

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

AVRUM M. BAUM, AS PARENT AND
GUARDIAN OF CHAYA BAUM,
INDIVIDUALLY AND ON BEHALF OF ALL
OTHERS SIMILARLY SITUATED

Appellant

v.

KEYSTONE MERCY HEALTH PLAN, AND
AMERIHEALTH MERCY HEALTH PLAN

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2677 EDA 2013

Appeal from the Order July 25, 2013
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): 3876

BEFORE: LAZARUS, J., MUNDY, J., and PLATT, J.*

MEMORANDUM BY MUNDY, J.:

FILED DECEMBER 09, 2014

Appellant, Avrum M. Baum, appeals from the July 25, 2013 order denying his motion to certify a class action against Appellees, Keystone Mercy Health Plan and Amerihealth Mercy Health Plan.¹ After careful review, we affirm in part, vacate in part, and remand for further proceedings.

* Retired Senior Judge assigned to the Superior Court.

¹ We note that "an order denying class certification is appealable under the collateral order doctrine." **McGrogan v. First Commw. Bank**, 74 A.3d 1063, 1079 (Pa. Super. 2013); **see also** Pa.R.A.P. 313(b) (stating that an order is immediately appealable as a collateral order if said order is "separable from and collateral to the main cause of action[,]" where the right involved is too important to be denied review and the question presented is *(Footnote Continued Next Page)*)

The trial court summarized the relevant factual and procedural history of this case as follows.

- (4) [Appellant] is a resident of Philadelphia, Pennsylvania, and is the father and guardian of Chaya Baum, a special-needs minor child who has health insurance with [Appellee] Keystone Mercy Health Plan. [Appellant] himself was and is not insured by [Appellees].
- (5) The Commonwealth of Pennsylvania pays for Chaya Baum's health insurance with Keystone through the Medicaid program.

...

- (10) Sometime in 2010, one of the [Appellees]' employees copied data from [Appellees]' computer system onto an unencrypted Flash Drive that was misplaced and never found.
- (11) The Flash Drive contained private health information (PHI) that is protected: by the [Appellees]' own practices; under federal law governing Privacy of Individually Identifiable Health Information (HIPPA Privacy Rule), 45 C.F.R. 160 et seq.; and under Pennsylvania Law, the Privacy of Consumer Health Information, 31 Pa. Code § 416.
- (12) On September 2010, Barbara G. Jones, [Appellees]' Chief Compliance & Privacy Officer, learned that the Flash Drive had been lost. She conducted an investigation that involved, among other things, identifying what information was on the Flash Drive and enlisting assistance of all [Appellees]' employees in finding it.

(Footnote Continued) _____

such that if review is postponed until final judgment in the case, the claim will be irreparably lost[]").

- (13) Through Ms. Jones, [Appellees] provided notice of the missing Flash Drive to the Pennsylvania Department of Public Welfare (DPW) on October 5, 2010, and to the [F]ederal Department of Health and Human Services Office for Civil Rights (OCR) on October 25, 2010.
- (14) The information on the Flash Drive included, variously, names, addresses/zip codes, date of birth, social security numbers, member identification numbers and clinical information, including medications, lab results and health screening information.
- (15) According to the report that [Appellees] sent to DPW, the Flash Drive contained partial social security numbers of 801 individuals and the complete social security numbers of seven individuals. For the remaining more than 283,000 individuals, the data included, variously, member identification numbers, clinical health screening information, names and addresses.
- (16) [Appellees] sent notices to 285,691 individuals concerning the loss, informing those individuals what personal data was on the Flash Drive and inviting them to contact [Appellees] for additional information.
- (17) [Appellees] offered credit monitoring to the 808 individuals whose partial or complete social security numbers appeared on the Flash Drive ... because, in [Appellees]' view, their PHI was most at risk. [Appellant] was not among the 808 individuals offered such monitoring.
- (18) The notice that [Appellant] received in October of 2010 informed him that his daughter's member identification number ... and health screening information were on the lost Flash Drive.

(19) Neither Chaya Baum's name, social security number nor address was on the Flash Drive.

(20) [Appellant] never contacted [Appellees] for additional information.

...

