NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

LORRAINE C. DAVIES, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF H. BRUCE DAVIES, DECEASED, Appellant v. J. MARK VEENIS, DAVIES-VEENIS & ASSOCIATES, INC., AND THREE RIVERS EQUITY MANAGEMENT, INC.	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1740 WDA 2011

Appeal from the Judgment Entered November 3, 2011,
in the Court of Common Pleas of Allegheny County
Civil Division at No. GD 08-003019

LORRAINE C. DAVIES, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF H. BRUCE DAVIES, DECEASED v. J. MARK VEENIS, DAVIES VEENIS & ASSOCIATES, INC., AND THREE RIVERS EQUITY MANAGEMENT, INC. Appellants	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1802 WDA 2011

Appeal from the Judgment Entered November 3, 2011,
in the Court of Common Pleas of Allegheny County
Civil Division at No. G.D. No. 08-003019

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

MEMORANDUM BY FORD ELLIOTT, P.J.E.: FILED: December 5, 2013

* Retired Senior Judge assigned to the Superior Court.

The above-captioned appeals arise from a jury trial which determined what sums were owed to appellants Lorraine C. Davies and the Estate of her husband, H. Bruce Davies, upon the death of Mr. Davies, by cross-appellants, J. Mark Veenis, Davies Veenis & Associates, Inc., and Three Rivers Equity Management, Inc., (TREM) which entities represented Mr. Davies' former investment business interests. Finding no error, we affirm.

We find no error with the trial court's holding. After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the trial court, it is our determination that there is no merit to the questions raised on appeal. The trial court's meticulous, 44-page opinion, filed on September 7, 2012, comprehensively discusses and properly disposes of the questions presented. We will adopt it as our own and affirm on that basis.

In addition to the trial court's rationale pertaining to its reasons for not allowing discovery of the February 7, 2008 Kaplan report, we add the following analysis. Appellants' basis for seeking the 2008 Kaplan report is an alleged contradiction between it and the expert report that Kaplan submitted for trial. According to appellants, the 2008 report did not include the TREM GP (BD) accounts as assets of TREM in its valuation, while the trial report did. Appellants' reason for this belief is an alleged admission by David Kaplan, during his deposition, that his 2008 report did not include

these TREM GP (BD) accounts as assets of TREM. Simply stated, Kaplan did not state at his deposition that the TREM GP (BD) accounts were not included as assets of TREM in the 2008 report. Rather, he stated that the accounts were not fully included because their values were based upon inaccurate tax returns. Upon review, we find that Kaplan testified consistently at his deposition and at trial.

Kaplan testified at his deposition as follows:

> Q. Do you recall whether or not in connection with the valuation report that you did that you took into account as an asset of TREM or assets of TREM the limited partnership accounts in the names Three Rivers Equity Management GP (BD) and Three Rivers Equity Management GP (MV) as assets of the company?
>
> MR. WYCOFF: You can answer that.
>
> A. It did not or at least did not fully take those into account.
>
> Q. Why?
>
> A. At the time that we were given information, those assets were not fully reflected on the balance sheets of TREM.
>
> Frankly, I think that issue was missed by all three of the firms that originally looked at appraising the interest in TREM, those firms being Mr. McGinty, Mark Gleason's firm and my firm, all for the same reason, because the assets were not fully reflected on the balance sheets due to a bookkeeping mistake that had occurred with the tax returns.
>
> Q. Who told you it was a bookkeeping mistake?

> MR. WYCOFF: Excuse me. Object to the form of the question in that there is no basis for assuming that someone told him that. That could have been his own analysis.
>
> BY MR. STEIN:
>
> Q. How did you come to the conclusion that it was a mistake?
>
> A. Later on I came to the conclusion it was a mistake through a combination of looking at the amended tax returns that were prepared and reading the deposition testimony of Mr. Hockman and Mr. Clark.

Videotaped deposition of David Kaplan, 8/12/10 at 18-19.

Thus, in his deposition Kaplan essentially testified that the TREM GP (BD) accounts were included to some extent, albeit not fully, as assets of TREM, but that there was a problem with their valuation because of incorrect amounts on certain tax returns. This precisely mirrors Kaplan's explanation at trial:

> Q. And you -- at the time that you did your valuation, of course, February 7, 2008, you did not -- you did not identify the TREM G.P. (BD) accounts as assets of the corporation; did you?
>
> A. Sure we did.
>
> Q. And how did you do that?
>
> A. They were on the balance sheet as of December 31, 2006, admittedly at a wrong number. I don't think any of the appraisers knew at that time or realized that the dollar amount on TREM's balance sheet was wrong.

What I mean by that is that $725,000 figure was not correct. But they're on the balance sheets in the combined settlement report, and then there's a discussion of the nonoperating assets in that report as well.

Q. And do you recall when I asked you at your deposition at page 18, "Do you recall whether or not in connection with the valuation report that you did, that you took into account as an asset of TREM or assets of TREM the limited partnership accounts in the same Three Rivers Equity Management G.P. (BD) and Three Rivers Equity Management (MV) as assets of the corporation?"

And you say, "I did not or at least not fully take those into account."

A. Right.

Q. And then I asked you, "Why not?" And you said, "At the time we were given information those assets were not fully reflected on the balance sheets."

Do you recall testifying to that?

A. Would you read that last part:

Q. "At the time we were given that information those assets were not fully reflected on the balance sheets of TREM."

A. Were not fully reflected on the balance sheets?

Q. That's what you say. At the time --

A. I'm not sure --

Q. "At the time we were given information, those assets were not fully reflected on the balance sheets of TREM."

A. I'm not sure what time that is actually, listening to your question. I don't know if there's a timeframe on that or not, but my understanding of what happened is they were on the balance sheet --

Q. Did you testify to what I asked you that you testified?

A. I'm assuming you're reading that part. You asked me this question three different times in my deposition.

Q. Of course I did, because your 2008 report is inconsistent with your testimony that the G.P. -- the G.P. accounts are assets of the corporation. So you would expect me to do that; wouldn't you?

A. I don't think it's inconsistent. I think it's right on there actually.

Q. Then you say, "Frankly, I think that issue was missed by all three of the firms that originally looked at appraising the interest in TREM, those firms being Mr. McGinty, Mark Gleason's firm and my firm, all for the same reason, because the assets were not fully reflected on the balance sheets due to a bookkeeping mistake that had occurred with the tax returns."

Do you recall testifying to that?

A. Right. I think that's what I said a few moments ago. I don't think any of us realized that the numbers on the tax return were wrong at that time.

Notes of testimony, 3/14-16 at 961-963.

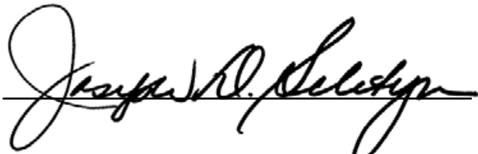
We find that appellants' "contradiction" between Kaplan's deposition and his trial testimony is wholly illusory. At trial, Kaplan again explained

that the TREM GP (BD) accounts were included in his 2008 report. In both the deposition and at trial, Kaplan explained that the values for the TREM GP (BD) accounts were simply faulty because they were based upon inaccurate tax returns. We see no real conflict and no indication that Kaplan's 2008 report conflicted with his trial report as to the inclusion of the TREM GP (BD) accounts as assets of TREM. Thus, the 2008 report offered no impeachment value and appellants were not harmed by the trial court's decision not to allow discovery of the 2008 Kaplan report.

Finally, we do not adopt those parts of the trial court's opinion that address the issues raised by the cross-appellants. Cross-appellants specifically conditioned review of their issues upon the granting of a new trial or a disturbing of the judgment below in any way. As the judgment below will remain wholly intact, we need not address the issues raised on cross-appeal.

Judgment affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/5/2013

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

LORRAINE V. DAVIES, Individually and as Executrix of The Estate of H. Bruce Davies, Deceased,	CIVIL DIVISION
Plaintiff,	No. GD 08-003019 1740 WDA 2011 1802WDA 2011
v.	**OPINION**
J. MARK VEENIS, DAVIES VEENIS & ASSOCIATES, INC., and THREE RIVERS EQUITY MANAGEMENT, INC.,	Hon. Christine A. Ward
Defendants.	

OPINION

BACKGROUND

J. Mark Veenis (hereinafter "Mr. Veenis") and H. Bruce Davies (hereinafter "Mr. Davies") were each 50% owners of two corporations, Davies-Veenis & Associates (hereinafter "DVA") and Three Rivers Equity Management, Inc. (hereinafter "TREM"). DVA performed traditional brokerage and financial management services for the clients of Mr. Veenis and Mr. Davies. As of September 8, 2006, the date of Mr. Davies' death, TREM served as the general partner of four limited partnership hedge funds. TREM generated income from the management fees assessed from managing the limited partnerships. DVA managed the administrative affairs of TREM and the funds, thereby generating management fees. (Trial Transcript at page 110) (hereinafter "TT at ___"). This lawsuit concerns claims by Plaintiff, Lorraine Davies (hereinafter "Ms. Davies") for payments allegedly owed pursuant to agreements reached between Mr. Veenis, Mr. Davies, DVA, and TREM.

Beginning on June 21, 2001, Mr. Davies, Mr. Veenis, DVA, and TREM entered into certain agreements that concerned succession planning and deferred compensation with respect to the businesses. These included the TREM Shareholders Agreement (Plaintiff's Trial Exhibit 1) (hereinafter "P. Tr. Ex. ___"), TREM Deferred Compensation Agreement (Plaintiff's Exhibit 2) (hereinafter "P. Ex. ___"), and DVA Shareholders Agreement (P. Tr. Ex. 3). On July 15, 2004, Davies, Veenis and DVA signed a final DVA Deferred Compensation Agreement (P. Tr. Ex. 4(D)). On December 22, 2005, Mr. Davies, Mr. Veenis and DVA also entered into Non-Qualified Death Benefits Agreements that revoked and terminated in writing two prior written agreements covering similar subject matter that had been formed in 1997. (Defendants Trial Exhibits 9-11) (hereinafter "D. Tr. Ex. ___"). Finally, on January 17, 2006, Mr. Davies, Mr. Veenis, and TREM entered into a Fee Sharing Agreement (D. Tr. Ex. 19).

In October 2005, Mr. Davies suffered a recurrence of the cancer with which he had originally been diagnosed in 2001. (TT at 133). Mr. Davies died on September 8, 2006. (TT at 141). Following the death of Mr. Davies, Ms. Davies (Davies' widow and Executrix of his estate) and Mr. Veenis became involved in a dispute regarding the calculation of the value of Davies' 50% interest in TREM. Pursuant to Section 3.3 of the TREM Shareholders' Agreement, a valuation expert was engaged to determine the "Redemption Purchase Price" to be paid by TREM for Mr. Davies' interest. (*See* P. Tr. Ex. 1). Mr. Veenis initially engaged a valuation expert named Kevin McGinty (hereinafter "McGinty"), who valued Mr. Davies' 50% interest in TREM at $51,161. (*See* D. Tr. Ex. 30). Displeased with this valuation, Ms. Davies retained Mark Gleason (hereinafter "Gleason"), who valued Mr. Davies' 50% interest at the time of his death at $1,832,000. (TT at 328).

