IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

THOMAS JEFFERSON UNIVERSITY, ET. AL.,	:	June Term 2001
Plaintiffs,	:	No. 002507
v.	:	Commerce Program
DR. RONALD WAPNER, ET. AL.,	:	
Defendants.	:	Post-Trial Motion

ORDER

AND NOW, this 22nd day of October, 2004, upon consideration of the parties' respective Motions for Post-Trial Relief, responses in opposition, memoranda, all matters of record, oral argument and in accord with the contemporaneous Memorandum Opinion, it hereby is **ORDERED** and **DECREED** that

1. Plaintiffs' Motion for Post-Trial relief is **DENIED**.

2. Defendants' Motion for Post Trial relief is **DENIED**.

BY THE COURT,

_____
C. DARNELL JONES, II, J.

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MEMORANDUM OPINION

JONES, II, J.

Presently before the court are the Post Trial Motions of the parties. For the reasons that follow, the parties' Post Trial Motions are **Denied**.

BACKGROUND

In this consolidated action, Plaintiffs Thomas Jefferson University and Thomas Jefferson Physicians ("TJU") instituted suit against Dr. Ronald Wapner ("Dr. Wapner") for breach of the duty of loyalty, breach of contract, tortious interference with existing and prospective contractual relations, misappropriation of trade secrets and civil conspiracy. TJU also instituted suit against Dr. Amy Levine ("Dr. Levine") for breach of the duty of loyalty, breach of contract, tortious interference with existing and prospective contractual relations and civil conspiracy.

In response, Drs. Levine and Wapner filed a counterclaim against TJU alleging violations of the Pennsylvania's Wage Payment and Collection Law, 43 P.S. 260.1 et. seq. (the "WPCL").[1] After a two week trial, TJU's claims were submitted to a jury as well as Dr. Wapner's and Dr. Levine's counterclaims for violation of the WPCL. On

[1] Dr. Wapner's counterclaim also alleged a claim for breach of contract, tortious interference with contract and defamation. These counterclaims were withdrawn during the trial.

November 6, 2003, a jury found in favor of Dr. Ronald Wapner and Dr. Levine on each count. The jury also found TJU was guilty of bad faith in its wrongful withholding of wages from Dr. Wapner. The jury also ruled that TJU did not owe wages to Dr. Levine under the WPCL.

On November 17, 2003, TJU filed post trial motion. The post trial motion asserts the following: 1) TJU is entitled to judgment notwithstanding the verdict on the duty of loyalty claim against Drs. Wapner and Levine, 2) TJU is entitled to judgment in their favor on the WPCL claim, 3) TJU is entitled to a New Trial on the duty of loyalty claim against Drs. Wapner and Levine since the verdict was against the great weight of the evidence, 4) TJU is entitled to a New Trial on the WPCL claim since the court erred in charging the jury on the WPCL claim.[2] Drs. Levine and Wapner also filed post trial motions.[3]

DISCUSSION

I. Jefferson Is Not Entitled to Judgment Notwithstanding the Verdict (JNOV).

A. Legal Standard For JNOV

The standard for review for judgment notwithstanding a verdict is whether the moving party is entitled to judgment as a matter of law because the evidence is such that no two reasonable minds could disagree and that the jury's verdict is against the weight of the evidence. Moure v. Raeuchle, 529 Pa. 394, 604 A.2d 1003 (1992). When reviewing a request for JNOV, the trial court must review the facts in a light most

[2] TJU raises additional issues in its Motion for Post Trial Relief. However, since TJU failed to brief or argue these issues, said issues must be deemed waived for purposes of the instant motion.
[3] Drs. Levine and Wapner argued that the court should have found as a matter of law that defendants did not breach their duty of loyalty to TJU. This court will deny defendants' motion for post trial relief since a factual question existed as to whether defendants' duty of loyalty was breached. Accordingly, defendants' motion for post trial relief is denied.

favorable to the verdict winner. Moure, supra. Because the court is, in a sense, intruding upon the province of the jury, the trial judge has a duty to review the entire record to determine if the verdict is against the clear weight of the evidence or whether there exists a serious injustice. Hilbert v. Katz, 309 Pa. Super. 466, 455 A.2d 704 (1983). Judgment NOV should only be granted in the clearest of cases.

