct. 2019). A proposed jury charge was properly denied because Plaintiff's allegations were not based on broad and general statements of policy violations but rather on the EMSSA, thus the proposed charge was not supported by the record. The Court's response to a jury question regarding public policy correctly stated the law and was necessary to clarify the jury's "doubt and confusion." Worthington v. Oberhuber, 215 A.2d 621 (Pa. 1966). The jury's award was not so "grossly excessive as to shock [the court's] sense of justice" and was supported by the evidence of record. Kane v. Scranton Transit Co., 94 A.2d 560 (Pa. 1953).

Plaintiff's errors complained of stemmed from the Court's denial of a new trial on punitive damages. Plaintiff did not set forth evidence that Defendant acted or failed to act in conscious disregard of a risk to Plaintiff or acted maliciously to end Plaintiff's career, thus the omission of a jury charge for punitive damages did not constitute error warranting a new trial. Citing Johnson v. Hyundai Motor Am., 698 A.2d 631 (Pa. Super. 1997).

Case No.: GD 18-012018. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Ward, J.

OPINION

I. THE PARTIES & BACKGROUND

This case arises following Metro Aviation, Inc. ("Metro" or "Defendant")'s decision to suspend, and ultimately, terminate Mr. Patrick DeVore ("Mr. DeVore" or "Plaintiff") for his alleged non-compliance with a pre-flight checklist.

Mr. DeVore is a seasoned pilot with various high ratings and certifications.[1] Mr. DeVore began working at Metro as a pilot in April 2007, up until his suspension and ultimately, his termination in October 2017. Metro is an air medical operator with various bases specializing in providing emergency transportation services, including transporting Allegheny Health Network ("AHN") patients and accompanying medical personnel by LifeFlight helicopters, piloted by Metro employees. Mr. DeVore began his career with Metro as a line pilot in Cranberry, Pennsylvania, before becoming a lead pilot in Chicago, Illinois.[2] Mr. DeVore then worked as a line pilot in Rostraver, Pennsylvania, and finally as a line pilot in Canonsburg, Pennsylvania ("Base").[3]

In 2017, Metro began using a smaller aircraft ("EC-135") for AHN transport from the Base.[4] Due to the new-found lack of space, AHN medical personnel began requesting reconfigurations to allow for better in-flight access to patients. Sometime before September 2017, Mr. DeVore discussed the nurses' requests with supervisor David Taggart ("Mr. Taggart"), Metro's then-Aviation Site Manager, who responded to Mr. DeVore that reconfiguring the EC-135 was illegal.

After nurse complaints persisted, two AHN nurses (Candice Myrgo and Robert Fareri) visited the Base to explore possible reconfigurations of the EC-135 during Mr. DeVore's shift on September 20, 2017.[5] Mr. DeVore attempted to telephone Chad Slovick ("Mr. Slovick"), a Metro mechanic, to inquire about the safety of the reconfiguration. However, Mr. DeVore's call transferred to Metro's headquarters where he spoke to Mark Breton ("Mr. Breton"), Metro's Head Director of Maintenance. During the conversation, Mr. Breton confirmed that the reconfiguration was safe so long as done in accordance with any flight manual and/or supplements. The EC-135 remained in the reconfiguration at turnover when Lead Pilot Gene Zalutsky ("Mr. Zalutsky") began his shift. When Mr. DeVore reported back to work the next day, Mr. Zalutsky accused Mr. DeVore of failing to follow the chain of command and verify the EC-135's airworthiness before turnover, which led Mr. DeVore to a brief outburst directed toward Mr. Zalutsky and Mr. Slovick.[6]

On October 4, 2017, Mr. DeVore was suspended for three days due to behavior/conduct, insubordination, and a policy/safety violation. Shortly thereafter, Metro required Mr. DeVore to make a rare trek to Metro's headquarters for failing to follow the chain of command. Finally, on October 10, 2017, Metro terminated Mr. DeVore, asserting that he failed to complete a pre-flight checklist on October 4, 2017.

II. PROCEDURAL HISTORY

Mr. DeVore initiated this action on September 17, 2018, upon the filing of a Complaint in Civil Action against Metro Aviation, Inc. ("Metro" or "Defendant"), alleging one count of wrongful termination. Defendant's Motion for Summary Judgment was denied on December 29, 2021. On February 25, 2022, Mr. DeVore filed Motions in Limine to sequester witnesses, to exclude evidence of unemployment compensation, and to exclude Defendant's exhibits.[7] On February 28, 2022, Metro filed a Motion in Limine to preclude certain evidence of OSHA violations, other accidents involving Metro, prior performance evaluations, other terminations and suspensions, Metro's promotional video, and Mr. DeVore's Social Security website information.

On March 2, 2022, this Court granted Mr. DeVore's Motions in Limine to sequester witnesses and to exclude evidence of unemployment compensation, and Metro's Motion in Limine to preclude certain evidence, in part, as to evidence of other accidents

involving Metro. On the same day, this Court denied Metro's Motion in Limine to preclude certain evidence, in part, as to evidence of OSHA violations, prior performance evaluations, Metro's promotional video, and Mr. DeVore's Social Security website information. All remaining Motions in Limine were held under advisement until trial, which began on March 3, 2022. On the morning of March 9, 2022, this Court held a charging conference addressing the parties' proposed verdict slips and proposed points for charge. During the conference, this Court declined to give Metro's proposed Point for Charge No. 6 and DeVore's request to send the issue of punitive damages to the jury.

On March 10, 2022, the jury began deliberations and found that Mr. DeVore was terminated in violation of Pennsylvania public policy and awarded $1,142,582.00 in economic damages, as well as non-economic damages in the amounts of $500,000.000 for harm to reputation, $300,000.00 for pain and suffering, $300,000.00 for embarrassment and humiliation, and $257,418.00 for loss of the ability to enjoy the pleasures of life.

On March 18, 2022, Metro timely filed a Motion for Post-Trial Relief seeking judgment n.o.v., a new trial as to liability and/or damages, and/or a remittitur of the jury's award. Mr. DeVore also timely filed a Motion for Post-Trial Relief on March 28, 2022, seeking a new trial limited to the question of punitive damages. Both motions for post-trial relief were ultimately denied on July 15, 2022, following oral argument. On July 19, 2022, judgment was entered on the verdict, which Metro and Mr. DeVore appealed to the Superior Court on August 16, 2022, and August 17, 2022, respectively. On the same respective dates, this Court issued an order directing Defendant and Plaintiff to file a Concise Statement of Errors Complained of on Appeal within 21 days of that order.[8] On September 6, 2022, both parties timely filed their Concise Statement of Errors Complained of on Appeal.

III. DISCUSSION

a. Defendant Metro's Alleged Errors

Metro's Concise Statement of Errors Complained of on Appeal contends the following ten assignments of error, which we address out of order:

1. The trial court erred in denying Defendant's Motion for Judgment n.o.v., because there was no evidence that Metro's actions in terminating Plaintiff's at will employment violated public policy, since (a) there is no public policy exception to the doctrine of at will employment under the Pennsylvania Emergency Medical Services Act; (b) there is no evidence that the termination of Plaintiff's at will employment implicated, undermined or violated any public policy under that Act; and (c) Plaintiff failed to demonstrate any violation of that Act.

2. The trial court erred in denying the Motion for a New Trial, since the trial court erred and/or abused its discretion when it denied Defendant's Motion in Limine to exclude evidence of a North Carolina OSHA violation and when it allowed Plaintiff's counsel to argue that Defendant terminated Plaintiff due to a desire to cover up the violation, thereby prejudicing Defendant and confusing/ misleading the jury.

3. The trial court erred in denying the Motion for a New Trial, since the trial court erred and/or abused its discretion when it denied Defendant's Motion in Limine to exclude evidence of the reasons for the resignation of a former employee, Dave Taggert, and when it allowed Plaintiff's counsel to argue that Defendant terminated Plaintiff due to a desire to up the circumstances of Mr. Taggert's resignation, thereby prejudicing Defendant and confusing/ misleading the jury.

4. The trial court erred in denying the Motion for a New Trial, since the trial court erred and/or abused its discretion when it denied Defendant's Motion in Limine to exclude summaries of the suspensions and terminations of other pilots and when it allowed Plaintiff's counsel to argue that Defendant treated Plaintiff differently, thereby prejudicing Defendant and confusing/ misleading the jury.

5. The trial court erred in denying the Motion for a New Trial, since the trial court erred and/or abused its discretion in precluding the video of the operation of the aircraft to demonstrate how the checklist and control switches work, as the evidence was highly relevant to the issue of why Plaintiff's at will employment was terminated, and in making prejudicial comments to the jury as to fairness of such evidence.

6. The trial court erred in denying the Motion for a New Trial, since the trial court erred and/or abused its discretion in declining to give Defendant's proposed Point for Charge No. 6, professional judgment as a defense to a wrongful termination claim under the public policy exception.

7. The trial court erred in denying the Motion for a New Trial, since the trial court erred and/or abused its discretion in providing a statement in response to the jury's question, during deliberations, as to whether public policy applied to Plaintiff or Defendant, which failed to fully and accurately state the law, thereby confusing/ misleading the jury and prejudicing Defendant.

8. The trial court erred in denying the Motion for a New Trial, since the trial court erred and/or abused its discretion in precluding evidence of Plaintiff's failure to mitigate his damages.

9. The trial court erred in denying the Motion for a New Trial, since the jury's verdict; and in particular, the pain and suffering damages as well as future wage loss damages, was excessive and not supported by the evidence of record.

10. The trial court erred in denying Defendant's Motion for Summary Judgment, because Plaintiff had a substantive statutory right of action to file a whistleblower claim (which he failed to do), which precludes the instant wrongful termination claim.

i. This Court properly denied Metro's Motion for Summary Judgment

First, we address Metro's tenth assignment of error, wherein Metro claims that this Court erred in denying Metro's Motion for Summary Judgment, asserting that the instant wrongful termination claim is precluded due to Mr. DeVore's failure to exercise his alleged substantive statutory right of action to file a whistleblower claim under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21 Act").[9] 49 U.S.C. § 42121.

Summary judgment should be denied where there is evidence that would allow a factfinder to render a verdict in favor of the nonmovant. Rourke v. Pennsylvania Nat. Mut. Cas. Ins. Co., 116 A.3d 87 (Pa. Super. 2015). On appeal, a trial court's denial of summary judgment is reviewed for an abuse of discretion or error of law. Ramsay v. Pierre, 822 A.2d 85, 90 (Pa. Super. 2003); see also Harman v. Borah, 756 A.2d 1116, 1123 (Pa. 2000) ("An abuse of discretion exists when the trial court has rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will").

At common law, at-will employees can be terminated for any reason, absent those that violate "constitutionally and/or statutorily anchored Pennsylvania policies." Weaver v. Harpster, 975 A.2d 555, 557, n.7 (2009); see also McLaughlin v. Gastrointestinal Specialists, Inc., 750 A.2d 283, 288 (Pa. 2000) (holding that the violation of a federal statute, in and of itself, does not implicate the public policy of the Commonwealth of Pennsylvania). While federal law may preempt state law, preemption may only occur where Congress expressly states that such state law is pre-empted or intends that federal law occupy a given field, or where state and federal law are in conflict. See Field v. Philadelphia Elec. Co., 565 A.2d 1170, 1174 (Pa. Super. 1989).

Here, Metro bases its argument on the AIR21 Act, a federal statute that aims to prohibit the discharge of employees due to an employee's involvement in reports or proceedings pertaining to violations of the Federal Aviation Administration or federal aviation safety laws. See 49 U.S.C. § 42121(a). The AIR21 Act does not implicate Pennsylvania's policy in and of itself. As a Hail Mary pass, Metro also argues that the Air21 Act preempts the Emergency Medical Services System Act. Field, 565 A.2d at 1174. However, Metro puts forth virtually no evidence supporting express or implied preemption. We are hard-pressed to find a conflict between the AIR21 Act, a federal statute aiming to protect whistleblower activity regarding federal aviation violations, and the Emergency Medical Services System Act, a statute aimed to further this Commonwealth's public policy of "quickly adapting and evolving to meet the needs of the residents of this Commonwealth for emergency and urgent medical care and to reduce their illness and injury risks." 38 Pa.C.S. § 8012(5). Mr. DeVore put forth ample evidence that allowed the jury to render a verdict in his favor, see Rourke, 116 A.3d 87, and as such, this Court properly denied Metro's Motion for Summary Judgment.

ii. This Court properly denied Metro's Motion for Judgment n.o.v.

Metro asserts that this Court erred in denying its Motion for Judgment n.o.v. "because there was no evidence that Metro's actions in terminating Plaintiff's at will employment violated public policy."[10]

Judgment non obstante verdicto ("JNOV") is properly entered where "the movant is entitled to judgment as a matter of law" or where "the evidence is such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant." Janis v. AMP, Inc., 856 A.2d 140, 143-44 (Pa. Super. 2004). In reviewing an order denying JNOV, the appellate court must determine whether there is sufficient competent evidence to sustain the verdict while viewing the evidence in the light most favorable to the verdict winner. Birth Ctr. v. St. Paul Companies, Inc., 787 A.2d 376, 383 (Pa. 2001) (JNOV should only be entered in clear cases, with doubt resolved in favor of the verdict winner). A trial court's denial of a motion for JNOV will only be disturbed for an abuse of discretion or an error of law controlling the outcome of the case. Hammons v. Ethicon, Inc., 190 A.3d 1248, 1264 (Pa. Super. 2018), aff'd, 240 A.3d 537 (Pa. 2020).

Although an employer may generally terminate an at-will employment relationship at any time and for any reason, see Braun v. Borough of Millersburg, 44 A.3d 1213 (Pa. Commw. Ct. 2012), Pennsylvania courts recognize claims for wrongful discharge where such discharge threatens clear mandates of public policy as articulated in the constitution, a statute, or a judicial decision. See e.g., Shick v. Shirey, 716 A.2d 1231 (Pa. 1998) (recognizing a wrongful discharge where an employee was terminated for filing a workers' compensation claim); Kroen v. Bedway Security Agency, 633 A.2d 628 (Pa. Super. 1993) (recognizing a wrongful discharge claim where an employee was terminated for refusing to take a test prohibited by statute); Field v. Philadelphia Electric Co., 565 A.2d 1170 (Pa. Super. 1989) (recognizing a wrongful discharge claim where an employee was terminated for reporting a violation, as mandated by statute).

Here, the Pennsylvania General Assembly has articulated by statute, amongst other things, that "[i]t serves the public interest if the emergency medical services system is able to quickly adapt and evolve to meet the needs of the residents of this Commonwealth for emergency and urgent medical care and to reduce their illness and injury risks." 35 Pa.C.S. § 8102(5) ("Emergency Medical Services System Act"). At trial, Mr. DeVore introduced ample evidence that the EC-135 reconfiguration constituted an aim toward better in-flight access to patients, and thus, patient safety.[11] Mr. DeVore also introduced evidence regarding communications with mechanic staff to ensure that the reconfiguration was safe. The inquiry here is not whether the Court agrees with the jury's findings, but rather, whether there was sufficient evidence in support thereof. See Brown v. Shirks Motor Exp., 143 A.2d 373, 379 (Pa. 1958) ("A judge's appraisement of evidence is not to be based on how he would have voted had he been a member of the jury, but on the facts as they come through the sieve of the jury's deliberation.") Seeing that there was sufficient evidence introduced at trial supporting the jury's finding that Metro wrongfully terminated Mr. DeVore in violation of public policy established pursuant to the Emergency Medical Services System Act, and viewing such evidence in favor of Mr. DeVore, it cannot be said that "no two reasonable minds could disagree that the outcome should have been rendered in favor of [Metro]." Janis, 856 A.2d at 143-44. As such, this Court did not err in denying Metro's Motion for Judgment n.o.v.

iii. This Court properly denied Metro's Motion for a New Trial.

