IN THE COURT OF COMMON PLEAS OF
CENTRE COUNTY, PENNSYLVANIA

MICHAEL J. MCQUEARY,
Plaintiff

v.

THE PENNSYLVANIA STATE UNIVERSITY,
Defendant

Docket No. 2012-1804

(Judge Gavin)

Plaintiff's Brief in Opposition to Defendant's Definitive Motion for Post-Trial Relief

Filed on Behalf of Plaintiff
Michael J. McQueary

Elliot A. Strokoff
Catherine E. Rowe
I.D. No. 16677 and 315907
Strokoff & Cowden, PC
132 State Street
Harrisburg, PA 17101

W. Timothy Fleming
Fleming Law Office
111 Sowers Street, Suite 330
State College, PA 16801

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Introduction

Defendant has submitted a 136 page "Brief in Support of Definitive Motion for Post-Trial Relief," (Defendant's Definitive Brief or "DDB") consisting of 2 parts. Part II, beginning on page 38 of Defendant's Definitive Brief,

> "restates the statement of issues and legal argument sections from the University's Brief in Support of its Motion for Post-Trial Relief on the misrepresentation and defamation claims . . . filed on February 6, 2017."

("DDB", p. 2). On March 8, 2017, Plaintiff submitted his Brief in Opposition to Defendant's Motion for Post-Trial Relief. For purposes of judicial economy, this Brief incorporates by reference the contents of the previously filed Brief in Opposition to Defendant's Motion for Post-Trial Relief, but will set forth some concise supplements to same in Part II.

Similarly, much of the Defendant's arguments in Part I of the "DDB" pertaining to the Whistleblower Count are a rehash of arguments which it previously set forth in the "Proposed Findings of Fact and Conclusions of Law submitted by Defendant, the Pennsylvania State University" on or about November 7, 2016. "Plaintiff's Proposed Findings of Fact and Conclusions of Law re Count I (Whistleblower)" was filed on November 10, 2016. Again, in the interest of judicial economy, this Brief incorporates the contents of Plaintiff's Proposed Findings of Fact and Conclusions of Law re Count I (Whistleblower) and Part I of this Brief will focus on the few additional arguments raised by the Defendant in its "DDB".

PART I

A. The Defendant's arguments concerning the Whistleblower Count fail because they are based on Defendant's version of the facts, not the facts as found by the Court.

The Defendant, in its "DDB", sets forth facts as it wished the Court to find them. Defendant's legal arguments are premised on its version of the facts. Defendant's legal arguments are doomed to fail because they are not based on the proper facts of the case.

Defendant's one sentence expression of the standard for the grant of a motion for judgment notwithstanding the verdict on pages 7-8 of the "DDB" is incomplete.

There are only two bases upon which a judgment notwithstanding a verdict can be entered:

> "one, the movant is entitled to judgment as a matter of law and/or two, the evidence was such that no two reasonable mind could disagree that the outcome should have been rendered in favor of the movant." (citation omitted). To uphold JNOV on the first basis, we must view the record and conclude 'that even with **all the factual inferences decided adverse to the movant** the law nonetheless requires a verdict in his favor, whereas with the second [we] review the evidentiary record and [conclude] that the **evidence** was such that a verdict for the movant was **beyond peradventure**." Rohm & Haas v. Continental Cas. Co., 781 A.2d 1172, 1176 (Pa. 2001). (emphasis added).

In addition, the verdict winner

> "must receive 'the **benefit** of **every reasonable inference** of fact arising therefrom, and any conflict of the evidence must be resolved in his favor.' (citation omitted). Any **doubts** must be **resolved** in **favor** of the **verdict winner**, and JNOV should only be entered in a clear case."

Id. (emphasis added). As the Commonwealth Court summarized: "JNOV cannot be granted if there is **any evidence** supporting the verdict." Gehres v. Falls Township, 948 A.2d 249, 255 (Cmwlth. Ct. 2008).

The Court made 277 Findings of Fact on the Whistleblower Count, and the "DDB" does not argue that any of the Court's Findings of Fact are not supported by evidence; nor does the Defendant argue that there isn't any evidence supporting the verdict.

Accordingly, Defendant's Motion for JNOV based on its version of the facts, and not on the facts found by the Court, must fail.

B. Defendant's causation argument ignores the evidentiary standard set forth in 43 P.S. §1424(b) and (c) and the Pennsylvania Supreme Court decision in O'Rourke v. Commonwealth, 778 A.2d 1194 (Pa. 2001).

Section 4 of the Whistleblower Law provides in pertinent part:

> "(b) **Necessary showing of evidence**. – An employee alleging a violation of this act must show by a preponderance of the evident that, **prior to** the alleged **reprisal**, the **employee** or a person acting on behalf of the employee had **reported** or was about to report in good faith, verbally or in writing, an **instance of wrongdoing** or waste to the employer or an **appropriate authority.**
>
> (c) **Defense**. – It shall be a defense to an action under this section if the defendant proves by a **preponderance** of the **evidence** that the action by the **employer occurred** for **separate** and legitimate reasons, which are **not merely pretextual**." (emphasis added).

The Court, on pages 44 and 45 of its November 30, 2016 Whistleblower Decision, summarized its findings supporting its conclusion that the Plaintiff made the "necessary showing of evidence" required by 43 P.S. §1424(b).

Again, the Defendant does not argue that any of the Court's 277 Findings of Fact were not supported by evidence. The Defendant does not challenge the findings that the Grand Jury Presentment found that Messrs. Curley and Schultz "made a materially false statement under oath . . . that he was not told by the graduate assistant that Sandusky was engaged in sexual conduct or anal sex with a boy in the Lasch Building showers" (FoF 7, 8), that they "were charged with perjury and failure to report (suspected child abuse) based on "Mr. McQueary's testimony," (FoF 9), and that the Plaintiff will be the principal Commonwealth witness in the Curley and Schultz criminal cases" (FoF 10). (Also FoF 69, that the Plaintiff will be the main witness in the criminal trials involving Mr. Curley and Mr. Schultz").

Then the Court went on to conduct the "separate and legitimate reasons, which are not merely pretextual" analysis set forth by the Supreme Court in O'Rourke v. Com. Dept. of Corrections, 778 A.2d 1194 (Pa. 2001). The Defendant in the "DDB" does not critique the Court's application of the O'Rourke analysis to the case at bar. Indeed, the "DDB" totally ignores the Supreme Court's 43 P.S. §1424(c) analysis in O'Rourke, mentioning O'Rourke only in passing on page 25 of the "DDB" in discussing the non-economic damages holding in Bailets v. Pa. Turnpike Comm., No. 265 MD 2009 (Pa. Cmwlth, October 6, 2016).

The Court, on pages 46-51 set forth its reasoning for concluding that PSU had fallen far short of its burden of proving by a preponderance of the evidence that its reasons for discriminating against the Plaintiff were not

separate and apart from his report of wrongdoing, and indeed were pretextual. While the Defendant argues for findings of fact that it had separate and legitimate reasons which were not pretextual for ostracizing the Plaintiff and terminating his employment, such factual findings would have been contrary to the overwhelming weight of the evidence.