TREM retained David Kaplan (hereinafter "Kaplan") of Alpern Rosenthal to determine the total value of both DVA and TREM for reasons more fully explained below. Kaplan concluded that the combined valuation of the two companies did not exceed $3,000,000. (D. Tr. Ex. 30). Having received this valuation from Kaplan, but not yet having received his complete report, counsel for Mr. Veenis and the companies sent a letter to Ms. Davies' counsel. In this letter of December 27, 2007, it is averred that, on the basis of Kaplan's valuation, the value of Mr. Davies' interest in the two companies at the time of his death could not have exceeded $1,500,000. Mr. Veenis' counsel maintained that because Ms. Davies had received $2,500,000 in insurance proceeds, she had in fact received a $1,000,000 windfall and, therefore, all rights of Mr. Davies' estate under the TREM Shareholders' Agreement had been terminated. The letter also stated that significant overpayments had been made to Ms. Davies by DVA under the DVA Deferred Compensation Agreement. (Defendants' Exhibit 30) (hereinafter "D. Ex. ___"). A few weeks after receiving this letter, on 2/13/2008, Ms. Davies' counsel instigated the present litigation by filing a Complaint in Civil Action. Over the course of the pleadings, the disputed issues multiplied.

An eight day jury trial was conducted which resulted in a verdict (Docket Entry 166) (hereinafter "Doc. ___") awarding substantial damages to Ms. Davies. That said, Ms. Davies did not win on all of her claims. Part of the verdict was molded by this Court upon Defendant's Motion to Mold Verdict. (Docs. 168, 206). The basis for molding the verdict was a stipulated agreement between the parties known as the "Standstill Agreement." The molding of the verdict reduced the amount of Ms. Davies' recovery. Neither party was completely satisfied with the outcome of the case and both sides filed Motions for Post-Trial Relief, which were denied in full by this Court on October 31st, 2011. (Docs. 203,204). Both parties have filed appeals and,

pursuant to this Court's Order (Doc. 214), both parties have filed a Concise Statement of Matters Complained of on Appeal. (Docs. 216,217). In total, there are twelve (12) issues complained of on appeal.

LEGAL STANDARDS

All parties, through Motions for Post-Trial Relief, have requested either a new trial or a judgment non obstante veredicto (hereinafter "judgment NOV"). The legal standards to be applied by the trial court to Post-Trial Motions requesting a new trial or judgment NOV are well-established, as are the standards for appellate review of trial court decisions upon such motions.

I. LEGAL STANDARDS GOVERNING THE TRIAL COURT'S REVIEW OF MOTIONS FOR POST-TRIAL RELIEF

> There is a two-step process that a trial court must follow when responding to a request for new trial. First, the trial court must decide whether one or more mistakes occurred at trial. . . . Second, if the trial court concludes that a mistake (or mistakes) occurred, it must determine whether the mistake was a sufficient basis for granting a new trial. The harmless error doctrine underlies every decision to grant or deny a new trial. A new trial is not warranted merely because some irregularity occurred during the trial or another trial judge would have ruled differently; the moving party must demonstrate to the trial court that he or she has suffered prejudice from the mistake.

Harman ex rel. Harman v. Borah, 562 Pa. 455, 467, 756 A.2d 1116, 1122 (2000) (internal citations omitted).

> It is axiomatic that there are two bases upon which a judgment n.o.v. 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 minds could disagree that the outcome should have been rendered in favor of the movant. To uphold JNOV on the first basis, we must review 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.
>
> When we review a motion for JNOV, we must consider the evidence in the light most favorable to the verdict winner, who must receive the benefit of every

reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his favor. Any doubts must be resolved in favor of the verdict winner, and JNOV should only be entered in a clear case. Finally, 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 deliberations.

Donoughe v. Lincoln Elec. Co., 936 A.2d 52, 60-61 (Pa. Super. Ct. 2007) *citing* Rohm and Hass Co. v. Continental Casualty Co., 781 A.2d 1172, 1176 (Pa. 2001).

II. LEGAL STANDARDS FOR APPELLATE REVIEW OF TRIAL COURT'S RULINGS ON MOTIONS FOR POST-TRIAL RELIEF

> We [The Superior Court] will reverse a trial court's decision to deny a motion for a new trial only if the trial court abused its discretion. *See Harman v. Borah,* 562 Pa. 455, 756 A.2d 1116, 1121-1122 (2000). We must review the court's alleged mistake and determine whether the court erred and, if so, whether the error resulted in prejudice necessitating a new trial. *See id.* at 1122-1123. If the alleged mistake concerned an error of law, we will scrutinize for legal error. *See id.* at 1123. Once we determine whether an error occurred, we must then determine whether the trial court abused its discretion in ruling on the request for a new trial. *See id.* "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." *Id.* at 1123.

Petrecca v. Allstate Ins. Co., 797 A.2d 322, 324 (Pa. Super. Ct. 2002).

> In reviewing a trial court's decision whether or not to grant judgment in favor of one of the parties, we must "consider the evidence, together with all favorable inferences drawn therefrom, in a light most favorable to the verdict winner. . . ." We will reverse a trial court's grant or denial of a judgment notwithstanding the verdict only when we find an abuse of discretion or an error of law that controlled the outcome of the case. Further, "the standard of review for an appellate court is the same as that for a trial court."

Lanning v. West, 803 A.2d 753, 756 (Pa. Super. Ct. 2002) *citing* Goldberg v. Isdaner, 780 A.2d 654 (Pa. Super. Ct. 2001) (internal citations omitted).

DISCUSSION

For purposes of clarity, and in an effort to address the Issues Complained of on Appeal fully and in context, this Opinion is organized in chronological order of the progression of the case. As such, the Issues Complained of on Appeal are addressed irrespective of the complaining party, but in the order of when the issue arose. Accordingly, the initial Issues addressed deal with pre-trial decisions of this Court, followed by decisions at trial, and then followed by post-trial rulings. The Issues Complained of on Appeal are, therefore, addressed as follows:

I. Plaintiff's Issue No. 1: The Court's denial of production of the Kaplan Report;

II. Plaintiff's Issue No. 8: The Court's dismissal of the breach of fiduciary duty individual claims;

III. Plaintiff's Issue No. 3: The Court's enforcement of the Standstill Agreement;

IV. Plaintiff's Issue No. 2: The Court's admission of testimony regarding the acts of Mr. and Mrs. Davies;

V. Defendants' Issue No. 1: The Court's admission of evidence regarding the Memorandum;

VI. Plaintiff's Issue No. 6: The Court's dismissal of the "further assurances" claim;

VII. Defendant's Issue No. 2: The Court's denial of the jury instruction on mistake;

VIII. Plaintiff's Issue No. 5: The Court's denial of the jury instruction regarding the valuation expert;

IX. Plaintiff's Issue No. 4: The Court's denial of the jury instruction on "estoppel by silence;"

X. Plaintiff's Issue No. 7: The Court's rejection of Plaintiff's request for Judgment NOV on the "estoppel by silence" issue;

XI. Defendants' Issue No. 3: The Court's upholding of the jury's finding on breach of fiduciary duty because no defendant owed said duty;

XII. Defendants' Issue No. 4: The Court's upholding of the jury's finding on breach of fiduciary duty because there were no damages.

I. THIS COURT PROPERLY DENIED MS. DAVIES PRODUCTION OF THE FEBRUARY 2008 KAPLAN REPORT

ISSUE COMPLAINED OF ON APPEAL: Whether the Trial Court erred in refusing during discovery and trial to order production to the Plaintiff of an expert report prepared by a trial expert which report appeared inconsistent with the expert's pre-trial report and his trial testimony.

In December of 2009, in response to a subpoena served by Ms. Davies seeking a report written by Kaplan and dated February 7, 2008 (hereinafter "2008 report"), the Defendants filed a Motion for Protective Order and to Quash Subpoena Directed to Alpern Rosenthal and a Brief in Support. (Docs. 73, 74). Ms. Davies responded with an Answer and Brief in Support (Doc. 75,76) and also made a Motion Pursuant to Rule 4003.5(a)(2) for Permission to Depose and Secure Documents from Alpern Rosenthal (Doc. 78), which the Defendants answered (Doc. 79). The Court granted Defendants' Motion to Quash and denied Ms. Davies' Motion Pursuant to 4003.5(a)(2). (Doc. 81). In August of 2010, Ms. Davies again sought production of the 2008 report, this time by filing a Motion to Compel Production of Documents and Testimony From a Fact Witness. (Doc. 109). The Defendants responded by filing an Opposition (Doc. 111) and the Court again ruled in favor of Defendants. (Doc. 116). Despite these repeated rulings by the Court, on the eve of trial, Ms. Davies' counsel served a subpoena upon Kaplan. In response, the Defendants filed another Motion to Quash (Doc. 169), the substance of which the Court effectively granted at trial. (TT at. 657- 959).

In her Motion for Post-Trial relief, Ms. Davies requested that this Court modify its decisions regarding the 2008 report and grant her a new trial on the issue of the valuation of Mr.

Davies' interest in TREM. Ms. Davies contends that the Jury Verdict shows that the jury found Kaplan more credible than Ms. Davies' valuation expert in regards to the valuation of Mr. Davies' 50% interest in TREM. Ms. Davies speculates that had she had this report during discovery or at trial, she could have demonstrated that Kaplan was not a credible witness and, as a result, the jury would have agreed with her valuation expert. This Court committed no error in refusing to order production of Kaplan's 2008 report during discovery and during the trial, so Ms. Davies is not entitled to a new trial on this issue.

Kaplan has had two distinct roles in the current dispute between the parties. Before litigation had commenced, but during a time when litigation was anticipated, Eckert Seamans Cherin & Mellott, LLC (hereinafter "Eckert Seamans") retained Kaplan as a consultant. (Plaintiff's Motion for Post-Trial Relief, Ex. 11). At the time when Kaplan was engaged by Eckert Seamans, Mr. Veenis believed that the $2.5 million insurance policy, of which she had received the proceeds, when Mr. Davies died, had been obtained in order to cover the purchase price of Mr. Davies' stock in both TREM and DVA. (TT at 600 - 601). Because of the widely divergent valuations of TREM given by McGinty and Gleason, and because of Mr. Veenis' genuine, albeit mistaken, belief that the $2.5 million in insurance proceeds disbursed to Ms. Davies should be credited as a payment made towards buying out Mr. Davies' interests in <u>both</u> companies, Mr. Veenis' counsel asked Kaplan to assist Eckert Seamans in generating a settlement proposal and to conduct an appraisal of the combined fair market value of both companies. Kaplan's firm, Alpern Rosenthal, concluded in the 2008 report that the combined value of TREM and DVA was not more than $3 million. Six days *after* the 2008 report was issued, Ms. Davies initiated this lawsuit. (*See* Defendants' Brief in Response to Plaintiff's Post-Trial Motions).

