**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

HIDDEN RIDGE CONDOMINIUM ASSOCIATIONS, INC., A PENNSYLVANIA NON-PROFIT CORPORATION, AND JILL WANZIE, TOM BURISH, KATHLEEN RAUSCHER, KAREN LOFE, AND COREY SIGLER, AS TRUSTEES AD LITEM OF THE EXECUTIVE BOARD OF THE HIDDEN RIDGE CONDOMINIUM ASSOCIATION, ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Appellees

v.

P. RONALD SABATINO A/K/A RONALD SABATINO, SCIOTO CONSTRUCTION COMPANY, A PENNSYLVANIA CORPORATION, AND T & R PROPERTIES, INC., AN OHIO CORPORATION,

v.

J.R. GALES & ASSOCIATES, INC., LAWSON EXCAVATING, INC., MEYER, UNKOVIC & SCOTT, LLP KEVIN F. MCKEEGAN, RYCO PLUMBING, L.L.C. and MITO INSULATION

APPEAL OF: SCIOTO CONSTRUCTION COMPANY, A PENNSYLVANIA CORPORATION

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1992 WDA 2012

Appeal from the Judgment entered December 11, 2012, in the Court of Common Pleas of Allegheny County, Civil Division, at No(s): GD 08-021879

BEFORE: FORD ELLIOTT, P.J.E., ALLEN, and COLVILLE*, JJ.

MEMORANDUM BY ALLEN, J.: **FILED DECEMBER 18, 2013**

*Retired Senior Judge assigned to Superior Court.

Scioto Construction Company ("Appellant") appeals from the judgment in favor of Hidden Ridge Condominium Association, Inc., et al. ("Hidden Ridge"). We affirm, and deny as moot Hidden Ridge's motion to quash the appeal.

The trial court recited the facts and procedural history of this case as follows:

> A civil action was commenced by Hidden Ridge Condominium Association, et al., (hereinafter "Hidden Ridge") in the fall of 2008 that included nine counts, naming three defendants. [Hidden Ridge] was suing the developer and his related entities for unpaid condominium fees and the cost of repair of certain construction defects. The developer (Sabatino, et al) joined the law firm that represented them, an engineering firm, as well as three (3) contractors as additional defendants. [Hidden Ridge] sought to compel Sabatino, et al to pay condo fees for all units that they owned, built or to be built. Sabatino, et al charged their attorneys with legal malpractice and settled with them for $473,000 prior to trial. This was the amount owed for condo fees through May of 2009. [Hidden Ridge] then proceeded before a jury in May of 2012 for the period after May of 2009 obtaining a verdict against [Appellant] for $251,725. A second trial was scheduled for September of 2012 on various counts for defective construction. However, before the second trial could be held, the parties settled all matters except the issue involving the sprinklers.
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> The procedural history of this case is long and complicated as reflected on twenty-three (23) pages of docket filings. This matter was initiated by praecipe filed on October 15, 2008. A complaint was subsequently filed on July 6, 2009. An Amended Complaint was filed on November 4, 2009. Said Amended Complaint included nine (9) counts and named three (3) defendants.
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> On April 8, 2010, Defendants Sabatino, et al filed an Answer, New Matter and Crossclaim. [Appellant] Scioto was

granted Leave to join additional defendant Meyer, Unkovic and Scott and their attorney McKeegan [Attorney Defendants].

On December 15, 2011, this Court granted partial summary judgment on the issue of condominium fees payable to Hidden Ridge. The amount of damages was to be determined at trial. On that same date, this Court denied the original defendants' motion for partial summary judgment.

On January 12, 2012, a Notice of Appeal was filed to the Superior Court by T&R Properties Inc., a management entity contracted by Sabatino. The Superior Court quashed that appeal on February 10, 2012 (see Superior Court No. 79 WDA 2012).

The matter of condominium fees contained in Count I of the Amended Complaint proceeded to a five (5) day jury trial from May 29, 2012 through June 4, 2012.[FN 1 On March 26, 2012, an Order was entered bifurcating the trial with the condo fee portion being tried in May and the remaining claims in September, 2012.] At the conclusion of said trial, the jury awarded the amount of $251,725.00 to Hidden Ridge for condominium fees, interest and late fees. (Verdict, dated June 4, 2012). The jury further found attorney Kevin McKeegan negligent and [Appellant] contributorily negligent.