The Defendant does not attempt to distinguish O'Rourke from the case at bar, or argue that O'Rourke is inapposite, either attempt at which would have been in vain. The Defendant opts to simply ignore the controlling Pennsylvania Supreme Court decision on the issue. Accordingly, its causation arguments must fail.

C. Defendant's duplicative damages argument fails for two reasons: its duplication argument is speculative and because of the Defendant's failure to request a simple jury interrogatory separating economic from non-economic damages.

The Defendant speculates that the Court awarded Whistleblower damages which "are duplicative of damages the jury already awarded McQueary on his misrepresentation and defamation claims." (p. 18, "DDB"). However, there is scant support for Defendant's speculation.

First, there is no basis for speculating that the jury awarded damages on the Whistleblower action. Indeed, the jury asked a specific question, the answer to which established a limit to damages it could consider.

> "Can we consider placement of McQueary on paid administrative leave and banishment from Penn State University football facilities under the realm of defamation?
>
> No."

(NT 10/27/16, p. 176-177). Further, no Whistleblower arguments were made to the jury during the parties' closings. (NT 10/26/16, PM, p. 61).

Thus, there is no basis for speculating that the jury awarded the Whistleblower damages.

With respect to the Defendant's speculation that the Court's Whistleblower award duplicated damages already awarded by the jury, the Court notes on pages 58-59 of its Whistleblower Decision, because "Penn State could have avoided this issue by use of a **simple** jury interrogatory, their argument against a potential double recovery is deemed to be waived." (emphasis added). The Court invited the Defendant "to submit a proposed verdict slip, go ahead. You know, it's pretty straightforward" (NT 10/26/16, PM, p. 62), but expressed the view that it didn't see a need for complex, individual elements, interrogatories. (Id. at 62-63). So PSU could have proposed a simple verdict slip, separating economic from non-economic damages. However, contrary to the Court's expression of the afternoon before, PSU avers that on October 27, 2016, presumably by the 8:15 a.m. deadline established the day before, it handed to the Court "Defendant's Proposed Verdict Slip and Special Interrogatories to the Jury," attached as Exhibit A to the Affidavit of George C. Morrison, which Affidavit is Exhibit 1 to the "DDB".[1] However, with respect to the duplication of damages issues, even the 20 question special interrogatories did not seek to split compensatory damages

[1] Plaintiff is not in a position to dispute Mr. Morrison's Affidavit. However, neither of Plaintiff's counsels believe they were provided with a copy of the Defendant's Proposed Verdict Slip and Special Interrogatories on October 27, 2016. Nor does there appear to be any reference to this Proposed Verdict Slip and Interrogatories in the record.

into economic and non-economic components! (See Questions 11 and 18 of the Special Interrogatories directing: "state the amount of compensatory damages.")

Furthermore, the Defendant's duplication of damages speculation not hold up in light of the Court's express reasoning in the award. The total liquidated damage award in the November 30, 2016 Order was $4,974,048.00, consisting of

> "1. Past and future economic loss $3,974,048.00[2]
> 2. Past and future non-economic loss $1,000,000.00"

Now, the jury verdict was for $1,150,000 for compensatory damages for defamation and $1,150,000 for compensatory damages for misrepresentation, or a total of $2.3 million in compensatory damages.

With respect non-economic damages the Court stated that:

> "Assuming that the jury award of compensatory damages on both the defamation and misrepresentation count were intended solely to compensate Mr. McQueary for the harm to his reputation and humiliation, I regard those sums as insufficient and not binding on me. Accordingly, I award one million dollars ($1,000,000) for his non-economic damages."

(Opinion, p. 62).

Implicit in this statement by the Court that $2.3 million was insufficient for total non-economic damages, would be the Court's conclusion that $3.3 million would have been the amount the Court would have awarded for non-economic damages had the jury not awarded any sum for non-

[2] The Court accepted economic expert Stavros', wide receiver coach scenario #6, even though the Court opined that "the objective evidence supports the conclusion that Mr. McQueary would have become an offensive coordinator or head coach at a Division 1 football program . . ." (Opinion, p. 57).

economic damages. And, the corollary to this is that assuming arguendo the $2.3 million was solely for wage loss, and the jury awarded nothing for harm to reputation and humiliation, the Court would have reduced the wage loss damages by the like amount. But the bottom line total of $4,974,048 whistleblower award would remain the same, and PSU is not prejudiced by any speculative duplication of damages.

D. Actual Damages include non-economic damages.

Plaintiff stands by its argument, on pages 25-27 of "Plaintiff's Proposed Findings of Fact and Conclusions of Law re Count 1 (Whistleblower)" submitted on November 10, 2016, that actual damages includes non-economic damage. However, two additional brief comments are in order.

First, on page 246 of its "DDB", Defendant argues, that Joseph v. Scranton Times, LP, 129 A.3d 404 (Pa. 2015) is inapposite to the case at bar. However, this argument that Joseph v. Scranton Times is inapposite to the case at bar conflicts with PSU's proposed finding 82 in the "Proposed Findings of Fact and Conclusions of Law submitted by Defendant, the Pennsylvania State University as to Plaintiff's Whistleblower Claim" submitted on November 7, 2016, which specifically cited to Joseph v. Scranton Times:

> "82. Although the Supreme Court of Pennsylvania has noted that actual damages may include compensation for 'non-monetary injuries' such as 'personal humiliation, mental anguish and suffering' Joseph v. Scranton Times, LP, 129 A.3d 404, 429 (Pa. 2015) (discussing damages for actual injuries and quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-350 (1974)), both the Pennsylvania and federal high courts reiterated that '*all awards must be supported by competent evidence concerning the injury,* although there need be no evidence which assigns an actual monetary value

to the injury.' Id. (quoting Gertz, 418 U.S. at 350)." (italics in original).

Second, on page 26 of "Plaintiff's Proposed Findings of Fact and Conclusions of Law re Count 1 (Whistleblower)," submitted on November 10, 2016, Plaintiff cites a number of cases for the proposition that actual damages include pecuniary losses, as well as compensation for physical and mental suffering – Sites v. Nationstar Mortgage LLC, 646 F.Supp. 2nd 699, 713, (M.D. Pa. 2009); Rankin v. City of Phila., 963 F.Supp. 463 (E.D. Pa. 1997); Palazzolo v. Damsker, Bucks County, et al., 2011 WL2601536 (E.D. Pa. 2011); and Weider v. Hoffman, et al, 238 F.Supp 437, 445 (M.D. Pa. 1965). The Defendant, in its "DDB", totally ignores this significant precedent that the term actual damages connotes compensatory damages which include mental suffering.

E. The Court did not err in denying the Defendant's Second Motion to Stay Proceeding made May 31, 2016 and the Defendant has not shown it was prejudiced thereby.

The issue of the Defendant's Motions to Stay this case, initially made on October 19, 2012, and again made on May 31, 2016, have been briefed by the Plaintiff twice before, and the Plaintiff incorporates those briefs herein and makes the following supplements thereto.

In ¶58 of its May 31, 2016 Motion to Stay, the Defendant alleged that because a scheduling order in the Curley and Schultz criminal cases called for pretrial motions and briefs to be filed by July 31, 2016, "The criminal case is moving forward." But as this Court noted on page 2 of its August 15, 2016 Opinion denying the Stay, "No trial date has been set" for the Curley and

Schultz trials. Further, given the history of the criminal cases, (Messrs. Curley and Schultz were first charged on November 5, 2011), it "is reasonable to conclude that they are unlikely to be resolved in the foreseeable future . . ." (Id. at p. 6).

