NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

LAURA ANTONSON AND MICHAEL ANTONSON, H/W, Appellants v. THE ROTHMAN INSTITUTE AND RECONSTRUCTIVE ORTHOPAEDIC ASSOCIATES II, P.C. AND VALLEY FORGE ARCADIA ASSOCIATES, INC. AND J.M. BASILE & ASSOCIATES, INC. AND J.M. BASILE PROPERTY MANAGEMENT, Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1102 EDA 2013

Appeal from the Judgment Entered March 27, 2013
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): 03372

BEFORE: BOWES, OTT, and JENKINS, JJ.

MEMORANDUM BY BOWES, J.: **FILED JUNE 26, 2014**

This contentious premises liability case ultimately resulted in a jury verdict in favor of Defendants Valley Forge Arcadia Associates, Inc. ("VFAA" or "Owner"), and J.M. Basile & Associates, Inc. and J.M. Basile Property Management Corp. (collectively "Property Manager") after two mistrials.[1] Plaintiffs Laura and Michael Antonson, Appellants herein, challenge the trial court's imposition of sanctions following the declaration of the first mistrial.

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[1] A November 19, 2012 docket entry indicates The Rothman Institute was dismissed from the case and Reconstructive Orthopaedic Associates II, P.C. settled prior to trial.

Additionally, the Antonsons allege that errors in the jury instructions and the trial court's failure to address the jury's questions at the third trial resulted in an improper verdict against them. After thorough review, we vacate the November 21, 2011 order imposing sanctions, but affirm judgment in favor of Defendants.

The facts giving rise to this negligence action are as follows. On December 12, 2008, Ms. Antonson went to The Rothman Institute at 170 North Henderson Road in King of Prussia, Pennsylvania, hereinafter "the property," for a follow-up appointment with her physician after shoulder surgery. The property was owned by VFAA and managed by the Basile defendants. Upon returning to her car following the appointment, Ms. Antonson realized that she left her cell phone in the office. As she walked back to the office on the sidewalk, she tripped and fell, landing on her left side and striking her head on the sidewalk. She maintained that she tripped due to a difference in the elevation of two concrete slabs in the sidewalk.

Prior to the first trial, Plaintiffs took the deposition of Ms. Suzanne Basile, an employee/owner of Property Manager and the corporate designee of both the Property Manager and Owner. She confirmed that photographs of the sidewalk taken by Plaintiffs and their experts depicting the area of Ms. Antonson's fall accurately represented the condition of the sidewalk at the time of the alleged fall. She testified that, after the incident, there had

been construction to the parking lot, the handicapped ramp, and the entrance to The Rothman Institute offices, but no changes were made to the specific area of the sidewalk where Ms. Antonson fell. Ms. Basile acknowledged that she had taken photographs documenting the post-accident construction, but had deleted them from her phone or obtained a new phone. She maintained that, in any event, the photographs that she took did not depict the area of the sidewalk where the fall allegedly occurred.

Prior to trial, Defendants filed a motion *in limine* to preclude evidence of subsequent remedial measures made to the area where Ms. Antonson fell. The trial court issued an order on November 14, 2011, that barred "[t]he introduction of any evidence of any subsequent repairs, remodeling, or work to the area in which Plaintiff alleges she suffered her accident . . ." Order, 11/4/11, at 1.

A jury trial commenced on November 14, 2011. On Friday, November 18, 2011, the Plaintiffs called Ms. Basile to testify as on cross-examination. Plaintiffs' counsel asked Ms. Basile: "From December 12th, 2008, to the time that you took your deposition, am I correct that you did take pictures of the sidewalk?" N.T. Trial, 11/18/11, at 83. Ms. Basile responded that counsel was incorrect. Counsel directed the witness to a page in her deposition where she stated that she took pictures of the sidewalk. Defense counsel asked for a sidebar. Defense counsel maintained

that Plaintiffs' counsel was "going straight into subsequent remedial measures." ***Id***. Plaintiffs' counsel advised the court that he was not going in that direction, as it was "already of record that there's been no change at all to the area." ***Id***. at 84. He explained that he merely intended to establish spoliation, *i.e.*, that the witness had taken photographs of the sidewalk and deleted or destroyed them. After ensuring that counsel did not intend to elicit evidence of subsequent remedial repairs, the trial court permitted the questioning and Defendants did not renew their objection. On direct examination, Ms. Basile explained to the jury that the photographs she deleted were unrelated to an investigation of Ms. Antonson's accident or lawsuit. ***Id***. at 105.

At the close of proceedings that day, and after the jury had been excused for the weekend, defense counsel reasserted her objection to the aforementioned testimony as implicating the trial court's order precluding evidence of subsequent remedial repairs. Additionally, for the first time, counsel took issue with Plaintiffs' suggestion that Ms. Basile destroyed photographs of the sidewalk. The trial court invited Defendants to file a motion to strike the testimony as irrelevant, since they maintained that the photographs were not taken or destroyed in connection with this litigation or Ms. Antonson's fall, but involved unrelated construction to other areas of the property.