The Defendants hired Thorp Reed & Armstrong (hereinafter "Thorp Reed") as trial counsel. In November of 2009, Thorp Reed hired Kaplan as an expert witness for trial. (*Id.*). In 2010, Kaplan prepared expert reports relevant to the subjects of his anticipated testimony, all of which were fully produced to Ms. Davies' counsel. These reports addressed the following issues relevant to issues at trial: (i) Kaplan's own valuation of Mr. Davies' 50% interest in TREM as of his date of death, (ii) Kaplan's review of the valuation conducted by Ms. Davies' expert, Gleason, and (iii) the manner in which deferred compensation payments are to be calculated under the DVA Deferred Compensation Agreement and the amount of DVA's overpayment of Deferred Compensation. (Plaintiff's Brief in Support of Plaintiff's Post-Trial Motion; Exs. 12 - 14).

The combined value of TREM and DVA, the subject of Kaplan's 2008 report, was not an issue at trial and was not addressed by any expert report prepared for use at trial. Kaplan has stated, via an affidavit made around the time that he was retained by Thorp Reed, that the service he would be performing for them "will require an entirely new and distinct analysis and report specific to the valuation of TREM and other economic claims in the litigation" and further stated that he "would not be able to reach any conclusions as to the value of TREM independent of DVA based on the analysis previously done" in preparing the 2008 report. (Plaintiff's Motion for Post-Trial Relief, Ex. 11).

"Commonly in litigation involving complex and specialized areas . . . a witness will perform dual roles, one as testifying expert, and one as consulting expert." Bro-Tech Corp. v. Thermal, Inc., CIV. 05-CV-2330, 2008 WL 724627 (E.D. Pa. Mar. 17, 2008). Even in situations where "an expert alternately dons and doffs the 'privileged hat' of a litigation consultant and the 'non-privileged hat' of the testifying witness" courts have frequently accorded protection to materials and opinions relating solely to the expert's consultant work. S.E.C. v. Reyes, C06-

04435 CRB, 2007 WL 963422 (N.D. Cal. Mar. 30, 2007). In the present case, the matter is even simpler. Kaplan did not alternately act as litigation consultant and expert witness. Rather he acted as a litigation consultant and then, years later, as an expert witness.

This Court's decision to protect the 2008 report from discovery was consistent with both the letter and the purpose of Pa. R.C.P. 4003.5(a)(3). As my esteemed colleague, the Honorable R. Stanton Wettick, has explained, "the purpose of Rule 4003.5(a)(3) is to encourage parties to consult freely and openly with experts by minimizing the likelihood that the information provided to an expert and the opinions that the expert forms may be used against any party who obtained or specially employed this expert." Goldblum v. Ins. Co. of N. Am., 11 Pa. D. & C.3d 354, 356 (Pa. Com. Pl., 1979).

Ms. Davies argues that, by choosing Kaplan as their expert witness, Defendants can no longer use Pa. R.C.P. 4003.5(a)(3) to afford any protection to Kaplan's 2008 report. This argument is specious.

> [W]hen a party retains an expert, if the expert is not expected to be called at trial, the protection offered is almost absolute. Even the identity of the expert is privileged. Discovery of *any* facts known or opinions held by this individual can only be had upon a showing of 'exceptional circumstances.' See rule 4003.5(a)(3) and *Goldblum v. INA*, 11 Pa. D. & C.3d 354 (1979). Moreover, *even when the expert is identified as a trial witness*, discovery is limited to a mere synopsis of the testimony expected, unless the court grants an application for 'cause shown.' See rule 4003.5(a)(2).

Tate v. Philadelphia Sav. Fund Soc'y, 1 Pa. D. & C.4th 131, 137 (Com. Pl., 1987) (emphasis added). Defendants rightly claim that they are entitled to the continued protection of Rule 4003.5(a)(3). Ms. Davies was not entitled to the 2008 report during discovery.

Ms. Davies also sought Kaplan's 2008 report during trial. "[W]ork-product objections are improper at trial because the rules that limit the discovery process do not limit the trial process.

Instead, non-privilege limitations on the scope of discovery vanish the moment the discovery process has ended." Pearlena Moses v. Albert Einstein Med. Ctr., 1993 WL 1156033 (Pa. Com. Pl., 1993). While it was entirely appropriate for Ms. Davies to request production of the 2008 report at trial, this Court did not err in denying her the production of the requested report. Ms. Davies contends that she was prejudiced at trial in that she could not fully cross-examine Kaplan without the 2008 report. Ms. Davies raised four specific issues on which she claimed she needed to examine Kaplan: (a) the valuation of Mr. Davies 50% interest in TREM, (b) whether expense reimbursements from TREM to DVA should be included as "gross receipts" in the calculation of deferred compensation payments made to Ms. Davies, (c) whether the DVA Deferred Compensation Agreement was modified, and (d) the ownership of the TREM GP (BD) accounts.

Defendants correctly argue that Kaplan's "opinions and conclusions expressed in the February 2008 Report itself were not related or pertinent to his valuation of TREM alone as a testifying expert." (Def. Brief in Response at 18). From the very beginning of the cross-examination of Kaplan by Ms. Davies' counsel, Kaplan described his work in 2007 and the factual basis on which he conducted the combined valuation of TREM and DVA. (TT at 953-955 and 959- 960). Kaplan has further sworn via affidavit that he could not value TREM alone based on his 2008 report. Ms. Davies' belief that he could is pure conjecture. Ms. Davies' claim that she needed to use the 2008 report to adequately cross-examine Kaplan as to his valuation of Davies' 50% interest in TREM fails.

Additionally, any claim that Ms. Davies needed the 2008 report to throughly cross-examine Kaplan on the issue of whether expense reimbursements from TREM to DVA should be included in the gross revenue of DVA is without foundation. Ms. Davies' counsel was permitted to question Kaplan concerning the expenses of DVA and TREM and how those expenses were

allocated and shared. (TT at 975 - 977 and 984 - 987). Ms. Davies' counsel was permitted to question Kaplan about how the reimbursements were reflected in the company financial statements and Kaplan was asked, during cross-examination, about his interpretation of terms such as "gross revenue," "fees and commissions," and "compensation for services" as these terms were used in the various written agreements in place between Mr. Davies and Mr. Veenis. (TT at 986- 987; 999- 1016). Most importantly, it is clear that Ms. Davies' counsel had adequate opportunity to build its case regarding the "gross receipts" issue because *the jury ruled in her favor on this issue.*

Further, Ms. Davies' contention that the 2008 report was needed in order to fully cross-examine Kaplan on the issue of whether there had been an oral modification of the DVA Deferred Compensation Agreement is spurious. Ms. Davies' counsel was able to question Kaplan concerning his discovery of DVA's failure to follow the contractual formula found in the DVA Deferred Compensation Agreement when making deferred compensation payments to Ms. Davies. (TT at 998- 999). As Kaplan was not present at any meeting between the partners at any point whatsoever, Kaplan was in no position to have further information regarding the existence or non-existence of any oral modification.

Finally, Ms. Davies' contention that the 2008 Report was necessary for use at trial in order for her to demonstrate her ownership of the TREM (GP) (BD) accounts is by far her most ineffective argument. After all, Ms. Davies *won* on the issue of ownership of the TREM (GP) (BD) accounts, so her argument is moot. Despite the mootness of the argument, this Court addresses it here so that, in the event of a new trial, it is abundently clear why Ms. Davies is not entitled to Kaplan's 2008 report.

Ms. Davies asserts that she needed the 2008 report for use at trial to attack Kaplan's credibility. She avers that the 2008 report is a prior inconsistent statement by Kaplan regarding ownership of the TREM (GP) (BD) accounts. "A party may impeach the credibility of an adverse witness by introducing evidence that the witness has made one or more statements inconsistent with her trial testimony." Com. v. Bailey, 262-63, 469 A.2d 604, 611 (Pa. Super. 1983).

Kaplan admitted that he had not fully considered the TREM (GP) (BD) accounts as assets of TREM when valuating the two companies in preparing his 2008 report. Ms. Davies correctly points out that, after 2008, Kaplan claimed via affidavit that he believed that the accounts were the property of TREM. (Ex. 16 to Appendix to Brief of Plaintiff in Support of Plaintiff's Post-Trial Motion). Ms. Davies argues that said admission shows that the 2008 report is a prior inconsistent statement that could be used to attack Kaplan's credibility.

It is true that Kaplan stated in an affidavit that, in his opinion, the money in the TREM GP (BD) accounts was the property of the corporation. It is also true that Kaplan has admitted that he did not include the full value of the TREM (GP) (BD) accounts as assets of TREM when he conducted his valuation of the two companies combined for the 2008 report. Taken in a vacuum, these two statements do appear inconsistent, but Ms. Davies' assertion that the 2008 report was necessary in order to demonstrate the inconsistency and attack Kaplan's credibility is disingenuous.

Ms. Davies' counsel questioned Kaplan extensively at trial about whether or not he had included the TREM GP (BD) accounts as assets of TREM for the purposes of calculating the combined value of the companies for the 2008 report and his affidavit and deposition testimony on this matter. (*See* TT at 957-). Kaplan testified that said accounts were not *fully* included as

corporate assets of TREM when he calculated the combined value of both companies for the 2008 report. (TT at 961). He testified that the partial omission of these assets from his earlier report occurred because the accounts had not been properly reflected on documentation he used to generate the 2008 report. He further testified that, to the extent that these assets were reflected in the documentation, they were considered to be TREM assets when he conducted the 2008 valuation. (TT at 961).

Kaplan *never* stated that the reason he did not fully include the TREM (GP) accounts as assets of TREM in his 2008 report was because he believed, at the time he made said report, that the assets were not coporate assets. Ms. Davies' own valuation expert, Gleason, testified that "there's a lot of reasons that I think Gleason & Associates, Mr. McGinty, even Mr. Kaplan in 2007 when we were looking at those valuation issues never included the G.P. accounts." (TT at 344). Kaplan has admitted that he did not fully include the TREM (GP (BD) accounts as corporate assets of TREM the 2008 report and has admitted that he did include said assets, in full, in his later valuation of TREM. The reason for the different treatment has been explained by Kaplan and his explanation of the discrepancy is supported documentary evidence (the amended tax returns) and by the testimony of Ms. Davies' own expert. "Mere dissimilarities or omissions in prior statements . . . do not suffice as impeaching evidence; the dissimilarities or omissions must be substantial enough to cast doubt on a witness's testimony to be admissible as prior inconsistent statements." Com. v. Bailey, 469 A.2d 604, 611 (Pa. Super. 1983). As such, Ms. Davies was not entitled to production at trial of the 2008 report on the basis on its being a prior inconsistent statement.