B. TJU Did Not Preserve its Right To Seek a Judgment Notwithstanding the Verdict on the Duty of Loyalty Claim.

TJU argues that it is entitled to JNOV since it conclusively established that Drs. Wapner and Levine breached their duties of loyalty such that no two reasonable minds could disagree that the outcome should have been rendered for plaintiffs. Pennsylvania Rule of Civil Procedure 227.1 (b) relating to Post-Trial Relief, states in part:

> (b) Post trial relief may not be granted unless the grounds therefore,
> (1) if then available, were raised in pre-trial proceedings or by motion, objection, point for charge, request for findings of fact or conclusions of law, offer of proof or other appropriate method at trial; and
>
> Note: If no objection is made, error which could have been corrected in pretrial proceedings or during trial by timely objection may not constitute a ground for post trial relief.
>
> (2) are specified in the motion. The motion shall state how the grounds were asserted in pre-trial proceedings or at trial. Grounds not specified are deemed waived unless leave is granted upon good cause shown to specify additional grounds.

Pa. R. Civ. P. 227.1 (b). Subdivision b (1) states two requirements for granting post trial relief, (1) the grounds for the relief requested must have been raised in pretrial proceedings or at trial and (2) the grounds must be stated in the motion. Explanatory Comments to Rule 227.1 (b)- 1983. A ground for a new trial or jnov must not be raised for the first time in the Motion for Post Trial Relief. It must be raised timely in pre-trial

proceedings or during the trial, thus affording the court the opportunity to correct the error. Id.

After reviewing the record in this matter, the court finds that TJU failed to raise during the pre-trial proceedings or during the trial any objections or exceptions regarding the duty of loyalty claim. In its memorandum in support of its post trial relief, TJU contends that it preserved the issue of JNOV by requesting a binding jury instruction for the duty of loyalty claim. A thorough review of the record in this matter belies this contention.

The record demonstrates that TJU submitted the following proposed jury instruction on the duty of loyalty claim:

> Under the law, an employee or agent like Drs. Wapner and Levine owed a duty of loyalty to Thomas Jefferson University and Jefferson University Professionals during their employment with those entities. What that means is that Drs. Wapner and Levine owed a duty to Jefferson to act with the utmost good faith to further and advance the interest of Jefferson. They were required to act solely for the benefit of Jefferson in all matters that concerned their employment.
>
> Thus, if you find that Dr. Levine, through her actions and inactions while she was employed by and paid by Jefferson, failed to act in the best interests of Jefferson, then you must find that Dr. Levine breached the duty of loyalty she owed to Jefferson.
>
> Similarly, if you find that Dr. Wapner, through his actions and inactions while he was employed by and paid by TJU and JUP, failed to act in the best interests of Jefferson, then you must find that Dr. Wapner breached the duty of loyalty he owed to Jefferson.

(Plaintiffs' Proposed Point for Charge, Supplemental Point for Charge No. 1).

TJU contends that by requesting and being denied this binding charge, it preserved its right to seek a JNOV. The court finds that TJU's contention is flawed for several reasons. First, the proposed instruction requested by TJU on the duty of loyalty claim does not constitute a binding instruction. Before the issuance of a binding

instruction, a court must consider the facts and the evidence in a light most favorable to the opposing party, giving the benefit of all reasonable inferences there from. Duquesne Light Co. v. Woodland Hills Sch.Dist., 700 A.2d 1038, 1046 (Pa. Commw. 1997)(McElhinny v. Iliff, 436 Pa. 506, 260 A.2d 739 (1970). "Binding instructions may not be given if there is a question of fact properly submissable to the jury." Duquesne, supra. (quoting Dible v. Vagley, 417 Pa. Super. 302, 307, 612 A.2d 493, 495 (1992)). Where there is evidence which alone would justify an inference of a disputed fact, it must go to the jury no matter how strong or persuasive may be the countervailing proof. McElhinny.

Here, TJU's proposed jury instruction presented a question of fact for the fact finder. The proposed charge specifically instructed the jury to decide if Drs. Wapner and Levine failed to act in the best interests of TJU. Had TJU submitted a binding instruction and the evidence supported same, then the issue of whether Dr. Levine and Dr. Wapner failed to act in the best interests of TJU would not have been left for the jury to determine and the court would have informed the jury that as a matter of law Dr. Levine and Dr. Wapner failed to act in the best interest of TJU. This however was not the case. As such this court finds that the jury instruction proposed by TJU was not a binding instruction.[4]

Second, assuming arguendo that the proposed charge submitted by TJU on the duty of loyalty claim constituted a binding instruction, TJU still failed to preserve its rights to review. "Unless a specific exception has been taken to an alleged error in the trial court's instructions, the alleged error will be deemed waived and will not be