On Monday, November 21, 2011, Defendants filed a motion for mistrial rather than a motion to strike. In support of the motion, defense counsel argued that when Plaintiffs elicited the fact that Ms. Basile had taken photographs and subsequently deleted them, he was aware that the photographs depicted post-accident construction work, and that the photographs no longer existed. N.T. Trial, 11/21/11, at 10. Defense counsel argued that the questioning crossed the line when Plaintiffs' counsel asked the witness whether she had taken pictures of the sidewalk after December 12, 2008. When Ms. Basile responded in the affirmative, Plaintiffs' counsel then asked the witness to admit that she either deleted or destroyed these pictures. ***Id***. at 12. Defense counsel alleged that this questioning misled the jury into believing that Defendants, "either on their own volition or through counsel, had deliberately destroyed evidence." ***Id***. at 13. He continued, "Not only have we now gotten into subsequent remedial repair which Your Honor precluded, this jury was left with the distinct impression, and we know that because we have three verifications from people who saw the audible and visual response from the jury to those questions and those answers."[2] ***Id***. He argued that counsel for Plaintiffs misled the court and the jury deliberately when "[w]e know for a fact that no

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[2] The verifications were provided by Jane North, Esquire, and Christopher R. Mavros, Esquire, co-counsel for defendants, and Robert Campbell of InCourt Technologies, the company hired by Defendants to assist at trial.

admissible evidence has been destroyed in this case, none whatsoever." ***Id***. The trial court granted the mistrial. In the order formalizing same, the court ordered counsel for plaintiffs to reimburse Defendants' counsel for all costs, fees, and expenses related to their defense at trial within ten days of the order.

On November 28, 2011, counsel for Defendants submitted documentation of $80,210.66 in costs, fees, and expenses incurred during the first trial. Plaintiffs' counsel filed a motion for reconsideration and/or to vacate the court's November 21, 2011 order and a cross-motion for attorneys' fees and costs. On December 20, 2011, Plaintiffs filed a notice of appeal to this Court from the order granting a mistrial. On January 18, 2012, the trial court denied the motions as moot, noting that the case was on appeal to this Court. We quashed the appeal as interlocutory on February 29, 2012.

On September 19, 2012, a hearing was held by the Honorable Paul Panepinto for the purpose of determining whether the fees, costs, and expenses were fair and reasonable. However, after discussion with counsel, all agreed that the court should first consider the motion for reconsideration filed by Plaintiffs. The court heard argument regarding the events precipitating the mistrial and imposition of sanctions, but subsequently deferred ruling on the cross-motions for sanctions and motion for reconsideration based on the coordinate jurisdiction rule. Order, 11/26/12.

A second trial commenced on April 23, 2012, but ended in a mistrial. Trial commenced for the third time on October 31, 2012. The jury found causal negligence on both Property Manager J.M. Basile and Ms. Antonson, and apportioned 75% of the negligence to Ms. Antonson, resulting in a defense verdict. Plaintiff's motion for post-trial relief was denied on April 1, 2013, and Plaintiffs timely filed the within appeal on April 5, 2013.

On January 29, 2013, Defendants filed a motion to assess reasonable attorneys' fees and expenses for the first trial pursuant to the November 21, 2011 order granting a mistrial. They maintained therein that Plaintiffs had never challenged the reasonableness of the bills despite the fact that the September 21, 2012 hearing provided an opportunity to do so. Defendants represented further that they had an expert who would issue an opinion as to the reasonableness of the charges, and thus requested that the court order plaintiffs' counsel to pay $79,280.66. Plaintiffs filed a response to the motion. The court had not disposed of the motion when the Plaintiffs timely filed the within appeal and complied with the trial court's order to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. The trial court authored a Rule 1925(a) opinion limited to the issues arising from

the second and third trials over which it presided.[3] The Plaintiffs present five issues for our consideration:

1. Whether the Trial Court committed an error of law in sanctioning Plaintiffs' counsel with attorneys' fees, costs, and expenses when: (1) each and every question that Plaintiffs' counsel asked was discussed at length, on the record, with the Trial Court authorizing and permitting those questions, which questions were later asked by Plaintiffs' counsel without any objection by defense counsel; (2) the record reflects that Plaintiffs did not violate a prior court order; and (3) the record reflects that such sanctions were not warranted. [Trial #1]

2. Whether the Trial Court committed an error of law by refusing to vacate its Order of November 21, 2011 granting attorneys fees, costs, and expenses where there was no evidence of willful misconduct. [Trial #1]

3. Whether the Trial Court committed an error of law by refusing to vacate its Order of November 21, 2011 granting attorneys fees, costs, and expenses where there was no argument as to whether the fees and costs submitted were necessary, reasonable, and customary charges. [Trial #1]

4. Whether the Trial Court committed an error of law in its charge to the jury which confused the jury as to the law when the Trial Court charged the jury on how owners and corporations are liable for acts or omissions of their agents or employees in a premises liability case. [Trial #3]

5. Whether the Trial Court committed an error of law in not addressing the jury's questions concerning negligence in a premises liability case against a landowner resulting in an inherently inconsistent verdict, contrary to the law and contrary to the facts of the case. [Trial #3]

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[3] The trial court declined to address in its Rule 1925(a) opinion the three assignments of error pertaining to the imposition of sanctions following the declaration of the mistrial since it did not preside over that trial.