An argument as to [Appellant's] Motion for Summary Judgment originally scheduled for June 11, 2012, was later continued by this writer until the August argument list (Order, dated June 6, 2012). Both Hidden Ridge and defendant Sabatino filed Motions for Post Trial Relief on June 13 and 14 of 2012, respectively. It was agreed by counsel for all parties that the Court would defer ruling on the post-trial matters until after the second trial set for September of 2012.

On September 24, 2012, counsel for all parties settled all matters except the sprinkler system prior to commencement of the second trial. The matter was settled for the amount of $675,000.00; $650,000.00 of which was payable to Hidden Ridge and the additional $25,000.00 payable to additional plaintiff Corey Sigler (See Order dated September, 24, 2012). It was, as set forth above, the understanding of the Court and all counsel that all post trial matters had been withdrawn as a part of the settlement and the only matter unresolved dealt with the sprinkler system. [Hidden Ridge] filed a Praecipe to Settle and Discontinue the docket on October 5, 2012. Sabatino and

> [Appellant] and Nationwide Insurance Company filed three (3) Praecipes to Settle and Discontinue the docket. The docket entry for the Nationwide praecipe appears to be a general settlement and discontinuance of the entire docket. The Nationwide's money would have been paid on behalf of Sabatino and [Appellant]. To the surprise of the Court, on December 18, 2012, [Appellant] Scioto filed a Notice of Appeal to the Superior Court of Pennsylvania.

Trial Court Opinion, 4/3/13, at 1-4.

On appeal, Appellant presents five issues for our review:

> 1. Whether the trial court erred in failing to grant a directed verdict (or judgment notwithstanding the verdict) in favor of [Appellant] on its claims against the Attorney Defendants where the evidence failed to establish that [Appellant] was contributorily negligent as a matter of law?
>
> 2. Whether the trial court erred in instructing the jury on the defense of contributory negligence in the absence of evidence sufficient to establish this defense, or alternatively, whether [Appellant] is entitled to a new trial on its claims against the Attorney Defendants because the finding of contributory negligence was against the weight of the evidence?
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> 3. Whether [Appellant] is entitled to a new trial due to the trial court's admission of a letter addressed by a lender's counsel to the Attorney Defendants which was irrelevant to the issue of contributorily [sic] negligence and which was the focus of the argument made to advocate this defense to the jury.
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> 4. Whether [Appellant] is entitled to a new trial due to the trial court's admission of irrelevant email communications which served solely or primarily to cast [Appellant] and its principal in a bad light in the eyes of the jury?
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> 5. Whether the trial court committed plain error in failing to order a mistrial and/or a new trial based on its own comments in open court accusing [Appellant's] principal of testifying falsely?

Appellant's Brief at 3-4. Appellant's first, third, and fourth issues are interrelated so we will discuss them together.

In its first issue, Appellant contends:

> This appeal concerns the unintended consequences of the Attorney Defendants' engagement by [Appellant] to draft a condominium declaration. The language the Attorney Defendants employed created a "non-flexible" condominium which compelled [Appellant] to pay substantial condominium fees on condominium units that existed only on paper. Neither the Attorney Defendants nor [Appellant] knew that [Appellant] would have to pay fees on non-existent units at the time they filed this declaration. The Attorney Defendants stipulated to the basic facts establishing [Appellant's] claim against them. The trial court, however, permitted Hidden Ridge to advocate in their defense and instructed the jury to consider the defense of contributory negligence. The trial court should have directed a verdict in [Appellant's] favor on this issue.

Appellant's Brief at 6-7.

Appellant's third and fourth issues challenge the trial court's admission of disputed evidence. Appellant posits:

> The trial court permitted Hidden Ridge to introduce evidence of a letter written by a lender to Attorney Defendants, which contained a statement that the condominium declaration, which had already been filed, had created a "non-flexible" condominium. The letter did nothing to prove [Appellant's] alleged negligence as it did nothing to put [Appellant] on notice of the unforeseen liability its attorneys had already created. The trial court also allowed Hidden Ridge to introduce a series of emails intended to paint [Appellant's] principal in an unflattering light, but which had nothing to do with any material issue of fact submitted to the jury.