And, as was pointed out at pages 3-4 of Plaintiff's Response to Second Motion to Stay Proceedings, Defendant, who acknowledges it was paying Mr. Schultz's and Mr. Curley's legal fees, never bothered to approach either of them, or their attorneys, to obtain information which the Defendant claims it needed to defend the civil case at bar. Thus, by not even attempting to seek evidence from Curley and Schultz, PSU is estopped from arguing prejudice.

Messrs. Curley and Schultz have pled guilty and have acknowledged in their guilty plea hearings that they were mandatory reporters, (See Section I of this Brief, infra). Both have testified at their guilty plea hearings and at the Spanier trial. Penn State cannot credibly argue that it was prejudiced by the October trial in the case at bar because it now has evidence which would have put it in a better position to defend than it had in October 2016. The memory lapses of Messrs. Curley and Schultz at the Spanier trial, their testimony inconsistent with the exhibits in this case, and their Spanier trial testimony that is inconsistent with their prior Grand Jury testimony, would have been far more damaging to PSU at a civil trial of this case than the abstract, sterile adverse inference jury instruction given.

F. PSU withdrew its attorney client privilege objections and any testimony concerning advice from PSU Vice President and General Counsel Baldwin.

On page 30 of the "DDB", PSU complains about the Court's inquiries, on October 24, 2016, touching upon discussions between Vice President and General Counsel Baldwin and President Ericson. However, PSU stated "We withdraw the objections to the extent that privilege is not being waived as to other conversations . . ." (NT 10/24/16, AM, p. 141).

The other *see also* reference on page 30 of the "DDB" is to an attorney client privilege objection during examination of Lisa Powers on October 17, 2016, but Ms. Powers was not asked about any privileged communications.

Lastly, it should be remembered that attorney client privilege was raised during a discovery motion and hearing thereon involving Ms. Baldwin's dual role as Vice President and General Counsel, especially in communications concerning her participation in the drafting of the Spanier Statement and consulting with the lawyers for Curley and Schultz concerning same, which for the most part the Court ruled were not covered by attorney client privilege. (Court Orders of May 27, 2015 and July 24, 2015).

Finally, there is no reference to or indication in the Court's Whistleblower Decision to any adverse reference because of attorney client privilege.

G. Defendant's claimed error that the Court refused to permit it to offer media accounts casting the Plaintiff in a negative light fails because the Court admitted numerous media accounts offered by Defendant and permitted many to be published to the jury, and besides the articles offered by Penn State were published after the November 5, 2011 Spanier Statement.

At "DDB" page 109, Penn State complains that it was not permitted to publish six articles to the jury ("DDB" Ex. 7), specifically referencing Defendant's Exhibits 70 and 71 as examples of two articles that "were sought to be introduced into evidence and published to the jury during Mr. Mahon's Day 2 testimony." (See "DDB", pp. 109-111). In fact, Penn State was permitted to publish Defendant's Exhibit 70, a *New York Times* article – "An Aspiring Coach in the Middle of a Scandal."

MS. CONRAD: Move for the admission of Defendant's 70.

MR. STROKOFF: No objection, Your Honor.

THE COURT: It's admitted.

MS. CONRAD: And permission to post it. Thank you.

BY MS. CONRAD:

Q. And what was the headline of the New York Time article?

A. An Aspiring Coach in the Middle of a Scandal.

Q. And what was the date of that article?

A. November 9, 2011.

(NT 10/18/16 AM, pp. 50-51) (emphasis added). Immediately preceding the admissions and publication of Defendant's Exhibit 70, was the admission and publication of Defendant's Exhibit 69, over Plaintiff's objection, which was a

media account from *Bleachrreport.com* – "Penn State Scandal: Why Mike McQueary Deserves Jail Time." (NT 10/18/16, AM, p. 50).

Penn State also argued that Defendant's Exhibit 71 was not published to the jury. ("DDB", p. 109-111). In fact, Penn State never requested to publish Defendant's Exhibit 71 – an article from *The Washington Post* entitled "Penn State and Joe Paterno: A scandal that so easily could have been avoided," (NT 10/18/16, AM, p. 52). Regardless, Penn State was permitted to ask Mr. Mahon to read text of the article into the record:

> "[Ms. Conrad]: And I want to direct your attention to the second page of that article, particularly to the third paragraph. There's a sentence that begins, 'but in 2002,' do you see that . . . reference?
>
> [Mr. Mahon]: Yes.
>
> [Ms. Conrad]: And could you read into the record, please, what that provides in the article?
>
> [Mr. Mahon]: The story says, '**But in 2002 when grad assistant Mike McQueary allegedly walked in on that horrible scene in the showers, on campus, right there it could have been stopped.**'"

(NT 10/18/16 AM, pp. 52-53). (emphasis added). Insofar as Penn State argues it was not permitted to publish Defendant's Exhibit 71, the fault lies with Penn State's failure to request publication. (NT 10/18/16, AM, p. 52).

Concerning those exhibits listed in "Exhibit Z" (See "DDB", p. 109), every article contained therein was admitted into evidence.[3] Moreover, Penn

[3] In some cases, those documents were also published: Def. Ex. 72 – *Chicagonow.com*, "Why is Penn State Letting Mike McQueary Stay and Coach?" (NT 10/24/16, AM, pp. 8-9): Def. Ex. 73 – *Sportsgrid.com*, "The Man who Allegedly saw Jerry Sandusky Raping a Young Boy will Coach for Penn State on Saturday," (NT 10/24/16, AM, p. 11); Def. Ex. 74 – *TMZ.com*, "Ex-Penn State Football Player[:] Fire Mike McQueary!!!" (NT 10/24/16, AM, pp. 23-24): and Def.

State failed to request publication of Defendant's Exhibit 68, an article from the *Altoona Mirror* – "Gieger's live blog Monday: McQueary failed to act like a responsible human being." (NT 10/17/16, PM, pp. 143-144). Again, Penn State elicited testimony concerning the context of Defendant's Exhibit 68:

"[Ms. Conrad]: And what is the headline of this article?

[Ms. Powers]: Gieger's Live Blog Monday. McQueary failed to act like responsible human being.

[Ms. Conrad]: And what about the other articles or messages that you were receiving on Thursday, November 10th?

[Ms. Powers]: They were along the same lines **that he should have done something more.**"

The Court permitted Penn State to examine Ms. Powers and Mr. Mahon about the contents of the news articles and specifically elicit testimony concerning the public's perception of the purported "poor choices [McQueary] made about how to handle witnessing" the incident. ("DDB", pp. 118-119). The publication of additional articles became cumulative. (NT 10/26/16, PM, p. 9).[4] Contrary to Penn State's argument, the Court reasonably determined that the numerous articles published to the jury, and the several other articles admitted into the record, were sufficient to allow Penn State to argue that McQueary's reputation was impacted in ways unrelated to the Spanier statement.

Ex. 76 – *Slate.com*, "Last Man Standing: Mike McQueary says that he saw Jerry Sandusky sexually assault a child. Why does he still have a job at Penn State?" (NT 10/24/16, p. 12).