Appellants' brief at 3-4.

First, Plaintiffs challenge the grant of the mistrial at the first trial and the imposition of sanctions. Our standard of review of the grant of a mistrial is whether the trial court abused its discretion. ***Poust v. Hylton***, 940 A.2d 380, 381 (Pa.Super. 2007). Similarly, our standard of review of issues concerning sanctions is one of abuse of discretion by the trial court. ***Ace Am. Ins. Co. v. Underwriters at Lloyds & Cos.***, 939 A.2d 935, 945 (Pa.Super. 2007). "A trial court commits an abuse of discretion when it 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." ***Polett v. Public Communications, Inc.***, 83 A.3d 205, 214 (Pa.Super. 2013).

While generally litigants are responsible for paying their own counsel fees, a trial court may award reasonable fees to a party "as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter." ***See*** 42 Pa.C.S. § 2503(7). In reviewing the trial court's award of attorneys' fees, "[w]e may only consider whether the court 'palpably abused its discretion in making a fee award.'" ***In re Barnes Found.***, 74 A.3d 129, 135 (Pa.Super. 2013) quoting ***Thunberg v. Strause***, 682 A.2d 295, 299 (Pa. 1996). If the record supports a trial court's finding that a litigant violated the conduct provisions of the relevant statute providing for the award of attorney's fees, that award should not be

disturbed on appeal. ***See Diener Brick Co. v. Mastro Masonry Contr***., 885 A.2d 1034, 1042 (Pa.Super. 2005).

The Antonsons argue that the trial court abused its discretion in granting a mistrial, and therefore, the order imposing attorney's fees based on counsel's conduct that allegedly prompted the mistrial must be vacated. They maintain that sanctions were not warranted as there was no evidence of wilful misconduct. They direct our attention to a record that substantiates that Plaintiffs' counsel cleared every question he intended to ask with the trial court before he asked it. Counsel explained that, contrary to defense counsel's representation that he was inquiring into forbidden subsequent remedial repairs, he was merely laying a foundation for a spoliation instruction. Plaintiffs point out that Defendants did not object to proposed questioning for that purpose. Furthermore, Plaintiffs contend that the imposition of sanctions in the amount of fees and costs submitted by the defense was improper where there was no evidence that the charges were reasonable and necessary.

Defendants counter that the mistrial was properly declared when Plaintiffs' counsel elicited that Ms. Basile had taken photographs of the sidewalk but destroyed or deleted them even though the litigation was ongoing. The prejudice, Defendants contend, was so profound that a curative instruction could not remove the taint. Furthermore, Defendants maintain that Plaintiffs had an opportunity to challenge the reasonableness

of the fees and expenses at the September 21, 2012 hearing. Since they failed to do so then, they are precluded from challenging their reasonableness on appeal.

The line of inquiry precipitating the declaration of the mistrial commenced when counsel for Plaintiffs asked the following question of Ms. Basile:

> Q. "To your knowledge, in looking at this photograph, has there been any, any physical change whatsoever to the area in which you understood Laura Antonson fell from December 12th, 2008, up to the present, which at the time of your deposition was February 25th, 2011?"

N.T. Trial, 11/18/11 (p.m. session), at 48. Defense counsel objected to the question, and a discussion at sidebar ensued. Defense counsel maintained that the question was "inviting the witness to give an answer that talks about a subsequent remedial measure." ***Id***. Plaintiffs' counsel disagreed, pointing out that the same question had been asked at the witness's deposition and that she answered that there had been no change. The court agreed, characterizing the question as merely confirming that the sidewalk looked the same as it did, and overruled the objection. The witness testified, consistent with her earlier deposition testimony, that the area where Ms. Antonson fell looked the same in the photographs as it did on the day of the fall.

Shortly thereafter, Plaintiffs' counsel asked Ms. Basile to confirm that she had taken photographs of the sidewalk sometime after the incident and

prior to her deposition. N.T. Trial, 11/18/11 (p.m. session), at 83. The witness responded that counsel was incorrect. ***Id***. At that point, counsel directed the witness to page 128 of her deposition, and defense counsel requested a sidebar conference. Again, defense counsel objected that counsel was "going straight into subsequent remedial repairs," and read from the deposition transcript the witness's earlier response to that same question: "Yes. When the construction was ongoing, which was done after the incident, yes." ***Id***. Plaintiffs' counsel advised the court that he was not going in that direction, as it was "already of record that there's been no change at all to the area." ***Id***. at 84. He explained that he was going to ask Ms. Basile if she had taken pictures. He advised the court that he intended to elicit the following testimony:

> [**Plaintiffs' Counsel**]: The question is:
>
> "From December 12th to the present have you ever taken photographs?"
>
> She says, "Yes."
>
> I said, "Where are those photographs?"
>
> She said, "I probably deleted them."
>
> [**Plaintiffs' Counsel**]: Again, this is something if they had photographs and she has them, it's spoliation.
>
> . . . .
>
> **The Court**: You are not going to ask her about the construction.

> [**Plaintiffs' Counsel**]: Of course not, Judge, not. I am trying my best to follow your Honor's rulings. I don't think I have stepped over that once.
>
> . . . .
>
> **The Court**: You are not going to ask about the construction.