Additionally, Metro asserts that this Court erred in denying Metro's Motion for a New Trial on eight different grounds, which we address in turn. The decision of whether to grant a new trial is within the trial court's sound discretion and will not be disturbed absent an abuse of discretion or error of law. See Peterson v. Shreiner, 822 A.2d 833, 836 (Pa. Super. 2003). While a new trial is warranted where the jury's verdict is so contrary to the evidence as to shock one's sense of justice, see Mano v. Madden, 738 A.2d 493, 495-495 (Pa. Super. 1999) (en banc), a new trial should not be granted because the evidence is conflicting, or the trial judge would have arrived at a different conclusion based on the same facts. Floravit v. Kronenwetter, 389 A.2d 130, 132 (Pa. Super. 1978).

1. This Court's proper evidentiary rulings do not warrant the granting of a new trial.

Metro asserts that this Court erred on various evidentiary rulings, and that these errors warrant the granting of a new trial. "It is well-settled that the admissibility of evidence rests within the sound discretion of the trial court; a new trial will not be granted unless the has been a manifest abuse of this discretion in admitting the challenged evidence. Johnson v. Hyundai Motor Am., 698 A.2d 631, 636 (Pa. Super. 1997) (citing Berman v. Radnor Rolls, Inc., 542 A.2d 525, 538 (Pa. Super. 1988)); see also Romeo v. Manuel, 703 A.2d 530, 532 (Pa. Super. 1997) (stating that an abuse of discretion exists where the appellant shows error in an evidentiary ruling and resulting prejudice). Evidence is relevant if it "logically tends to establish a material fact in the case, make the fact at issue more or less probable, or supports a reasonable inference or presumption about the existence of a material fact." Phatak v. United Chair Co., 756 A.2d 690, 691 (Pa. Super. 2000). While relevant evidence is generally admissible, Pa.R.E. 402, "[t]he court may exclude relevant evidence if its probative value is outweighed by . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Pa.R.E. 403.

a. This Court did not err in denying Metro's Motion in Limine to Exclude Violations of OSHA Regulations.

Metro argues that this Court erred in denying Metro's Motion in Limine to exclude a North Carolina OSHA violation, alleging that the violation "was unrelated to any fact at issue in this matter."[12] However, this Court disagrees. As explained above, although an at-will employee may bring a wrongful discharge claim where such discharge threatens clear mandates of public policy, see e.g. Shick, 716 A.2d 1231, an employer may proffer "a separate, plausible, and legitimate reason" for such termination. Reuther v. Fowler and Williams, Inc., 386 A.2d 119, 122 (Pa. Super. 1978).

Here, Mr. DeVore's claim for wrongful discharge rested upon the allegation that Metro terminated Mr. DeVore in violation of Pennsylvania public policy, an exception to the doctrine of at-will employment. Although Metro proffered alleged legitimate reasons for Mr. DeVore's termination, the prior OSHA violation was relevant to Mr. DeVore's rebuttal – that is, Metro was motivated to suspend, and ultimately terminate Mr. DeVore, to avoid further attention from OSHA. Though this Court may exclude relevant

evidence, Metro failed to show any proscribed dangers outweighing the relevance of the prior OSHA violation. See Pa.R.E. 403. Therefore, this Court properly denied Metro's Motion in Limine to Exclude Violations of OSHA Regulations and Metro's Motion for a New Trial.

b. This Court properly denied Metro's Motion in Limine to Exclude Evidence of Other Terminations and Suspensions.

Next, Metro argues that this Court erred in denying Metro's Motion in Limine to Exclude Evidence of Other Terminations and Suspensions, specifically regarding evidence of Mr. Taggart's resignation following an investigation into his involvement in falsified documentation.

Here, again, Metro proffered "legitimate reasons" for Mr. DeVore's termination, such as Mr. DeVore's alleged failure to follow a pre-flight checklist. While falsifying documentation and failing to follow a pre-flight checklist both constitute policy violations, Mr. DeVore was terminated, unlike Mr. Taggart, who Metro permitted to voluntarily resign.[13] This disparity has a tendency to weaken Metro's assertion that Mr. DeVore was terminated pursuant to a legitimate reason. As noted above, while this Court may exclude relevant evidence, Metro failed to show any proscribed dangers outweighing the relevance of Taggart's resignation. See Pa.R.E. 403. Therefore, this Court properly denied Metro's Motion in Limine to Exclude Evidence of Other Terminations and Suspensions.

Similarly, in its fourth assignment of error, Metro asserts that this Court erred when it "denied Defendant's Motion in Limine to exclude summaries of the suspensions and terminations of other pilots." However, at trial, Mr. DeVore did not introduce any evidence, aside from Taggart's resignation, regarding suspensions and/or terminations of other Metro pilots. Even assuming arguendo that this Court's denial of Metro's Motion in Limine to exclude summaries of the suspensions and terminations of other pilots was erroneous, such error was harmless and does not warrant a new trial.

c. This Court properly precluded Metro's video demonstrating the operation of the EC-135 and its controls.

Further, Metro asserts that this Court erred in denying its Motion for a New Trial because this Court erroneously precluded a video demonstrating the operation of the EC-135 and its controls ("Exhibit 7"). Although Mr. DeVore initially filed a Motion in Limine seeking to preclude Exhibit 7, this Court held that motion under advisement until trial. During trial, Plaintiff objected to the introduction of Exhibit 7, which this Court sustained. Evidence is relevant if it "logically tends to establish a material fact in the case, make the fact at issue more or less probable, or supports a reasonable inference or presumption about the existence of a material fact." Phatak, 756 A.2d at 691; see also Pa.R.E. 403 ("The Court may exclude relevant evidence if its probative value is outweighed by . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.")

Metro asserts that Exhibit 7 is "highly relevant to the issue of why Plaintiff's at will employment was terminated" because the video shows the cockpit and the controls, and demonstrates the proper sequence of events following completion of the pre-flight checklist. However, being that Exhibit 7 is merely a demonstrative video that does not capture Mr. DeVore's actions in question on October 24, 2017, Exhibit 7 cannot possibly tend to make Plaintiff's alleged failure to follow protocol more or less probable. Even if Exhibit 7 is somehow relevant, Brian Bihler ("Mr. Bihler")[14] testified at trial that the EC-135 recording system would have captured Mr. DeVore's actions in question on October 24, 2017. While Mr. Bihler testified that cockpit recordings were automatically overwritten after 25 flights hours, Chad Slovick ("Mr. Slovick") testified that the contents were removed from a SIM card and uploaded to the "cloud" for preservation following 25 flight hours before erasure. Mr. DeVore testified that he requested the October 24, 2017 recording, yet the same was not produced. Allowing the admission of recreated cockpit footage, in the absence of the original footage capturing Mr. DeVore's actions on the date in question, creates unfair prejudice which outweighs the relevance, if any, of Exhibit 7. As such, this Court did not err in precluding Exhibit 7.

Metro also contends that this Court erred in "making prejudicial comments to the jury as to the fairness of such evidence."[15] Previously, Metro identified the Court's alleged prejudicial comment as follows:

Folks, just so you understand -- there was a video of the startup procedure as done by Mr. DeVore that was -- whatever reason -- and there is a dispute about that as to why we don't have it today, whether it was taped over, whether it was as Mr. Slovick said, it went to the cloud, et cetera. But it strikes the Court it is not fair to have a recreated video, if, as Mr. Slovick stated, there would be a video of what actually happened. So the Court has sustained the objection, and we won't be seeing that today.

This Court's statement was consistent with the adverse inference charge given to the jury considering Mr. Bihler and Mr. Slovick's contradicting testimony regarding the October 4th cockpit video. "The decision whether to tell the jury an unfavorable inference may be drawn from the failure of a party to produce some circumstance, witness or document is also one which lies within the trial court and which will not be reversed absent manifest abuse." Magette v. Goodman, 771 A.2d 775, 780 (Pa. Super. 2001) (quoting Clark v. Philadelphia College of Osteopathic Medicine, 693 A.2d 202, 204 (Pa. Super. 1997)). Generally, "[w]here evidence which would properly be part of a case is within the control of the party in whose interest it would naturally be to produce it, and without satisfactory explanation he fails to do so, the jury may draw an inference that it would be unfavorable to him." Id. In Magette, 771 A.2d at 780-81, the Court held that the appellant made an adequate showing at trial that entitled him to an adverse inference instruction in a medical malpractice case where a doctor testified to throwing away an EKG strip, reasoning that strips are not routinely reserved despite knowing that the case involved an unknown cause of death in light of a seven-year retention policy. See also Clark, 693 A.2d at 205 (affirming the trial court's adverse inference instruction where a doctor testified that notes were not produced because files were "thinned" and because no notes were taken).

Here, Metro's failure to produce the October 4th cockpit video is comparable to Magette and Clark. As in Magette, where a doctor testified to throwing away an EKG strip reasoning that strips are not routinely reserved despite a seven-year retention policy, 771 A.2d at 780-81, here, Mr. Bihler testified that the October 4th cockpit video was automatically overridden due to the passing of 25 flight hours, despite a policy of uploading data to the "cloud" before erasure as testified to by Mr. Slovick. Likewise, as in Clark, where the trial court properly gave the jury an adverse inference instruction in light of contradicting explanations for a doctor's failure to produce notes, 693 A.2d at 205, here, this Court properly explained its reasoning to the jury for sustaining DeVore's objection to Exhibit 7 and properly gave the jury an adverse inference instruction in light of conflicting explanations for Metro's failure to produce the October 4th cockpit video – that is, Mr. Bihler's explanation that the footage is automatically overwritten following 25 flight hours in comparison to Mr. Slovick's testimony that footage is preserved by uploading footage to the "cloud" before erasure.

Because the October 4th cockpit video recorded Mr. DeVore's actions, which Metro alleges was the legitimate reason for Mr. DeVore's termination, the video would properly be part of the case. Testimony by Mr. Bihler and Mr. Slovick establishes that the cockpit data is within the control of Metro, whose interest it would naturally be to produce such data. Finding that Metro has failed to establish a satisfactory explanation for the failure to produce the October 4th cockpit video, this Court properly explained

to the jury why Mr. DeVore's objection was sustained and ultimately told the jury that an unfavorable inference may be drawn from Metro's failure to produce the October 4th cockpit video. See Clark, 693 A.2d at 204.

d. This Court did not err in precluding evidence of Mr. DeVore's alleged failure to mitigate his damages.

During Metro's opening statement, Metro made an improper reference to Mr. DeVore's prior employment at Home Depot.[16] In response, Mr. DeVore made an oral motion for a curative instruction, which was granted over Metro's objection.[17] More specifically, this Court advised the jury that "under the law, an employee's only post termination obligation is to seek comparable employment."[18] Despite the instruction, Metro attempted to revisit the topic while cross-examining Mr. DeVore, asking "Now, you did work for Home Depot between your furlough at USAir and…"[19] Counsel for Mr. DeVore then objected to relevancy, at which point counsel for Metro argued that Mr. DeVore's employment at Home Depot is relevant because such employment would have reduced social security damages claimed by Mr. DeVore.[20] This Court sustained Plaintiff's objection.[21] Now, Metro asserts that this Court erred in precluding evidence of Mr. Devore's alleged failure to mitigate his damages.

Evidence is relevant if it "logically tends to establish a material fact in the case, make the fact at issue more or less probable, or supports a reasonable inference or presumption about the existence of a material fact." Phatak, 756 A.2d at 691; see also Pa.R.E. 402 ("Evidence that is not relevant is not admissible.") As this Court advised the jury, "[t]he law requires a person to minimize their damages by taking all reasonable steps to seek substantially comparable employment that was available."[22] Furthermore, the employer bears the burden of proof in showing that substantially comparable work was available, and that the plaintiff failed to exercise reasonable due diligence in seeking alternative employment. Stultz v. Reese Bros., 835 A.2d 754, 764 (Pa. Super. 2003); see also Vladmirsky v. Sch. Dist. of Philadelphia, 206 A.3d 1224, 1229-30 (Pa. Commw. Ct. 2019) (defining substantially comparable or equivalent work as "employment which affords virtually identical opportunities for a promotion, compensation and responsibilities.")

Here, Metro was free to introduce evidence relevant to Mr. DeVore's mitigation of damages within the meaning of the law – i.e. substantially comparable employment. However, instead, Metro focused on introducing evidence of Mr. DeVore's failure to return to Home Depot, where he made $15.00 per hour. Simply put, employment as a manager at Home Depot does not "afford[] virtually identical opportunities for a promotion, compensation and responsibilities" as employment as a Line Pilot at Metro, where DeVore earned a total of $130,000 per year as a licensed professional. See Vladmirsky, 206 A.3d at 1229-30. Therefore, Mr. DeVore's employment as a manager at Home Depot is not "substantially comparable or equivalent" to his employment as a Line Pilot at Metro. Evidence of Mr. DeVore's prior employment at Home Depot and Mr. DeVore's failure to return to Home Depot does not make Mr. DeVore's mitigation of damages more or less probable because mitigation of damages requires proof of substantially comparable work, and thus constitutes irrelevant and inadmissible evidence pursuant to Pa.R.E. 402.

2. This Court did not err in declining to give Metro's proposed Point for Charge No. 6, professional judgment as a defense to a wrongful termination claim under the public policy exception, and thus did not err in denying Metro's Motion for a New Trial.

Metro asserts that this Court erred in declining to include Metro's Proposed Point for Charge No. 6, which reads as follows:

6. PROFESSIONAL JUDGMENT

When an act to be performed by a professional turns upon a question of judgment, as to its legality or ethical nature, the employer is not precluded from conducting its business where the professional's opinion is open to question. McGonagle v. Union Fidelity Corp., 383 Pa.Super. 223, 556 A.2d 878 (1989), appeal denied, 525 Pa. 584, 575 A.2d 115(1990).

In reviewing a trial court's refusal to give a specific jury instruction, an appellate court's role is to determine whether the record supports the trial court's decision. Levey v. DeNardo, 725 A.2d 733 (Pa. 1999); see also McCay v. Philadelphia Electric Company, 291 A.2d 759, 763 (Pa. 1972) (providing that a trial court's charge to the jury must be reviewed in its entirety); Voitasefski v. Pittsburgh Rys. Co., 69 A.2d 370, 373 (Pa. 1949) (explaining that a charge is adequate unless "the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to fundamental error.")

McGonagle speaks on differences of opinion between an employer and an employee. There, an at-will employee brought a wrongful discharge action following his termination for refusing to mail insurance policies, as the plaintiff believed that doing so would violate state regulations. McGonagle, 556 A.2d at 879-81. The defendants took the position that the "violations" were minor policy filing problems, which were easily resolved without revenue loss or regulation violations, rather than illegal or unethical acts. Id. at 885. However, the plaintiff failed to specify any statutes or regulations supporting that plaintiff was terminated in violation of public policy. Id. As such, the McGonagle Court held that "such broad and general statements of policy violations" did not constitute a clear mandate of public policy. Id.