Appellant's Brief at 7.

In reviewing a trial court's denial of JNOV, we are mindful:

> A JNOV can be entered upon two bases: (1) where the movant is entitled to judgment as a matter of law; and/or, (2) the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered for the movant. When reviewing a trial court's denial of a motion for JNOV we must consider all of the evidence admitted to decide if there was sufficient competent evidence to sustain the verdict. In so doing, we must also view this evidence in the light most favorable to the verdict winner, giving the victorious party the benefit of every reasonable inference arising from the evidence and rejecting all unfavorable testimony and inference. Concerning any questions of law, our scope of review is plenary. Concerning questions of credibility and weight accorded the evidence at trial, we will not substitute our judgment for that of the finder of fact. If any basis exists upon which the [fact finder] could have properly made its award, then we must affirm the trial court's denial of the motion for JNOV. A JNOV should be entered only in a clear case.

***Am. Future Sys. v. Better Bus. Bureau***, 872 A.2d 1202, 1215 (Pa. Super. 2005) (internal citation omitted), *affirmed* 923 A.2d 389 (Pa. 2007). We will reverse a trial court's denial of a JNOV only where the trial court abused its discretion or committed an error of law that controlled the outcome of the case. ***Ty-Button Tie, Inc. v. Kincel and Co., Ltd.***, 814 A.2d 685, 690 (Pa. Super. 2002).

In addressing a trial court's denial of a motion seeking a new trial, we acknowledge:

> [O]ur standard of review when faced with an appeal from the trial court's denial of a motion for a new trial is whether the trial court clearly and palpably committed an error of law that controlled the outcome of the case or constituted an abuse of discretion. In examining the evidence in the light most favorable

> to the verdict winner, to reverse the trial court, we must conclude that the verdict would change if another trial were granted. Further, if the basis of the request for a new trial is the trial court's rulings on evidence, then such rulings must be shown to have been not only erroneous but also harmful to the complaining parties. Evidentiary rulings which did not affect the verdict will not provide a basis for disturbing the jury's judgment….
>
> > Moreover, the admission or exclusion of evidence is within the sound discretion of the trial court. In reviewing a challenge to the admissibility of evidence, we will only reverse a ruling by the trial court upon a showing that it abused its discretion or committed an error of law.

***Schmidt v. Boardman***, 958 A.2d 498 (Pa. Super. 2008), *affirmed* 11 A.3d 924 (Pa. 2011) (citation omitted). Upon review, we find no trial court abuse of discretion or error of law that would warrant JNOV or a new trial in this case.

The trial court entered an order finding that Appellant was responsible for condominium fees, the full amount of which was for the jury to determine. *See* Order, 12/15/11. In viewing the evidence adduced at trial in the light most favorable to Hidden Ridge, we note that property manager Edward Zehfuss provided expert testimony that Appellant "had an obligation to pay fees on the units that [Appellant] owned," even if they were unsold. N.T., 6/1/12, at 440. Mr. Zehfuss managed 69 condominium and homeowner associations covering "roughly 5,000" dwellings. *Id.* at 433. Mr. Zehfuss testified that Appellant had failed to pay the outstanding condominium fees for its unsold units. *Id.* at 458. According to Mr. Zehfuss,

Appellant, by and through Sabatino, did not "attempt to object to the fees or set them aside," nor did "Mr. Sabatino on behalf of [Appellant] ever make an attempt to call [a special] meeting" to object to the fees or amend the condominiums' declaration so as to alter its obligation to pay for the fees. *Id.* at 462-463.

Appellant's expert, Allen Palmer, was asked about an August 18, 2003 letter from Judith Tribble, Esquire, counsel for Appellant's lender, to the Attorney Defendants. The letter was "carbon cop[ied] to Cindy Rankin, who Mr. Sabatino has acknowledged is his employee." *Id.* at 571. The letter was described as containing a "laundry list" of requirements from Appellant's lender. *Id.* at 571-572. Mr. Palmer read to the jury a portion of the August 18, 2003 letter, which stated under item 6, "Flexible condominium. I assume you and the developer have discussed this, and this is not a flexible condominium." *Id.* at 572. Mr. Palmer additionally read to the jury that under item 12, the letter stated, "I am assuming that this project is not a flex condo regime. No language in docs and Bylaws." *Id.* at 573.