II. Ms. Davies has waived her argument that this Court erred by dismissing the breach of fiduciary duty claims asserted against Mr. Veenis individually. Even if this argument was not waived, the individual claims for breach of fiduciary duty were handled according to provisions of the Standstill Agreement

ISSUE COMPLAINED OF ON APPEAL: Whether the Trial Court erred by dismissing Plaintiff's breach of fiduciary duty claims against the individual Defendant Veenis.

There were four individual counts alleging breaches of fiduciary duty against Mr. Veenis, one of which was dismissed upon Defendants' Motion for Summary Judgment. Three such counts survived Defendants' Motion for Summary Judgment. In this "Issue Complained of on Appeal" Ms. Davies does not bother to (i) make clear which dismissal(s) she believes were improper, (ii) indicate the circumstances under which the dismissal(s) occurred, or (iii) state the basis on which this Court dismissed the counts(s). By failing to clearly and concisely state her grievences, Ms. Davies has waived her right to appeal dismissal of these claims.

On November 28th, 2011, this Court issued a Pa. R.A.P. §1925(b) Order. (Doc. 214). Said Order explicitly stated that "[a]ny issue not properly included in this Statement . . . shall be waived." *Id.* A 1925(b) "[s]tatement shall concisely identify *each ruling or error* that the appellant intends to challange *with sufficient detail to identify all pertinent issues for the judge.*" Pa. R.A.P. §1925(b)(4)(ii) (emphasis added). "Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived." Pa. R.A.P. §1925(b)(4)(vii). The rationale for these rules, and the reason they should be strictly enforced, is clear:

> The facilitation of appellate review requires that the trial court be afforded the opportunity to address the issues raised on appeal. When an appellant fails adequately to identify in a concise manner the issues sought to be pursued on appeal, the trial court is impeded in its preparation of a legal analysis which is pertinent to those issues. *Id.* An issue not identified for review in a Rule 1925(b)

statement is waived whether or not the lower court actually addresses the issue in an opinion.

In re Estate of Daubert, 2000 PA Super 219, 757 A.2d 962, 963 (Pa. Super. Ct. 2000) (citations omitted). Ms. Davies' 1925(b) statement regarding dismissal of claims against Mr. Veenis for breach of fiduciary duty lacks the clarity necessary for this Court to adequately address the matter and is therefore waived.

Furthermore, even if the issue complained of on appeal was not effectively waived by Ms. Davies' failure to clearly and concisely state it, the Court had sufficient legal grounds on which to dismiss the individual breach of fiduciary duty claims. Namely, the parties, by entering into the Standstill Agreement (which is discussed in further detail below) agreed to maintain the disputed funds from the TREM GP (BD) accounts in separate investment accounts (the "TREM GP II accounts") which would be awarded to the party that the jury found was entitled to those accounts. As such, if Mr. Veenis were found liable of a breach (or breaches) of fiduciary duty for his actions in moving those funds between various accounts, the award to Ms. Davies would be the funds from the TREM GP II accounts established by the Standstill Agreement, thus negating any possible recovery from Mr. Veenis personally. Thus, the individual claims for breach of fiduciary duty were subsumed by the Standstill Agreement.

III. THE DECISIONS OF THIS COURT TO ENFORCE THE STANDSTILL AGREEMENT AND MOLD THE VERDICT IN ACCORDANCE WITH SAID AGREEMENT WERE NOT IN ERROR

ISSUE COMPLAINED OF ON APPEAL: Whether the Trial Court erred by enforcing, on a motion filed by Defendants immediately prior to trial, an agreement which should have been raised by Defendants in new matter but was not so raised and was therefore waived.

In her Motion for Post-Trial Relief, Ms. Davies sought a reversal of the Court's November 16, 2010 Order enforcing the provisions of a stipulation made by the parties - the

"Standstill Agreement." This Court's decision to uphold the provisions of this agreement between the parties was proper.

On December 4, 2008, Ms. Davies filed a Motion for Order Directing Return of Funds Improperly Removed From Estate Account. (Doc. 22). She took this action because, in August of 2008, over a million dollars in assets that had previously been held in accounts within the funds of funds labeled "TREM GP (BD)" had been transferred into new accounts labeled as "Estate of H. Bruce Davies" and then moved again to a TREM account controlled by Mr. Veenis. Ms. Davies alleged that the assets had belonged to her husband, and now belonged to the estate, and that it was wrongful for Mr. Veenis to transfer these assets into an account he controlled. *Id.* Mr. Veenis alleged that the money in the "TREM GP (BD)" account had never belonged to Mr. Davies. Mr. Veenis claimed that the general partner accounts labeled with (BD) and (MV) did not contain assets belonging to Mr. Davies and Mr. Veenis individually, but rather these accounts "were used internally by Davies and Veenis to track their respective origination of business and investors in each of the four funds. Such tracking was reviewed in connection with salary and year-end bonuses paid to Davies and Veenis by DVA, the sister company which performs administrative services for TREM." (Doc. 23). In order to procedurally resolve Ms. Davies' "Motion for Order Directing Return of Funds Improperly Removed From Estate Account," the parties entered into the Standstill Agreement. (D. Tr. Ex. 42). In entering into the Standstill Agreement, the parties preserved the funds held inTREM GP (BD) accounts during the pendency of the trial, agreeing to hold the funds in separate accounts (the "TREM GP II accounts") and to pay the funds from those accounts based on the jury's determination and as agreed to in the Standstill Agreement. The Standstill Agreement is, in essence, a binding pre-trial stipulation.

On November 5, 2010, the Defendants filed a Motion to Enforce the Standstill Agreement, which this Court granted on November 8, 2010. On March 18, 2011, the Defendants filed a Motion to Mold the Verdict in accordance with the Standstill Agreement and, on November 3, 2011, this Court molded the verdict pursuant to Defendants' request. (Doc. 168, 206). Ms. Davies decries this Court's enforcement of the Standstill Agreement and has filed an Amended Notice of Appeal which challenges the molded verdict.

Ms. Davies mistakenly argues that Defendants were not entitled to enforcement of the Standstill Agreement because Defendants never mentioned said agreement in any New Matter. Ms. Davies correctly asserts that Pennsylvania Rule of Civil Procedure 1032 establishes that "a party waives all defenses and objections which are not presented either by preliminary objection, answer or reply. . . ". Ms. Davies also correctly asserts that the defenses of release and accord and satisfaction must be plead under the heading of New Matter and that failure to so plead these defenses results in a waiver of said defenses. Pa. R.C.P. § 1032. However, it is important to note that the Standstill Agreement does not provide a defense, as it in no way protects Defendants from liability on the contract and fiduciary duty claims. Rather, the Standtill Agreement, which was formed after the pleadings were completed, was simply a stipulation regarding the maintenance of this account during the period of ongoing litigation. The Standstill Agreement, *which all parties willingly entered into*, established that the assets (damages) claimed by Ms. Davies in her various contract and fiduciary duty Counts would be set aside in the TREM GP II investment accounts, and that the accounts would be awarded to satisfy the jury findings on these claims. As such, the enforcement of the Standstill Agreement did not lead to the dismissal of any claims, as an affirmative defense would have, but rather capped liability for those claims to the amount contained in the TREM GP II accounts.

Further, the Defendants actually did plead the defenses of accord and satisfaction and estoppel and waiver in their Answer, New Matter and Amended Counterclaims to both the Amended Complaint and Second Amended Complaint. (Doc. 68, ¶¶ 145-146 and Doc. 113, ¶ 193). As such, Ms. Davies' claim that Defendants failed to raise defenses or to claim that she waived any part of her claims is incorrect.

There is absolutely no reason for Ms. Davies to contend that she was unaware of the Standstill Agreement that she willingly entered into in order to resolve her own pending motion. There is also no reason for Ms. Davies to contend that the Standstill Agreement does not apply to any individual claims against Mr. Veenis. First, the jury did not find that Mr. Veenis was liable on any individual claim. (Doc. 166). The verdicts on both the breach of oral contract claim and the breach of fiduciary duty claim applied solely to TREM. (Doc. 166, Jury Questions 7, 12, and 13). Second, even if Mr. Veenis were individually liable on these claims, the Standstill Agreement stated that it was "binding upon and inure to the benefit of the Parties hereto and each and all of their respective representatives, officers, directors, affiliates, partners, successors, assigns, employees and agents." (D. Tr. Ex. 42). As the President of TREM, Mr. Veenis was clearly covered by the Standstill Agreement. As such, there is no basis on which to conclude that the Court erred in enforcing the the Standstill Agreement.

This Court's molding of the verdict in accordance with the Standstill Agreement was proper. The jury decided that the disputed funds were and always had been the property of Mr. Davies and his estate was entitled to recovery of these funds. Ms. Davies freely and voluntarily entered into a stipulated agreement that placed the disputed funds into an investment account which was subject to the vagaries of the financial marketplace. She also freely and voluntarily agreed that "neither TREM nor any of the limited partnerships shall be liable to Davies for any

market losses or other loss or diminution of value of the Disputed Amounts." (*See* D. Tr. Ex. 42). This Court's molded verdict awarded ownership of the money in the TREM II account to Ms. Davies and she received the benefit of her bargain.

The disputed funds had been placed in an investment account pursuant to the stipulated Standstill Agreement. This Court's molded verdict awarded Ms. Davies all funds contained in that investment account at the time of the jury verdict. Ms. Davies was entitled to no more and no less than she was awarded.

IV. THIS COURT'S RULING REGARDING EVIDENCE WHICH MS. DAVIES CLAIMS WAS IRRELEVANT, UNFAIR, AND PREJUDICIAL WAS NOT IN ERROR

> **ISSUE COMPLAINED OF ON APPEAL:** Whether the Trial Court erred in permitting into evidence testimony concerning alleged improper conduct by the deceased when the Defendants, in response to an in limine motion by Plaintiff, had agreed not to use such evidence during trial and which evidence was irrelevant to the issues to be determined by the jury, prejudicial to Plaintiff because of its content and because the only person who could have contradicted the testimony was dead.

In Defendants' Answer to Plaintiff's Second Amended Complaint, New Matter and Second Amended Counterclaims (Doc. 113), it was alleged that Mr. and Mrs. Davies and conspired to "surreptitiously" form a limited partnership (TRMSF) and a new limited liability company (TRIM) to manage the new partnership. Mr. Veenis alleged that he and the corporate Defendants were excluded from participation in these new entities, that employees of DVA/TREM were instructed to keep Mr. Veenis in the dark about these new companies, and that the activities engaged in by the Davies' when creating the new companies amounted to fraud. Based on this alleged fraudulent behavior by the Davies', Defendants asserted a new counterclaim for "equitable recoupment." On October 6, 2010, Ms. Davies filed an Answer to Defendants' Second Amended New Matter and Counterclaims and also filed a Supplemental Motion for Summary Judgment attacking the "equitable recoupment" claims. (Docs. 117,139).