Mr. DeVore's termination is much different than that of the plaintiff in McGonagle, where no violation of public policy was identified in light of minor policy filing problems. Here, Mr. DeVore identified the Emergency Medical Services System Act which provides, amongst other things, that "[i]t serves the public interest if the emergency medical services system is able to quickly adapt and evolve to meet the needs of the residents of this Commonwealth for emergency and urgent medical care and to reduce their illness and injury risks." 35 Pa.C.S. § 8102(5). Furthermore, the quick adaptation and evolution to meet the needs of residents for emergency and urgent medical care and to reduce illness and injury risks is not a minor concern. Unlike McGonagle, the case at hand is not about differences of opinion, and thus, Metro's Proposed Point for Charge No. 6 did not constitute a prejudicial omission of something basic or fundamental. See Voitasefski, 69 A.2d at 373. Here, in reviewing the charge as a whole, all issues were made clear to the jury, including defenses asserted by Metro. As such, this Court did not err in declining to include Metro's Proposed Point for Charge No. 6 because Mr. DeVore did not base his claim on "such broad and general statements of policy violations," as the employee in McGonagle did. 556 A.2d at 885. Finding that the record did not support Metro's Proposed Point for Charge No. 6, no new trial is warranted on this ground.

3. This Court did not err in responding to the jury's question, during deliberations, as to whether public policy applied to Plaintiff or Defendant, and thus did not err in denying Metro's Motion for a New Trial.

During deliberations, the jury posed the following question, "Does public policy apply to Pat DeVore individually or would public policy apply to Metro Aviation?" to which this Court responded with the following answer, "Public policy applies to both Metro Aviation and Patrick DeVore in that Metro Aviation is prohibited from terminating Mr. DeVore's employment for any reason that would violate a Pennsylvania public policy. In other words, Metro Aviation cannot terminate Mr. DeVore for actions that furthered the Pennsylvania public policy."[23] More specifically, Metro asserts that the Court's response "failed to fully and accurately state the law, thereby confusing/ misleading the jury and prejudicing Defendant."

It is well-established that "where a jury returns on its own motion indicating confusion, the court has the duty to give such additional instructions on the law as the court may think necessary to clarify the jury's doubt or confusion." Worthington v. Oberhuber, 215 A.2d 621, 621 (Pa. 1966). Absent a showing that confusion worked to the losing party's detriment, a new trial is not warranted. Nebel v. Mauk, 253 A.2d 249, 251 (Pa. 1969).

The answer provided to the jury in this case is consistent with Pennsylvania law, which recognizes a claim for wrongful discharge where such discharge "is a clear violation of public policy in the Commonwealth," Roman v. McGuire Mem'l, 127 A.3d 26 (Pa. Super. 2015), as well as the Court's duty, as mandated by the Supreme Court of Pennsylvania in Worthington. Seeing that Metro did not make any showing that the answer provided was somehow detrimental to the defense, see Nebel, 253 A.2d at 251, this Court did not err in its response to the jury's question and thus, Metro is not entitled to a new trial.

4. The jury's verdict is supported by evidence of record, and thus this Court did not err in denying Metro's Motion for a New Trial or request for remittitur.

Metro alleges that the jury's verdict was excessive and not supported by the evidence of record, specifically regarding damages from pain and suffering and future wage loss. On these grounds, Metro claims that this Court erred in granting its Motion for a New Trial.

As in reviewing a trial court's denial of a motion for a new trial, see Peterson, 822 A.2d at 836, a trial court's denial of a request for remittitur is reviewed for an abuse of discretion or an error of law. Smalls v. Pittsburgh–Corning Corp., 843 A.2d 410, 414 (Pa. Super. 2004). The decision to refuse a new trial due to a verdict's excessiveness rests within the trial court's sound discretion. Hall v. George, 170 A.2d 367 (Pa. 1961); see Kravinsky v. Glover, 396 A.2d 1349, 1358 (Pa. Super. 1979) (quoting Kane v. Scranton Transit Co., 94 A.2d 560, 563 (Pa. 1953)) ("We will not hold that a verdict is excessive unless it is 'so grossly excessive as to shock our sense of justice.'") Each case is unique and a court should apply relevant factors based upon each case's unique circumstances in determining whether a verdict is excessive. Mineo v. Tancini, 502 A.2d 1300 (Pa. Super. 1986). However, it is not the court's function to substitute its judgement for the jury's where the verdict bears a reasonable resemblance to the proven damages. Pastenbaugh v. Ward Baking Co., 97 A.2d 816 (Pa. 1953).

Here, the jury awarded $1,142,582.00 for economic damages and non-economic damages in the amounts of $500,000.000 for harm to reputation, $300,000.00 for pain and suffering, $300,000.00 for embarrassment and humiliation, and $257,418.00 for loss of the ability to enjoy the pleasures of life. Turning to the amount awarded for future wage loss, as encompassed in the economic damages award of $1,142,582.00, Mr. DeVore introduced evidence of annual losses for six years – that is, from the time Mr. DeVore was terminated from Metro at age 64 to the time of Mr. DeVore's anticipated retirement at age 70. In light of Mr. DeVore's previous earnings at Metro and Mr. Bihler's testimony that Metro provides employees with a 4% annual raise in compensation, DeVore testified to an annual loss of $136,126.54 over six years. Mr. DeVore further testified to other losses amounting to $239,658.00, resulting from the loss of healthcare, previously completely paid for by Metro. While the jury was free to reject the testimony and evidence of such losses, it did not. Considering the testimony and evidence introduced at trial, it cannot be said that the verdict is "so grossly excessive as to shock [the court's] sense of justice." Kane, 94 A.2d at 563.

Metro also takes issue with the $300,000.00 amount awarded for pain and suffering, arguing that the award is excessive and unsupported by the record. In reviewing the parties' proposed verdict slips prior to charging the jury, Metro placed the following objection on record regarding Mr. DeVore's proposed instruction on non-economic damages for pain and suffering:

I don't believe there's been any testimony about pain and suffering. I think there's been testimony about embarrassment, humiliation, arguably about enjoyment ability to enjoy the pleasures of life. I don't recall Mr. DeVore saying anything about being in pain. There is absolutely no evidence that he sought any kind of medical treatment. That is my objection.[24]

With regard to damages for pain and suffering, the jury was instructed as follows:

Mr. DeVore must have experienced pain and suffering in order to claim damage award for past noneconomic loss and for future noneconomic loss. You are instructed that Mr. DeVore is entitled to be fairly and accurately compensated for all mental anguish, discomfort, inconvenience, and any distress you find he will endure in the future as a result of his termination.[25]

The Supreme Court of Pennsylvania has held that damages may be based on inferences drawn from testimony and evidence presented at trial. See Bailets v. Pennsylvania Tpk. Comm'n, 181 A.3d 324, 336 (Pa. 2018).[26] In Bailets, 181 A.3d at 326-27, the defendant-employer appealed a $3.2 million verdict, including an award of $1.6 million in non-economic damages, entered in favor of a plaintiff-employee following a non-jury trial regarding the plaintiff's termination in retaliation for reporting wrongdoing on behalf of the employer in violation of the Whistleblower Law.[27] More specifically, the plaintiff's non-economic damages included harm to his reputation, humiliation, and mental anguish. Id. at 329. There, the employer argued noted the lack of medical evidence, such as doctors' visits or counseling, regarding the employer's distress. Id. at 335. Nonetheless, the Court held the plaintiff's mental anguish warranting non-economic losses was evidenced by worry, fear, guilt, insomnia, and weeping. Id. at 336. In doing so, the Court reasoned that the plaintiff's decision to expose wrongdoing had caused the plaintiff to "ruminate[] endlessly, wondering whether he had done the right thing given his resulting dire financial predicament and its impact on his family." Id.

Mr. DeVore's experience here is very similar to Bailets' experience, who had been properly awarded $1.6 million in non-economic damages including mental anguish, following evidence of worry, fear, guilt, insomnia and weeping and a finding that the plaintiff had been terminated in retaliation for reporting wrongdoing in violation of a statute. See id. at 336. As in Bailets, where the defendant-employer argued the absence of medical evidence, see id. at 335, here, Metro also argues the lack of medical evidence. We find that Metro's argument to this end has no merit. Here, the jury properly awarded $300,000 in non-economic damages for Mr. DeVore's pain and suffering, following similar evidence of worry, fear, guilt, and weeping at trial. DeVore testified "[w]hen I was terminated, it was -- I don't know how -- it was instantly disseminated. I was leprosy. Don't talk to me. Don't go near me. It spread."[28] As a result, Mr. DeVore lost close relationships, which he feared maintaining because he did not want to put their jobs at risk. Mr. DeVore testified to resulting emotional instability, in that "one minute, [he is] okay, and the next minute [he] is not."[29] Mr. DeVore also testified regarding the financial effects of the termination. This testimony could – and did – reasonably lead a jury to infer that DeVore was ridden with worry, guilt, and mental anguish as a result of his termination, warranting non-economic losses for pain and suffering. As such, this Court cannot say that the $300,000.00 amount awarded to Mr. DeVore for pain and suffering is "so grossly excessive as to shock our sense of justice." See Kane, 92 A.2d at 563.

b. Plaintiff DeVore's Alleged Errors

Mr. DeVore's Concise Statement of Errors Complained of on Appeal asserts the following four assignments of error:

i. Did the trial court err in failing to grant a new trial limited to the determination and award of punitive damages where the evidence was sufficient to submit to the jury the question of whether Defendant-Appellant Metro Aviation, Inc.'s conduct was malicious, wanton, willful, oppressive, or showed reckless indifference to the interests of others?

ii. Did the trial court err in failing to charge the jury on punitive damages, as requested and proposed by Plaintiff-Appellee Patrick DeVore, where the evidence was sufficient for a jury to determine the question of whether Defendant-Appellant Metro Aviation, Inc.'s conduct was malicious, wanton, willful, oppressive, or showed reckless indifference to the interests of others?

iii. Did the trial court err in striking from Plaintiff-Appellee Patrick DeVore's proposed verdict slip the question, "Was Metro Aviation, Inc. willful, wanton, or reckless in its termination of Patrick DeVore?" in the context of a wrongful discharge claim derived from an express statement of public policy?

iv. Did the trial court err in failing to allow the jury to consider the question of whether to award punitive damages on the verdict slip?

i. This Court properly denied DeVore's Motion for a New Trial

In summary, Mr. DeVore contends that this Court erred in denying a new trial limited to the issue of punitive damages, failing to charge the jury on punitive damages, striking Mr. DeVore's question regarding punitive damages from Mr. DeVore's proposed verdict slip, and failing to allow the jury to consider the question of punitive damages. Being that all four assignments of errors boil down to whether this Court erred in precluding the issue of punitive damages to go to the jury, we elect to address them together. In doing so, we refer to the standards of review and rules set forth above. See Peterson, 822 A.2d at 836 (providing that the decision of whether to grant a new trial is within the trial court's sound discretion and will not be disturbed absent an abuse of discretion or error of law); Voitasefski, 69 A.2d at 373 (explaining that a charge is adequate unless "the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to fundamental error.")

A court is only bound to charge on law for which the record provides some factual support. See Levey, 725 A.2d at 735. Under Pennsylvania law, "a court may award punitive damages only if an actor's conduct was malicious, wanton, willful, oppressive, or exhibited a reckless indifference to the rights of others." Johnson v. Hyundai Motor Am., 698 A.2d 631, 639 (Pa. Super. 1997).[30] In other words, to support a charge for punitive damages, the evidence must establish that the defendant acted, or failed to act, in conscious disregard of a risk to plaintiff, of which the defendant had a subjective appreciation. Hutchinson ex rel. v. Hutchinson v. Luddy, 870 A.2d 776, 772 (Pa. 2005) ("[A] showing of ordinary negligence is not enough to warrant punitive damages.")

Here, Mr. DeVore asserts that this Court's decline to charge the jury on punitive damages at the March 9, 2022 charging conference was both premature and improper. First, DeVore asserts this ruling to be premature due to its occurrence before Mr. Zalutsky's direct and cross-examination, as well as Mr. DeVore's rebuttal examination. In arguing that this decision was improper, Mr. DeVore relies upon the cases of Field and Carlini v. Glenn O. Hawbacker, Inc., 219 A.3d 629, 635 (Pa. Super. 2019). In Field, 565 A.2d at 1183, the Court held that an employer's actions evidenced reckless indifference in support of a charge for punitive damages where the employer sent an employee to remedy a standing-water problem while keeping the plant operational, despite being directly told that doing so was dangerous. As such, the Field Court reversed the trial court's decision to strike the employer's request for punitive damages. Id. The Carlini Court also held that punitive damages were warranted. There, an employer ordered an employee to operate a rock truck following the employee's on-the-job injury resulting in a worker's compensation claim. 219 A.3d at 634. Although the employee was originally permitted to return to work without restrictions, the doctor placed the employee on sedentary duty after she voiced her concerns about the order. Id. Upon the employer's request to do so, the doctor voided the employee's sedentary duty status, after which the employer fired the employee for insubordination. Id. at 634-635.

Unlike in Field and Carlini, where evidence established that the employers had actual knowledge of a risk to the employee and the conscious disregard thereof, here, Mr. DeVore does not set forth any evidence supporting that Metro acted, or failed to act, in conscious disregard of a risk to Mr. DeVore, of which Metro had a subjective appreciation. See Hutchinson ex rel., 870 A.2d at 772. While Mr. DeVore argues that Metro "knew exactly what [Metro] was doing" in forcing Mr. DeVore's retirement for a wrongful purpose, there is no evidence to support this assertion.[31] Although the jury may have rejected Metro's proffered alleged legitimate reasons for Mr. DeVore's termination, the matter remains that Metro's decision was allegedly based on various actions including Mr. DeVore's insubordinate behavior, and failure to follow procedure. On the other hand, no evidence suggests that Metro "knew exactly what it what doing" and set out to maliciously end Mr. DeVore's career. The last day of testimony on March 9, 2022 did not change the absence of factual support for the charge on punitive damages. Considering this evidentiary gap, it cannot be said that the omission of a charge for punitive damages constituted a fundamental error warranting a new trial.

IV. CONCLUSION

In light of the aforementioned reasons, the judgment below should be affirmed.

BY THE COURT:
/s/The Hon. Christine A. Ward

[1] Mr. DeVore has more than 35 years of experience and holds Certified Flight Instructor and Certified Flights Instructor Instrument certifications issued by the Federal Aviation Association ("FAA"), a single engine airplane commercial rating, and an Air Transport Pilot rating in multi-engine aircraft and helicopters.

[2] Lead pilots earn $3,000 more than line pilots at Metro.

[3] Metro continued to compensate Mr. DeVore as a lead pilot, despite his position as a line pilot at the Rostraver and Canonsburg bases.

[4] Before using the EC-135, Metro pilots primarily flew an EC-145, a larger aircraft, for emergency air transport.

[5] Matt Poremba (AHN Medical Director) and Chief Flight Nurse Karen Bourden knew of Nurse Myrgo and Fareri's visit to the Base to explore possible reconfigurations. Mr. DeVore also believed Mr. Taggart to have knowledge of Nurse Myrgo and Nurse Fareri's visit to the Base for purposes of explore possible reconfigurations.

[6] Following the accusations, Mr. DeVore told Mr. Slovick that he was "sick of [his] bulls**t" before sticking his finger into Mr. Slovick's chest.

[7] Mr. DeVore sought to preclude Defense Exhibits 18 (Photos of the EC-135 Helicopter), 7 (Video Operation of the EC-135 Controls), 13 (Helicopter Job Availability Notices), and 18 (Hand-written Notes of Karen Freeman).