Trial Court Opinion, 7/25/13, at 2, 4-6.

On January 28, 2011, Appellant filed a complaint alleging a violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL), as well as claims of negligence and negligence *per se*. On February 25, 2011, Appellees filed a notice of removal of the case to the United States District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1441. On November 14, 2011, the District Court remanded this case back to the trial court. Thereafter, Appellant filed an amended complaint on September 20, 2012 again alleging a violation of the UTPCPL, as well as claims of negligence and negligence *per se*, to which Appellees filed their answer and new matter on October 10, 2012. Appellant filed his reply to Appellee's new matter on October 23, 2012.

Relevant to this appeal, on October 19, 2012, Appellant filed a motion for class certification. Appellees filed their memorandum in opposition on November 16, 2012. Appellant filed his reply memorandum in support of class certification on March 1, 2013. The trial court conducted a hearing on Appellant's class certification motion on April 29, 2013. On July 25, 2013,

the trial court entered an order denying Appellant's motion for class certification. On August 21, 2013, Appellant filed a timely notice of appeal.²

On appeal, Appellant raises the following issues for our review.

1. Whether the [trial] court abused its discretion by denying [Appellant]'s motion for class certification predicated upon factual findings contradicted by the otherwise uncontroverted record evidence when it held that [Appellant] failed to demonstrate predominance of issues common to the class over solely individual issues[?]
2. Whether the [trial] court abused its discretion when, in deciding [Appellant]'s motion for class certification, it held that the uncontroverted testimony of [Appellant]'s expert lacked weight and credibility[?]
3. Whether the [trial] court abused its discretion when, in deciding [Appellant]'s motion for class certification, it declined to draw reasonable inferences in [Appellant]'s favor[?]
4. Whether the [trial] court abused its discretion when, in deciding [Appellant]'s motion for class certification, it declined to credit undisputed documentary and testimonial evidence in the record showing common class-wide harm[?]
5. Whether the [trial] court abused its discretion when, in deciding [Appellant]'s motion for class certification, it found that [Appellant] was not typical of the putative class[?]

Appellant's Brief at 4-5.³

² Appellant and the trial court have complied with Pennsylvania Rule of Appellate Procedure 1925.

We begin by noting our standard of review.

In Pennsylvania, trial courts are vested with broad discretion in deciding whether to certify a class action. We will not disturb an order denying class certification on appeal unless the trial court neglected to consider the requirements of the rules or abused its discretion in applying them.

McGrogan, supra at 1080. Furthermore, Pennsylvania Rule of Civil Procedure 1702 sets the criteria for class actions, and provides as follows.

Rule 1702. Prerequisites to a Class Action

One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
- (4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709; and
- (5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

(Footnote Continued) _____

³ We note that Appellant presents his arguments in his brief in a different order than that in his statement of the questions presented on appeal. However, for ease of review, we will follow the designations contained in Appellant's statement of questions presented.

Pa.R.C.P. 1702.

Instantly, Appellant's issues challenge the trial court's denial of class certification on several different bases. By its plain text, Rule 1702 is an all or nothing rule, *i.e.*, Appellant must satisfy all five criteria in order for class certification to be proper. As a result, we elect to address only Appellant's fifth issue as it pertains to his claims of negligence, as it is dispositive of this appeal concerning inclusion of his negligence counts into the proposed class.

In his fifth issue, Appellant avers that the trial court abused its discretion when it concluded that he could not satisfy the typicality requirement set forth in Rule 1702(3), because "there was no evidence that there was any other way that the Flash Drive could be used to result in identity theft or loss of privacy[.]"⁴ Appellant's Brief at 19, *quoting* Trial Court Opinion, 7/25/13, at 20. Appellees' counter that even assuming the trial court had found Appellant's expert's testimony to be credible "this would not enable [Appellant] to establish the requisite elements for class certification because [the expert]'s testimony showed only that someone finding the lost Flash Drive would not be able to identify Chaya Baum or the vast majority of the individuals whose information was on the Flash Drive." Appellees' Brief at 11.

⁴ Appellant's complaint characterized the class as consisting of "all individuals whose PHI or other confidential, personal information or privacy was compromised through [Appellees]' improper handling of the Flash Drive." Appellant's Amended Complaint, 9/20/12, at ¶ 10.