Feeling that discovery on this new claim was needed, Ms. Davies' counsel moved to continue the upcoming trial. On October 29, 2010, this Court heard arguments on motions for summary judgment and the motion to continue the trial. During these arguments, Mr. Veenis agreed to withdraw the "equitable recoupment" claim. This Court confirmed that this claim was withdrawn in an Order dated November 8, 2010. (Doc. 137).

Despite the withdrawal of the "equitable recoupment" claims, Ms. Davies' counsel was still concerned that Defendants would accuse the Davies of fraud in front of the jury, so on November 16, 2010, Ms. Davies' counsel filed a Motion in Limine. (Doc. 148). In the motion, Ms. Davies requested that the Court prohibit Defendants from (1) offering evidence to prove that Ms. Davies or her husband engaged in any fraudulent activity, and (2) using terms such as "fraud," "fraudulent," or similar language in connection with the conduct of Ms. Davies or her husband. Mot. in Limine, dated Nov. 8, 2010, filed Nov. 16, 2010, ¶ 10, at 3. Defendants filed a response to this Motion on February 24, 2011 (Doc. 170) stating that Ms. Davies' concerns were "unfounded" and further stating that "Defendants consent to refrain from making any reference to the dismissed recoupment claims, and Defendants are making no claim of fraud." Because the "equitable recoupment" claim had been withdrawn and because the Defendants had consented not to argue said claim at trial, this Court did not make an official ruling regarding Ms. Davies' November 16th Motion in Limine prior to trial.

In Defendants' opening argument, Defense counsel made the following remarks:

> What happened there was in 2002 Bruce Davies felt that he wanted to do something different. Even though he was 50 percent partner with Mr. Veenis in all these other businesses and these funds, he went out and went to the company attorneys and had them create documents and he, you know, prepared this document that instead of having TREM be the general partner in this new fund, he created a new general partner called, TRIM, T-R-I-M. He was 51 percent owner of that. Lorraine Davies was 49 percent owner. So, it was mainly his clients that were getting that fund and all of the commissions would go to TRIM but they

> were distributed solely to Davies. In fact, he even went to the staff at the Davies-Veenis& Associates and TREM, Linda Hummingbird, along with Mary Ellen --

Suspecting that counsel for the Defendants was about to sally forth into forbidden territory, Ms. Davies' counsel raised an objection and requested a sidebar conference. (TT at 79 – 81). This Court overruled this objection, but required Defendants to refrain from using words such as "fraud, misrepresentation, [or] anything like that." (TT at 81). This Court's qualification was *in favor* of Ms. Davies. Therefore, her allegation that this Court allowed terms such as "fraud," "fraudulent" or similar language is meritless.

Ms. Davies fails to point to any specific testimony alleging that Mr. or Mrs. Davies committed fraud. It may be the case that testimony regarding the Davies' behavior surrounding the formation of TRMSF and TRIM portrayed the Davies in a bad light, but this Court was "not required to exclude all evidence that may have been detrimental " to Ms. Davies' case. Schuenemann v. Dreemz, LLC, 34 A.3d 94, 102 (Pa. Super. 2011).

This case involved questions regarding the business relationship between Mr. Davies and Mr. Veenis, such as whether they entered into oral agreements and whether the Davies Memorandum[1] (hereianfter "Memorandum") reflected an agreement between the partners. Mr. Davies' conduct in not disclosing the formation of TRMSF and TRIM to his partner was relevant because it gave the jury a feel for the relationship between Mr. Davies and Mr. Veenis. Any "[e]vidence which tends to establish some fact material to the case, or which tends to make a fact a issue more or less probable, is relevant." Commonwealth v. Scott, 389 A.2d 79, 82 (Pa. 1978); *See also* Pa.R.Evid.401, comment (codifying existing Pennsylvania law as represented by the Supreme Court's definition of relevance in *Scott*). All relevant evidence is admissible, except as otherwise proved by law. Pa.R.Evid. 402. The jury could use information regarding the Davies'

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[1] *See* P. Tr. Ex. 44.

conduct to assist them in the decision-making process when deliberating upon issues such as whether or not the partners likely entered into oral agreements, as opposed to written agreements, at a given point in the business relationship.

This Court's qualification of its ruling such that the Defendants had to avoid the use of the words "fraud, misrepresentation, [or] anything like that" prevented unfair or prejudicial statements from being heard by the jury. No instances of the words "fraud," *et al.* were spoken during the trial in describing the Davies' behavior. The course of conduct undertaken by Mr. and Mrs. Davies during the formation of TRMSF and TRIM was relevant to matters before the jury. By limiting the testimony regarding these events, the Court successfully allowed the Defendants to explore a relevant matter while at the same time protecting Ms. Davies from the potential prejudice that the use of words such as "fraud" could have generated.

V. THIS COURT DID NOT IMPROPERLY ADMIT HEARSAY EVIDENCE

> **ISSUE COMPLAINED OF ON APPEAL:** Whether the Trial Court improperly admitted hearsay evidence relayed through the Memorandum of H. Bruce Davies and through hearsay statements of Bruce Davies and the companies' accountant, Steele Stenger, offered to prove that the DVA Deferred Compensation Agreement had been modified, that Davies personally owned the TREM GP (BD) accounts, and that TREM breached a fiduciary duty by transferring the assets in those accounts. If and only if Plaintiff receives a new trial for any reason, Defendants request that a new trial be held on the breach of fiduciary duty claim against TREM and that this hearsay evidence be properly excluded from those proceedings.[2]

At issue here is a Memorandum introduced at trial as Plaintiff's Exhibit Number 43. The Memorandum was prepared by Mr. Davies on December 22, 2005, following a meeting between Mr. Davies and Mr. Veenis. The Memorandum was originally handwritten by Mr. Davies, and then was given to Mr. Davies' accountant, Steele Stenger (hereinafter "Stenger"), to put into a typewritten form. (TT at 552-55). Stenger testified at trial that when Mr. Davies handed him the

[2] This Court did not grant a new trial. But in the event that the Superior Court may, we address this issue.

document, he told him that he thought the document identified the money that Ms. Davies would receive, and asked him whether he (Stenger) thought that Ms. Davies would be happy with the way that Mr. Davies had provided for her. (*Id.* at 553-54). The Memorandum states, in relevant part, as follows:

> On Thursday, December 22, 2005, I finalized my agreements with my partner, J. Mark Veenis. Upon my demise, Davies Veenis & Associates (DVA) will pay the existing health insurance for my wife Lorraine for a period of 10 years and for my son Bryce until he is done with college. In addition, Davies Veenis Associates (*sic*) will pay Lorraine or heir $200,000 per year for 10 years.

Pl. Ex. 43.

A copy of the Memorandum was also provided to Mr. Veenis. (TT at 603). At trial, Mr. Veenis testified that he was familiar with the Memorandum, having read it and discussed it with Mr. Davies during a thirty (30) minute meeting. (TT at 605-09). On November 3, 2010, Defendants filed a Motion in Limine, arguing that the Memorandum and any statements made by Mr. Davies concerning it were inadmissible hearsay. This Court denied the motion, finding that the statements were admissible under Rule(s) 803(3) and 803(25), as exceptions to the rule against the admission of hearsay. As such, the Court allowed for the Memorandum and testimony concerning it to be introduced at trial.

Pennsylvania Rule of Evidence 801(c) defines "hearsay" as:

> a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Pa.R.E. 801(c).

Pennsylvania Rule of Evidence 802 explains that:

> [h]earsay is not admissible except as provided by these rules, by other rules prescribed by the Pennsylvania Supreme Court, or by statute.

Pa.R.E. 802.

Pennsylvania case law makes it clear that where an out of court statement is offered for the purpose of proving the truth of its contents, it is hearsay and should be disallowed. For instance, in Commonwealth v. Levanduski, the Pennsylvania Superior Court determined that the letter of a murder victim stating that his wife and her lover planned to kill him was inadmissible hearsay, as it was offered to prove the truth therein - that the wife and her lover planned to kill him. 907 A.2d 3 (Pa. Super. Ct. 2006). Similarly, in Romeo v. Manuel, the Pennsylvania Superior Court affirmed a lower court's determination that in a medical malpractice case, the testimony of a wife repeating her deceased husband's statements about instructions given to him by his doctor, was hearsay as it was introduced for the purpose of proving that the doctor gave him the instructions that caused him harm. 703 A,2d 530, 533-34.

While hearsay is not permitted as a general rule, the Rules provide an abundance of exceptions to the general rule. Rule 803 offers a number of exceptions to the inadmissibility of hearsay where the availability of the declarant is immaterial. Rule 803(3) explains that "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health" is admissible hearsay. Pa.R.E. 803(3). Additionally, Rule 803(3) states that:

> [a] statement of memory or belief offered to prove the fact remembered or believed is included in this exception only if it relates to the execution, revocation, identification, or terms of declarant's will.

Id.

Pennsylvania case law clearly distinguishes between statements offered for the truth of their content and statements offered to demonstrate the speaker's then existing state of mind, intent, plan or motive. For instance, in Knit With v. Knitting Fever, Inc., a breach of contract case in which the defendant sought summary judgment claiming that the plaintiff was not the

real party of interest, the United States District Court for the Eastern District of Pennsylvania determined that a deceased woman's statements to her son about her desire to turn a business into a partnership fell squarely within the state of mind exception found in Rule 803(3). 742 F.Supp.2d 568, 582 (E.D. Pa. 2010). Additionally, the court held that the statement was admissible to demonstrate the woman's plan or intent to turn the business into a partnership. Id. at 581. Similarly, in Hooker v. State Farm Fire & Cas. Co., the Pennsylvania Commonwealth Court determined that, in a negligence case against a contractor and a City, a homeowner's out of court statement was admissible to demonstrate that she believed that her home was more damaged than the defendant contractor had suggested it was. 880 A.2d 70, 82 (Pa. Commw. Ct. 2005).

The statements related to the Memorandum and the Memorandum itself were deemed admissible at trial because they were not offered to prove the facts therein, but rather to demonstrate that Mr. Davies believed he owned certain assets which would be distributed to his wife Lorraine after his death. Much like the statements in Knit With and Hooker, the alleged hearsay statements of Mr. Davies, contained in the Memorandum, and repeated in the testimony of Ms. Davies and Stenger, were offered to demonstrate that Mr. Davies believed that he owned the TREM GP (BD) accounts, that he believed that there was $2,000,000 in the four limited partnerships, and that he believed that he and Mr. Veenis had orally agreed to paying Ms. Davies $200,000 a year for ten (10) years and providing health insurance for Ms. Davies and their son Bryce. For these purposes, these statements are valid, non-hearsay, evidence.