[8] Pursuant to Pa.R.A.P. 1925(b).

[9] See also Metro's Brief in Support of Motion for Post-Trial Relief, p. 17-18.

[10] More specifically, Metro claims that Mr. DeVore's termination did not violate public policy because (1) there is no public policy exception to the doctrine of at will employment under the Pennsylvania Emergency Medical Services Act; (2) there is no evidence that the termination of Plaintiff's at will employment implicated, undermined or violated any public policy under that Act; and (3) Plaintiff failed to demonstrate any violation of that Act.

[11] The testimony of Nurse Candice Myrgo, Nurse Robert Fareri, and Chief Flight Nurse Karen Bourden supported that the EC-135 was reconfigured for the purpose of allowing better in-flight access to patients.

[12] Def.'s Motion for Post-Trial Relief pursuant to Pa.R.C.P. 227.1.

[13] See Def.'s Ex. V.

[14] Metro's Director of Operations and Corporate Representative.

[15] Metro's Statement of Errors, ¶5.

[16] During Metro's opening statement, defense counsel stated, in reference to Mr. DeVore, "there is a three-year period where he was a manager at Home Depot making $15 an hour. He didn't go back to Home Depot. He hasn't worked anywhere." March 2, 2022, Tr. 55:8-11.

[17] March 4, 2022, Tr. 3:3-4:24

[18] Id. at 5:25-6:10.

[19] Id. at 194:24-195:19.

[20] Id.

[21] Id.

[22] Pennsylvania's Standard Jury Instruction 21.180

[23] Before providing the jury with clarification, the Court held a conference with counsel during which Defendant objected to the proposed answer, which remained unchanged in final form. Instead, Defendant suggested that the Court respond with "The public policy applies to both Metro Aviation and Patrick DeVore."

[24] March 9, 2022, Tr. 22:6-13.

[25] March 10, 2022, Tr. 66:23-67:4; see also Pa. Suggested Jury Instruction 7.130.

[26] See also Stonehill Coll. v. Massachusetts Comm'n Against Discrimination, 808 N.E.2d 205, 225 (Mass. 2004) (stating that "evidence in the form of some physical manifestation of the emotional distress, or evidence in the form of expert testimony, is not necessary to obtain an award.")

[27] 43 P.S. §§ 1421–1428.

[28] March 4, 2022, Tr. 149:1-3.

[29] Id. at 151:17-18.

[30] See Kasanovich v. George, 34 A.2d 523, 525 (Pa. 1943) (characterizing wanton conduct as recognizing the probability of injury to another and the reckless disregard of such consequences).

[31] Pl.'s Brief in Support of Motion for Post-Trial Relief, p. 6.

DIAMOND DESIGN, INC. t/d/b/a DIAMOND DESIGN JEWELERS OF WEXFORD vs. ALICIA BLAIR, SCOTT BLAIR and JEWELRY BY ALICIA AND SCOTT vs. CHARLES DUFFY and CHRISTYANN DUFFY

Uniform Trade Secrets Act – Opinion Pursuant to Pa.R.A.P. 1925(a) – Reduction of Jury Verdict to Conform to Law – Customer List as Trade Secret – Unfair Competition Claim in Absence of Direct Competition – Conversion without Deprivation of Use – Wage Payment and Collection Laws – Attorney's Fees under the Wage Payment and Collection Laws – Request for a New Trial on Damages After an Excessive Jury Verdict

Third-Party Defendants, owners of Plaintiff company, a jewelry company, are the Mother and Step-Father of Defendants. Defendants worked for Plaintiff company, and were in discussions with Plaintiff company to buy the company from Third-Party Defendants. Defendants instead decided to open up their own jewelry company, Co-Defendant. When forming Co-Defendant company, Defendants used Plaintiff's customer list to jumpstart their business. After a jury trial on all issues, all parties sought an appeal over a multitude of issues, as addressed below. Plaintiff company was meritorious in bringing claims under the Uniform Trade Secrets Act, Common Law Unfair Competition, and Conversion, and were awarded $142,400.00, $41,300.00, and $41,300.00 respectively. The Court molded the Jury verdict, limiting recovery to $142,400.00, as the underlying facts and damages for the Unfair Competition and Conversion claims were the same as those for the Uniform Trade Secrets Act, and Plaintiff testified that actual damages for the theft of its customer list was $142,400.00. The Court ruled that customer lists fall are recognized as trade secrets, if maintained with a substantial level of protection and secrecy, and possess competitive value. The Court ruled that the jury's finding that Defendant's actions violated Common Law Unfair Competition conformed to law, even though Defendant company and Plaintiff were not doing business at the same time. In doing so, the Court cites testimony that

the two companies had roughly 2 months of overlap, and the fact that Plaintiff had discussed selling the customer list prior to it being stolen. Because the customer list possess minimal to no value if it is not secret, competition existed between Plaintiff and Defendant over the use of the customer list. Defendants argued that the jury's finding of conversion was insufficient as a matter of law, as Defendants did nothing to actually hinder Plaintiff's use of the list. The Court rejected this argument, as the customer list lost substantial value due to Defendant's actions. Defendant, who was salaried and substantially part of the upkeep and decision making process for Plaintiff company, was not entitled to overtime compensation under the Wage Payment and Collection Laws. Co-Defendant, who worked for the company part time, was entitled to relief for unpaid wages sufficient to compensate him for work provided, and rate of pay, when not made clear through contractual language, is a rightfully a question for the jury. When claims that allow for recovery of attorney's fees and claims that do not allow for such recovery are brought together, attorney's fees may only be awarded for time spent working on the claims that allow for the recovery of attorney's fees. When actual calculation of attorney's fees are not presented to the Court, it is in the Court's power to determine what constitutes fair and reasonable attorney's fees. The Court ruled that, because the Court molded the jury verdict to limit the damages to conform with the law, no new trial on damages was required.

Case No.: G.D. 18-10757. Superior Court docket nos. 997 and 1066 WDA 2022. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Hertzberg, J. November 10, 2022.

OPINION

I. Background

Charles ("Chuck") Duffy began working for a jeweler in 1977. Then in 1982 he opened his own jewelry store called Diamond Design. Mr. Duffy's store was located in the Clark Building in downtown Pittsburgh, which is a large, tall building, that was then dominated by jewelry businesses. His business in the Clark Building did "bench work" (taking components of jewelry and assembling them into finished pieces) for all the other jewelry stores.

Christyann Duffy began working as an apprentice jeweler when she was sixteen years old. She obtained an associate's degree in manufacturing jewelry. Ms. Duffy worked for several different jewelers before being hired in 1986 as a diamond setter by Goldstock Company, located in the Clark Building She met Chuck Duffy when she took him a piece of jewelry to repair. They married, and Ms. Duffy began working for Diamond Design in 1996 when the business moved to the Pittsburgh suburb known as Wexford. They incorporated Diamond Design with Chuck and Christyann Duffy both having ownership interests. Christyann managed the store while Chuck focused on bench work.

In 2005 Christyann Duffy had a surgery that disabled her for five months. Christyann had trained her daughter from a previous marriage, Alicia, to be a jeweler. When Christyann had the surgery she and Chuck hired Alicia as the store's new manager.

Beginning with the opening of Diamond Design in the Clark Building in 1982, Chuck Duffy maintained a customer list. At first he handwrote all customers' names, addresses and phone numbers into a book. When Christyann began working for Diamond Design, she became responsible for maintaining the customer list and transferred it to an electronic format on the Excel program in a computer owned by the business. When Alicia was hired to manage the store in 2005, she became responsible for the list. It was very common for customers of Diamond Design to return there to purchase additional jewelry for occasions such as birthdays, weddings, anniversaries and holidays. At least once a year Diamond Design used the list to mail customers advertisements describing jewelry to entice them to return to the store and make purchases. As the owners of Diamond Design, Inc., the customer list was therefore valuable to Chuck and Christyann Duffy in procuring repeat sales to customers on the list.

During the summer of 2017, Chuck and Christyann began talking to Alicia and her husband, Scott Blair, about selling them Diamond Design, Inc. and retiring. Alicia and Scott Blair were interested in purchasing the business and were able to reach a verbal agreement with Chuck and Christyann over some of the terms of the purchase, including the price. In anticipation of purchasing the business, Scott Blair, who had no experience with jewelry, terminated his employment as a helicopter mechanic late in November of 2017. He then began going to Diamond Design with Alicia to have Chuck Duffy teach him to do bench work. However, in April of 2018 Alicia and Scott Blair suddenly terminated their positions with Diamond Design. They realized it would be less expensive to start a jewelry business from scratch than to purchase one from someone else. They did this in July of 2018, opening Jewelry by Alicia and Scott, also located in Wexford. Alicia had kept an electronic copy of Diamond Design's customer list, and she and Scott used it to mail notice of the Grand Opening of Jewelry by Alicia and Scott to all 2,600 of Diamond Design's customers. Chuck Duffy was shocked when Diamond Design's customers showed him notices of the Grand Opening they had received, as he did not give Alicia and Scott Blair permission to use Diamond Design's customer list.

Diamond Design, Inc. initiated this litigation in August of 2018 by suing Alicia Blair, Scott Blair and Jewelry by Alicia and Scott. Diamond Design, Inc. asserted claims for, among other things, violation of the Pennsylvania Uniform Trade Secrets Act, common law unfair competition and conversion. The Blairs each made counterclaims against Diamond Design, Inc. for unpaid wages under the Pennsylvania Wage Payment and Collection Law ("WPCL"), 43 P.S. §260.1, et seq. The Blairs also joined Chuck and Christyann Duffy as third-party defendants in a defamation claim. I presided over a jury trial that began on October 27, 2021. The jury's verdict was in favor of Diamond Design, Inc. in the amount of $142,400 on the misappropriation of trade secrets claim, $41,300 on the common law unfair competition claim and $41,300 on the conversion claim (I molded the verdict to the total of $225,000). On the counterclaims the jury found Alicia Blair was not owed any wages and Scott Blair was owed $5,000. On the claim against the Duffys for defamation, the jury found in favor of the Duffys.

The Blairs filed five motions for post-trial relief, including a petition for attorneys' fees and costs under 43 P.S. §260.9a(f) in the WPCL, a motion to mold Diamond Design's verdict to avoid double recovery and a motion to mold Scott Blair's damages award to add liquidated damages. After an evidentiary hearing on the petition for attorneys' fees and costs, briefs and oral argument, I granted the petition for attorneys' fees and costs with an award to Scott Blair in the amount of $27,642 and I granted the Blairs' motion to mold the verdict by reducing the verdict against them from $225,000 to $142,400. I also added liquidated damages of $1,250 to the jury's $5,000 award to Scott Blair. Judgment was entered from which a timely appeal to the Superior Court of Pennsylvania was first filed by Diamond Design, Inc., followed by the filing of a timely appeal by the Blairs. Statements of errors complained of on appeal were filed by Diamond Design, Inc. and the Blairs, which will be addressed below in accordance with Pennsylvania Rule of Appellate Procedure 1925(a).

II. Reduction of Jury Verdict

Diamond Design contends I made an error by molding the jury verdict from $225,000 to $142,000 by eliminating the jury's award of $41,300 under the common law unfair competition claim and $41,300 under the conversion claim. This argument is meritless because there was no basis for damages in excess of the $142,000 verdict for violation of the Uniform Trade Secrets Act. 12 Pa.C.S. §5304 in the Pennsylvania Uniform Trade Secrets Act specifies "damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss." Chuck Duffy provided the only evidence on actual loss, testifying $142,000 "is the value of the customer base and the goodwill of the store as well as the name." Transcript, Jury Trial, October 27, 2021-October 29, 2021 ("T" hereafter), p. 119. Regarding unjust enrichment, Alicia Blair testified that Jewelry by Alicia and Scott had revenues of $390,000, $450,000 and $650,000 for the years 2018, 2019 and 2020. See T, pp. 236-237. I instructed the jury it could award Diamond Design its actual loss as well as the unjust enrichment of the Defendants under the Uniform Trade Secrets Claim. See T, p. 494. Therefore, the $142,000 the jury awarded Diamond Design as a result of the Uniform Trade Secrets Act violation could have included both the actual loss to Diamond Design as well as the unjust enrichment of the Defendants. There is no authority for allowing damages in excess of Diamond Design's actual loss under the common law unfair competition or conversion claims, and Diamond Design proposed no contrary instruction to the jury. See Plaintiff's Proposed Points for Charge to the Jury nos. 6 and 9 and T, pp. 440-443. With actual loss already included in the $142,000 under the Uniform Trade Secrets claim, and Mr. Duffy's testimony $142,000 is the value of the customer base, goodwill and name, there was no basis for the jury's awards of additional damages of $41,300 under the unfair competition claim and $41,300 under the conversion claim. Additionally, the same conduct, misappropriation of the customer list, established the Defendants' liability for all three claims. Hence, I made no error by eliminating those two awards and reducing the jury verdict from $225,000 to $142,000.

Diamond Design also contends I made an error by molding the jury verdict to eliminate the $41,300 for unfair competition and $41,300 for conversion because it submitted case law that established the viability of those two claims. However, I agree with the jury's determination that there was liability for the two claims. I molded the verdict because no additional damages could be awarded when the measure of damages for them was already included in the Trade Secrets Act damages award.

III. Customer List as Trade Secret

The Blairs contend that, as a matter of law, Diamond Design's customer list is not a trade secret that is protected from misappropriation. However, in Morgan's Home Equipment Corp. v. Martucci, (390 Pa. 618, 136 A.2d 838 (1957)), the Pennsylvania Supreme Court found the customer list of a business engaged in selling household articles was a trade secret that was entitled to protection. The Court held that the customer list constituted a trade secret because of its substantial secrecy and competitive value to the business. Id., 390 Pa. at 623, 136 A.2d at 842; also see O.D. Anderson v. Cricks, 815 A.2d 1063 at 1070 (Pa.Super. 2003) (travel company's customer list held to be a trade secret) and A.M. Skier Agency, Inc. v. Gold, 2000 Pa.Super. 53, 747 A.2d 936 at 940 (insurance company's customer list held to be a trade secret). Even though the Pennsylvania Uniform Trade Secrets Act (12 Pa.C.S. §5301-5308) or "PUTSA" extinguished the common law tort for the misappropriation of trade secrets, PUTSA has retained this common law definition of trade secret. See Allied Environmental Service, Inc. v. Roth, 2019 Pa.Super. 328, 222 A.3d 422 at 427.