Id. at 85.

Plaintiffs' counsel then obtained admissions from the witness that she had taken pictures of the sidewalk, that she had deleted or destroyed them, despite knowing at the time that there was litigation involving someone falling on the sidewalk. ***Id***. at 86. Defendants did not object to this examination. Upon direct examination, defense counsel returned to the subject of the deleted photographs and elicited the following testimony:

> [**Defense Counsel**]: Now, you had also been asked some questions about some photographs that you may have taken.
>
> Were those photographs in any way related to an investigation of Mrs. Antonson's accident?
>
> [**Ms. Basile**]: Nothing to do with that.
>
> [**Defense Counsel**]: Were those photographs in any way related to anything having to do with Mrs. Antonson's lawsuit?
>
> [**Ms. Basile**]: Nothing to do with her at all.

N.T. Trial, 11/18/11 (p.m. session), at 105.

At the close of proceedings that Friday afternoon, and after the jury had been excused for the weekend, defense counsel brought up the subject of the photographs.

[**Defendants' Counsel]**: Secondly, I just want to note for the record that permitting plaintiffs' counsel to question my witness regarding photographs that she took specifically for a construction project to repair the sidewalk post-accident completely violates Your Honor's rulings that subsequent remedial repairs do not come in.

And now there has been a suggestion to the Jury that she somehow destroyed photographs of the sidewalk.

The Court: Just file a motion, and I will decide the motion.

. . . .

The Court: if you knew that those photographs were taken because of that construction, and I have said that there is no testimony or evidence with respect to the construction, now the Jury has heard that there are photographs that were destroyed or deleted, that leaves them wondering why that was done.

So, if [Defense Counsel] files a motion, I am inclined to grant it to strike that testimony.

[**Plaintiffs' Counsel**]: Your Honor had indicated that we can't mention subsequent remedial measures, and we didn't.

But this is – but, Your Honor, if I could –

The Court: Then what is the purpose of the photographs?

[**Plaintiffs' Counsel**]: I will tell you why. This woman testified that this area of the sidewalk had not changed, and it's in the same condition –

The Court: Yes.

[**Plaintiffs' Counsel**]: --as it was up to the present. She said she took photographs of that. That means it's discoverable.

. . . .

The Court: Well, what is the importance of having the photographs out there as being deleted?

. . . .

What is the relevance? Other than to imply to the Jury that there is evidence that has been hidden, what is the point?

[**Plaintiffs' Counsel**]: The point is it is spoliation.

The Court: No.

[**Plaintiffs' Counsel**]: It was a question of fact here that she knew about this fall; She knew about the injury; There were photographs that were taken; Nothing has changed; That she destroyed these photographs –

The Court: One is not connected to the other; the photographs weren't destroyed in connection with this litigation, nor with the accident. The photographs were deleted after the construction was completed.

. . . .

[**Plaintiffs' Counsel**]: your Honor, we believe that is inconsistent with the evidence of the deposition and the testimony of the witness.

The Court: It may be. But the testimony with respect to the construction is irrelevant. I have ruled it out of the case.

. . . .

The Court: I am not going to allow an inference to the Jury that photographs were destroyed that were related to this case.

N.T. Trial, 11/18/11 (p.m. session), at 165-170. The trial court viewed that questioning as irrelevant and told the defense it would entertain a motion to strike.

The following Monday morning, Defendants filed a motion for mistrial. Attorney Kevin Deasy entered his appearance that morning on behalf of Defendants for the specific purpose of arguing the motion. He accused

Plaintiffs' counsel of deliberately misleading the jury into believing that Ms. Basile destroyed evidence and violating the court's order prohibiting evidence of subsequent remedial measures, although "no admissible evidence had been destroyed in this case." N.T. Trial, 11/21/11 (a.m. session), at 14. He proffered verifications from three people who were sitting in the courtroom at the time and "who saw the audible and visual response from the jury." ***Id***. Defense counsel maintained that a curative instruction was inadequate to remove the taint. Furthermore, he argued that since Plaintiffs' counsel was duplicitous and deceitful, a mistrial was warranted, and the City of Philadelphia's costs, as well as legal fees incurred by the defense, should be paid. ***Id***. at 17.

Plaintiffs' counsel pointed out that the questions he asked were expressly permitted by the trial court before the questions were posed to the witness. Furthermore, he noted that the area where Ms. Antonson fell looked the same in March 25, 2011 when the pictures were taken as it did on the date of the accident. ***Id***. at 19. No subsequent remedial measures were undertaken in that area of the sidewalk.[4] The court permitted the questioning, reasoning that it did not imply that there were remedial repairs – only that the area looked the same on the dates in question. ***Id***. at 23.

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[4] The question: To your knowledge, has there been any physical change to the area in which you understood Laura Antonson fell from February 12th, 2008 up until the time we took your deposition, which was February 15th, 2011?" Ms. Basile answered, "No." ***Id***. at 24.

Plaintiffs' counsel argued that the construction photographs were discoverable, that they may have been relevant, and whether Ms. Basile intentionally destroyed or deleted them was "classic relevant evidence, probative evidence, and we haven't asked for a spoliation charge yet because we were waiting to create a record . . ." ***Id***. at 31.