Unlike in Levanduski and Romeo, the statements here were not offered to prove the truth contained within them. They were not offered to prove that Mr. Davies, in fact, owned the accounts, that there was, actually, $2,000,000 in the four limited partnerships, or that the oral

modification was, in fact, undertaken. That proof came from other evidence offered at trial - evidence that was not challenged as inadmissible hearsay.[3]

Defendants claim in numerous documents that Rule 803(3) does not allow for the admission of statements of "memory or belief" unless they relate to the declarant's will. This is an flawed reading of Rule 803(3), as it completely omits the qualifier "offered to prove the fact remembered or believed." As the statements here were not offered to prove the fact of either the oral modification or the ownership and amount of the accounts, the hearsay exception in Rule 803(3) applies to these statements.

Additionally, these statements are admissible to demonstrate Mr. Davies' then existing state of mind with regard to his plan, intent, and design for the future financial security of his family. The Memorandum clearly sets forth Mr. Davies' plan for the distribution of the $2,000,000 that he believed was in the four limited partnerships. During trial, Stenger confirmed that the Memorandum contained statements of Mr. Davies' intent and plan for the financial well-being of his family. (*See* TT at 553-54). As these statements were offered not to prove the truth therein, but rather to demonstrate Mr. Davies' then existing state of mind with regard to his intent, plan, and design for the future, the statements were properly admitted.

There are additional reasons why the statements related to the Memorandum are not impermissible hearsay. Pennsylvania Rule of Evidence 803(25) provides an exception to the hearsay rule for an "[a]dmission by [a] party opponent," noting that the statement is admissible

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[3] Evidence that in December of 2006 DVA began paying Ms. Davies $50,000 per quarter, which added up to $200,000 a year, was offered at trial. *See* TTat 150, 801. These payments continued until the present lawsuit was filed in December of 2008. This evidence was offered to prove that there was, in fact, an oral modification, and that Davies was, in fact, entitled to the TREM GP (BD) money. Additionally, Linda Hummingbird testified that she believed that the TREM GP (BD) money belonged to Davies. *See* TT at 421. William Hockman also testified to that belief. *See* TT at 521. Documentary evidence in the form of emails from Linda Hummingbird also demonstrates that it was believed that the TREM GP (BD) accounts belonged to Davies. *See* P. Tr. Ex. 31, 32. Defendants did not seek to exclude any of this probative evidence.

hearsay where "[t]he statement is offered against a party and is...a statement of which the party has manifested an adoption or belief in its truth."

Here, the statements relating to the Memorandum are being offered against Mr. Veenis and are, at least in part, statements in which Mr. Veenis "has manifested an adoption or belief in its truth." In his Answer, New Matter and Counterclaim, which was filed on March 13, 2008, Mr. Veenis alleged the following:

> 121. On December 22, 2005, Mark Veenis and Bruce Davies met together to discuss the overall effect of the various agreements which they had entered into with TREM, DVA and each other.
>
> 122. As part of their discussion, Bruce Davies and Mark Veenis discussed the terms upon which the survivor of them would purchase the interests of the other in both TREM and DVA in the event of the death of one of them.
>
> 123. Bruce Davies and Mark Veenis agreed that the entire interests of a deceased shareholder in both TREM and DVA would be paid in full by a $2.5 million dollar insurance policy and insurance trust each of them had taken out on the life of the other as part of their business succession plan.
>
> 124. To memorialize their oral agreement, Bruce Davies had prepared a memorandum which he directed be maintained in the business records of TREM and DVA ("TREM/DVA Memorandum"). He also provided copies of the TREM/DVA Memorandum to Mark Veenis, his accountant, Steele Stenger, and his counsel, Thomas Butz and John Previs. A true and correct copy of the TREM/DVA Memorandum is attached hereto as Exhibit A.[4]
>
> 125. The TREM/DVA Memorandum, which was prepared by Bruce Davies and signed by him on December 29, 2005, was discussed between Bruce Davies and Mark Veenis and both agreed that it reflected their mutual understanding and agreement that the $2.5 million dollar insurance policy which each had taken out on the life of the other was intended to pay for the total redemption price of the ownership interests of the deceased shareholder in both TREM and DVA.

(P. Ex. 44). This same language was used in Defendants' Answer, New Matter and Counterclaim to Plaintiff's Amended Complaint. (P. Ex. 44-F). Mr. Veenis' use of the language "[t]o memorialize their oral agreement" suggests to this Court that Mr. Veenis did "manifest an

[4] Exhibit A is the document which throughout this opinion has been called the Memorandum.

adoption or belief in the truth" of at least part of the Memorandum. In Mr. Veenis's own words, the Memorandum reflected an "understanding and agreement" between himself and Mr. Davies on the subject of health insurance. (P. Ex. 44). "Admissions of this type, i.e., those contained in pleadings, stipulations, and the like, are usually termed 'judicial admissions' and as such cannot later be contradicted by the party who has made them." Tops Apparel Mfg. Co. v. Rothman, 244 A.2d 436, 438 (Pa. 1968). "It is well established that judicial admissions are admissible as exceptions to the hearsay rule and may arise from a party's statement in his pleadings." Linefsky v. Redevelopment Auth. of the City of Philadelphia, 698 A.2d 128, 133 (Pa. Commw. Ct. 1997).

Mr. Veenis' testimony during the trial makes it clear to this Court that Mr. Veenis "manifest[ed] an adoption or belief" in the truth of at least one of the statements contained within the Memorandum, thereby making said document admissible hearsay when offered against Mr. Veenis. (TT at 608). By admitting that the Memorandum reflected, at least in part, an oral agreement reached by the partners during their December 22, 2005 meeting, Mr. Veenis opened the door to a full inquiry into the nature of the agreement reached by the partners and into what extent the Memorandum reflects said agreement.

VI. THIS COURT PROPERLY DISMISSED MS. DAVIES' "FURTHER ASSURANCES" CLAIM

> **ISSUE COMPLAINED OF ON APPEAL:** Whether the Trial Court erred by dismissing Plaintiff's "further assurances" claim against the surviving shareholder which claim was based on the language of the shareholders' agreement.

> The TREM Shareholders' Agreement contains the following clause:

> Further Assurances. The Shareholders shall execute and delivery [sic.] any all necessary documents or instruments and take all other action necessary or appropriate to carry out and effectuate the provisions of the Agreement.

(P. Ex. 1). Based upon said provision, Ms. Davies requested that charges regarding "further assurances" be given to the jury. This Court refused the requested jury charges and dismissed the "breach of further assurances" claim. (Doc. 195).

Initially, it should be noted that Ms. Davies never plead a separate count entitled "Breach of Further Assurances" in her Complaint or the amendments thereto. The manner in which Ms. Davies put forward her proposed jury instruction[5] (Doc. 163) indicates that she views this claim as as a claim that Mr. Veenis breached the TREM Shareholder's Agreement and that Mr. Veenis is personally liable for any such breach.

The cases cited by Ms. Davies in her proposed points for charge do not bolster her "further assurances" claim, but rather highlight the flaws in her argument. Every case cited on this issue involves real estate law. This is because

> [t]he further assurances provision has its historical origins in the conveyancing of real estate. When Blackacre was conveyed, it came with a covenant of further assurances that the grantor would do whatever was necessary to make certain that the grantee received what the grantee bargained for--i.e., good and marketable title to the real estate. Contemporary [contract] drafters have taken this real estate concept and applied it in other contexts. . . .

TINA L. STARK, NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE 607 (2003). When taken out of the context of a real estate transaction, it becomes unclear what affirmative obligations, if any, a "further assurances" clause might impose on the parties to a contract. It has been noted that including a "further assurances" clause in an agreement may not even be necessary in light of certain emerging common law concepts such as the implied covenant of good faith and fair dealing. *Id.*

By an Order signed November 8, 2010, this Court granted in part Defendants' Motion for Summary Judgment and dismissed Count 3 of Plaintiff's Second Amended Complaint. (Doc.

[5] The proposed charges regarding "further assurances" appear under the heading "Breach of Contract Against Defendant J. Mark Veenis."

137). Count 3 was a claim against TREM and Mr. Veenis individually entitled "Breach of Warranty of Good Faith and Fair Dealing." (Doc. 107). The wording of Ms. Davies' requested "further assurances" charge ("A party who undertakes a personal obligation to assure the carrying out of the provisions of a contract is liable if he or she fails to take action necessary to carry out the contract.") sounds remarkably like her claim for breach of implied covenant of good faith and fair dealing: "Plaintiff contends that the Defendant Mark Veenis breached the TREM Shareholders' Agreement by failing to take all action necessary or appropriate to carry out and effectuate the provisions of [said agreement]" *Id.* at 12.

Many Pennsylvania courts, both state and federal, have held that there is no separate action for a breach of a covenant of good faith and fair dealing. As our Superior Court has stated, Pennsylvania law does "not recognize a claim for breach of [the] covenant of good faith and fair dealing as an independent cause of action separate from the breach of contract claim." LSI Title Agency, Inc. v. Evaluation Services, Inc., 951 A.2d 384, 391 (Pa. Super. 2008). For this reason, a "breach of the covenant of good faith is subsumed in a breach of contract claim." JHE, Inc. v. SEPTA, 2002 WL 1018941 at *6 (Pa. Com. Pl. May 17, 2002). This Court believes that the breach of the covenant of further assurances claim, like the claim for breach of the implied covenant of good faith and fair dealing, is not a separate claim in its own right. Dismissal of any separate claim was therefore appropriate.

Plaintiff attempted to use the "further assurances" contract language to extend personal liability for breach of contract to Mr. Veenis. Mr. Veenis signed the TREM Shareholder's Agreement in his capacity as "Secretary/Treasurer," not as an individual. Shareholders in [a] corporation are not liable for corporate debts, and, in most cases are not liable for their corporate acts or the corporate acts of other shareholders. DESIREE A. PETRUS & MARK WARDA, HOW TO

START A BUSINESS IN PENNSYLVANIA 11 (3rd. ed. 2003). It has been held that a "further assurances" clause, when used outside of the real estate context, "does not alter or expand the substantive scope of the parties' duties and obligations" under the contract. Fitzpatrick v. Queen, No. Civ. A. 03-4318, 2005 WL 1172376 at *7 n. 13 (E.D. Pa. May 16, 2005). Simply signing a contract that contains a further assurances clause does not make one personally liable for for an alleged breach of said contract based on said individual's corporate acts. This Court properly dismissed the "further assurances" claim and allowed Ms. Davies to pursue her breach of contract claims against the corporate entity.