During the trial, there was unrebutted and credible testimony that Diamond Design's customer list was maintained with substantial secrecy and was of competitive value. The list was kept on Diamond Design's computer, which could be accessed only by employees who knew the password. See, T, pp. 87-89, 93. Also the store had an alarm system monitored by a security company that could call the police, and there were surveillance cameras on the inside and outside of the store. See, T, p. 93. The customer list was private (T, p. 99), never made public (T, pp. 89, 93), and Mr. Duffy testified it was "sacred" (T, p.99). Mrs. Duffy testified "you never give that information out, never." T, p. 214. Diamond Design's customer list was not information competitors could obtain from trade journals or looking in a phone book's yellow pages. Cf. Spring Steels, Inc. v. Molloy, 400 Pa. 354, 162 A.2d 370 (1960) and Pestco, Inc. v. Associated Products, Inc., 2005 Pa.Super. 276, 880 A.2d 700. It took Diamond Design forty years to develop the list through the painstaking efforts of the owners and their salaried employee, Alicia. See T, pp. 88 and 210. Diamond Design used its customer list to obtain repeat sales by mailing out advertisements to its customers for special occasions. See T, p. 89. Mr. Duffy testified the customer list was very important as "the basis of the income coming into the store." T, p. 90. Alicia Blair also admitted the customer list had value and was used to procure business from repeat customers. See T, pp. 307-8. Hence the list was "a material investment of time and money….and constitutes a valuable asset." Morgan's Home Equipment, 390 Pa. 618, 623; 136 A.2d 838, 842. The competitive value of a jewelry store's customer list even was acknowledged by Alicia Blair. She testified to meetings held after she left Diamond Design to explore other jewelry stores the Blairs considered purchasing. In each meeting she testified that she obtained descriptions of their customer lists because customer lists are important. See, T, pp.289,305-6. Therefore, Diamond Design's customer list is a trade secret that is entitled to protection from misappropriation.

IV. Unfair Competition Claim

The Blairs additionally contend, as a matter of law, Diamond Design's common law unfair competition claim fails because it was not in competition with Jewelry by Alicia and Scott, which opened after Diamond Designs ceased operations. This argument is premised on Jewelry by Alicia and Scott having not begun competing with Diamon Design until the mailing announcing Jewelry by Alicia and Scott's Grand Opening on July 24, 2018. But, Alicia Blair took the customer list on April 18, 2018 and registered Jewelry by Alicia and Scott on April 27, 2018, (see T, p. 234), circumstantial evidence from which it could be inferred that the competition began before the planned closure of Diamond Design at the end of June of 2018. There also was testimony from Mr. Duffy that he did business until the beginning of August of 2018. See T, pp. 96-97. Finally, the Blairs' argument ignores the fact that the primary competition between the two businesses was for use of the customer list. When the sale of Diamond Design to the Blairs fell through, Mr. Duffy had discussions with others interested in the customer list, who lost interest when they found out Alicia had it. See, T, pp. 94-95 and 182-184. Hence, regardless of when Diamond Designs ceased operations, it clearly was in competition with Jewelry by Alicia and Scott for use of the customer list. Therefore, Diamond Design's unfair competition claim does not fail as a matter of law.

V. Conversion Claim

The Blairs further contend Diamond Design's conversion claim fails as a matter of law because after Ms. Blair made an electronic copy of the customer list it still remained on Diamond Design's computer. Conversion is defined as "the deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent and without lawful justification." L.B. Foster Co. v. Charles Caracciolo Steel & Metal Yard, Inc., 2001 Pa.Super. 131, 777 A.2d 1090, 1095. Under this definition, interference with Diamond Design's use of the customer list is conversion. As mentioned above,

Diamond Design could not sell the customer list after others interested in it found Alicia had it. Clearly this interfered with Diamond Design's use of the list, regardless of whether a version remained on Diamond Design's computer.

VI. Alicia's WPCL Claim

The Blairs also contend that, as a matter of law, Diamond Design did not meet its burden of proving it was exempt from having to pay Alicia Blair overtime wages when she exceeded a forty hour work week. It is undisputed that Diamond Design paid Ms. Blair on a salary basis at a rate of $68,368 per year (or $1,315 per week). For Ms. Blair to fall within the administrative overtime pay exemption, Diamond Design also had to prove her primary duty is office or nonmanual work in management or general business operations with the exercise of discretion and independent judgment with respect to significant matters. See 34 Pa.Code §231.83. The Blairs are incorrect in arguing Diamond Design did not meet its burden of proof. Diamond Design sustained its burden of proof with testimony from Alicia Blair herself that described her position with Diamond Design as manager and designer (See T, pp.328-329) with independent judgment in designing the custom jewelry that differentiated Diamond Design from other jewelry stores (See T, pp. 322-323). She also exercised independent judgment modifying the website, preparing print advertising and social media marketing. See T, pp.323-327. Finally, Ms. Blair herself clearly believed Diamon Design was exempt from having to pay her overtime since she never asked Mr. Duffy for overtime pay. See T, pp.319-320. Hence, Diamond Design met its burden of proving that it was exempt from paying Alicia Blair overtime wages.

VII. Diamond Design's Damages

The Blairs additionally contend I should have ordered a new trial on damages because the amount of the jury's verdict was unrelated to Diamond Design's damages. However, I granted the Blairs' post-trial alternative request by reducing the jury verdict from $225,000 to $142,400. There was evidence that Diamond Design sustained a monetary loss from Alicia and Scott's use of the customer list. Mr. Duffy testified to having discussions with others interested in the customer list, who lost interest when they found out Alicia had it. See T, pp. 94-95 and 182-184. Mr. Duffy also testified the value of the customer list, goodwill and the name Diamond Design was $142,000. See T, p. 119. The Trade Secrets Act also provides for additional damages for unjust enrichment caused by the misappropriation (see 12 pa.C.S. §5304). The jury received evidence of such unjust enrichment as Jewelry by Alicia and Scott had revenues of $390,000, $450,000 and $650,000 in 2018, 2019, and 2020. Hence, the $142,400 verdict is related to Diamond Design's damages and a new trial on damages is, therefore, unwarranted.

VIII. Scott's WPCL Claim

The Blairs further contend that the jury's $5,000 award to Scott Blair was arbitrary and inconsistent with the undisputed evidence. This argument is premised on Diamond Design paying him wages at the rate of $803 per week. See T., pp. 462-463. But, there was no evidence of any agreed upon wage rate for Mr. Blair, with Mr. Blair admitting during the trial he never discussed how much he was going to be paid. See T,p. 382, l. 11-13. $803 per week was calculated based on the $5,625 paid to Mr. Blair being compensation for his work during seven weeks in March and April of 2018, when Diamond Design issued payments to Mr. Blair. Mr. Duffy vehemently denied the $5,625 was only compensation for seven weeks in March and April. See T, pp. 147-150. Diamond Designs argued the $5,625 instead was for a sixteen week period that began in December of 2017 and represented a rate of $268 per week. See T, pp.104-105. Contrary to the Blairs' position, Mr. Blair's rate of compensation was unclear, which allowed the jury, as the factfinder, to determine what it was. The $5,000 awarded by the jury, rather than being arbitrary, was more than Diamond Design wanted, less than Mr. Blair wanted, but quite appropriate.

IV. Attorney Fees and Costs

Both Diamond Design and the Blairs contend that I made an error by awarding Scott Blair $26,100 in attorney fees and $1,542 in costs under 43 P.S. §260.9a(f) in the WPCL. Diamond Design argues my attorney fee award is too large when compared with the $5,000 jury verdict for Mr. Blair, while the Blairs argue that it is too small to reasonably compensate Mr. Blair for the attorney fees and costs he incurred. Neither argument is sensible or proper. As to Diamond Design's argument my award is too large compared to the jury verdict, the Superior Court of Pennsylvania has unmistakably stated that a counsel fee award will not be reversed solely on the basis of being disproportionate to the amount of the underlying verdict. See Signora v. Liberty Travel, Inc., 2005 Pa.Super. 366, 886 A.2d 284 at 293 and Neal v. Bavarian Motors, Inc., 2005 Pa.Super. 305, 882 A.2d 1022 at 1031. The Blairs' argument that my award is too small to compensate them for the attorney fees they incurred is contradicted by their efforts to be reimbursed at a rate of $360 per hour when the fees they incurred were at a rate of $225 per hour. See transcript, Hearing, April 12, 2022 ("TH" hereafter), pp. 101-102.

The Blairs asked for an award of $144,301.70 for their attorney fees and costs. Their counsel attempted to identify approximately 400 hours of work that were devoted to Scott Blair's WPCL claim. Notwithstanding clear precedent requiring an effort to apportion time spent by counsel to the distinct causes of action (see Croft v. P.&W. Foreign Car Service, 383 Pa.Super. 435, 557 A.2d 18 at 20 and Signora v. Liberty Travel, Inc., 886 A.2d at 293-294), the Blairs' apportionment effort was minimal. Their counsel and their expert witness instead asserted that time spent defending against Diamond Design's misappropriation of the customer list claims and pursuing Alicia Blair's WPCL claim and the Blairs' defamation claim could not be apportioned because it was "inextricably intertwined" with Scott Blair's WPCL claim. See Ambrose v. Citizens National Bank of Evans City, 210 Pa.Super. 172, 5 A.3d 413 (2010). Diamond Design pointed to multiple unapportioned hourly and cost entries involving all of the Blairs' claims and defenses (e.g., hours spent on drafting the counterclaim, the pre-trial statement and post-trial motions, trial preparation, rehearsing the voire dire statement and at the jury trial; costs for the mediation fee and trial presentation services).

The Blairs' argument, that the time spent defending the misappropriation of the customer list claims and pursuing Alicia Blair's WPCL claim and the Blairs' defamation claim are "inextricably intertwined" with Scott Blair's WPCL claim, is unacceptable. First, their reliance on Ambrose above is misplaced as what happened in Ambrose is much different than what happened with Diamond Design and the Blairs. Unlike the Blairs, the two employees in Ambrose initiated the action with a WPCL claim. This was important to the Superior Court's determination that the counsel fees incurred defending the employer's counterclaims were inextricably intertwined with the employees' WPCL claim. See 5 A.3d at 421. The employees in Ambrose also were successful in defeating the employer's counterclaims, while the Blairs were not the prevailing parties in the customer list misappropriation claims brought by Diamond Design. The Ambrose two employees were successful not only in defeating the counterclaims but also in their WPCL claims, while Alicia Blair was unsuccessful in her WPCL claim and both Blairs were unsuccessful in their defamation claim. Also, the counterclaims in Ambrose were a sham and were interposed to intimidate the employees into dropping their meritorious WPCL claims. This too was important to the determination they were inextricably intertwined with the WPCL claims. See 5 A.3d at 420. Since Diamond Design prevailed on the misappropriation of the customer list claims, they were not sham claims interposed in an attempt to intimidate the Blairs to drop their meritorious claims.

Scott Blair's WPCL claim also does not flow from the facts common to the other claims and is distinct from them. See Ambrose 5 A.3d at 420. The WPCL claim of Scott Blair relies on different facts than Alicia Blair's WPCL claim. Scott agreed to work as an uncompensated apprentice for one or two months to learn about bench work at the jewelry store he and Alicia planned to purchase. When negotiations over the terms of the purchase dragged on for an additional two or three months, on April 14, 2018 Scott and Alicia left the jewelry store and never returned. Scott claimed the $5,625 Diamond Design ended up paying him was less than the amount required by the WPCL. Alicia, however, worked for Diamond Design as a salaried employee paid $68,368 per year. Her WPCL claim was premised exclusively on her not being paid overtime when she worked over forty hours in a week. Both of the Blairs' WPCL claims also are distinct from Diamond Design's misappropriation of customer list claim, since the customer list claims arise from the July, 2018 mailing to all customers on the list announcing the Grand Opening of Jewelry by Alicia and Scott. Finally, the defamation claim does not flow from facts common to any other claim since it allegedly was the result of a voicemail message left by Christyann Duffy for Scott Blair's mother and a Facebook post by Ms. Duffy that allegedly accused them of stealing jewelry from the store.

In any event, the Blairs were of no help to me in determining their reasonable attorney fees since they would not apportion their attorney fee claim between Scott Blair's WPCL claim and the other claims. Dimond Design was not much more helpful as it pointed to some hourly cost entries that were not apportioned but failed to suggest a reasonable attorney fee award or even some range that could be reasonable. I calculated the award of $26,100 in attorney fees and $1,542 in costs under 43 P.S. §260.9a(f) by considering the factors in 41 P.S. §503(b) (see Ambrose):

(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 client or clients from the services.

(4) The contingency or the certainty of the compensation.

Factor (1) does not favor the Blairs as the litigation was not complex, protracted or novel and required average skill. As to factor (2), there was no dispute that the hourly rates requested were customary, but lead counsel for the Blairs acknowledged billing them at the rate of $225 per hour when his customary charge is $360 per hour. Factor (3) does not favor the Blairs since Scott asked the jury to award him $16,650 (see T, pp. 461-463) for his WPCL claim but the resulting benefit to him was a $5,000 verdict. Factor (4) also does not favor the Blairs as their counsel's compensation was not based on any contingency. See TH, p. 100.

In this situation, the best way to determine reasonable attorney fees is to first ascertain the number of hours that reasonably would have been expended by one skilled lawyer representing Scott Blair in litigation focused exclusively on his claim for wages of $16,650 under the WPCL. Then, multiply the total of those hours by his lead attorney's customary $360 per hour rate. I determined those hours that reasonably would have been expended in such litigation for communications with clients and opposing counsel, pleading preparation, discovery and discovery motions, motions for summary judgment, mediation, a compulsory arbitration hearing, preparation for the arbitration hearing and a jury trial, pre-trial statement preparation and conference, a jury trial and post-trial motions. The total came to 72.5 hours, which multiplied by $360 results in a reasonable attorney fee of $26,100. As to costs, I mostly reimbursed one-sixth of them since there were six claims between the parties and the Blairs only prevailed on one. I did not provide any reimbursement for the expert who testified at the hearing on the petition for attorney fees because he was of no assistance to me. Therefore, my award of $26,100 in attorney fees and $1,542 in costs was correct.

BY THE COURT:
/s/The Hon. Alan Hertzberg

CITY OF PITTSBURGH, PENNSYLVANIA vs. FRATERNAL ORDER OF POLICE, FORT PITT LODGE NO. 1

Pa.R.A.P 1925(a) Opinion – Denial of Statutory Appeal – Policemen and Firemen – Collective Bargaining Act – Violation of Collective Bargaining Agreement

The Fraternal Order of Police, Fort Pitt Lodge No. 1 ("Union") filed a class action grievance against the City of Pittsburgh ("City") alleging that the termination of a surviving spouse's health insurance coverage upon the death of a retired police officer was a violation of the collective bargaining agreement between the parties. Following a hearing and written argument, an arbitrator issued an award in favor of the Union. The City then filed a Statutory Appeal. Following written briefs and argument, the Court issued an order denying the City's appeal and upholding the arbitrator's award. The City then appealed to the Commonwealth Court, and following the filing of the Concise Statement of Errors Complained of on Appeal, the Court issued this order. This matter arose following the City denying health benefits to a surviving spouse of a recently deceased retired police officer. The CBA noted that the City was to be a health insurer of last resort for retired officers and their spouses. However, it also specifically listed terminating events for health insurance coverage, but the death of a retired officer was not one of those events. The arbitrator interpreted the CBA to mean that the surviving spouse was to maintain health insurance coverage until one of the specifically enumerated terminating events occurred. The Court noted that it gave extreme deference to the arbitrator's award as it is due under 43 P.S. § 217.7 in Act 111. The Court further noted that Act 111 appeals are limited to "narrow certiorari review," and where an Act 111 dispute depends on the interpretation of a collective bargaining agreement, the court is bound by the arbitrator's determination, even if incorrect. See P.S.P. v. PA State Troopers' Assoc., 840 A.2d 1059, 1062 (Pa. 2004). Addressing the errors complained of on appeal, the Court first held that the arbitrator's decision was not an "overt instance of reformation" of the CBA, but it was rather an interpretation of the CBA. The Court further held that neither side acted in bad faith, that the Arbitrator's award did not strip the City of its authority to bargain for the terms of health insurance for its police officers and retirees, and that health insurance benefits were bargained for and won by the Union. Here, the arbitrator simply interpreted the provisions related to health insurance coverage. For the above reasons, the Court found that it committed no error in upholding the arbitrator's award.