Defense counsel accused Plaintiffs' counsel of "mixing [up] the area of the accident with the area of the construction." ***Id***. at 36. He argued that the deleted photographs were not taken of the area of the fall. Defense counsel added that plaintiffs' counsel "then went further to accuse the defendants of destroying what you have already ruled as inadmissible evidence." ***Id***. at 39. The court granted the motion for mistrial.

From a thorough review of the record, we glean the following. Much of the confusion at the first trial stemmed from the parties' non-specific references to the sidewalk. Plaintiffs pled that Ms. Antonson tripped and fell on the sidewalk where two adjacent sidewalk blocks were dangerously uneven. Complaint, ¶ 11. Photographs of the specific area of the sidewalk where Ms. Antonson fell were taken by Plaintiffs and agents of Defendants. It was undisputed that there was no subsequent change to that particular area of the sidewalk. Ms. Basile acknowledged during her deposition that the parking lot, the handicapped ramp, and the sidewalk area in front of The Rothman Institute entrance were subsequently remodeled, and that she took pictures of the construction, which showed the sidewalk. She did not retain

the pictures depicting the construction. She did, however, clarify that the area of the sidewalk where Ms. Antonson fell was not subsequently repaired; only the areas outside the entrance to The Rothman Institute and the parking lot were redone. Deposition, Suzanne Basile, at 133.

In addition to the transcript of proceedings culminating in the declaration of a mistrial, we also have the benefit of the argument presented to Judge Panepinto on September 21, 2012.[5] At the latter proceeding, the court and the parties agreed to focus initially on Plaintiffs' motion for reconsideration of the court's order granting sanctions and cross-motion for sanctions. In fact, the issue of the reasonableness of the attorneys' fees, costs, and expenses was not reached. Thus, Defendants' contention that Plaintiffs waived any challenge to the reasonableness of the fees by failing to challenge them at that proceeding is without merit.

It is also apparent from that September 2012 hearing that both Plaintiffs' counsel and Defendants' counsel had developed new legal and factual arguments to justify their respective stances on the mistrial and sanctions. Plaintiffs' counsel noted for the first time that defense counsel did not object to the questions that precipitated the mistrial. Plaintiffs' counsel also reiterated his position that he apprised the trial court in advance of what he intended to ask and why, and the trial court permitted it.

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[5] It was Judge DiVito, not Judge Panepinto, who presided at the first trial, and who declared the mistrial and ordered payment of attorney's fees.

Defense counsel, instead of focusing solely on whether the inquiry about deletion or destruction of photographs violated the court's order precluding evidence of subsequent remedial repairs, now argued that the deleted photographs were irrelevant as they did not depict the area of the sidewalk where Ms. Antonson fell, and that a spoliation instruction was unwarranted.

At trial, Ms. Basile denied taking pictures of the sidewalk and Plaintiffs' counsel sought to impeach her with her inconsistent deposition testimony. Ms. Basile testified at her deposition that she took photographs of the sidewalk; she testified at trial that she did not take pictures of the sidewalk. Plaintiffs argue on appeal that they were entitled to impeach Ms. Basile with her inconsistent testimony, and that even evidence of subsequent remedial repairs is admissible for that purpose. Pa.R.E. 407 (providing that evidence of subsequent remedial repairs may be admitted for purposes of impeachment, or "proving ownership, control, or the feasibility of precautionary measures," if disputed). Additionally, Plaintiffs contend that the questioning was proper as they were merely laying a foundation for a spoliation instruction. Such an instruction permits the jury to infer that when one party disposes of evidence before the other party has had an opportunity to inspect it, when that party should have recognized that it was relevant to an issue in the lawsuit, the evidence was unfavorable to that party unless satisfactorily explained. Pa.SSJI (Civ.) 5.60. Finally, Plaintiffs

question how their counsel can be found to have violated the court's order when he advised both the court and defense counsel of the questions he intended to ask and for what purpose, the court permitted the questions, and defense counsel did not object.

We find that Plaintiffs' counsel did not violate the court order precluding evidence of subsequent remedial repairs to the area where Ms. Antonson fell. However, as the trial court realized after the fact, Plaintiffs' counsel was improperly attempting to impeach the witness with inconsistencies between her deposition and trial testimony that were collateral to the issues at hand. All agreed that the Plaintiffs' photographs accurately depicted the area of the sidewalk where Ms. Antonson fell. Ms. Basile's photographs, to the extent they depicted that same area of the sidewalk where Ms. Antonson fell, were cumulative. Insofar as they depicted post-accident construction, they were irrelevant and inadmissible. Moreover, while subsequent remedial measures can be introduced to impeach if the other party makes conflicting statements regarding the fact of repair, or on the issue of causation or feasibility of repair, that exception was not triggered herein.