As noted above, Rule 1702(3) requires a class action proponent to show typicality. Pa.R.C.P. 1702(3). "This factor requires that the class representative's overall position on the common issues is sufficiently aligned with that of the absent class members to ensure that his pursuit of his own interests will advance those of the proposed class members." ***Baldassari v. Suburban Cable TV Co., Inc.***, 808 A.2d 184, 193 (Pa. Super. 2002) (citation omitted), *appeal denied*, 825 A.2d 1259 (Pa. 2003). The trial court concluded that "[t]he totality of [Appellant]'s expert testimony ... points to the conclusion that the loss of the Flash Drive created no risk of identity theft because the Member ID is not 'the key' to an individual's identity." Trial Court Opinion, 7/25/13, at 20.

At the certification hearing, Appellant called Murali Krishna Chemuturi, an expert in computer software. N.T., 4/29/13, at 108. Chemuturi testified that he was given, among other documents for his review, two database files. ***Id.*** at 110. He further testified that he was able to learn certain health information pertaining to Chaya Baum from this database. ***Id.*** at 113-114. Chemuturi was able to obtain this information about Chaya Baum using her Member ID number to identify her. ***Id.*** at 112. According to Chemuturi, "[t]he member ID is the key for the particular person in the system." ***Id.*** at 117. However, on cross-examination, Chemuturi acknowledged that he was only able to obtain Chaya's member ID number through counsel, specifically he was "given a photocopy of the identity card

of Miss Chaya Baum on which her number and other details [were] there[.]” **Id.** at 126. In addition to Chemuturi’s testimony, Appellant acknowledged during his testimony that neither his daughter’s name or social security number were on the missing Flash Drive. **Id.** at 44, 52.

After careful review, of the certified record, we conclude Appellant has not shown the typicality required to certify this case as a class action within the meaning of Rule 1702. Appellant acknowledged that his daughter’s name and social security number were not contained on the missing Flash Drive. Furthermore, Appellant’s own expert testified that the only way he was able to identify any of the information pertaining to Chaya Baum was because he was given her member ID number for the purposes of his review. As a result, we conclude the trial court’s findings are amply supported by the record, and the trial court correctly found that Appellant did not show the typicality required to certify a class action lawsuit. Since Appellant did not satisfy the typicality requirement under Rule 1702(3), we need not address his remaining arguments pertaining to his negligence claim, as Appellant was required to satisfy all of Rule 1702’s prongs in order to prevail. Therefore, we conclude the trial court did not abuse its discretion when it denied Appellant’s certification motion concerning Appellant’s claim of negligence. **See McGrogan, supra.**

We next address Appellant’s claim that the trial court abused its discretion when it denied his motion to certify his claim under UTPCPL’s

catch-all provision.⁵ We begin by observing that a private cause of action is explicitly allowed under the UTPCPL.

§ 201-9.2. Private actions

(a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, may bring a private action to recover actual damages or one hundred dollars (\$100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars (\$100), and may provide such additional relief as it deems necessary or proper. The court may award to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorney fees.

73 P.S. § 201-9.2(a). This Court has explained the purpose and scope of private causes of action under the UTPCPL as follows.

The UTPCPL is Pennsylvania’s consumer protection law and seeks to prevent unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. The purpose of the UTPCPL is to protect the public from unfair or deceptive business practices. **Our Supreme Court has stated courts should liberally construe the UTPCPL in order to effect**

⁵ We note that Appellant did not list this issue in his statement of questions presented in his brief. **See, e.g.,** Pa.R.A.P. 2116(a) (stating, “[t]he statement of the questions involved must state concisely the issues to be resolved ... [and n]o question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby[]”). Nevertheless, as Appellant preserved this issue and developed the same in the argument section of his brief, we decline to find waiver on this basis.

the legislative goal of consumer protection.

The UTPCPL provides a private right of action for anyone who suffers any ascertainable loss of money or property as a result of an unlawful method, act or practice.