[4] Furthermore, TJU did not move for a directed verdict on the duty of loyalty claim. The court could only infer from TJU's failure to move for a directed verdict that it too believed that questions of fact existed on the duty of loyalty claim thus further supporting the position that the proposed jury instruction on the duty of loyalty is not a binding instruction.

considered by the reviewing court." Gray v. H.C. Duke & Sons, Inc., 387 Pa. Super. 95, 563 A.2d 1201 (1989). "Where a party fails to specifically object to a trial court's jury instruction, the objection is waived and cannot subsequently be raised on appeal." Cruz v. Northeastern Hospital, 2002 Pa. Super. 185, 801 A.2d 602 (2002) (quoting Randt v. Abex Corp., 671 A.2d 228, 232 (Pa. Super. 1996)). By specifically objecting to any obvious error, the trial court can quickly and easily correct the problem and prevent the need for a new trial. Filmore v. Hill, 445 Pa. Super. 324, 665 A.2d 514 (1995)(citing Dilliplaine v. Lehigh Valley Trust Co., 457 Pa. 255, 260, 322 A.2d 114, 116 (1974)).

During the charging conference, the court informed TJU that it was inclined to go forward with the instructions as proposed by the defendants since they were more concise and less argumentative. N.T. 11/03/03, p. 5. The court further stated that the defendants' instructions were subject to modification and input from counsel. Id. TJU suggested modifications to defendants' jury instructions which were accepted by the court and made exceptions on the record for those modifications which were not accepted by the court.

In regard to the proposed instruction for the duty of loyalty claim, the following discussion ensued:

THE COURT: …Next. Breach of duty of loyalty.

MR. ROSENAU: That one was okay, Your Honor, although we prefer ours. Have that noted for the record that one is okay.

THE COURT: Next. There was a submission by the plaintiffs as to breach of fiduciary duty,

MR. ROSENAU: It's duty of loyalty as well. It's a subset of overall fiduciary duty.

THE COURT: If I give this, I don't have to give the –would you accept me giving this breach of duty of loyalty on Page 21 proposed by the defense without giving

the extended breach of fiduciary duty relationship instructions that you proposed which is 4.16, 4.17, 4.18, and then you had damages at 4.19.

MR. ROSENAU: Well, as far as the elements, we're okay with that.

THE COURT: You'll accept the defense?

MR. ROSENAU: On Page 21, yes.

N.T. November 3, 2003, p. 26.

TJU never requested an exception for the breach of duty of loyalty instruction nor did they except or object to the instruction after the jury was charged. N.T. 11/3/03 p. 48, N.T. 11/5/03 p. 202. Based on the record, the court could only conclude that TJU did not take an exception or object to the duty of loyalty instruction because it agreed at the time of the trial with the instruction given by the court. TJU now attempts to ignore the specific requirement provided for within the rules of procedure to raise their objection during the proceedings with the shield of "binding instruction". The court's research has not uncovered any authority excusing a party from objecting or making an exception when a "binding instruction" is requested by a party.

In Gray v. H.C. Duke & Sons, Inc., 387 Pa. Super. 95, 563 A.2d 1201 (1989), defendant contended that the trial court erred in refusing to give a binding instruction. The Superior Court found that defendant waived its right to make such a contention. The court reasoned "[U]nless a specific exception has been taken to an alleged error in the trial court's instructions, the alleged error will be deemed waived and will not be considered by the reviewing court." Id at 1208 (quoting Wilkerson v. Allied Van Lines, Inc., 360 Pa. Super. 523, 537, 521 A.2d 25, 32 (1987)). Although defendant submitted a point for charge, it failed to take specific exception to the court's refusal to give a binding

charge. Id. Like the defendant in Gray, TJU failed to take a specific exception to the court's refusal to give a "binding" charge.

In support of its position, TJU relies upon Caldwell v. Philadelphia, 358 Pa. Super. 406, 517 A. 2d 1296 (1986). Cadwell is inapposite. In Cadwell, plaintiff sued the City of Philadelphia for negligence arising from the Philadelphia police's failure to obtain as part of its auto accident investigation the identity of the driver who struck the plaintiff. At trial, the City submitted a binding instruction which stated "there is no legal duty imposed upon the City of Philadelphia to insure the success of its police investigation, and it cannot be held legally responsible for unsuccessful investigations." Id. The trial court refused to give the instruction and the City took an exception to that refusal. The City was held liable and appealed. The Superior Court held that the City had not waived its right to move for JNOV because they had requested a specific point for charge and because the City specifically objected to the trial court's denial of the charge. Here, unlike the City in Cadwell, TJU failed to specifically object when the court failed to give its "binding" instruction. Thus, contrary to TJU's claim a binding instruction does not excuse one from raising an objection or taking an exception at the time of trial.