However, we find no indication that Plaintiffs' counsel intentionally flouted the trial court's order or that his conduct was vexatious, obdurate, or undertaken in bad faith. The trial court pre-approved the questions counsel proposed to ask. Had defense counsel framed the objection as one of

relevance or impeachment on a collateral matter, the trial court likely would have curtailed the inquiry or stricken the testimony and informed the jury to disregard it. A curative instruction to the effect that any photographs that were deleted or destroyed did not depict the area where Ms. Antonson fell and were irrelevant would have sufficed. This is not a situation like the one in ***Poust***, ***supra***, where this Court held that counsel's flagrant and intentional use of the obviously prejudicial word "cocaine" in violation of the prior pre-trial preclusion order of the trial court automatically warranted a mistrial. ***Id***. at 385. We held therein that, to allow counsel to violate a court order without declaring a mistrial "would defeat the intended purpose of such orders." ***Id***.

Nor did the trial court make a specific finding that counsel's conduct was vexatious, obdurate, or dilatory. Such a finding is required before attorney's fees can be awarded pursuant to § 2503(7). ***See Township of South Strabane v. Piecknick***, 686 A.2d 1297, 1301 (Pa. 1996); ***see also Yeager v. Kavic***, 765 A.2d 812, 815 (Pa.Super. 2000) (finding abuse of discretion and reversing award of counsel fees where no specific finding made and sanctions were imposed based on witness's conduct). In contrast, we affirmed the award of attorney's fees in ***Scalia v. Erie Ins. Exch.***, 878 A.2d 114, 118-119 (Pa.Super. 2005), where the trial court specifically found the plaintiffs' conduct to be obdurate and vexatious since they had no legal or factual basis for their lawsuit and its sole purpose was annoyance. On the

record before us, we find no support for the declaration of the mistrial or the imposition of the type of sanctions imposed herein.[6]

We view Plaintiffs' counsel's attempt to lay a foundation for a spoliation instruction with admissions that the witness had taken photographs of the sidewalk and deleted them as misguided, but not sufficient to warrant imposition of attorneys' fees.[7] Defense counsel was able to explain why the witness did not retain those photographs by eliciting testimony that the photographs were unrelated to the litigation.[8] Had defense counsel articulated at sidebar why such testimony was irrelevant, and that it constituted impeachment on a collateral matter, the trial court likely would have precluded the inquiry. Failing that, had defense counsel objected immediately after the testimony and sought a curative instruction,

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[6] Since we conclude that the declaration of the mistrial and imposition of sanctions was improper, we do not reach the issue of the reasonableness of the sanctions or whether the trial court should have held a hearing on their reasonableness prior to entering its order.

[7] On the facts herein, we find little support for an adverse inference instruction based on spoliation. ***See Mount Olivet Tabernacle Church v. Edwin L. Wiegand Div., Emerson Elec. Co.***, 781 A.2d 1263, 1269-70 (Pa.Super. 2001). While the trial court was not required to make such a determination, it is difficult to conceive how the Plaintiffs could have been prejudiced by Ms. Basile's destruction of the photographs where Defendants stipulated that the portion of the sidewalk where Ms. Antonson fell was accurately depicted in Plaintiffs' photographs.

[8] We see nothing that would have precluded defense counsel from eliciting additional testimony from the witness that the photographs did not depict the area of the sidewalk where the plaintiff fell without violating the court order precluding evidence of subsequent remedial repairs.

the trial court could have remedied any prejudice. We find it incongruous that Defendants did not even object at the time, but now contend that, "The damage done by the suggestion that relevant evidence had been destroyed was immediate, palpable and irreparable." Appellees' brief at 19. Based upon the record before us, and absent specific findings by the trial court of vexatious, obdurate or dilatory conduct on the part of Plaintiffs' counsel, we vacate the order imposing attorneys' fees and sanctions.

We turn now to claims of error arising from the third trial. Plaintiffs contend that the trial court's instruction on the liability of corporations for the acts or omissions of their agents or employees was legally incorrect and so confusing that a new trial is required. Appellants' brief at 40.

> In examining jury instructions, our scope of review is limited to determining whether the trial court committed a clear abuse of discretion or error of law controlling the outcome of the case. Error in a charge is sufficient ground for a new trial if the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue. Error will be found where the jury was probably misled by what the trial judge charged or where there was an omission in the charge. A charge will be found adequate unless the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to a fundamental error. In reviewing a trial court's charge to the jury, we must look to the charge in its entirety. Because this is a question of law, this Court's review is plenary.

Passarello v. Grumbine, 87 A.3d 285 (Pa. 2014), (quoting ***Quinby v. Plumsteadville Family Practice, Inc.***, 907 A.2d 1061, 1069-70 (Pa. 2006)) (citations, quotation marks, and ellipses omitted). The law is well settled that an error in a jury instruction may necessitate a new trial "if the

charge as a whole is inadequate or not clear or as a tendency to mislead or confuse rather than clarify a material issue." ***Quinby***, ***supra*** at 1069.

First, Plaintiffs allege that it was error to charge the jury that Ms. Basile was only acting as an employee of J.M. Basile & Associates, Inc., where she was also the corporate designee of J.M. Basile Property Management Corp. and VFAA. The thrust of their argument is that the apportionment of liability would have been different had the jury been properly instructed, and would have resulted in a verdict for Plaintiffs.

Defendants counter that Plaintiffs' failure to timely object prior to the charge renders any objection waived. Second, the fact that Ms. Basile was the corporate designee of VFAA for purposes of litigation did not automatically make her an employee agent of VFAA or subject VFAA to vicarious liability. Moreover, Plaintiffs did not timely propose an instruction or a special interrogatory on the verdict slip that would ask the jury to determine whether Ms. Basile was an independent contractor agent or employee agent of VFAA so as to render Owner liable.