The trial court characterized Ms. Tribble's correspondence as relevant to the testimony of Mr. Palmer, Appellant's expert, regarding whether the Attorney Defendants had a duty to "meet the requirements of [Appellant's] lender." *Id.* at 563. Mr. Palmer conceded that the timing of "when Mr. Sabatino knew [that the condominiums were either flexible versus nonflexible] would be relevant to the issue of when [Sabatino] had a duty to

mitigate, stop those damages." *Id*. at 568. The trial court observed and commented: "The letter from Miss Tribble, which was introduced, subsequently a fact, the issue of flexible versus nonflexible was raised by the lender's attorney." *Id.* at 564. This evidence was therefore germane to whether Appellant had notice of its liability for the condominium fees.

As to the emails which were introduced into evidence by Hidden Ridge, the trial court held a conference in chambers where it ruled that of the 14 emails Hidden Ridge sought to introduce, only 5 would be admissible because they related to the issue of Appellant's "control", which was "relevant" to whether Appellant could have altered its liability for the condominium fees. N.T., 5/31/12, at 335-349. Appellant's counsel even stated that "[s]ome I have no objection to." *Id.* at 335. Having reviewed the record, we find no abuse of discretion in the trial court's measured approach in considering the admissibility of the emails, and limiting their number.

The Pennsylvania Rules of Evidence provide in relevant part:

> **Rule 401. Definition of "relevant evidence"**
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> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Pa.R.E. 401 (1998).

> **Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible**
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> All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible.

Pa.R.E. 402 (1998).

The record supports the trial court's determination that the letter and emails with which Appellant takes issue were relevant to Appellant's knowledge, understanding, and notice of liability. The amount of Appellant's liability was a critical issue for the jury. Therefore, the trial court did not abuse its discretion in admitting the letter and emails. ***See Schuenemann v. Dreemz, LLC,*** 34 A.3d 94, 102 (Pa. Super. 2011) (internal citation omitted) ("We reiterate that a trial court has broad discretion with regard to the admissibility of evidence, and is not required to exclude all evidence that may be detrimental to a party's case.").

There was evidence adduced at trial in favor of and against a finding that Appellant owed monies to Hidden Ridge, and the extent to which Appellant may or may not have been contributorily negligent in incurring those damages. The evidence included the opinions of various experts, along with the aforementioned letter and emails. After considering the evidence, the jury determined the damages Appellant owed to Hidden Ridge, and that Appellant had been contributorily negligent in incurring that debt. After reviewing the record, we affirm the trial court's order denying Appellant's motion for JNOV because there was record evidence from which

the jury could reach its verdict. ***See Brown v. Progressive Insurance Co.***, 860 A.2d 493, 497 (Pa. Super. 2004) ***citing Van Zandt v. Holy Redeemer Hosp.,*** 806 A.2d 879, 886 (Pa. Super. 2002) (internal citation omitted) ("Concerning questions of credibility and weight accorded evidence at trial, we will not substitute our judgment for that of the finder of fact."); ***see also Commonwealth v. Hawkins,*** 701 A.2d 492, 501 (1997) (the credibility of witnesses is "solely for the jury to determine").

Our affirmance acknowledges that "[i]t is the function of the jury to evaluate evidence adduced at trial to reach a determination as to the facts, and where the verdict is based on substantial, if conflicting evidence, it is conclusive on appeal." ***Commonwealth v. Reynolds,*** 835 A.2d 720, 726 (Pa. Super. 2003) (internal citation omitted). Indeed, in ***Morin v. Brassington***, 871 A.2d 844, 852-853 (Pa. Super. 2005), we declined to reweigh the evidence on appeal in a breach of oral contract action, and affirmed the trial court's verdict in plaintiff's favor, despite incredible accusations made by both parties regarding the actual existence of the agreement. ***Id.*** The ***Morin*** court ruled it "[would] not invade the credibility-determining powers of the fact-finder merely because the evidence was conflicting and the fact-finder could have decided the case either way." ***Id.*** at 852. Likewise, we will not "invade the credibility-determining powers of the fact-finder" in the present case.