[4] As the Court stated when Penn State tried to again re-publish to the jury Def. Ex. 76 to the jury as the parties neared the end of trial (despite it having already been admitted and published on the morning of October 24), "You have so many news articles in here it's over the top. Both sides. Both sides have so many that if this jury hasn't figured out that the news media is accusing him of not being a man, that's the argument, what should have done, this article is no different." (NT 10/26/16, PM, p. 9).

Moreover, the articles admitted and published to the jury were published after the Spanier Statement was published on November 5, 2011. The jury "may consider . . . **the character and previous general standing of the plaintiff in the community . . . And, if that reputation is already bad, evidence of this fact is admissible and should be considered in mitigation of damages.**" Corabi v. Curtis Pub. Co., 441 Pa. 432, 473, 273 A.2d 899, 920 (1971) (emphasis added) abrogation on other grounds recognized in American Future Sys, Inc. v. Better Business Bureau, 592 Pa. 66, 78, 923 A.2d 389, 396 (2007) (abrogating Corabi on the issue of the evolution to the public/private figure distinction in determining the burden of proof in defamation claims).

All of Defendant's Exhibits identified in Defendant's "Exhibit Z" were published following the November 5, 2011, Spanier Statement and, accordingly, do not go to his reputation before the publication of the statement.[5]

Regardless, the Court admitted most of PSU's news articles and allowed several to be published to the jury. Penn State was not prejudiced in the Court's refusal to publish additional cumulative evidence.

[5] Penn State's reliance on Corabi, supra, and Wallace v. Media News Group, Inc., 568 Fed. Approx. 121 (3d Cir. 2014), is misplaced. Both cases concern the admission of evidence that purports to establish that the plaintiff already had a tarnished reputation. See, Corabi, supra (finding that if the plaintiff's reputation is "already bad, evidence of this fact is admissible"); and Wallace v. Media News Group, Inc., 568 Fed. Appx. 121 (3d Cir. 2014) (finding that pro se plaintiff's already tarnished reputation for allegedly bludgeoning his mother to death "is admissible and should be considered as a factor to mitigate the level of compensatory damages").

H. The Attorneys Fees Award is not erroneous.

Plaintiff's Brief in Support of Award of Contingency Attorney's Fee was filed on March 6, 2017. The "DDB" raises no new arguments. Accordingly, Plaintiff incorporates its Brief filed on March 6, 2017 herein.

PART II

As noted in the Introduction to this Brief, Part II of the "DDB" is a restatement of Defendant's Brief in Support of its Post-Trial Motions Trial on February 6, 2017. Therefore, incorporation by reference herein was Plaintiff's Brief in Opposition to Defendant's Motion for Post-Trial Relief, filed on March 8, 2017.

However, following in this part are a few concise supplements thereto.

I. Incredibly, Penn State still has not abandoned its argument that Messrs. Curley and Spanier were not mandated reporters even after Messrs. Curley and Schultz publicly admitted in open court that they were mandated reporters.

In addition to the legal argument on pages 1-3 of Plaintiff's Brief in Opposition to Defendant's Motion for Post-Trial Relief, that Messrs. Curley, Schultz and Spanier were mandated reporters, two months ago Messrs. Curly and Schultz publicly conceded, under oath and with advice of their legal counsel, that they were mandated reporters.

On March 13, 2017, Messrs. Curley and Schultz pleaded guilty to the crime of Endangering the Welfare of Children, 18 Pa. C.S. §4304(a)(2), specifically agreeing that "being a person . . . in an official capacity, prevented

or interfered with the making of a report of suspected child abuse under 23 Pa. C.S. Chapter 63 (relating to child protective services) . . ." (Paragraphs 1 of the two Guilty Plea Agreements attached as Exhibits 1 and 2, respectively).

At Mr. Schultz's guilty plea hearing of Monday, March 13, 2017, in going over the elements of the charge to which he was pleading guilty, we find the following exchange:

> "Attorney Ditka: The particular charge which we have remaining, the elements are, first, that you, in an official capacity, with respect to the report of Jerry Sandusky in the shower of February 9, 2001 -- **it was part of your employment to make a report of the suspected child abuse**. Do you understand that?
>
> Defendant: **Yes**."

(Schultz Guilty Plea Hearing, 3/13/17, NT 4-5; attached as Exhibit 3 hereto).

Similarly, at Mr. Curley's guilty plea hearing on the same day, toward the end of the summary of the evidence is the following:

> "Attorney Shulte: "And that you were charged with the **duty to report the suspected child abuse** and **failed in that duty in violation** of the statute regarding endangering the welfare of children.
>
> Do you understand that that's a summary of the evidence that would be presented against you?
>
> The Defendant: **Yes**."

(Curley Guilty Plea Hearing, 3/13/17, NT 23; attached as Exhibit 4 hereto).

There seems to be little dispute that former President Spanier, as "the person in charge" of PSU, was a mandated reporter under 23 Pa.C.S.A. §6311(c), which as the Court observed at the trial, Spanier recognized in his

"we become vulnerable for not having reported it" email of February 27, 2001, Plaintiff's Trial Exhibit 10.

Thus, notwithstanding concessions by Messrs. Curley, Schultz and Spanier that they were mandated reporters, PSU apparently has not abandoned its argument that, contrary to the humanitarian purposes of the Child Protective Services Law, Curley, Schultz and Spanier were not mandated reporters.

J. A Supplemental Note about Defendant's misrepresentation statute of limitations argument.

Defendant pleaded 21 paragraphs of New Matter on May 3, 2013, paragraph 75 of which reads:

> "75. Some or all of the Complaint is barred by the applicable statute of limitations."

Presumably, according to the Defendant, this at best vague averment is PSU's basis for contending that the statute of limitations of misrepresentation can be argued post-trial. Certainly, it is beyond argument that Defendant did not state the material facts upon which this defense was based (Pa.R.C.P. 1019(a)), not did ¶75 specifically state any averment of time. (Pa.R.C.P. 1019(f)

The question as to "when a party's injury and its cause were discoverable or discoverable **is for the jury**." Drelles v. Manufactures Life Ins. Co., 881 A.2d 822, 832 (Pa Super. 2005) (citing Fine v. Checcio, 870 A.2d 850, 859 (Pa. 2005)); see also Kelly v. Dawson, 62 A.3d 404, 421 (Pa Super. 2013) holding "The discovery rule 'ordinarily' requires a jury to make a factual determination."

As per Court direction, the parties were to provide Proposed Points for Charge on or before September 29, 2016. The Defendant failed to raise any statute of limitation issue in any of its 58 proposed points for charge. It is unclear if Defendant's Proposed Points for Charge were filed with the Prothonotary. If it is determined that they were not filed, Plaintiff will file them. Penn State further failed to raise any question concerning statute of limitations on the issue of misrepresentation in its 20 question Proposed Verdict Slip and Special Interrogatories to the Jury. (See PSU Br. in Support of Definitive Mot. for Post-Trial Relief, Ex. 1).