This Court was correct in refusing to charge the jury in the manner requested by Ms. Davies' attorney. Trial courts are "vested with substantial discretion in fashioning the charge and may select its own language cognizant of the need to adequately apprise the jury of the law as it applies to the evidence adduced a trial. Unless the language the court chose incorrectly states the law or mischaracterizes the evidence in a way that prejudiced the jury's consideration and thereby undermined the accuracy of the verdict, [the Superior Court] will not interfere with the court's exercise of discretion." Rettger v. UMPC Shadyside, 991 A.2d 915 (Pa. Super. 2010). Plaintiff's counsel requested not only that this Court include a jury charge which simply quoted the "further assurances" clause of the contract, but further requested that this Court instruct the jury as follows: "A party who undertakes a personal obligation to assure the carrying out of the provisions of a contract is liable if he or she fails to take action necessary to carry out the contract." (Doc. 163). Since Mr. Veenis had not undertaken any personal obligation, such a charge was not an accurate statement of the law, and was rightly refused.

This Court's decision that the "further assurances" claim was not a valid independent claim was proper and required by Pennsylvania caselaw. This Court allowed Ms. Davies to raise

breach of contract claims against the corporate entity and gave accurate breach of contract instructions to the jury. This Court's dismissal of the "further assurances" claim and refusal of the requested proposed point for charge was proper and ought to be upheld on appeal.

VII. THIS COURT'S REFUSAL TO GIVE THE "MISTAKE" INSTRUCTION REQUESTED BY THE DEFENDANTS WAS PROPER

> **ISSUE COMPLAINED OF ON APPEAL:** Whether the Trial Court improperly failed to provide the jury with an appropriate instruction concerning the legal significance of the Defendants' mistaken transfer of the TREM GP (BD) assets into investment accounts owned by the Estate of H. Bruce Davies but managed by TREM, thereby prejudicing Defendants on Plaintiff's fiduciary duty claim against TREM. If and only if Plaintiff receives a new trial for any reason, Defendants request that a new trial be held on the breach of fiduciary duty claim against TREM and that a proper mistake instruction be given to the jury in the course of those proceedings.[6]

Defendants' rightly point out that "the general rule in this state is, when one makes a payment under a mistake of fact, he may recover back the amount of such payment." Gilberton Fuels v. Philadelphia & Reading Coal & Iron Co., 20 A.2d 217, 219 (Pa. 1941). "The ground on which the rule rests is that money paid through misapprehension of facts belongs, in equity and good conscience, to the person who paid it." Travelers Equities Sales, Inc. v. Wasserman, Civ. A. No. 87-8127, 1989 WL 41428 at *2 (E.D. Pa. April 20, 1989).

Defendants claim that "because Defendants were simply correcting a mistaken transfer, the return of the TREM GP (BD) accounts to the General Partner accounts was not a breach of fiduciary duty." (Brief in Support of Defendants' Motion for Post-Trial Relief, 30). The Defendants believe that the jury's finding in favor of Ms. Davies on the breach of fiduciary claim stemmed from this Court's refusal to charge the jury on the significance of Mr. Veenis' allegation that the transfer was a "mistake" and the general rule found in Gilberton Fuels. The Court's decision not to charge the jury regarding mistake was proper and should be upheld.

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[6] *See* footnote 2.

Mr. Veenis' own testimony shows that the "mistake" he claims to have made is not the type of mistake which falls within the general rule of Gilberton Fuels. He testified that the transfer of the money to the estate accounts was an intentional act and that he specifically instructed one of the Defendants' employees, Linda Hummingbird, to effectuate the transfer. (TT at. 630). Mr. Veenis never argued that he transferred the money to the estate accounts by accident or that a mistaken belief that the money belonged to the estate caused him to effectuate the transfer. What he does say is that the transfer "was an honest mistake based on the fact that I was not aware of the tax consequences." (TT at 863). Mr. Veenis' understanding of, or rather lack of understanding of, the tax consequences of the transfer is not the type of "mistake of fact" that the Gilberton Fuels rule applies to. Only an accidental transfer of assets he believed belonged to the Defendants or an intentional transfer rooted in an honest and genuine mistake regarding ownership would have given him the right to "recover back" the money from the estate account.

There was ample evidence of record demonstrating that the motivation for moving the money back to the TREM GP accounts was a desire to avoid the tax consequences of the original transfer rather than an attempt by the Defendants to correct a past mistake. Ownership of the assets which were originally held in the TREM GP (BD) accounts was a central issue in this case. Until the jury rendered its verdict regarding ownership of the monies, it remained in doubt whether the money paid into the estate accounts and later transferred back into the TREM accounts belonged, "in equity and good conscience," to TREM. The jury found that the money in the TREM GP (BD) belongs, and belonged at the time of transfer, to Mr. Davies' estate. (Doc. 166, Jury Question 7). The removal of the monies from the estate accounts was thus wrongful and actionable. The question of whether the wrongful transfer rose to the level of a breach of

fiduciary duty was a matter for the jury to decide in light of all the evidence. This Court's refusal to charge the jury regarding "mistake" was proper and does not justify a new trial on the breach of fiduciary duty claim.

Neither side has attacked via Post-Trial Motions the portion of the verdict that decided that the estate is and was the rightful owner of the assets which were originally in the TREM GP (BD). If there is a new trial on the breach of fiduciary duty claim, said trial will take place with the fact of the estate's ownership of the money firmly established. Mr. Veenis' stance throughout this litigation was that he was operating under a mistake of fact when he transferred the money *to* the estate account, not when he moved it again into the TREM GP account. Since it is now an established fact that Mr. Veenis did not have any legal claim to these funds at the time of either transfer, and since Mr. Veenis has *never* alleged that his transfer of the assets *from* the estate accounts *to* the TREM GP account was a mistake, the Defendants would not be entitled to a mistake instruction in a new trial of the breach of fiduciary duty claim.

VIII. <u>THIS COURT'S REFUSAL TO GIVE THE VALUATION INSTRUCTION REQUESTED BY MS. DAVIES WAS PROPER</u>

> **ISSUE COMPLAINED OF ON APPEAL:** Whether the Trial Court erred by refusing to charge the jury that in valuing the shares of the deceased's interest in the corporation as of the date of death, the valuation expert testifying at trial is required to follow the instructions for valuation in the contract in which the valuation formula or method was set forth.

One of the issues for the jury to decide was the value of Mr. Davies' fify percent (50%) interest in TREM. The TREM Shareholders' Agreement (Pl. Tr. Ex. 1) stated in paragraph 3.3 the manner in which the Redemption Purchase Price was to be determined. Counsel for Ms. Davies requested the following jury instruction:

> Where the parties have by agreement provided the formula or instructions by which a valuation of a business is to be conducted upon the death of one of the

parties, a valuation expert engaged to perform such a valuation is required to abide by the formula or instructions.

The Court refused this instruction because it was unnecessary and would have removed a factual issue from the jury. The valuation experts presented by Plaintiff and Defendants clearly differed in their interpretation of section 3.3. It was up to the jury to determine which was right.

In her Brief in Support of Plaintiff's Post-Trial Motions, Ms. Davies asserts that Section 3.3 was not even mentioned to the jury in this Court's instructions regarding the claim for breach of the TREM Shareholder's Agreement and valuation of Mr. Davies' interest in said company. This is patently untrue. This Court's jury instructions regarding the valuation issue specifically mentions Section 3.3 of the TREM Shareholder's Agreement. (TT at 1221). The jury verdict form mentions Paragraph 3 three times and in one instance refers specifically to Section 3.3. (Doc. 166). The jury was thus fully apprised by the Court that they should refer to Section 3.3 when assessing the testimony of the valuation experts and when calculating the value of Mr. Davies' interest in TREM.

Ms. Davies' valuation expert disagreed with Defendants' valuation expert as to the meaning of paragraph 3.3. The jury heard extensive testimony regarding (i) the manner in which each expert conducted his valuation, (ii) each expert's interpretation of Section 3.3, and (iii) each expert's opinion regarding the other expert's interpretation of Section 3.3. The TREM Shareholder's Agreement was included in the documents provided to the jury for use during deliberations. Counsel for Ms. Davies has correctly stated that "the language of the contract should determine the valuation method used by the expert." (Pl. Br. at 64). Adhering to this basic principle, this Court properly allowed the jury to read and apply the valuation provision. It was for the jury to decide, on the basis of the language of Section 3.3, how Mr. Davies' interest in TREM was to be calculated. It was their duty to calculate the value of Mr. Davies' interest

according to their interpretation of Section 3.3. This Court's instruction on this issue (TT at 1221-1222) and the wording of the jury questionnaire (Doc. 166), made it more than clear that the jury was duty bound to apply Section 3.3 when calculating Mr. Davies' interest in TREM. It seems that they agreed with Kaplan's interpretation of Section 3.3. (*See* Pl. Br. at 66). There was no error in this Court's decision not to give Ms. Davies' requested charge.

IX. <u>THIS COURT'S REFUSAL TO GIVE THE "ESTOPPEL BY SILENCE" INSTRUCTION REQUESTED BY MS. DAVIES WAS PROPER</u>

> **ISSUE COMPLAINED OF ON APPEAL:** Whether the Trial Court erred by refusing to charge the jury that they could consider as evidence of the existence of an oral amendment to a written agreement the failure of defendant Veenis to deny the existence of the oral amendment when he knew that his dying partner, the other 50% shareholder, believed that such an oral amendment existed and had memorialized that belief in a written document which he gave to Defendant Veenis.
>
> Counsel for Ms. Davies requested that this Court charge the jury as follows:
>
> Where a party receives a document setting forth the terms of an oral agreement between that party and the party who wrote the document, and where the party receiving the document has an opportunity to read it and does so in the presence of the party who wrote the document and where the party receiving the document fails to deny the existence of the agreement or otherwise assert that no such agreement exists, you may find that the failure to deny the existence of the agreement is evidence that the agreement does exist.

Plaintiff's Proposed Points for Charge, Doc. 161). This Court rightly refused to give this charge as it was unnecessary and could have misled the jury.

Counsel for Ms. Davies asserts that Mr. Veenis' silence when presented with the Memorandum during a thirty (30) minute meeting between him and Mr. Davies could be considered by the jury as evidence of the existence of an oral modification of the DVA Deferred Compensation Agreement and asserts that this Court's refusal of a jury charge focusing on Mr. Veenis' admitted silence amounts to reversable error.

The charge requested by counsel for Ms. Davies could have placed undue emphasis on Mr. Veenis' admission that he did not refute any statement contained within the Memorandum after reading it for three (3) minutes during a brief meeting with Mr. Davies in which they discussed subjects ranging from investment matters to golf. If this Court had given the instruction requested by counsel for Ms. Davies, the jurors may have felt that they *had* to view Mr. Veenis' "silence" regarding the Memorandum as proof that the document accurately reflected an oral agreement between the partners. The jury was free to interpret Mr. Veenis' testimony regarding the Memorandum and his behavior when presented with said document as they saw fit.