Case No.: SA 22-193. 1076 CD 2022. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Hertzberg, J. November 21, 2022.

OPINION

This Opinion supports my August 30, 2022 Order of Court which denied the City of Pittsburgh's Statutory Appeal. The City of Pittsburgh ("the City") and the Fraternal Order of Police, Fort Pitt Lodge No. 1 ("the Union") are parties to a collective bargaining agreement (CBA), pursuant to the Policemen and Firemen Collective Bargaining Act ("Act 111"), that addresses the terms and conditions of employment between the parties and is effective from January 1, 2019 to December 31, 2022. Section 14 of the CBA, which addresses health insurance coverage, includes provisions regarding health insurance coverage for retirees and their spouses. Section 14 B(II.9.) provides that for officers who retire after 2001, "…the City will be the health insurer of last resort…The City's obligation to provide continuation of health insurance coverage is terminated if the employee is or becomes employed or self-employed or has access to private medical insurance coverage or Medicare through his/her spouse or if his/her spouse has private medical insurance or Medicare or any opportunity to obtain such coverage." On March 8, 2021 retired Officer Gary Rupert died. On April 12, 2021, Erin Rupert, the surviving spouse, was informed by a health care provider that she no longer had health insurance coverage. This termination of coverage was confirmed by a letter she received dated April 13, 2021 informing her that her coverage was terminated as a result of the death of her husband. To continue her benefits, she would have to pay $1,400 per month. Ms. Rupert contacted the Union, who was unaware of the City's practice of terminating health insurance coverage for surviving spouses upon the death of a retired police officer. After some investigation, the Union filed a class action grievance alleging that this type of termination was a violation of the CBA. A hearing was conducted on October 13, 2021 and October 15, 2021. The City presented evidence that this termination of retiree spousal health insurance was in accordance with the parties' past practice, but the Union presented evidence disproving the concept. After consideration of the hearing and written argument, on March 15, 2022 the arbitrator issued an award in favor of the Union. On April 18, 2022 the City filed a Statutory Appeal. I held a conference with the parties on June 9, 2022 and ordered them to submit written briefs. Argument on the statutory appeal was held on August 29, 2022 and on August 30, 2022 I issued an Order denying the City's Statutory Appeal and upholding the arbitrator's award. The City filed this appeal to the Commonwealth Court of Pennsylvania. On October 20, 2022 the City filed its Concise Statement of Errors Complained of on Appeal, which I will address in this Opinion.

Before I address the allegations of error made by the City, it is important to note that I gave the arbitrator's award the extreme deference that it is due under 43 P.S. §217.7 in Act 111, which provides that an arbitration award "shall be final on the issue or issues in dispute and shall be binding upon the public employer and the policemen or firemen involved." Act 111 appeals are limited to "narrow certiorari review" which only allows for review of (1) the jurisdiction of the arbitrator; (2) the regularity of the proceedings; (3) an excess of the arbitrator's powers; and (4) deprivation of constitutional rights. Where an Act 111 dispute depends on the interpretation of a collective bargaining agreement, the court is bound by the arbitrator's determination, even if incorrect. See Pennsylvania State Police v. Pennsylvania State Troopers' Association, 840 A.2d 1059, 1062 (Pa. 2004). Errors of law, erroneous interpretation of or misapplication of language in a collective bargaining agreement "is not a valid basis for vacating an Act 111 arbitration award." See City of Pittsburgh v. Fraternal Order of Police, Fort Pitt Lodge No. 1, 224 A.3d 702, 708 (Pa.Super. 2020).

The City first alleges that I abused my discretion by denying its statutory appeal because the arbitrator's decision amounted to a reformation of the CBA. An Act 111 arbitrator "should not undertake to equitably reform a collective bargaining agreement. Absent an indisputably overt instance of reformation, however, we find the task of distinguishing between such an innovation and errors of law in the interpretation to be unmanageable." Id. at 714. The CBA is specific about being a health insurer of last resort for retired officers and their spouses. The CBA also specifically lists terminating events for health insurance coverage, the death of a retired officer is not one of those enumerated terminating events. The arbitrator in this case interpreted that to mean that the surviving spouse will continue to have health insurance coverage until one of those specific terminating events occurs. Interpreting the health insurance provision of the CBA and its meaning in the absence of specifics regarding the death of a retiree is far from an "overt instance of reformation." Therefore, the arbitrator's award here was based on an interpretation and is entitled to deference. When the acts that an Act 111 arbitrator mandates an employer to undertake are "legal and relate to the terms and conditions of employment," the arbitrator is within his powers. Borough of Montoursville v. Montoursville Police Bargaining Unit, 958 A.2d 1084, 1092 (Pa.Cmwlth. 2008). Here, the arbitrator is requiring the City to continue to provide health insurance benefits to surviving spouses of deceased retired police officers. This is certainly legal, and health insurance is a term of employment, therefore the arbitrator was within his powers and I made no error by failing to vacate his award.

The City next argues that I abused my discretion because "neither Act 111 nor PLRA makes it an unfair labor practice for an Act 111 bargaining unit to refuse to bargain with public employers in good faith. This lack of enforcement mechanism deprives public employers the ability to redress instances of bad faith committed by Act 111 bargaining units." In collective bargaining, "bad faith is a desire or an intention not to reach an agreement." Pennsylvania Labor Relations Board v. Merion Memorial Park, 178 A.2d 553, 555 (Pa.1962). The failure of either party to bargain for a specific clause relating to the status of health insurance benefits upon the death of a retiree does not amount to bad faith on either side, and certainly not only on the side of the Union. Therefore, I committed no error by failing to vacate the arbitrator's award.

The City next alleges that I abused my discretion because the "interpretation of an Act 111 grievance arbitration award that empowers the arbitrator to bind a public employer to a benefit which has not been bargained for, and which can only be obtained through Act 111 bargaining – not through administrative or legislative action, is an impermissibly [sic] delegation of the home rule municipal function because it usurps the contracting authority of a municipality to the grievance arbitrator, in violation of the Home Rule Charter and Optional Plans Law and Pennsylvania's Constitution." Here, the arbitrator's award did not strip the City of its authority to bargain for the terms of health insurance for police officers and retirees. Instead, the arbitrator simply interpreted the language of the CBA related to health insurance coverage meant for surviving spouses of deceased retired police officers. Therefore, I committed no error by failing to vacate the arbitrator's award.

Finally, the City alleges that I abused my discretion because "unequal application of law allows Act 111 bargaining units to attempt to obtain through grievance arbitration what they did not obtain through the collective bargaining process, as is the case here." The Union did bargain for and win health insurance coverage benefits, the arbitrator simply interpreted the provisions related to retiree health insurance coverage. Therefore, I committed no error by failing to vacate the arbitrator's award.

BY THE COURT:
/s/The Hon. Alan Hertzberg

NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION, MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, JEFFERY B. FRANCOEUR, KYLE C. PALMIERI AND SCOTT WILSON vs. CITY OF PITTSBURGH

Income Tax – Pennsylvania Constitution Uniformity Clause – Unconstitutional Distinction Based on Resident Status

Plaintiffs, Players' Associations for professional athletes in the NHL, MLB, and NFL, challenged the constitutionality of Defendant, the City of Pittsburgh's, Non-Resident Sports Facility Usage Fee (the "Facility Fee"), which is a tax imposed on non-Pittsburgh resident professional athletes in the NHL, MLB, and NFL for games played (or days worked) in Pittsburgh. The Facility Fee assesses 3% on personal income for nonresidents of Pittsburgh, while resident athletes of Pittsburgh are subject to the 1% tax assessed on all residents. Plaintiffs argued that the Facility Fee was unconstitutional on its face because it makes a facial distinction between classifications of taxpayers – residents and nonresidents. The Court determined that the Facility Fee's distinction between taxpayers based on residency was unconstitutional and violative of the Pennsylvania Constitution's Uniformity Clause because the individuals – here, professional athletes – are engaged in the same professions. As such, the residency distinction was deemed arbitrary and unreasonable. The Court additionally noted that the Facility Fee was further unconstitutional because it created a lack of uniformity among professional athletes. For these reasons, the Court enjoined the City from further collecting the Facility Fee. Defendant argued that the Court should have severed the unconstitutional portion of the Facility Fee ordinance, resulting in the Facility Fee being assessed on both residents and nonresident, rather than issuing injunctive relief. The Court rejected that argument, determining that the Court did not have authority to effectively legislate a tax.

Case No.: GD-19-015542. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Ward, J.

OPINION

I. BACKGROUND

The National Hockey League Players' Association, Major League Baseball Players' Association, and National Football League Players' Association ("Plaintiffs") are organizations representing the interests of professional athletes playing in the National Hockey League ("NHL"), Major League Baseball ("MLB"), and National Football League ("NHL"). Jeffrey B. Francoeur, Kyle C. Palmieri, and Scott Wilson ("Named Plaintiffs") are persons who are employed or were formerly employed by the NHL, MLB, or NFL, and during the course of their career, have played in a sports venue located in the Pittsburgh, PA.

The City of Pittsburgh ("the City" and/or "Defendant") is a city of the second class and is granted authority to enact tax laws in its jurisdiction under the Pennsylvania Constitution. The City of Pittsburgh contains PPG Arena, PNC Park, and Acrisure Stadium, which host events for the NHL, MLB, and NFL respectively.

Defendant enacted a Non-Resident Sports Facility Usage Fee ("Facility Fee") pursuant to Pittsburgh City Ordinance § 271.01, et seq., which was authorized by the Pennsylvania Local Tax Enabling Act, 53 Pa. C.S. § 6924.304 ("the Act"). The Act allows the City of Pittsburgh to "enact a publicly funded facility usage fee upon those nonresident[1] individuals who use such facility to engage in an athletic event or otherwise render a performance for which they receive remuneration." 53 Pa. C.S. § 6924.304. The ordinance reads: "A license fee equal to three (3) percent of taxable earned income allocable to the days worked in a publicly funded facility is hereby imposed upon each nonresident who uses a publicly funded facility to engage in an athletic event or otherwise render a performance for which a such nonresident receives remuneration." Pittsburgh City Ordinance § 271.02.

Under this program, only nonresidents of Pittsburgh who use the city's sports venues (Acrisure Stadium, PPG Paints Arena, or PNC Park) are subject to the Facility Fee in the amount of a 3% assessment on personal income earned while in Pittsburgh. Similarly situated resident athletes of Pittsburgh are not required to pay the Facility Fee. This 3% assessment against income is in lieu of any other earned income tax imposed by the City. For example, all other income earned within the City of Pittsburgh is subject to a 1% tax. Thus, to illustrate, while nonresident athletes are subject to the Facility Fee in the amount of 3% of their income earned in the City's sports facilities, a resident athlete's earned income in those facilities is subject to the 1% earned income tax.

The portion of a nonresident athlete's earned income subject to the fee is assessed differently against athletes for each of the professional sports leagues in this case. By statute, income subject to the fee for athletes in the NFL is calculated by dividing the athletes' league-sanctioned team activities time in Pittsburgh by their league-sanctioned activities time for the year. League-sanctioned activities are known as "duty days." Duty days include preseason games and practices, regular season games and practices, and post season games and practices. This ratio is then multiplied by total earned income to determine income subject to the Facility Fee. On the other hand, income subject to the Facility Fee for MLB and NHL athletes is calculated by dividing the number of games played in Pittsburgh by total games played, including preseason and postseason games. This ratio is then multiplied by total earned income to determine income subject to the fee. Put simply, while NFL athletes pay the Facility Fee based upon the number of duty days spent in the City, MLB and NHL athletes pay based upon the number of games played in the City.

Named Defendants are all active or retired professional athletes who were subject to the tax while playing away games in Pittsburgh. Following a game in Pittsburgh, 3% of the players' game checks would be withheld by the club and paid to the City of Pittsburgh. If a player's club did not withhold the Facility Fee from them, the player would be responsible for paying the Facility Fee directly to the City of Pittsburgh.

On November 5, 2019, the Plaintiffs filed a declaratory action against the City of Pittsburgh concerning the constitutionality of the Facility Fee, alleging that the fee was facially discriminatory in violation of the Privileges and Immunities Clause and the Dormant Commerce Clause of the U.S. Constitution, and the Uniformity Clause of the Pennsylvania Constitution. The Plaintiffs sought an injunction against the City to bar it from continuing to impose and collect the Facility Fee. On January 28, 2022, Plaintiffs filed a motion for summary judgment. None of the pertinent facts in this case were in dispute by the parties, leaving only a pure question of law to be resolved by this Court: whether the City's tax was unconstitutional on its face. As such, the matter was ripe for disposition at summary judgment. This Court heard argument on July 19, 2022 and issued a Memorandum and Order granting summary judgment in Plaintiffs' favor on September 21, 2022. The City of Pittsburgh appealed.

II. ERRORS COMPLAINED OF ON APPEAL

The City of Pittsburgh makes the following assignments of error upon this Court on appeal:

1. The Court erred in finding that the Facility Fee violates the Uniformity Clause of the Pennsylvania Constitution.

2. The Court erred in finding that the Facility Fee is unconstitutional on its face, as applied to Plaintiffs, and as applied to any and all nonresident professional athletes.

3. The Court erred in barring any action by the City intended to assess impose, or collect the Fee.

4. The Court erred in not severing the alleged unconstitutional portions of the Fee ordinance.

The Court's analysis follows in two parts, based upon these assignments of error. First, the Court will discuss the constitutionality of the Facility Fee under the Uniformity Clause of the Pennsylvania Constitution. Second, the Court will address whether it erred by granting relief in the form of an injunction, rather than severing the unconstitutional portion of the law.

III. ANALYSIS

A. Whether the Facility Fee Violates the Uniformity Clause

The Pennsylvania Constitution provides that "[a]ll taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax…." Pa. Const., art. 8, § 1 (hereinafter "the Uniformity Clause"). Of course, the Uniformity Clause only applies to "taxes." Although the City maintains that the Facility Fee's label as a "fee" is important for administrative purposes, it conceded in its summary judgment brief and at argument that the Facility Fee is a "tax" to which the Uniformity Clause would apply. Thus, this issue is not preserved on appeal and this Court need not analyze whether the Facility Fee is a tax to determine the applicability of the Uniformity Clause.

The Pennsylvania Supreme has held that the Uniformity Clause requires "substantial equality of the tax burden." Amidon v. Kane, 279 A.2d 53, 59 (Pa. 1971). Specifically, "the imposition of taxes which are to a substantial degree unequal in their operation or effect upon similar kinds of businesses or property, or upon persons in the same classification, is prohibited." Id. The Uniformity Clause does not require perfect uniformity or exact equality of taxes. Id. Rather, "reasonable and practical classifications are justifiable." Id. However, "where a method or formula for computing tax will, in its operation and effect, produce arbitrary or unjust or unreasonably discriminatory results, the constitutional provision relating to uniformity is violated." Id.