Because TJU did not object or make an exception to the duty of loyalty jury charge, its claim for JNOV is now waived. See Dilliplaine v. Lehigh Valley Trust Co., 457 Pa. 255, 260, 322 A.2d 114, 117 (1974)(holding that in order to preserve an issue for review, trial counsel is required to make a timely, specific objection during trial). [5]

[5] TJU also seeks JNOV and a new trial on Dr. Wapner's counterclaim for WPCL. Unlike the duty of loyalty claim, TJU preserved its right to seek JNOV and a new trial. N.T. 11/6/03 p. 9, 11.

C. JNOV Should Not Be Entered in TJU's Favor on the Duty of Loyalty Claim against Drs. Levine and Wapner.

TJU argues that at trial it was conclusively established that Drs. Levine and Wapner breached their duty of loyalty such that no two reasonable minds could disagree that the outcome should have been rendered in TJU's favor. Notwithstanding TJU's failure to preserve such a claim for this court's consideration, the court nonetheless denies TJU's request for a motion JNOV.

After the evidence was presented, the jury was given the following instruction on the duty of loyalty claim:

> An employee owes a duty of loyalty to his or her employer during his or her employment. This duty requires that the employees act in good faith in the furtherance and advancement of the interests of his or her employer while employed. And prohibits an employee from acting or agreeing to act for persons whose interest conflict with those of his or her employer. This duty does not, however, continue after the employee resigns.
>
> To recover on these claims the plaintiffs must establish by a preponderance of the evidence that defendants failed to act in good faith in the furtherance and advancement of the interest of the plaintiffs prior to resigning their employment.
>
> N. T. November 5, 2003 at 182-83.

In accordance with this instruction, the jury was required to find whether Drs. Levine and Wapner acted in good faith in the furtherance and advancement of the interest of TJU prior to resigning their employment.

TJU claims that Drs. Levine and Wapner breached their duty of loyalty when they disclosed confidential operational information to Hahenmann, attended a meeting with Mercy Fitzgerald on October 27, 2000 and when Dr. Wapner actively solicited Mercer. (TJU memorandum in support of Post Trial Motion p. 13-14). After considering the evidence presented, the jury could have concluded from the evidence that Drs. Wapner

and Levine did not breach their duty of loyalty to TJU. The evidence demonstrates that the alleged confidential financial and operational information was not confidential at all but was generally known in the industry. The number of sessions and services provided to satellite hospitals is not confidential. N.T. 11/04/03 at 133-135. Moreover, the evidence presented to the jury demonstrated that the scope of services that would be needed at Mercy Fitzgerald was not disclosed by Dr. Levine or Dr. Wapner but by Dr. Shima, the director of the Department of Obstetrics and Gynecology at Mercy Fitzgerald who informed Dr. Klasko of the scope of services required at the hospital. Similarly, the testimony of several witnesses confirmed that the financial information relating to the services performed by TJU at the satellite hospitals was not confidential. N.T. 10/29/03 34-35; N.T. 10/30/03 at 132; N.T. 11/04/03 at 141-42; N.T. 10/28/03 at 28-32; 10/28/03 at 131. Dr. Wapner testified that the only information he provided to Hahnemann were general estimates of the average cost per session which is well known in the small medical community of maternal fetal medicine. N.T. 10/30/03 at 130-32, 138-39.

With respect to TJU's claim that Dr. Wapner breached his duty of loyalty when he actively participated in the solicitation of Mercy Fitzgerald to leave TJU and go to Hahnemann, the evidence demonstrates the following: At the end of September 2000 or October 2000, Wapner contacted Dr. Toomey, the Administrator at Mercy Fitzgerald, to inform him that he resigned from TJU. Wapner testified that he felt it was his professional obligation to his colleagues and patients to inform them he was leaving. N.T. 11/04/03 at 98-99. Wapner did not call Dr. Toomey to solicit business. N.T. 11/04/03 at 99. The subject of Hahnemann providing perinatal services did come up after

Dr. Toomey told him that Hahnemann and Mercy Fitzgerald had recently entered into an academic affiliation. Id.