Thus, in failing to raise this issue for a jury determination, the Defendant is estopped from the post hoc ambush and has waived the issue. See, Bruzzese v. Bruzzese, No. 1056 WDA 2014, 2015 WL7100724 at *5-6 (Pa. Super. May 12, 2015) (holding that while Appellant raised the issue of statute of limitations in New Matter, Appellant failed to raise the issue or preserve it at trial and, thus, it was waived) (Attached hereto as Appendix A).

Further, even assuming arguendo the affirmative defense was not waived, the Plaintiff proved by clear and convincing evidence that he did not know – and he had no reason to know – that Messrs. Curley and Schultz, had misrepresented their intent to see that his report was properly investigated. The Plaintiff testified that Curley and Schultz told him that his report was serious, would be properly investigated and appropriate action would be taken. (NT 10/21/16, AM, p. 55; NT 10/24/16, AM, p. 95-96). The Plaintiff trusted Curley and Schultz "without a doubt." (NT 10/24/16, p. 97). After all, these

men were the highest ranking administrator of the University - one was in charge of the Athletics Department and one was in charge of the PSU police. (They were not adversaries or competitors as is typically the situation in a discovery case). Indeed, that Curley may have done something wrong was so incomprehensible to the Plaintiff that when he heard that Curley might be charged with something concerning Sandusky, Plaintiff could not believe it – because "Tim Curley is a good person, he's a good man." (NT 10/21/16 AM, p. 69; NT 10/24/16, p. 96-97).

It was not until the Freeh Report came out in July 2012 that Plaintiff learned that Curley and Schultz never saw to it that his report was investigated at all, much less properly investigated. As Plaintiff testified:

> "I was livid. I didn't know about any of the e-mails or the conversation or them going to the attorney and especially on a Sunday for three hours, or research, or whatever they want to term it. I was livid. That's when I learned about all of that."

Id.

It is inconceivable that the Plaintiff, or any reasonable graduate assistant, would not have trusted and relied on the representations of Athletic Director Curley and University Vice President Schultz about such a serious matter. It was not until July 2012 that McQueary had any reason to know that Curley and Schultz had intentionally misrepresented their intent to have this serious matter investigated.

CONCLUSION

For all the reasons cited in this Brief, and in the Plaintiff's prior Briefs incorporated by reference herein, Defendant's Motion for Post-Trial Relief is without merit and must be denied.

Respectfully submitted,

STROKOFF & COWDEN, P.C.

By: _____

Elliot A. Strokoff
I.D. No. 16677
Catherine E. Rowe
I.D. No. 315907
132 State Street
Harrisburg, PA 17101
(717) 233-5353

DATE: 6/9/17

FLEMING LAW OFFICE

By: _____

William T. Fleming, Esq.
111 Sowers Street, Suite 330
State College, PA 16801
814-278-5280

DATE: 6/9/17

IN THE COURT OF COMMON PLEAS
OF DAUPHIN COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

GARY CHARLES SCHULTZ

No. CP-22-CR-0003616-2013

2017 MAR 13 PM 12:51

GUILTY PLEA AGREEMENT

Under Rule 590 of the Pennsylvania Rules of Criminal Procedure, the Commonwealth, the defendant, and the defendant's counsel enter into the following guilty plea agreement. Any reference to the Commonwealth in this agreement shall mean the Office of the Attorney General for the Commonwealth of Pennsylvania.

1. The defendant agrees to plead guilty to one count of Endangering Welfare of Children, 18 Pa.C.S. §4304(a)(2), graded as a misdemeanor of the first degree, pertaining to the fact that he being a person in an official capacity, prevented or interfered with the making of a report of suspected child abuse under 23 Pa. C.S. Ch 63 (relating to child protective services).

2. The defendant agrees to cooperate fully and truthfully with the Commonwealth as follows:

a. Defendant agrees to provide truthful, complete and accurate information and testimony. The defendant understands that if he testifies untruthfully in any material way he can be prosecuted for perjury;

EXHIBIT 1

IN THE COURT OF COMMON PLEAS
OF DAUPHIN COUNTY, PENNSYLVANIA

2017 MAR 13 PM 12:59

COMMONWEALTH OF PENNSYLVANIA

v.

TIMOTHY MARK CURLEY

No. CP-22-CR-0003614-2013

GUILTY PLEA AGREEMENT

Under Rule 590 of the Pennsylvania Rules of Criminal Procedure, the Commonwealth, the defendant, and the defendant's counsel enter into the following guilty plea agreement. Any reference to the Commonwealth in this agreement shall mean the Office of the Attorney General for the Commonwealth of Pennsylvania.

1. The defendant agrees to plead guilty to one count of Endangering Welfare of Children, 18 Pa.C.S. §4304(a)(2), graded as a misdemeanor of the first degree, pertaining to the fact that he being a person in an official capacity, prevented or interfered with the making of a report of suspected child abuse under 23 Pa. C.S. Ch 63 (relating to child protective services).

2. The defendant agrees to cooperate fully and truthfully with the Commonwealth as follows:

a. Defendant agrees to provide truthful, complete and accurate information and testimony. The defendant understands that if he testifies untruthfully in any material way he can be prosecuted for perjury;

b. Defendant agrees to provide all information concerning his knowledge of, and participation in, the failure to report the 2001 incident between Jerry Sandusky and an unknown minor in the

EXHIBIT 2

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
	:	DAUPHIN COUNTY, PENNSYLVANIA
VS.	:	
	:	NO. 5164 CR 2011
GARY CHARLES SCHULTZ	:	NO. 3616 CR 2013

TRANSCRIPT OF PROCEEDINGS

GUILTY PLEA

[Pages 1 - 20]

BEFORE: HONORABLE JOHN A. BOCCABELLA, SR. JUDGE

DATE: MONDAY, MARCH 13, 2017

PLACE: COURTROOM NO. 6
DAUPHIN COUNTY COURTHOUSE
HARRISBURG, PENNSYLVANIA

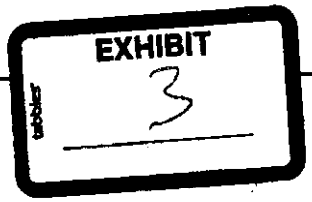
APPEARANCES:

LAURA A. DITKA, ESQUIRE
CHIEF DEPUTY ATTORNEY GENERAL

For - Commonwealth

THOMAS J. FARRELL, ESQUIRE
FARRELL & REISINGER, LLC

For - Defendant



your plea must be voluntarily made and that no clemency is being promised in exchange for your plea, with the exception of any plea bargain or agreement previously reached between yourself, the attorney, and the Attorney General's Office. Do you understand that?

THE DEFENDANT: Yes.

ATTORNEY DITKA: That plea bargain has been set forth in the document that the Court has and made part of the record; is that correct?

THE DEFENDANT: Yes.

ATTORNEY DITKA: By pleading guilty to any charge, you are admitting that you committed the offense. Do you understand that?

THE DEFENDANT: Yes.

ATTORNEY DITKA: The Commonwealth would have to prove beyond a reasonable doubt each and every element of the offenses of which you are charged, as you would be -- as would be required in a jury or non-jury trial. Do you understand that?

THE DEFENDANT: Yes.

ATTORNEY DITKA: The particular charge which we have remaining, the elements are, first, that you, in an official capacity, with respect to the report of Jerry Sandusky in the shower on February 9th, 2001 -- it was part of your employment to make a report of the suspected child abuse.