Whether Plaintiffs waived their challenge to the jury instruction presents a question of law for which our standard of review is *de novo*; our scope of review is plenary. ***Pocono Manor Investors, LP v. Pa. Gaming Control Bd.***, 927 A.2d 209, 216 (Pa. 2007). The requirement for a timely and specific objection at trial is to "ensure that the trial judge has a chance to correct alleged trial errors." ***Dilliplaine v. Lehigh Valley Trust Co.***, 322

A.2d 114, 116 (Pa. 1974). Objections to jury instructions must be made before the jury retires to deliberate, unless the trial court specifically allows otherwise. Pa.R.C.P. 227(b).

We find the objection registered immediately following the court's charge to be timely. While counsel were given a copy of the proposed charge in advance, there is no indication that the trial court apprised counsel that any objections had to be leveled prior to the charge. Plaintiffs lodged their objections before the jury began its deliberations.

Plaintiffs submitted a proposed point for charge that included former Pa.SSJI (Civ.) 4.00C, Corporation -- Employees, that informed the jury that the corporate defendants could only act "through their officers, agents and employees" and that their acts or omissions performed within the scope of their employment, were chargeable to the corporation. ***See*** current Pa.SSJI (Civ.) 6.30. At the charge conference, the trial court and all counsel agreed that the instruction was appropriate. N.T., 11/14/12, at 114. Defendants initially questioned the propriety of Pa.SSJI (Civ.) 6.50, "Vicarious Liability (Employer and Employee Sued – Relationship and Authority Not in Dispute). Defense counsel objected to any suggestion that the acts of Property Manager would be imputed to VFAA, and wanted to ensure that if the jury were to find Ms. Basile negligent, only Property Manager would be liable. Plaintiffs argued that Ms. Basile was the agent for the Owner and an agent for her corporation because she was the corporate designee of both. ***Id***. at

116.[9] Pa.SSJI (Civ.) 6.50, which did not address the precise legal question, was read without objection. Plaintiffs did not appreciate that there remained a disputed issue regarding VFAA's liability for the acts and omissions of Ms. Basile and/or J.M. Basile, which depended on whether that latter were independent contractors or employee agents of VFAA.

The thrust of Plaintiffs' claim is that while Pa.SSJI (Civ.) 6.50 adequately addressed the vicarious liability of a corporation for the acts of its employees, it did not set forth the law of agency as it relates to independent contractors. Specifically, Plaintiffs contend that the court should have instructed the jury that Ms. Basile and J.M. Basile were agents of the Owner, VFAA, and that VFAA, as the principal, was liable for the negligence of its agents.

Defendants counter that such an instruction would have been improper. It was their position that Ms. Basile and Property Manager were independent contractors of VFAA and that VFAA delegated all responsibility for property maintenance to the entity and its employees. In determining whether one is an employee agent rather than an independent contractor, the question is whether the person or corporation performing services is subject to the principal's right of control over the manner in which the work

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[9] We agree with Defendants that VFAA's designation of Ms. Basile as its corporate designee in this litigation was not conclusive of her status as an employee agent of that entity rather than the employee of an independent contractor.

is performed. Pa.SSJI (Civ.) 6.10.[10] Defendants maintained that J.M. Basile was an independent contractor as VFAA did not control the manner in which it managed the property.[11]

It is apparent from the discussion at the charging conference that Plaintiffs failed to appreciate the distinction between independent contractors and employee agents. While it would have been appropriate for the court to

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[10] Pa.SSJI (Civ.) 6.10 provides:

> An [employee] [servant] is one whose conduct in the performance of the service is controlled or is subject to the right of control by the [employer] [master]; that is, the [employer] [master] has the right to control not only the results of the work, but also the right to direct the manner in which the work is to be performed. It is the right to control the performance of the [work] [service] that is conclusive and if such right exists, even though not exercised, the relation of [employer] [master] and [employee] [servant] may be found to be present.
>
> [An independent contractor is one who agrees to perform services for a principal, but whose physical conduct in the performance of the service is not subject to the right of control by the principal.]
>
> The [principal] [employer] [master] is liable to third persons for the wrongful conduct of his or her [agent] [employee] [servant] performed in furthering the interests, activities, affairs, or business of the [principal] [employer] [master], if the [agent] [employee] [servant] himself or herself is liable. [But one who engages an independent contractor is generally not liable to others for the wrongful conduct of the contractor.]

Pa.SSJI (Civ.) 6.10 (brackets in original).

[11] There was no claim that VFAA negligently hired J.M. Basile for the task. ***See*** Pa.SSJI (Civ.) 6.150 Employer – Independent Contractor (Employing Incompetent or Unfit Contractor).

submit to the jury the issue of whether J.M. Basile and Ms. Basile were employee agents or independent contractors of VFAA, Plaintiffs did not request such an instruction or submit a proposed point for charge on that issue.[12] Nor did Plaintiffs object to the charge on this basis. After the trial court instructed the jury, Plaintiffs' counsel objected and asked the court to instruct the jury that J.M. Basile **was** the employee/agent of VFAA. Since that relationship was disputed, such an instruction would have been improper. Having failed to either furnish a proposed point for charge or object to the charge on the proper basis, any claim of error is waived. ***See*** Pa.R.C.P. 226(a); ***Broxie v. Household Fin. Co.***, 372 A.2d 741, 743 (Pa. 1977) (holding that submission of a point for charge is sufficient to preserve a civil instruction issue).