The evidence further suggests that the October 27, 2000 meeting was requested by Mercy Fitzgerald to discuss how the relationship between his new employer Hahnemann MCP and a new affiliate of Hahnemann MCP, Fitzgerald Mercy relationship, could go forward. N.T. p. 10/24/03 at 121-122. At the time of the meeting, the contract between TJU and Mercy Fitzgerald was expired and no steps were taken to renegotiate the contract. N.T. 11/04/03 at 102. Indeed, TJU, upon learning of Wapner's resignation on or about September 7, 2000, made a decision to abandon its relationships at the non-profitable satellite hospitals because it simply did not have the staffing or desire to maintain those relationships. N.T. 10/27/03 at 203; N.T. 10/28/03 at 10-11. Mercy Fitzgerald was of no economic benefit to TJU because it made no money. Indeed, Dr. Levine, who was the doctor primarily responsible for serving the patients at Mercy Fitzgerald and was the lowest paid physician in the department, upon announcing her resignation was not persuaded by TJU to remain as done in the past with other doctors. Moreover, TJU knew that contracts would follow the doctors who left. Rubinsohn D.T. 8/16/01 at 98-99. Dr. Klasko testified that in the medical field, where the stakes are high, when doctors change their places of employment, relationships follow. N.T. 10/29/03 at 30-31; 119-120. This was confirmed by Dr. Bolognese, Dean Nasca, Mr. Rubinsohn and Dr. Berghella.

Dr. Levine testified that she was on vacation and contacted by Dr. Wapner's secretary that a meeting was scheduled at Mercy Fitzgerald for October 27. N.T. 10/23/03 at 94-95. Dr. Levine testified that she did not arrange the meeting, did not

know the purpose of the meeting and merely attended the meeting for informational purposes only to see if she wanted to work at Hahnemann. Id. at 95-96. Dr. Levine did not contribute anything to the meeting. N. T. 10/24/03 at 126-127, N.T. 10/29/03 at 88.

Dr. Levine testified that Dr. Toomey provided the contract to her. The contract was not marked confidential and did not contain confidential information. Moreover, at the point the contract was provided to her, Fitzgerald Mercy already decided to go with Dr. Wapner.

As for TJU's conflict of interest policy, Wapner and Levine testified that they were familiar with this policy that governed faculty members and employees. Wapner testified that he dedicated his whole life to devoting his best efforts in the furtherance of TJU's mission. N.T. 10/30/00 p.106. Drs. Levine and Wapner respectively testified that they believe they acted in the interest of TJU. N. T. 10/31/03 p. 10-11; N.T. 10-23-03 p. 85. Each testified to a belief that by discussing their departure dates with the chair of the department and obtaining his approval that they were acting in good faith. Each testified that they were dissatisfied with TJU and did not hide such dissatisfaction from their supervisor. Dr. Levine testified that by discussing employment at another institution is not a conflict of interest. N.T. 10/24/03 at 23-25.

A review of the conflict of interest policy demonstrates that the jury could have concluded that the actions of Dr. Levine and Wapner did not constitute a conflict of interest since the policy at issue did not specifically define conflict of interest and specifically states that the policy is subject to interpretation and degree. P-100. Moreover, the policy does not inform doctors what is and what is not confidential. Thus,

a jury could have rightfully concluded that whether an action constitutes a conflict of interest is subject to the interpretation of the individual doctor.

As for the Mercer contract, the evidence demonstrated that TJU intentionally decided not to meet its contractual obligations and provide physicians as promised. Rubinsohn D.T. 8/28/02 at 130, II. 4-24. In fact, Dr. Bolognese testified that he attempted to renegotiate the contract with Mercer in May 2000 but an agreement could not be reached. N.T. 10/28/03 at 153. Moreover, the jury could have concluded that any actions taken by Wapner with respect to the Mercer contract occurred after he resigned and left Hahnemann. The record demonstrates that Wapner spoke with Dr. Coopersmith in November 2000 at Mercer to tell him he had left TJU, N.T. 10/31/03 at 38; N.T. 10/24/03 at 154-55; that in November 2000 draft contracts were circulated which contemplated the provision of perinatology services by the Wapner Group, N.T. 10/24/03 at 172-173; the obstetricians at Mercer voted to go with Wapner, N.T. 10/24/03 p. 161; Wapner left TJU in November 2000, N.T. 10/30/03 p. 155 and that Hahnemann began providing services at Mercer after Mercer terminated its contract with TJU at the end of December 2000 because TJU failed to show up for scheduled sessions. N.T. 10/24/03 at 163-165.