Do you understand that?

THE DEFENDANT: Yes.

ATTORNEY DITKA: Second, that you prevented or interfered with the making of that suspected child abuse under the laws of Pennsylvania.

THE DEFENDANT: Yes.

ATTORNEY DITKA: And, third, that you did so intentionally, knowingly, or recklessly. One acts intentionally when it is his or her conscious object or purpose to cause such a result. A person acts knowingly when he or she is aware that it is practically certain that his or her conduct will cause such a result. And a person acts recklessly when he or she consciously disregards a substantial or unjustifiable risk the consequence will result from his or her conduct. Do you understand that?

THE DEFENDANT: Yes, I do.

ATTORNEY DITKA: Could you please state your full name and spell your last name for the benefit of the court reporter.

THE DEFENDANT: My name is Gary Charles Schultz, S-c-h-u-l-t-z.

ATTORNEY DITKA: Mr. Schultz, you can read, write, and understand the English language?

THE DEFENDANT: Yes.

ATTORNEY DITKA: You understand that today you

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
	:	DAUPHIN COUNTY, PENNSYLVANIA
VS.	:	
	:	NO. 5165 CR 2011
	:	NO. 3614 CR 2013
TIMOTHY M. CURLEY	:	

TRANSCRIPT OF PROCEEDINGS

GUILTY PLEA

[Pages 1 - 29]

BEFORE: HONORABLE JOHN A. BOCCABELLA, SR. JUDGE

DATE: MONDAY, MARCH 13, 2017

PLACE: COURTROOM NO. 6
DAUPHIN COUNTY COURTHOUSE
HARRISBURG, PENNSYLVANIA

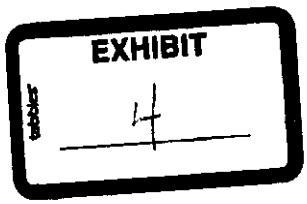
APPEARANCES:

PATRICK J. SCHULTE, ESQUIRE
DEPUTY ATTORNEY GENERAL

For - Commonwealth

CAROLINE M. ROBERTO, ESQUIRE

For - Defendant



February 2001 Mike McQueary report.

And that you were charged with the duty to report the suspected child abuse and failed in that duty in violation of the statute regarding endangering the welfare of children.

Do you understand that that's a summary of the evidence that would be presented against you?

THE DEFENDANT: Yes.

ATTORNEY SCHULTE: Do you understand all of the rights that you have been read during the course of this colloquy?

THE DEFENDANT: Yes.

ATTORNEY SCHULTE: Your Honor?

THE COURT: Thank you.

ATTORNEY ROBERTO: If I can, Your Honor, there is one thing that I noticed, before the Court accepts the plea -- or rejects the plea -- but accepts the plea in this matter. We have signed a copy of something called Acknowledgement of Rights, and I think the Court might have a copy of that. On Page 3, No. 6, it states, I understand that if I plead guilty, I have waived my right to appeal except as set forth in appellate waiver provisions of my plea agreement.

I think in light of what Mr. Schulte has put on the record regarding the four areas that are preserved for appeal, I would just like the record to be clear that

2015 WL 7100724
Only the Westlaw citation is currently available.
NON–PRECEDENTIAL DECISION–
SEE SUPERIOR COURT I.O.P. 65.37.
Superior Court of Pennsylvania.

Terri BRUZZESE, Appellee
v.
John BRUZZESE, Appellant
v.
David E. Martin, individually, NFI, LLC, a Pennsylvania Limited Liability Company, Financial Advisors Consortium, Inc., a Pennsylvania Corporation, Network for Financial Independence, LLC a Pennsylvania Limited Liability Company and Giovanni Bruzzese, as Executor of the Estate of Carmella Bruzzese, Deceased.

No. 1056 WDA 2014.
|
Filed May 12, 2015.

Appeal from the Judgment Entered June 4, 2014, In the Court of Common Pleas of Allegheny County, Civil Division at No(s): GD09–006968.

BEFORE: BENDER, P.J.E., LAZARUS, J., and MUNDY, J.

MEMORANDUM BY BENDER, P.J.E.:

*1 John Bruzzese (Appellant) appeals from the judgment entered June 4, 2014, following a trial in which a jury awarded Terri Bruzzese (Wife) damages for breach of contract. We affirm.

In 1974 and 1977, Domenic Bruzzese (Husband) purchased Prudential life insurance policies from Appellant, an insurance agent and Husband's brother. The policies identified Husband's parents as beneficiaries.

Husband and Wife married in 1981. In 1983, Wife became pregnant with their first child. During Wife's pregnancy, Husband and Wife determined to modify their life insurance plans. To that end, Husband and Wife met with Appellant at their home. With Appellant's assistance, Husband prepared the necessary documents to switch the named beneficiaries on his life insurance policies to Wife. In addition, Wife purchased a policy from Appellant. As their agent, Appellant agreed to file the paperwork.

In 2007, following a short illness, Husband died. At that time, Wife discovered that Appellant had never filed the change of beneficiary forms for the 1977 life insurance policy. The policy benefit, $40,441.95, was paid to Husband's mother, not Wife. Despite Appellant's assurances that Wife would receive the benefit, she did not.

Wife commenced this litigation in April 2009, filing a praecipe for writ of summons naming Appellant as defendant. Following a long delay, Wife filed a complaint in November 2011, claiming negligence and breach of contract. Appellant filed preliminary objections that were denied by the trial court. Thereafter, Appellant filed an answer and new matter. Appellant also filed a joinder complaint, alleging that additional defendants were solely liable over to Wife for any damages.

Prior to trial, Appellant filed a motion *in limine,* seeking to prevent Wife from introducing (1) evidence contrary to various judicial admissions, allegedly made during pleadings, and (2) hearsay testimony of statements made by Husband prior to his death. The trial court denied the motion in part, deferring a decision regarding hearsay testimony until trial. Subsequently, the trial court permitted Wife to testify that Husband planned and/or intended to amend his life insurance policies, naming her the beneficiary.

A jury trial commenced in March 2014. Following trial, the jury returned a verdict. On the negligence claim, the jury found that Wife was 60% negligent; Appellant was 40% negligent; and additional defendants were not negligent. Thus, Wife was not entitled to damages on this claim. However, the jury further found that Appellant had breached an oral contract between him and Husband and that Wife was a third-party beneficiary of that contract. The trial court molded the verdict in favor of Wife and against Appellant in the amount of $40,441.95.

Appellant and Wife filed post-trial motions. The trial court denied Appellant's post-trial motions; granted Wife's motion to add $15,376.81 in prejudgment interest to the verdict; and ordered judgment entered on her behalf in the amount of $55,818.76. Appellant timely appealed and filed a court-ordered 1925(b) statement. [1] The trial court issued a responsive opinion.