Furthermore, even if this alleged error was not waived, Plaintiffs have have failed to demonstrate how this omission in the charge warrants a new trial. "In order to obtain a new trial the moving party must demonstrate in what way the trial error caused an incorrect result." ***Lockley v. CSX***

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[12] There is an exception to the general rule that a principal is not liable for the failure of its independent contractor to exercise due care, which is not applicable herein. ***See*** Pa.SSJI (Civ.) 6.170 (recognizing that in certain situations, the duty to exercise ordinary care cannot be delegated because the work creates a peculiar risk of harm). Furthermore, a principal may be subject to liability for negligence if it fails to use due care in choosing a careful and competent contractor to perform the work, an allegation that was not asserted herein. ***See*** Restatement (Second) of Torts, § 411; ***Lutz v. Cybularz***, 607 A.2d 1089 (Pa.Super. 1992).

Transp., Inc., 5 A.3d 383, 388 (Pa.Super. 2010). The jury's finding that VFAA was not negligent is consistent with a finding that Property Manager was an independent contractor agent, not an employee agent of VFAA, and VFAA was not vicariously liable for Property Manager's negligence. Neither the record nor the law provides any support for Plaintiffs' contention that if the jury had concluded that VFAA was vicariously liable for the negligence of J.M. Basile, the jury would have found Ms. Antonson less than 75% negligent.

Next, Plaintiffs challenge the trial court's responses to three questions submitted by the jury during its deliberations. The scope of supplemental instructions given in response to a jury's request rests within the sound discretion of the trial judge. ***Commonwealth v. Davalos***, 779 A.2d 1190, 1195 (Pa.Super. 2001). This Court recognized in ***Commonwealth v. Washington***, 418 A.2d 548, 552 (Pa.Super. 1980), that there may be situations in which a trial judge may decline to answer questions put by the jury. It is only where a jury returns again indicating confusion that the court is duty-bound to give additional instructions.

The trial court met with counsel to discuss the appropriate replies to the jury's questions. In response to the jury's request that the trial court review the law of negligence, the court re-read its earlier charge on negligence to which no objection had been lodged. After the jury exited the courtroom, Plaintiffs' counsel took issue with the fact that the court read the

definition of negligence and then launched into comparative negligence. When the court asked whether counsel was objecting, and pointed out that it just re-read the same charge it previously read, Plaintiffs' counsel agreed and dropped the matter. Since Plaintiffs did not specifically object, any claim of error is waived. ***See*** Pa.R.A.P. 302(b) ("A general exception to the charge to the jury will not preserve an issue for appeal. Specific exception shall be taken to the language or omission complained of.").

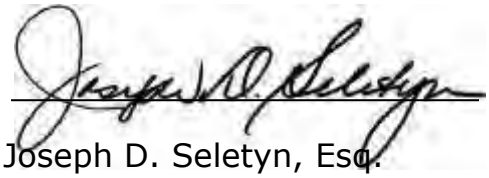
Next, Plaintiffs complain about the adequacy of the trial court's response to the jury's question: "What was the factual cause to the Plaintiffs?" N.T., 11/15/12, at 6. The court advised counsel that it proposed to tell the jury, "I read you the charge of what factual cause was, and you have to determine that based on the law that I gave you and the evidence." ***Id***. at 7. Plaintiffs' counsel specifically stated, "We have no objection to that." ***Id***. The court then added, "If they ask me to reread it, different story. But that's not what the question is." ***Id***. Now Plaintiffs argue that the court's response did nothing to provide additional guidance and that the jury left the courtroom confused. They contend that the trial court should have re-read the instruction on factual cause. Since Plaintiffs did not object at the time, in fact agreed with the court's proposed response, any claim of error is waived. Pa.R.A.P. 302(a).

Finally, Plaintiffs contend that the trial court abused its discretion when it failed to explain questions 7 and 8 on the verdict slip. Those questions

dealt with percentage of causal negligence and the award of damages. The trial court advised counsel that it intended to tell the jury to answer the verdict questions. ***Id***. at 8. Plaintiffs' counsel acknowledged that the question was difficult as there was no guidance from the jury as to what they meant. ***Id***. Now, on appeal, Plaintiffs allege that the jury obviously did not understand the law of causal negligence and apportionment of liability. Implicit in Plaintiffs' argument is the belief that the court should have re-instructed the jury on these items. However, since Plaintiffs never asked the trial court to re-instruct the jury on causal negligence and apportionment of liability, they should not be heard now to complain that the court's response was deficient. Notably, despite Plaintiffs' belief that the jury did not understand the law, it returned with a verdict a short time later that was both internally consistent and in conformity with the applicable law. We find no reason to disturb the jury's verdict.

The November 21, 2011 order imposing sanctions is vacated. Judgment affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/26/2014