Based on this testimony, the jury could have concluded that Drs. Levine and Wapner did not violate of their duty of loyalty to TJU.

D. Judgment Should Not Be Entered in TJU's Favor on the Claim that TJU did not have a Good Faith Assertion of a Right of Set Off as to Dr. Wapner's Wages.

TJU argues that the jury's determination that plaintiffs did not have a good faith assertion of a right of set off as to wages owed to Dr. Wapner should be set aside and

judgment on that issue should be entered in TJU's favor. The record does not support TJU's contention.

The evidence presented at trial demonstrates that Wapner fulfilled all of his obligations to TJU. N.T. 10/27/03 p. 190. Indeed, Dean Nasca testified that it was not until the late Winter or early Spring 2001 that TJU first heard anything about the alleged misconduct of Wapner. Id. p. 196. The evidence further demonstrates that Wapner stayed beyond his stated departure date to assist TJU in the transition and participated in helping the parties keep the National Institute of Health grant for TJU.

Based on the foregoing evidence, a jury could have concluded that TJU did not have a right of set off on Dr. Wapner's wages.

III. TJU's Request for New Trial must be Denied.

In the alternative, TJU requests a new trial arguing that the verdict was against the weight of the evidence. The basis for granting a new trial is that the jury's verdict is so contrary to the weight of the evidence that "it shocks the conscience" and results in a miscarriage of justice. Diehl v. SEPTA, 34 Phila. 484, 488 (1997)(citing Thompson v. Philadelphia, 507 Pa. 592, 493 A.2d 669 (1985)). Determining whether a verdict shocks the conscience so that a new trial is warranted is always within the discretion of the trial judge and is reviewable only where there is an abuse of discretion. Id.

A. The Court Did Not Err In Instructing The Jury That TJU Bears The Burden Of Establishing It Acted In Good Faith.

TJU argues that the court erred in charging the jury on Dr. Wapner's WPCL claim by allocating to it the burden of proving that it had a good faith assertion of a right of setoff. This court does not agree.

"Pennsylvania enacted the WPCL to provide a vehicle for employees to enforce payment of their wages and compensation held by their employers." Hartman v. Baker, 766 A.2d 347 (Pa. Super. 2000)(quoting Oberneder v. Link Computer Corp., 449 Pa. Super. 528, 674 A.2d 720, 721 (1996)). "The underlying purpose of the WPCL is to remove some of the obstacles employees face in litigation by providing them with a statutory remedy when an employer breaches its contractual obligation to pay wages." Id. The WPCL "does not create an employee's substantive right to compensation; rather, it only establishes an employee's right to enforce payment of wages and compensation to which an employee is otherwise entitled by the terms of an agreement." Banks Eng. Co. v. Polons, 697 A.2d 1020, 1024 (Pa. Super. 1997).

In Hartman v. Baker, supra., the court assumed that the employer bore the burden of proving that a good faith contest or dispute existed regarding the payment of wages assuming wages were due and owing. Id. at 354. The court also held that the employer had to establish this burden with clear and convincing evidence. Id.

In Walker v. Washbasket Wash & Dry, 2001 U.S. Dist. Lexis 9309 (E.D. Pa. 2001), the court relying upon Hartman explicitly held it is the employer's burden to prove by clear and convincing evidence that his contest to the employee's claim for non payment was made in good faith. Id.

The court finds that although the act is silent as to who bears the burden of proof, placing the burden of proof upon TJU is in accord with the legislative purpose of the act. TJU withheld the wages from Dr. Wapner and should therefore have the burden of proving why the wages were withheld. Accordingly, TJU's motion for a new trial is denied.

B. TJU Motion for a New Trial Based on the Duty of Loyalty Claim is Denied.

TJU also argues that a new trial should be granted since the jury's verdict was against the weight of the evidence. As set forth above, sufficient evidence exists to support the jury's verdict on the duty of loyalty claim. As such, TJU's Motion for a New Trial on the Duty of Loyalty Claim is Denied.

CONCLUSION

For the foregoing reasons, the parties Motions for Post Trial Relief are Denied. An order contemporaneous with this Opinion will be filed.

BY THE COURT,

_____

C. DARNELL JONES, II, J.