*2 Appellant raises the following issues on appeal:

> 1. Are general denials to material averments of fact set forth in [n]ew [m]atter judicial admissions[,] which may not be contradicted by additional evidence?
>
> 2. May a party offer testimony related to the terms of an oral contract based on conversations with a person deceased at the time of trial under Pa.R.E. 803?
>
> 3. May a claimed third party beneficiary to a contract recover damages when there is no proof of any consideration for the creation of the underlying contract from which the third party claim is derived?
>
> 4. Should a jury be charged on both negligence and contract law when the underlying basis for the claim at issue is that of a third party beneficiary under a contract?
>
> 5. May a claimed third party beneficiary to a contract file suit more than twelve years after she and the actual contracting party were both aware of an alleged breach of contract?
>
> 6. May a[t]rial [c]ourt refuse to charge the jury on impossibility of performance when there was evidence offered and admitted in support of that affirmative defense without objection?

Appellant's Brief at 6 (statements of trial court answers to these questions omitted). [2]

Initially, we observe that Appellant's proposed standard of review is imprecise. *See* Appellant's Brief at 5 (suggesting that we review the trial court's decisions for a clear abuse of discretion or an error of law that controlled the outcome of this case). Appellant does not seek a new trial, *see, e.g., Gorman v. Costello,* 929 A.2d 1208, 1212 (Pa.Super.2007) (cited by Appellant), but rather judgment notwithstanding the verdict (JNOV). *See* Appellant's Brief at 41; *see also* Appellant's Post–Trial Motion at 1 and 7 (unnumbered).

> There are two bases upon which a court may enter a [JNOV]: (1) the movant is entitled to judgment as a matter of law, ... or (2) the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant.... With the first, a court reviews the record and concludes that even with all factual inferences decided adverse to the movant, the law nonetheless requires a verdict in their favor; whereas with the second, the court reviews the evidentiary record and concludes that the evidence was such that a verdict for the movant was beyond peradventure.
>
> ...
>
> [I]n reviewing a motion for [JNOV], the evidence must be considered in the light most favorable to the verdict winner, and he must be given the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his favor. Moreover, a court should only enter a [JNOV] in a clear case and must resolve any doubts in favor of the verdict winner. A lower court's grant or denial of a [motion for] [JNOV] will be disturbed only for an abuse of discretion or an error of law. In examining this determination, our scope of review is plenary, as it is with any review of questions of law.

*3 *Quinby v. Plumsteadville Family Practice, Inc.*, 907 A.2d 1061, 1074 (Pa.2006) (citations and some punctuation omitted).

To the extent Appellant does not develop an argument attuned to this standard, he risks waiver of issues otherwise preserved. *See, e.g., McEwing v. Litiz Mut. Ins. Co.*, 77 A.3d 639, 647 (Pa .Super.2013) (quoting *Umbelina v. Adams*, 34 A.3d 151, 161 (Pa.Super.2011) (finding waiver where an appellate brief fails to develop an issue "in any other meaningful fashion capable of review")). Nonetheless, we will endeavor to review Appellant's issues on their merits.

In his first, second, and third issues, Appellant challenges evidentiary decisions of the trial court. Within this context, Appellant contends that Wife failed to establish (1) an underlying contract between Husband and Appellant and (2) her status as a third-party beneficiary of the alleged contract. *See* Appellant's Brief at 28–32. We infer from Appellant's presentation the following: *if* we grant Appellant relief on his evidentiary issues, thus eliminating certain evidence favorable to Wife from the record, we may *then* examine the remaining evidence and conclude that Appellant is entitled to judgment as a matter of law. *See Quinby*, 907 A.2d at 1074. Thus, we proceed.

Generally, we review a trial court's evidentiary decisions for an abuse of discretion. *See Schmalz v. Mfrs. and Traders Trust Co.*, 67 A.3d 800, 802–03 (Pa.Super.2013). To the extent Appellant challenges the trial court's interpretation of our procedural or evidentiary rules, our review is *de novo. See Sigall v. Serrano,* 17 A.3d 946, 949 (Pa.Super.2011).

In his first issue, Appellant contends that the trial court erred in denying that portion of his motion *in limine* claiming errors in Wife's pleadings. *See* Appellant's Brief at 17–23. According to Appellant, Wife failed to deny specifically several factual averments pleaded in Appellant's new matter. For example, Appellant averred that he never met with Husband or Wife to discuss a change in beneficiary status. According to Appellant, Wife's general denial of this and other averments constitute judicial admissions, citing in support Pa.R.C.P. 1029(b). Thus, Appellant concludes, Wife should not have been permitted to contradict these admissions at trial.

Appellant's argument is without merit. Rule 1029(b) provides as follows:

> Averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication. A general denial or a demand for proof, except as provided by subdivisions (c) and (e) of this rule, shall have the effect of an admission.

Pa.R.C.P. 1029(b). However, it is well settled that we examine pleadings as a whole to determine whether a material fact has been admitted. *See Alwine v. Sugar Creek Rest., Inc.*, 883 A.2d 605, 609 (Pa.Super.2005); *Ramsay v. Taylor,* 668 A.2d 1147, 1149 (Pa.Super.1995) (citing *Cercone v. Cercone,* 396 A.2d 1, 6 (Pa.Super.1978)). Further, "[n]ew matter properly contains averments of facts only if they are extrinsic to facts averred in the complaint. *Watson v. Green,* 331 A.2d 790, 792 (Pa.Super.1974) (emphasis added). No reply is necessary to an allegation previously and "clearly placed into issue by the complaint[.]" *Id.*

*4 As reasoned by the trial court,

> [t]o accept [Appellant's] position would be to ignore the complaint's averments that [Husband] and [Wife] met at their home with [Appellant] to change the beneficiary on [Husband's] life insurance policies and [that] [Husband] and [Appellant] completed the documents for the change. Rule 1029(b) ... requires a determination of whether [Wife] denied [Appellant's] averment that he never met with [Husband] and [Wife] "by necessary implication." By describing the meeting in the complaint, and generally denying [Appellant's] allegation of never meeting, [Wife] denied the allegation by necessary implication.

Trial Court Opinion at 4 (citations omitted). No reply to the factual averments contained in Appellant's new matter was necessary. *Watson,* 331 A.2d at 792. Thus, we discern no abuse of the trial court's discretion.[3]

In his second issue, Appellant contends that the trial court erred by permitting Wife to testify regarding Husband's intention to make Wife the beneficiary of his life insurance policies. *See* Appellant's Brief at 23–24. According to Appellant, Wife's testimony was inadmissible hearsay, suggesting that it comprised a statement of memory.

Appellant is incorrect. Wife did not testify to a statement of Husband's *memory,* but rather to a statement of his *future intent.* Pennsylvania Rule of Evidence 803(3) states that the following is *not* excluded by the rule against hearsay and, therefore, admissible to establish the truth of the matter asserted:

> A statement of the declarant's then-existing state of mind (such as motive, intent or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the

> validity or terms of the declarant's will.

Pa.R.E. 803(3).

As stated by the trial court,

> [Wife] offered [Husband's] plan or intention to make [Wife] the beneficiary to show [Husband] *later acted in conformity with this plan* or intention by discussing it with [Appellant] and signing the beneficiary change forms at the meeting. The testimony falls squarely within the hearsay exception for then-existing mental, emotional, or physical condition.

Trial Court Opinion at 6 (emphasis added) (quotation marks omitted) (citing in support *Commonwealth v. Begley*, 780 A.2d 605, 623 (Pa.2001) ("Intention ... is a fact, and the commonest way for such a fact to evince itself is through spoken or written declarations."). We agree and, therefore, discern no abuse of the trial court's discretion.