Ms. Davies' requested instruction was also unsupported by the law. In fact, the case Ms. Davies' relied upon to support her requested instruction, *Lapio v. Robbins*, is entirely distinguishable from the facts at issue here. 720 A.2d 1229 (Pa. Super. Ct. 1997). *Lapio* involved a loan check, which was alleged to have been erroneously made out to an individual instead of a business. *Id.* at 1233. The individual then cashed the check. *Id.* The court held that the cashing of the check was conduct consistent with a personal loan, which the court then enforced. *Id.* *Lapio* did not involve a meeting, an oral modification or "silence" of any kind. Rather, the *Lapio* court merely reaffirmed the principle that a party can ratify a contractual agreement by acting in accordance with the agreement. There is simply no caselaw cited by Ms. Davies to support her right to the requested jury instruction on estoppel by silence.

Ms. Davies raised a claim of oral modification of a written agreement. She was therefore entitled to a jury instruction which accurately informed the jury of the law applicable to such a claim. Such an instruction was given by this Court. (TT at 1220-1221). No further instruction was required, and given the possibility that Ms. Davies' requested charge could have

inappropriately influenced the jury by placing undue emphasis on one particular piece of evidence, this Court properly refused to give the instruction.

X. <u>THIS COURT CORRECTLY REFUSED TO GRANT JUDGMENT NOV BASED UPON MS. DAVIES' "ESTOPPEL BY SILENCE" ARGUMENT</u>

> **ISSUE COMPLAINED OF ON APPEAL:** Whether the Trial Court erred by refusing a motion for judgment NOV against Defendant Veenis based on his admission that he knew that the deceased shareholder believed that he and Defendant Veenis had entered into an oral modification of a written agreement and Defendant Veenis had a duty to speak and deny the existence of the oral amendment if he believed there was none.

Mr. Veenis admitted in pleadings and at trial that he met with Mr. Davies on December 22, 2005 "to discuss the overall effect of the various agreements which they had entered into with TREM, DVA and each other." (TT at 600). One of Ms. Davies' claims in this case is that during that meeting the partners made an oral modification to the DVA Deferred Compensation Agreement.

Mr. Veenis testified that at a later meeting with Mr. Davies he did look over the "Davies Memorandum" briefly and that the partners discussed some matters relating to the contents of the document, as well as other topics such as possibly taking a golf vacation together. (TT at 604 – 607). Veenis admitted that one statement contained within the Memorandum accurately reflected an oral agreement between the partners on the subject of health insurance for the Davies family. (TT at 608).

It is without question that the "Davies Memorandum" contains a statement regarding payment of DVA deferred compensation which is inconsistent with the written DVA Deferred Compensation claim. Ms. Davies requested that this Court render judgment NOV on the issue of oral modification of said agreement because Mr. Veenis did not dispute the accuracy of the

statement regarding deferred compensation found in the "Davies Memorandum" at the time he read said document.

Ms. Davies' request is rooted in the concept of "estoppel by silence." Pennsylvania law does recognize such a concept under certain circumstances. Fried v. Fisher, 196 A. 39, 41-42 (1938). That said, "[a]s a general rule, mere silence or inaction is not a ground for estoppel unless there is a duty to speak or act." Farmers Trust Co. v. Bomberger, 362 Pa. Super. 92, 99, 523 A.2d 790, 794 (1987). Such a duty to speak is not evident here.

The jury found in favor of Mr. Veenis on the issue of oral modification of the DVA Deferred Compensation Agreement. Ms. Davies asserts that this Court erred in not granting judgment NOV on this issue, but this Court's decision to let that part of the verdict stand was clearly consistent with and compelled by the standard of review set by Pennsylvania case law.

> When we review a motion for JNOV, we must consider the evidence in the light most favorable to the verdict winner, who must receive the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his favor. Any doubts must be resolved in favor of the verdict winner, and JNOV should only be entered in a clear case. Finally, 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 deliberations.

Donoughe v. Lincoln Elec. Co., 936 A.2d 52, 60-61 (Pa. Super.Ct. 2007) *citing* Rohm and Hass Co. v. Continental Casualty Co., 781 A.2d 1172, 1176 (Pa. 2001).

There is no evidence on the record that Mr. Veenis was aware at the time he read the "Davies Memorandum" that it was inconsistent with the DVA Deferred Compensation Agreement. In fact, Mr. Veenis testified that, at the time he read and discussed the memorandum with Mr. Davies, he did not recognize that the statement contained therein regarding DVA deferred compensation was inconsistent with the written DVA Deferred Compensation Agreement. (TT at 608). If Mr. Veenis did not realize when he read the document that it

reflected Mr. Davies' belief that an oral modification to the DVA Deferred Compensation Agreement had occurred during the December 22, 2005 meeting, how could he refute such a belief?

Because the jury ruled in Mr. Veenis' favor on this issue, this Court had to consider the uncontroverted evidence that Mr. Veenis was unaware, at the time he discussed the "Davies Memorandum" with his partner, of any inconsistency between the memorandum and the DVA Deferred Compensation Agreement in the light most favorable to Mr. Veenis. For this reason, this Court, when ruling on Ms. Davies' motion requesting judgment NOV on the issue of oral modification of the DVA Deferred Compensation Agreement, viewed Mr. Veenis' testimony as proof that Mr. Veenis did not know that the two documents were inconsistent at the time of the meeting. In such a circumstance, he could not have had a duty to speak to Mr. Davies about the inconsistency. In the absence of such a duty, there can be no estoppel by silence.

XI. THIS COURT CORRECTLY UPHELD THE JURY'S DETERMINATION THAT TREM BREACHED ITS FIDUCIARY DUTY

> **ISSUE COMPLAINED OF ON APPEAL:** Whether the Trial Court improperly upheld the jury's finding for Plaintiff on the breach of fiduciary duty claim against TREM because, as a matter of law, Plaintiff was not owed any fiduciary duty by any of the Defendants given that (i) she was not a shareholder in TREM and (ii) she refused to sign the limited partnership agreements of the TREM investment funds as the Executrix of the Estate.

TREM alleges that it did not owe a fiduciary duty to Ms. Davies. While TREM did not owe a fiduciary duty to Ms. Davies as an individual, the jury found that TREM owed a fiduciary duty to the estate of Bruce Davies. Ms. Davies, in her role as Executrix, under Pennsylvania estate and agency law is owed that fiduciary duty.

An Executrix is "one who . . . administers the estate" of an decedent. Bryan A. Garner, A Dictionary of Modern Legal Usage 338 (2d ed. 1995). This administrator is the personal

representative of the estate. 20 Pa.C.S.A. § 102 (West 2005); See also Garner, supra, at 29 (both "Executrix" and "Administrator" refer to someone who administers the estate of a decedent). Ms. Davies, in her role as the personal representative of the estate of Bruce Davies, has possession of all of the personal estate of Bruce Davies, including Mr. Davies' ownership in TREM, and has the right the maintain any action with respect to it. 20 Pa.C.S.A. § 3311(a) (West 2005).

As an individual, Ms. Davies was not a shareholder in TREM; Mr. Davies was. (D.Ex. 5, at 1). After his death, and through probate, Mr. Davies' property transferred to his estate. (P. Ex. 5). Consequently, as the personal representative of the Estate of Bruce Davies, Ms. Davies presently owns 50% of the Issued Shares in TREM. § 3311(a).

TREM also claims that it did not owe any fiduciary duty to Ms. Davies because she failed to sign the new TREM funds' limited partnership agreements. This claim is meritless. Ms. Davies had no duty to sign the new limited partnership agreements. Actually, Ms. Davies, in her role as representative of the estate of Bruce Davies, had a fiduciary duty to the estate to liquidate the estate for prompt distribution of assets. In re Spotts Estate, 2 Pa. D. & C.3d 111, 114 (Ct. Com. Pl. 1977); 32 Standard Pennsylvania Practice 2d § 152:1. Had she signed the new limited partnership agreements Ms. Davies may well have violated her duty to the estate or waived her standing in this matter. Gibboney v. Derrick, 12 A.2d 111 (Pa. 1940) (a partner's widow became a partner, as an individual, in her deceased husband's partnership, thus waiving her standing in an action commenced against the partnership in her capacity as the executrix for her deceased husband's estate).

Under Pennsylvania law, corporations "can only act through its officers, directors or other agents." Aldhelm, Inc. v. Schuylkill Cnty. Tax Claim Bureau, 879 A.2d 400, 406 n.15 (Pa.

Commw. Ct. 2005) *citing* Ashley v. Ashley, 393 A.2d 637 (Pa. 1978). Thus, corporations "are bound by the acts of their representatives within the apparent scope of the business with which they are entrusted." Pollock Indus., Inc. v. Gen. Steel Castings Corp., 201 A.2d 606, 611 (Pa. Super. 1964). Here, TREM, a Pennsylvania corporation, was bound by Mr. Veenis' actions in his capacity as its *de facto* sole controlling shareholder and officer, immediately after the death of Mr. Davies.

The jury was convinced that TREM, through the actions of Mr. Veenis in his capacity as the *de facto* sole controlling shareholder and officer, owed this fiduciary duty of *loyalty*, *good faith* and *fairness* to the estate of Bruce Davies. The jury's finding is consistent with applicable law and the evidence of record and thus should not be disturbed by this, or any other, court.

XII. THIS COURT DID NOT IMPROPERLY UPHOLD THE JURY'S VERDICT ON MS. DAVIES' CLAIM THAT TREM BREACHED ITS FIDUCIARY DUTY

ISSUE COMPLAINED OF ON APPEAL: Whether the trial court improperly upheld the jury's finding for Plaintiff on the breach of fiduciary duty claim against TREM because, even if Plaintiff was owed a fiduciary duty, Plaintiff suffered no damages from the management of the TREM GP (BD) accounts because, pursuant to the express Standstill Agreement between the parties, the assets contained in the TREM GP (BD) accounts in the TREM GP (BD) accounts were placed in separate TREM GP II accounts in the TREM investment funds pending a determination of their ownership at trial.

This Court molded the jury's verdict. The molded verdict makes it clear that there is no separate award of damages for breach of fiduciary duty, with said award being part and parcel of the award of the assets contained in the TREM GP II accounts (as required by the Standstill Agreement). While this Court did not do away with the jury's finding of a breach of fiduciary duty, this Court *did not* uphold the jury's monetary damages award relating to said finding. As a result, Defendants' related Issue Complained of on Appeal is moot.

CONCLUSION

It is clear that this Court did not commit any reversible error at any stage of this complex litigation. This Court applied the necessary and proper standards when evaluating each party's requests for post-trial relief. Each issue raised on appeal by either of the parties, whether related to discovery (Issue I), pre-trial motions (Issues II and III), admission of evidence at trial (Issues I, IV and V), dismissal of claims (Issues II and VI), jury instructions (Issues VII, VIII, and IX) or post-verdict rulings (Issues X, XI and XII), is meritless. As such, neither party is entitled to a new trial or a judgment NOV.

DATE September 7, 2012

Christine Ward
Hon. Christine A. Ward