Here, the Facility Fee makes a facial distinction between residents and nonresidents. Any such disparate treatment in taxation must be supported by a "non-arbitrary, reasonable and just basis…." Nextel Comms. of Mid-Atlantic, Inc. v. Commonwealth, 171 A.3d 682, 696 (Pa. 2017). The burden is on the taxpayer to show that "no reasonable distinction exists between the classes." Id. Additionally, the Uniformity Clause mandates that "there must be no lack of uniformity within the class." Id. (emphasis added); see also Saulsbury v. Bethlehem Steel Co., 196 A.2d 664, 666 (Pa. 1964) ("While different subjects may be reasonably classified for tax purposes, there must be no lack of uniformity within the class, either on the given subject of the tax or the persons affected as payers.") (internal citation omitted). Thus, the mandate of the Uniformity Clause is twofold. Firstly, any distinctions between classifications of taxpayers must be reasonable and non-arbitrary. Secondly, assuming a given classification is justifiable, there must be no lack of uniformity within that classification.

The City argues that this Court erred in finding that the Facility Fee is unconstitutional on its face. A plain reading of the ordinance enacting the fee shows that the City makes two facial distinctions.[2] One classification distinguishes between that class of persons who engage in athletic events or performances in the City's various sports arenas, and that class of persons who do not; the other distinguishes between residents and nonresidents within the class of persons who engage in said athletic events or performances. Thus, if these facial distinctions are arbitrary or unreasonable, or otherwise create a lack of uniformity within a class of tax subjects, the Facility Fee will be held to be unconstitutional on its face.

In this regard, the Facility Fee fits squarely within the holding of Danyluk v. City of Johnstown, 178 A.2d 609 (Pa. 1962). In Danyluk, the City of Johnstown imposed a flat ten-dollar annual tax upon nonresidents who engaged in any occupation within the city limits. Id. at 609. While, unlike the Facility Fee, Johnstown's occupational tax made no classifications based upon the type of professions or occupations subject to the tax, Johnstown's tax did make a distinction between residents and nonresidents. There, the Supreme Court plainly held that "[r]esidence cannot be made the basis of discrimination of taxation of persons engaged in the same occupation or profession." Id. at 610. A classification based upon residency was, as a matter of law, "unreasonable." Id. Thus, the City's Facility Fee violates the first of the Uniformity Clause's mandates, that a distinction must be non-arbitrary and reasonable.

The policy behind the Uniformity Clause aids in understanding why a distinction based upon residency is unreasonable. The Supreme Court has said that one of these policies is to prevent "disparate treatment of [tax classes] in order to avoid political accountability." Valley Forge Towers Apartments N, LP v. Upper Merion Area Sch. Dist., 163 A.3d 962, 979 (Pa. 2017). In this sense, it would be unfair and unreasonable to place a tax burden on nonresidents, to whom the City is not politically accountable, rather than on the City's residents.

The City's Facility Fee also fails to adhere to the second of the Uniformity Clause's mandates, that there must be no lack of uniformity within a classification. "If a tax is levied on an occupational privilege, it must apply to all who share the privilege. Part of the class may not be excused, regardless of the motive behind the action." Saulsbury, 196 A.2d at 666. Here, within the class of persons subject to the tax (i.e. those persons engaged in athletic events or performances in the City's arenas), there is a lack of uniformity because only some members of that class of persons bear the burden of the tax (i.e. nonresidents), while others bear none of the burden (i.e. residents). Thus, the Facility Fee fails to provide for "substantial uniformity in tax burden." Amidon, 279 A.2d at 59.

The City contends, however, that the tax burden borne by residents and nonresidents is substantially uniform due to the ultimate effective tax rate on each class's income. For example, while nonresident athletes like Plaintiffs are subject to the 3% Facility Fee, they are not subject to income or school district taxes. On the other hand, while resident athletes may not be subject to the Facility Fee, they are responsible for a 1% income tax and a 2% school district tax. Thus, the City argues, both resident and nonresident athletes ultimately bear an equal tax burden of 3% of their income, although via different tax provisions. Thus, the City posits that this Court erred in finding that the Facility Fee is unconstitutional "as applied to Plaintiffs." This argument, however, is an unavailing defense. In Danyluk, the City of Johnstown made a similar argument that, while only nonresidents had to pay an annual ten-dollar occupational tax, residents were subject to a different ten-dollar head tax. 178 A.2d at 610. The Supreme Court found that contention without merit. Id.

The Danyluk Court's rejection of this "as-applied" argument is consistent with caselaw in the inverse situation (i.e. where a facially-neutral tax creates a disparate impact of tax burden). The Commonwealth Court has consistently rejected claims, in the tax assessment appeals context, that a facially neutral action on the part of the taxing authority violates the Uniformity Clause because the action results in disparate impact. See GM Berkshire Hills LLC v. Berks Cty. Bd. of Assessment, 257 A.3d 822, 831-32 (Pa. Commw. Ct. 2021) (citing Punxsutawney Area Sch. Dist. v. Broadwing Timber, LLC, No. 1209 C.D. 2018, 2019 WL 5561413 (Pa. Commw. Ct. Oct. 29, 2019)) (rejecting argument that a disparate impact creates a basis for violation of the Uniformity Clause); Kennett Consolidated Sch. Dist. v. Chester Cty. Bd. of Assessment Appeals, 228 A.3d 29, 39 (Pa. Commw. Ct. 2020) ("[T]he facially

neutral action employed by District is not sufficient to result in a violation of the Uniformity Clause."). If a disparate impact cannot make a facially neutral tax violative of the Uniformity Clause, then a uniform impact cannot save a facially discriminatory tax from the Uniformity Clause's mandate.

Thus, the City's Facility Fee violates the Uniformity Clause by distinguishing between residents and nonresidents. First and foremost, the disparate burden for the Facility Fee that is placed on nonresidents is arbitrary and unreasonable. The City is unable to avoid this facially arbitrary distinction by arguing that the City's tax scheme, wholistically, creates an equal impact on residents and nonresidents. The Facility Fee also creates a lack of uniformity within the class of athletes subject to the tax, as resident athletes who use the sports facilities are not subject to the tax. Therefore, this Court did not err in finding that the Facility Fee was unconstitutional.

B. Whether the Court Erred in Issuing an Injunction

The City also takes issue with this Court's enjoinment of the City from further collecting the Facility Fee. Instead, the City argues that this Court should have severed the unconstitutional portion of the ordinance and allowed the rest of the ordinance to remain in place. On appeal from a final decree of injunctive relief, the question is whether the trial court abused its discretion or committed an error of law. Neshaminy Constructors, Inc. v. Phila., Pa. Bldg. & Construction Trades Council, AFL-CIO, 449 A.2d 1389, 1390 (Pa. Super. Ct. 1982). The foregoing analysis demonstrates that no error of law was committed by this Court in finding that the Facility Fee violates the Uniformity Clause. Thus, the remaining question is whether this Court abused its discretion in awarding permanent injunctive relief rather than severing the unconstitutional portion of the ordinance.

The authority for this Court to sever portions of a statute or ordinance is provided by statute. 1 Pa. C.S. § 1925. Section 1925 provides:

If any provision of any statute … is held invalid, the remainder of the statute … shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one….

When determining the severability of a statute, "[t]he touchstone of legislative intent is whether, with the unconstitutional portion of a statute removed, the legislature would prefer what remains of the statute to no statute at all." Phantom Fireworks Showrooms, LLC v. Wolf, 198 A.3d 1205, 1214 (Pa. Commw. Ct. 2018).

Here, the City suggests that this Court can save the remaining portions of the Facility Fee by severing the word "nonresident" from the operative portion of the ordinance. Without distinguishing between residents and nonresidents, the City argues that the remaining ordinance would be valid.[3] For this Court to do as the City suggests would not so much cure the ordinance of its constitutional infirmities as it would constitute judicial enactment of a 3% facility tax on all resident athletes in addition to nonresident athletes. Without a clear intent from the General Assembly to impose such a tax on a new class of persons, this Court believes that it is without authority and discretion to effectively legislate such a tax.

The Supreme Court addressed a nearly identical issue of severability in Saulsbury v. Bethlehem Steel Co. In that case, the Court found that an occupational tax, which applied only to individuals within the class who earned more than $600 a year, violated the Uniformity Clause. 196 A.2d at 666. Upon the defendant's urging the Court to sever the income distinction from the tax, the Court replied:

In the present ordinances, there are not two separate and distinct provisions. The tax is not imposed on all individuals enjoying an occupation within the municipalities. It is clearly restricted to and imposed only on those earning more than $600. a year. In fact, those earning less are not mentioned and for us to accede to appellants' argument in this respect, and say that the individuals in this class are subject to the tax imposed, would constitute judicial legislation and a rewriting of the ordinances.

Id. at 666-67. The Court held that, in such a circumstance, the ordinance was not capable of separation in fact. Id.

Here, the same conclusion is necessarily reached. Severing "nonresident" from the ordinance would effectively create a tax for residents. Neither the statute nor the ordinance mentions residents, evincing no intent to impose such a tax burden on residents. To the contrary, the General Assembly provided in the statute authorizing the Facility Fee that, "[s]hould a court of competent jurisdiction determine this provision to be invalid for any reason, persons subject to the [Facility Fee] shall not be exempt from any previously applicable earned income tax." 53 Pa. C.S. § 6924.304. The "previously applicable" taxes to which this provision refers are the City of Pittsburgh's regular 1% earned income tax and 2% school district tax, form which nonresident athletes were exempted by virtue of the Facility Fee. This provision shows that, in the event the Facility Fee was found invalid, the General Assembly intended to unexempt nonresident athletes from the City's income and school district taxes, rather than to exempt resident athletes from those taxes by making the Facility Fee applicable to them. As such, this Court did not err or abuse its discretion by enjoining the City from collecting the Facility Fee, finding that the ordinance was not capable of severance.

IV. CONCLUSION

For the foregoing reasons, this Court did not err in finding that the City's Facility Fee violated the Uniformity Clause of the Pennsylvania Constitution by making an unreasonable and arbitrary distinction between resident and nonresident athletes. Additionally, this Court committed no error in finding that the unconstitutional portion of the Facility Fee was not severable, and awarding injunctive relief to Plaintiffs.

BY THE COURT:
/s/The Hon. Christine A. Ward

[1] The Pittsburgh Code of Ordinances § 271.01 defines "nonresident" as "[a] person domiciled outside the City."

[2] For reference, the ordinance reads: "A license fee ... is hereby imposed upon each nonresident who uses a publicly funded facility to engage in an athletic event or otherwise render a performance for which such nonresident receives remuneration." Pittsburgh City Ordinance § 271.02.

[3] Note that the Plaintiffs also challenge the constitutionality of the Facility Fee's distinction between those who engage in athletic events or performances and those who do not. The Plaintiffs argue that a separate tax classification based upon a taxpayer's occupation or perceived level of income also runs afoul of the Uniformity Clause. Although this Court need not decide whether such a distinction is unconstitutional, assuming that such a distinction would violate Uniformity Clause, removing "nonresident" from the ordinance would not eliminate this challenge to the Facility Fee. In fact, it would create a whole new class of plaintiffs now subject to the 3% tax: resident athletes.

MELANIE BUDKEY vs. NORTHERN ENTERPRISING PROPERTIES, WALTER VANGENEWITT, LORI VANGENEWITT

Damages – Attorney Fees Award – Unfair Trade Practices and Consumer Protection Law

Plaintiff, initially pro se, filed a Complaint for damages resulting from, among others, Defendant's failure to refund Plaintiff's security and utility deposits. When Defendants filed preliminary objections, Plaintiff obtained counsel and filed an amended complaint, including claims of breach of warranty of habitability and violation of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). Plaintiff was awarded $6,350 by the arbitration panel; Defendants appealed. At a non-jury trial, the Court awarded Plaintiff $8,970, which included $5,407.50 in attorney fees. Defendants argued that attorney fees award was disproportionate to the amount of the verdict. The Court determined the award was appropriate because the amount of time required for counsel to attend the half-day arbitration hearing and prepare for and attend the non-jury trial was reasonable. Further, the Court found that hourly rate charged was customary and that the amount in controversy was substantial to Plaintiff. Defendants also argued the attorneys fee award did not further the purposes of the UTPCPL because one of the Defendants died and, thus, could not be deterred from further UTPCPL violations. The Court rejected that argument, finding that the UTPCPL attorney fees provision intends to reduce deception of consumers by all businesses, not just Defendants.

Case No.: AR19-5797. Superior Court docket no. 119 WDA 2023. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Hertzberg, J. March 8, 2023.

OPINION

This proceeding was initiated by Walter Vangenewitt and Lori Vangenewitt appealing, without counsel, from a Magistrate District Judge's ruling that they owed Melanie Budkey $1,229.77 plus costs of $214.57. After being directed to file a complaint, Ms. Budkey, without counsel, filed a complaint that demanded damages from Mr. and Mrs. Vangenewitt of $1,756.74. This complaint (with extensive attachments) itemizes the damages as a refund of an $850 security deposit Ms. Budkey provided Northern Enterprising Properties for the lease of residential property known as 2211 Aurora Drive from 2012 to 2019, refund of $67.37 from a utility deposit, missed work from litigation of $624.80 and court filing fees of $214.57. Mr. and Mrs. Vangenewitt responded to the complaint with a preliminary objection to being sued individually when Northern Enterprising Properties was the "correct defendant." Ms. Budkey promptly obtained an attorney who filed an amended complaint against Northern Enterprising Properties as well as Mr. and Mrs. Vangenewitt that included claims of breach of warranty of habitability and violation of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL" hereafter).

Mr. and Mrs. Vangenewitt, still without counsel, filed an answer and then proceeded to the compulsory arbitration hearing. According to the award, the arbitration hearing consumed 3.25 hours and culminated in an award in favor of Ms. Budkey in the amount of $6,350. Northern Enterprising Properties and Mr. and Mrs. Vangenewitt ("Defendants" herein) then obtained counsel who filed an appeal from the arbitration award. I presided over the non-jury trial of the dispute on November 2, 2022 and entered a verdict in favor of Ms. Budkey in the amount of $8,970. My verdict consisted of $2,990 for breach of warranty and wrongful withholding of the security deposit, which I tripled pursuant to the UTPCPL. The Defendants have not challenged this verdict, but they have appealed to the Superior Court of Pennsylvania from my January 9, 2023 award of attorney fees of $5,407.50 to Ms. Budkey under 73 P.S. §201-9.2 in the UTPCPL. The Defendants filed a concise statement of matters complained of on appeal, and I will address those matters below in accordance with Pennsylvania Rule of Appellate Procedure 1925(a).

The Defendants contend I made an error by awarding an amount of attorney fees, $5,407.50, that is disproportionate to the amount of the verdict, $8,790. This argument is premised on a distortion of the UTPCPL caselaw that indicates a proper attorney fee award should have "proportionality" to the damages award. The entirety of the language in the caselaw speaks to "a sense of proportionality," but does "not mandate a proportion that would be the limit of acceptability" and would allow for an attorney fee award 350 percent larger than the UTPCPL damages award. Neal v. Bavarian Motors, Inc., 2005 PA Super 305, 882 A.2d 1022, 1031. With the caselaw also explicitly prohibiting the damages award from serving as a cap or ceiling for the attorney fee award (see Sewak v Lockhart, 699 A.2d 755 at 763 (Pa. Super. 1997)), my award being approximately 60 percent of the damages award cannot possibly serve as the sole basis for it being erroneous.