In his third issue, Appellant claims that Wife failed to present evidence that the contract between Husband and Appellant was supported by consideration. *See* Appellant's Brief at 33–36. Appellant fails to support his argument with any citation to legal authority. Accordingly, we deem this issue waived. *See McEwing*, 77 A.3d at 647; Pa.R.A.P. 2119. Absent waiver, this Court has previously stated that "[w]hether a contract is supported by consideration presents a question of law." *Pennsy Supply, Inc. v. Am. Ash Recycling Corp. of Pa.*, 895 A.2d 595, 601 (Pa.Super.2006).

*5 The trial court determined the following:

> Since [Appellant] was the agent on the policy, he received commissions from the policy premiums paid by [Husband]. In return for payment of premiums, one service that a life insurance agent provides to a customer is to assist with beneficiary changes. [Notes of Testimony [N.T.], 03/17–18/2014, at 93–102.] Hence, the premiums paid by [Husband] (from which [Appellant] received commissions) are the consideration for [Appellant's] agreement to have the beneficiaries changed on [Husband's] policies.

Trial Court Opinion at 7. We discern no legal error by the trial court.

Based upon our disposition of Appellant's first three issues, and our review of the record as a whole, Appellant is not entitled to JNOV. Wife established (1) a contract between Husband and Appellant; (2) that she was an intended third-party beneficiary to that contract; and (3) Appellant failed to perform his contractual obligation. *See generally Scarpitti v. Weborg*, 609 A.2d 147, 150–51 (Pa.1992) (discussing third-party beneficiaries). Thus, we will not disturb the jury's verdict, or the judgment entered thereupon. To the extent Appellant points to other evidence in the record more favorable to him, we reiterate that we view the record in the light most favorable to the verdict winner. *See Quinby*, 907 A.2d at 1074.

In his fourth issue, Appellant contends that the trial court erred in permitting the jury to consider both of Wife's claims, for negligence and breach of contract. *See* Appellant's Brief at 25–28. According to Appellant, the "gist of the action" doctrine prohibits consideration of a negligence claim where the facts alleged set forth an ordinary breach of contract claim. *See, e.g., eToll, Inc. v. Elias/Savion Adver., Inc.*, 811 A.2d 10 (Pa.Super.2002).

On this issue, Appellant's request for JNOV is inappropriate. *See Eichman v. McKeon*, 824 A.2d 305, 317, Pa.Super. 2003) ("Error in a [jury] charge is sufficient ground *for a new trial*, if the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue.") (emphasis added). Appellant has not requested a new trial. Moreover, we deem this claim moot. The jury determined that Wife was comparatively more negligent than Appellant, and thus not entitled to damages on her negligence claim. Any error made by the trial court did not control the outcome of this case. *Id.*

In his fifth issue, Appellant contends that Wife's contract claim is barred by the statute of limitations. *See* Appellant's Brief at 36–40. This raises a question of

law, for which our standard of review is *de novo*. *See, e.g., Commonwealth v. Riding*, 68 A.3d 990, 993–94 (Pa.Super.2013) (citing *Commonwealth v. Russell*, 938 A.2d 1082, 1087 (Pa.Super.2007); *Commonwealth v. Taylor*, 65 A.3d 462, 467 (Pa.Super.2013)). According to the trial court,

> [w]hile [Appellant] pled the bar of the statute of limitations under new matter, he did nothing at trial to raise it as a defense. Specifically, [Appellant's] counsel did not mention the statute of limitations defense in either his opening or his summation to the jury and did not submit a point for charge on the subject or include the subject in the proposed verdict form. Therefore, it cannot be the basis for relief on appeal.

*6 Trial Court Opinion at 11 (citing Pa.R.C.P. 227.1(b)(1)); *see also, e.g., In re Adoption of D.M.H.*, 682 A.2d 315, 322 (Pa.Super.1996). We agree that Appellant did not preserve this issue at trial. Accordingly, we deem it waived.[4]

In his sixth issue, Appellant contends that the court erred or abused its discretion when it denied Appellant's requested jury charge on impossibility of performance. *See* Appellant's Brief at 32–33. Appellant fails to support his argument with any citation to legal authority. Accordingly, we deem this issue waived. *See McEwing*, 77 A.3d at 647; Pa.R.A.P. 2119.

Absent waiver on the above ground, and similar to our discussion of Appellant's fourth issue, *supra*, Appellant's request for JNOV is inappropriate, and Appellant has not requested a new trial. *See Eichman*, 824 A.2d at 317. Nevertheless, on the merits, which we review for clear abuse of discretion or error of law controlling the outcome of the case, *see id.*, the trial court stated the following:

> Appellant premises [his] argument on a provision in the life insurance policy that prohibits agents from modifying the insurance policy. [Wife], however, never alleged that [Appellant] alone could modify the insurance policy to make her the beneficiary. She simply alleged that during a meeting in 1983 [, Appellant] took the change of beneficiary documents that [Husband] had signed but failed to submit them to Prudential.

Trial Court Opinion at 10. We agree. The premise of Appellant's claim is without merit, and thus, we discern no abuse of the trial court's discretion or error of law.

Judgment affirmed.

All Citations

Not Reported in A.3d, 2015 WL 7100724

Footnotes

1 Appellant's statement was untimely. At this Court direction, Appellant sought and received *nunc pro tunc* relief from the trial court, permitting the untimely filing. Accordingly, we permitted the appeal to proceed.

2 Appellant's brief does not conform to our rules of appellate procedure. Appellant presents six issues for our consideration, yet his argument includes seven sub-sections. *See* Pa.R.A.P. 2119(a). Moreover, Appellant's presentation of the issues is haphazard. For example, in his third issue, Appellant claims there was no evidence of consideration to support Wife's claim of a contract, and yet Appellant does not discuss this issue until his sixth, briefed argument. *See* Appellant's Brief at 33.

3 Appellant also suggests that Wife admitted the alleged contract between Appellant and Husband was not supported by consideration. Appellant is incorrect. Wife pleaded that Appellant served as Husband's insurance agent, thus establishing the requisite consideration. *See* Complaint at ¶¶ 7, 8.

4 We note that Appellant's suggestion that he raised this issue in a motion for nonsuit is not supported by the record. *See* N.T. at 103–06; *see also* Appellant's Brief at 40. Moreover, as observed by the trial court, it appears Appellant specifically *conceded* this point during trial. *See* Trial Court Opinion at 11–12 (citing N.T. at 37, 175).

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IN THE COURT OF COMMON PLEAS OF
CENTRE COUNTY, PENNSYLVANIA

MICHAEL J. MCQUEARY, Plaintiff v. THE PENNSYLVANIA STATE UNIVERSITY, Defendant	Docket No. 2012-1804 (Judge Gavin)

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have this day served a true and correct copy of the foregoing Plaintiff's Brief in Opposition to Defendant's Definitive Motion for Post-Trial Relief by email and First-Class Mail on the following person(s):

conradn@whiteandwilliams.com

Nancy Conrad, Esq.
White and Williams LLP
3701 Corporate Parkway, Suite 300
Center Valley, PA 18034

Dated: 6/9/17

By: _____
Catherine E. Rowe