Fazio v. Guardian Life Ins. Co. of Am., 62 A.3d 396, 405 (Pa. Super. 2012) (emphasis added; citation omitted), *appeal denied*, 72 A.3d 604 (Pa. 2013). Historically, “[t]o bring a private cause of action under the UTPCPL, a plaintiff must show that he justifiably relied on the defendant’s wrongful conduct or representation and that he suffered harm as a result of that reliance.” **Yocca v. Pittsburgh Steelers Sports, Inc.**, 854 A.2d 425, 438 (Pa. 2004) (citation omitted). In this case, the trial court concluded that Appellant’s UTPCPL claim did not satisfy the commonality requirement of Rule 1702(2) because “a plaintiff bringing a private action under the UTPCPL must show reliance, [therefore,] class treatment of a UTPCPL claim sounding in fraud is inappropriate.” Trial Court Opinion, 7/25/13, at 18.

However, in the case *sub judice*, Appellant’s complaint alleged a claim under the catchall provision of the UTPCPL, which reads, in relevant part, as follows.

§ 201-2. Definitions

As used in this act.

...

(4) “**Unfair methods of competition**” and “**unfair or deceptive acts or practices**” mean any one or more of the following:

...

(xxi) Engaging in any other fraudulent **or deceptive conduct** which creates a likelihood of confusion or of misunderstanding.

73 P.S. § 201-2(4)(xxi) (emphasis added). This Court has recently held that, to the extent a complaint alleges **deceptive** conduct under the catchall provision of the UTPCPL, a plaintiff need not show justifiable reliance to recover. **Grimes v. Enterprise Leasing Co. of Phila., LLC**, 66 A.3d 330, 337 n.4 (Pa. Super. 2013), *appeal granted*, 80 A.3d 1058 (Pa. 2014); **Bennett v. A.T. Masterpiece Homes at Broadsprings, LLC**, 40 A.3d 145, 152 n.5, 154-155 (Pa. Super. 2012).⁶ In this case, Appellant's complaint specifically alleged both fraudulent and deceptive conduct. Appellant's Amended Complaint, 9/20/12, at ¶ 33(b). Therefore, the trial court's conclusion, that Appellant's motion to certify his UTPCPL claim as a class action failed due to issues regarding reliance, was not correct to the extent deceptive conduct was alleged. **See Grimes, supra; Bennett, supra**. Due to the trial court's conclusion that reliance was required and could not be shown, it did not give any further consideration to the other Rule 1702

⁶ We note Appellant cites to **Grimes** in his reply brief. **See** Appellant's Reply Brief 9 n.6. Furthermore, in the trial court, Appellant noted the split of authority as to whether reliance was required at all under the UTPCPL after the most recent amendments. **See** Appellant's Reply Memorandum of Law in Further Support of Motion for Class Certification, 3/1/13, at 9.

factors.⁷ It is not for this court in the first-instance to make findings and conclusions regarding this or the other Rule 1702 factors. Therefore, we conclude the best course of action is to vacate in part and remand to the trial court. On remand, the trial court is directed to make findings and conclusions regarding the remaining Rule 1702 factors as they relate to Appellant's UTPCPL deceptive conduct claim.

Based on the foregoing, we conclude the trial court did not abuse its discretion when it denied Appellant's motion for class certification regarding his claim of negligence and his claim under the UTPCPL regarding fraudulent conduct. However, we also conclude that the trial court abused its discretion when it held that Appellant's UTPCPL claim could not be certified to the extent it alleged deceptive conduct under the UTPCPL's catchall provision. Accordingly, the trial court's July 25, 2013 order is affirmed in part, vacated in part, and the case is remanded for further proceedings, consistent with this memorandum.

Order affirmed in part and vacated in part. Case remanded.
Jurisdiction relinquished.

⁷ The trial court noted that Appellees also argued Appellant's UTPCPL claim did not meet the commonality requirement because he "did not purchase Chaya Baum's insurance [and] he suffered no ascertainable loss[.]" Trial Court Opinion, 7/25/13, at 18. However, the trial court only stated that it agreed with Appellees regarding their argument on reliance. *Id.* As both parties' arguments on appeal focus exclusively on reliance, we express no opinion on these other two arguments and the trial court may consider them on remand.

J-A30020-14

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/9/2014