Instead, the attorney fees award to Ms. Budkey should be evaluated by considering: "(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 client or clients from the services, and (4) the contingency or certainty of the compensation." Croft v. P & W Foreign Car Service, Inc., 383 Pa. Super 435, 439, 557 A.2d 18, 20 (1989) citing 41 P.S. §503. Counsel for Ms. Budkey provided a detailed description of the time required for the half day arbitration hearing, the non-jury trial and related services, which totaled 43.4 hours. I carefully reviewed each entry and considered Defendants' references to specific time entries being unreasonable, and I determined a total of 36 hours was reasonable (resulting in counsel's award being reduced from the $6,510 requested to the $5,407.50 awarded). While there were no novel or particularly difficult issues, had counsel spent less than 36 hours she would not have been able "properly to conduct the case." The Defendants have not argued that the rate of $150 per hour that counsel multiplied by the hours spent is higher than what is customary, and I do not find that to be the case. The amount involved in the controversy is viewed by defendants as "relatively minimal," but Ms. Budkey, a working mother who was raising a minor child on her own, could disagree. In any event, Ms. Budkey clearly benefitted. The complaint she filed without counsel demanded damages of $1756.44 while the non-jury verdict with counsel was $8,970. No evidence was provided by counsel or requested by Defendants on the contingency or certainty of compensation, making that issue inapplicable. Considering the above appropriate factors for an award of attorney fees under the UTPCPL, I believe the award of $5,407.50 was a proper exercise of my discretion and not erroneous.

The Defendants also contend my award of $5,407.50 in attorney fees to Ms. Budkey is erroneous because it does not serve the purposes of the UTPCPL. More specifically, they argue that Walter Vangenewitt, the principal of Northern Enterprising Properties, died on November 24, 2022, hence he would not be deterred from further UTPCPL violations. See ¶s 13-16, Defendant's response to Plaintiff's motion for attorney fees filed 1/3/2023, Document 29 in Allegheny County's electronic docket. This argument is meritless. First, the Defendants' argument omits two purposes of the UTPCPL attorney fees provision: making the claimant whole (see McCauslin v. Reliance Finance Co., 2000 PA Super 134, 751 A.2d 683 at 686) and encouraging experienced attorneys to litigate UTPCPL cases (see Krishnan v. Cutler Group, Inc., 2017 PA Super 312, 171 A.3d 856 at 903). Both of these purposes are

served by my attorney fees award in this case. In addition, the punishment and deterrence purposes of the UTPCPL attorney fees provision is intended to reduce deception of consumers by any business, not just deception by Mr. Vangenewitt and Northern Enterprising Properties. Therefore, my attorney fees award to Ms. Budkey serves this purpose as the punishment also deters other businesses from deceptive practices.

BY THE COURT:
/s/The Hon. Alan Hertzberg

TIMOTHY R. CALFO vs.
DONNA L. JONES a/k/a DONNA L. CALFO a/k/a DONNA L. COLEMAN

Compulsory Arbitration – Contract – Intent to be Bound

Plaintiff field a seven-count complaint, including counts for breach of contract and unjust enrichment; various contracts and other documents were exhibits to Plaintiff's complaint. Defendant filed preliminary objections, including one requesting dismissal and to compel arbitration. Defendant's argument compelling arbitration was based on a provision in an operating agreement that was attached to Plaintiff's complaint. The operating agreement at issue applied to members of an LLC. On one hand, Defendant argued that the operating agreement should compel arbitration, but on the other hand, Defendant argued that, under the same operating agreement, Plaintiff was not a member of the LLC. As such, the Court noted that Defendant could not make two contradictory arguments under the same agreement. Because the Court determined there was no operating agreement signed by both Plaintiff and Defendant that demonstrated both parties intended to be bound to its terms, including the arbitration provision, the Court overruled Defendant's preliminary objection to dismiss and transfer to arbitration.

Case No.: GD-22-011544. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. McVay, J. March 17, 2023.

Pa.R.C.P. 1925(b) OPINION

Procedural History

On 9/25/2022, Timothy Calfo ("Calfo") filed a seven-count complaint that included a Declaratory Judgement, Preliminary and Permanent Injunction, Breach of Contract, two counts of Unjust Enrichment, Fraud, and Conversion, against his mother Donna L. Jones a/k/a Donna L. Calfo a/k/a Donna L. Coleman ("Jones"). The complaint avers various disputes between Jones and Calfo related to the ownership and sale of Calfo Properties, LLC, ("Calfo Properties") and a commercial property located at 91 Terence Dr. Pittsburgh, PA 15236, ("Terence Drive") owned by Calfo Properties and rented to Calfo's plumbing and air conditioning business, ("Calfo Mechanical") that was owned solely by Calfo.

Additionally, there are disputes regarding repairs and improvements to the residential property located at 5315 Adobe Dr., Pittsburgh, PA 15236, ("Residence") which is owned solely by Jones but occupied by both parties as a family residence prior to their disputes.

There is also a dispute regarding an alleged agreement to sell the residential property and the sale price. Calfo also alleges that Jones was interfering with the operation of his company, Calfo Mechanical, a business of which she had no legal interest in.

Calfo's complaint had ten (10) exhibits attached which are as follows:

• Exhibit "A": An Agreement for Sale for the Residence between the Seller Jones and the Buyer Calfo for $275,000.00, dated 9/20/2021. The agreement only contains Calfo's signature.

• Exhibit "B": An Addendum to Exhibit "A", an Agreement of Sale for the Residence which was not signed by either Calfo or Jones.

• Exhibit "C": An Agreement of Sale for Commercial Property at Terence Drive, between Seller Gob and Buyers Jones and Calfo for $315,000.00, dated 10/07/2017. The agreement is signed by all parties.

• Exhibit "D": An Operating Agreement for Calfo Properties dated 1/12/2017, Calfo and Jones are named as members with each owning a 50% membership interest. This Agreement is not signed.

• Exhibit "E": An Amendment to Exhibit "C" and an Agreement of Sale of Commercial Property located at Terence Drive, where the names of Calfo and Jones are listed as Buyers, dated March 2017. This Agreement is not signed by any party.

• Exhibit "F": An Operating Agreement for Calfo Properties dated 1/12/2017, Jones is listed as 100% sole member. Jones signed this agreement and Calfo is not referenced in the agreement.

• Exhibit "G": An Assignment of Agreement of Sale of Commercial Property for Terence Drive dated 3/09/2017. Calfo and Jones assign their individual rights as buyers to Calfo Properties. Both Calfo and Jones signed the agreement as individual buyers, and Jones also signed as the sole member/owner of Calfo Properties.

• Exhibit "H": A Mortgage dated 4/18/2017, from Calfo Properties to Brentwood Bank for $252,000.00, signed by Jones as sole member of Calfo Properties. Jones also signed an LLC Acknowledgement certifying that she was the sole member of the Calfo Properties.

• Exhibit "I": A Storm Sewer Right of Way between Calfo Properties to Pleasant Hills Borough dated 1/30/2019, signed by Calfo for Calfo Properties. This agreement does not designate Calfo as a member but rather on behalf of the LLC.

• Exhibit "J": An Open-End Mortgage Agreement for $660,000.00 to Huntington National Bank dated 6/30/2020, in which the property at Terence Drive was collateral. It was signed by Calfo and Jones as members of Calfo Properties. The LLC acknowledgement was only signed by Jones, indicating that she was authorized to act on behalf of Calfo Properties.

• Exhibit "K": An Open-End Mortgage Agreement for $660,000.00 from Jones to Huntington National Bank dated 6/30/2020, in which the Residence was the collateral property. The agreement was signed by Jones individually.

No other exhibits were attached to the Calfo Complaint.

On 10/28/2022, Jones filed Preliminary Objections to Calfo's Complaint averring six objections which are as follows: 1) Motion to Dismiss for Improper Service, 2) Motion to Dismiss Based on Agreement for Alternative Dispute Resolution under Pa. R.C.P. 1028(a)(6), 3) failure to attach copies of a writing in which the claim is based on, 4) a demurrer to the preliminary and permanent injunctions, 5) a demurrer to the fraud count due to lack of specificity to allege the necessary elements to establish a fraud claim, and 6) a motion for a more specific statement for Counts VI and VII to support a claim for punitive damages.

On 1/13/2023, after reviewing the complaint, briefs, and oral argument, I ruled that Preliminary Objection I regarding improper service was moot, I overruled Preliminary Objections II – VI, and sustained Preliminary Objection VII with leave to amend.

Jones filed an appeal to my 1/13/2023 order on 1/20/2023 and filed her concise statement of errors on 2/6/2023. Jones' appeal is limited to my overruling her one preliminary objection requesting dismissal and transfer to arbitration pursuant to Exhibit "D" of Calfo's Complaint. This preliminary objection was brought pursuant Pa.R.C.P. 1028(a)(6) which is essentially a petition to compel arbitration.

Standard of Review

"When presented with a petition to compel arbitration, the trial court must determine whether an agreement to arbitrate the controversy exists." Davis v. Ctr. Mgmt. Grp., LLC, 192 A.3d 173, 182 (2018). "If a valid arbitration agreement exists between the parties and appellants' claim is within the scope of the agreement, the controversy must be submitted to arbitration." Id. at 182-3. "Arbitration is a matter of contract and, as such, it is for the court to determine whether an express agreement between the parties to arbitrate exits." Smith v. Cumberland Grp., Ltd., 687 A.2d 1167, 1171 (1997). In order to find an enforceable contract, all the essential elements must be found. Johnston the Florist, Inc. v. TEDCO Const. Corp., 657 A.2d 511, 516 (1995). "We must examine whether both parties have manifested an intent to be bound by the terms of the agreement, whether the terms are sufficiently definite, and whether consideration existed. If all three of these elements exist, the agreement shall be considered valid and binding." Id.

Rule 1028(c)(2) states that if a party's preliminary objections raise an issue of fact, "the court shall consider evidence by depositions or otherwise." See Pa.R.C.P. 1028(c)(2). The rule does not mandate that a trial court order discovery between the parties when the preliminary objections do not raise an issue of fact. Le Vin Co., LLC v. Blue Star Wine Co., No. 1062 EDA 2017, 2018 WL 1442540 (Pa. Super. Ct. Mar. 23, 2018).

Discussion

Jones takes the mistaken position that this case must be dismissed and remanded to arbitration based on Exhibit "D" of the Complaint, an alleged Operating Agreement for Calfo Properties dated 1/12/2017. Significantly, the agreement is not enforceable since it does not show the intent of the parties to be bound by it as required in Johnston the Florist. This is apparent and not an issue of fact because the operating agreement that purports to provide equal ownership to both parties and would require arbitration, is not signed by either party. Therefore, no further discovery was necessary.

In the nature of having your cake and eating it too, Jones denies that Calfo is a member of Calfo Properties, and that Jones is the sole member/owner relying upon the other Operating Agreement, also dated 1/12/2017. This other operating agreement, Exhibit "F", contains only Jones' signature and purports that Jones is the sole member of Calfo Properties. The signature on that page is not an issue of fact as it is only signed by Jones.

Jones' reliance on Waters v. Express Container Servs. of Pittsburgh, LLC, 284 A.3d 1217 (2022), reargument denied (Dec. 14, 2022) is misplaced. The facts in Waters are clearly distinguishable from the case sub judice.

In Waters, both parties admitted that there was a binding contract which contained an arbitration clause for disputes arising under the contract. The issue was whether a personal injury claim fell under the terms of the contract, not whether there was a contract. Here, Calfo claims he is an owner/member of Calfo Properties, but has not attached any signed operating agreement or other document that clearly assigns him an interest in it. In fact, Exhibit "D", the alleged Operating Agreement of Calfo Properties, which purports to provide Calfo 50% ownership is not even signed by him, let alone by Jones. In addition, Calfo avers that Jones had fraudulently signed his name to the assignment of the purchase of the property at Terence Drive to Calfo Properties. While Jones vehemently denies that Calfo is a member, and avers she is the sole member of Calfo Properties, as evidenced by the Operating Agreement signed by Jones, she still argues that Calfo should be bound by the agreement even though he is not a member.

I would also point out that Jones' stance that she is the sole owner of the Calfo Properties is logically contrary to her position that this matter is subject to compulsory arbitration. Jones avers that Calfo's Complaint and lawsuit should be dismissed and transferred to arbitration based solely on the Operating Agreement that is not signed by either party. More importantly, Jones argues that Calfo is bound to arbitration by an agreement that she does not recognize as being otherwise binding upon Calfo when she claims that Calfo has no membership interest in Calfo Properties. It logically cannot be both ways.

Jones' rationale for compulsory arbitration is clearly flawed when you examine the terms of the only signed Operating Agreement containing Jones' signature. Exhibit "F". Jones acknowledges in her briefs that the terms in the unsigned and signed operating agreements are identical except for who are the members.

In Exhibit F, the signed agreement in which Jones is the sole member, we find the following controlling terms regarding Membership:

Article I Definitions: i. Member: shall mean Donna Jones, and each other entity or person that may hereafter be admitted to the Company as a member.

Article II Formation Purpose and Duration: 2.11: Members: The names, present mailing address, units and percentages of each member is set forth in Exhibit "A". which lists Donna Jones as the sole member with 100% ownership.

Article V Management of Company by Members: 5.9 Decisions Requiring Unanimous Member Approval: (b.) To admit a new member.

Article VIII Transfer of Units: 8.2 Admission of additional Members: Additional members may be admitted to the Company from time to time with the prior written approval of the Members. Each newly admitted Member shall execute such documentation as the existing Members require to evidence ownership in the Company and shall be bound by the terms and provisions of this Agreement. Any purported admittance of new members other than in accordance with this Section 8.2 shall be null and void. (Emphasis added)

The Operating Agreement's member admission requirement states that a new member is to obtain the unanimous approval of all members, and the new member will execute documentation that proves ownership and their consent to be bound by the terms of the operating agreement. I found it significant that none of the exhibits attached to the complaint seemed to comply with the above contractual requirements. Any purported admittance of new members other than in accordance with Section 8.2 shall be null and void. Exhibit "F"

Significant to this question is Jones' denial of Calfo's Membership status or unwillingness to stipulate that she had consented to admit Calfo as a new member. Since Jones takes the position that Calfo is not a member of Calfo Properties, she

cannot use the Operating Agreement which only applies to its members to enforce the compulsory arbitration clause. It cannot be read both ways. The language of the operating agreement is clear that arbitration is for resolving disputes between members, not individuals claiming to be a member.

Jones also incorrectly argues that pursuant to Pennsylvania's Uniform Limited Liability Act of 2016, I am required to find that Calfo has assented to the operating agreement requiring compulsory arbitration. Section 8816(b), Application of operating agreement, deemed assent, states, "A person that becomes a member of a limited liability company is deemed to assent to the operating agreement." The statute only applies if Calfo is a member of the limited liability company. This rationale fails for the same reasons described more fully above, i.e., Calfo has not proven he is a member nor has Jones admitted or stipulated he is a member of Calfo Properties. If Jones had been willing to stipulate that Calfo was a member of Calfo Properties, I may have ruled differently. Again, Jones cannot have it both ways, if she wants to enforce the arbitration clause of the operating agreement, Calfo must be deemed a member. If Calfo is not a member there can be no assent to the operating agreement which would require compulsory arbitration.

Conclusion

In conclusion, I overruled Jones' preliminary objection to dismiss based on an alternative dispute resolution clause because there is not a signed operating agreement that demonstrates both parties intended to be bound to it and its arbitration clause. Since there is not an operating agreement signed by both Calfo and Jones which made Calfo a member of Calfo Properties, and no documentation showing that Jones consented to Calfo as a member, I had to overrule Jones' preliminary objection. I did not find an issue of fact present in whether an agreement to arbitrate existed. For these reasons I should be upheld.

BY THE COURT:
/s/The Hon. John T. McVay Jr.