Appellant's second issue claims the trial court erred in charging the jury on the defense of contributory negligence because "[t]here was no evidence presented to the jury that supported" the charge. Appellant's Brief at 7. We disagree. Our review of the record and applicable law comports with the trial court's determination that the jury was properly charged regarding contributory negligence. During the charging conference, the trial court explained that it would give a contributory negligence instruction. The trial court expressed that even though Appellant was arguing "[liability] is solely [the Attorney Defendants'] fault … [Hidden Ridge had] a right to say no, there are two parties who share in this fault, if you view [Attorney Defendants] being one party and the other party being [Appellant]/Sabatino." N.T., 6/4/12, at 657.

An issue warrants a jury instruction where it was raised at trial and the "evidence adduced at trial would support such a charge." ***Commonwealth v. Boczkowski,*** 846 A.2d 75, 98 (Pa. Super. 2004) (internal citation omitted). "A jury instruction will be upheld if it clearly, adequately, and accurately reflects the law." ***Commonwealth v. Smith***, 956 A.2d 1029, 1034-35 (Pa. Super. 2008) (*en banc*) (internal citation omitted). Further, "[w]hen reviewing a challenge to part of a jury instruction, we must review the jury charge as a whole to determine if it is fair and complete. A trial court has wide discretion in phrasing its jury instructions, and can choose its own words as long as the law is clearly, adequately, and accurately

presented to the jury for its consideration. The trial court commits an abuse of discretion only when there is an inaccurate statement of the law." ***Commonwealth v. Roser***, 914 A.2d 447, 455 (Pa. Super. 2006) (internal citation omitted). Here, the jury charge did not contain any inaccurate statements of law, and the evidence adduced at trial "supported a charge" regarding contributory negligence. ***Id.*** Therefore, Appellant was not entitled to a new trial based on the trial court's jury instruction concerning contributory negligence.

In its fifth issue, Appellant contends that the trial court erred in "failing to order a mistrial and/or a new trial based on [the trial court's] own comments in open court accusing [Appellant's] principal of testifying falsely[.]" Appellant's Brief at 4. However, Appellant concedes that his trial counsel "did nothing" following the trial court's remarks. Appellant's Brief at 21. Citing ***Dilliplaine v. Lehigh Valley Trust Co.,*** 322 A.2d 114 (Pa. 1974), Appellant acknowledges "the position of our appellate courts that a civil litigant's remedy for its counsel's failure to seasonably object is an action for malpractice." Appellant's Brief at 22. Appellant urges us to create "a singular exception to the rule" in this case. *Id.* We cannot.

> It is beyond peradventure that the Superior Court must follow [the Pennsylvania Supreme] Court's mandates, and it generally lacks the authority to determine that [the Pennsylvania Supreme] Court's decisions are no longer controlling. *Commonwealth v. Jones,* 520 Pa. 385, 554 A.2d 50, 51–52 (1989). Moreover, the intermediate appellate courts are duty-bound to effectuate [the Pennsylvania Supreme] Court's decisional law. *See, e.g., Behers v. Unemployment Comp. Bd. of*

> *Review,* 577 Pa. 55, 842 A.2d 359, 367 (2004) (task of lower courts is "to effectuate the decisional law of [the Pennsylvania Supreme] Court, not to restrict it through curtailed readings of controlling authority").

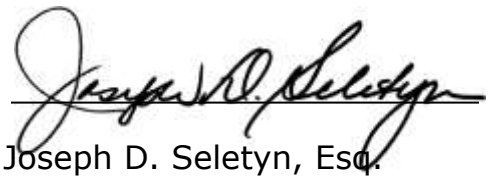
***Walnut Street Associates, Inc. v. Brokerage Concepts, Inc.,*** 20 A.3d 468, 480 (Pa. 2011).

Based on the foregoing, we affirm the trial court.

Judgment affirmed. Motion to quash denied as moot.

Judge Ford Elliott P.J.E. files a Concurring Statement.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/18/2013