IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

SPAK LAND COMPANY,	:	NOVEMBER TERM, 2001
Plaintiff	:	
	:	No. 2672
v.	:	
	:	(Commerce Program)
THE GOODYEAR TIRE & RUBBER	:	
COMPANY, INC.	:	Superior Court Docket
Defendant	:	Nos. 2170EDA2005; 2172EDA2005

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O P I N I O N

Albert W. Sheppard, Jr., J. …….. September 29, 2005

This Opinion is submitted relative to cross-appeals of this court's Order of May 12, 2005 denying defendant The Goodyear Tire & Rubber Company, Inc.'s ("Goodyear") Motion for Judgment NOV and Goodyear's Motion for a New Trial and denying plaintiff Spak Land Company's ("Spak") Motion to Mold the Verdict to include pre-judgment and post-judgment interest in the amount of fifteen percent (15%) per annum.

For the reasons discussed, this court respectfully submits that its Order should be affirmed.

BACKGROUND

On or about March 10, 1987 Spak entered into a twenty (20) year Lease with Goodyear for a building and land (the "Property"). On June 16, 1999 a truck ran into the building causing damage to the Property. On July 1, 1999, Goodyear notified Spak that it was terminating the lease under Paragraph 11(a), claiming that the building was rendered "untenantable" because of the damage the building sustained. Spak filed this breach of contract claim, alleging an improper termination of the Lease and challenging the claim that the building was rendered untenantable.

The crux of the case revolved around the issue of the rights of the parties in the event of damage to the property. The relevant provision of the Lease provided:

> If the improvements on the premises shall be damaged by fire, the elements or unavoidable casualty so they are rendered *totally untenantable*, either party hereto shall have the right, if it so desires, to terminate this Lease as of the day of damage . . .

Exh. P-4, Paragraph 11(a). (Emphasis added.)

In part, Goodyear argued that the Property was "totally untenantable" because the Certificate of Occupancy had been revoked following the accident.

During trial, Spak introduced evidence of its damages allegedly due to the lease termination, including an Exhibit which set out an itemization of damages. Exh. P-106; Exh. "B" of Spak's Motion for Post-Trial Relief.

This Exhibit set out Spak's alleged damages as follows:

Lost Rental Income	$740,274
Total Non-Reimbursed Real Estate Taxes	$ 98,206
Total Non-Reimbursed Insurance	$ 26,223
Total Water Charges	$ 1,452
Total Leasing Related Costs	$ 36,252
Sub Total of Economic Damages	$902,407

Interest at 15% per annum from July 1, 1999 to September 29, 2004	$ 720,798
Total Damages to Date of Trial	$1,623,205

On October 7, 2004, after a seven day trial the jury returned a verdict in favor of Spak, in the amount of $902.407. Exh. "C" of Spak's Motion for Post-Trial Relief.

Goodyear timely filed a Motion for Post-Trial Relief asserting that this court should grant judgment notwithstanding the verdict because, as a matter of law, Goodyear had the right to terminate the lease since the store was rendered "totally untenantable". Additionally, Goodyear argued in the alternative, that this court should grant Goodyear a new trial because evidence that the store in question was unprofitable should have been precluded and the jury should have been charged that: (1) the revocation of the Certificate of Occupancy rendered the property "totally untenantable" within the meaning of Paragraph 11(a) of the lease, (2) even if the damage to the building could have been repaired quickly and inexpensively, the property remained "totally untenantable", until such time as those repairs were made by Spak, and (3) that in deciding whether the property was "totally untenantable," the jury should consider whether Goodyear could still carry on business at that location until the damages were repaired.

In addition, Goodyear asserted that the court committed prejudicial and reversible error in: (1) granting Spak's Motion *in Limine* to preclude all reference to the involvement and opinions of Jay B. Rosen, P.E., (2) granting Spak's Motion *in Limine* to preclude all reference to the Spak's Pre-Trial Memorandum in the litigation against the truck driver, (3) denying Goodyear's Motion *in Limine* to preclude evidence of the June 23, 1999 file notes of Kim Raines Sweitzer, (4) denying Goodyear's Motion *in Limine* to preclude the testimony of Spak's engineering expert Albert Tantala, and (5) permitting

Spak's expert, Charles Wiel, to offer the opinion that the reason Montgomery Township revoked the Certificate of Occupancy was because of minor electrical problems.

The court denied Goodyear's Motion for Post-Trial Relief in an Order dated May 12, 2005.

Spak's basis for its cross-appeal was the court's denial of its Post-trial Motion requesting pre-judgment interest and post-judgment interest at the rate of fifteen percent (15%) per annum.

DISCUSSION

I. Goodyear's Motion for Judgment Notwithstanding the Verdict is Denied

Our Pennsylvania Supreme Court has stated the standard in reviewing a motion for a judgment notwithstanding the verdict:

> We must determine whether there was sufficient competent evidence to sustain the verdict . . . We view the evidence in the light most favorable to the verdict winner and give him or her the benefit of every reasonable inference arising there from while rejecting all unfavorable testimony and inferences . . . Moreover, "[a] judgment n.o.v. should only be entered in a clear case and any doubts must be resolved in favor of the verdict winner." . . . Finally, "a judge's appraisement of evidence is not to be based on how he would have voted had he been a member of the jury . . ." . . . A court may not vacate a jury's finding unless "the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of movant." . . .

Birth Center v. St. Paul Companies, Inc., 567 Pa. 386, 397-398, 787 A.2d 376, 383 (2001) (internal citations omitted). Further, the Supreme Court emphasized that "while a judge may disagree with a verdict, he or she may not grant a motion for J.N.O.V. simply because he or she would have come to a different conclusion. Indeed the verdict must stand unless there is no legal basis for it." Id. at 398.

A. Goodyear's Basis for the Granting of a Judgment Notwithstanding the Verdict

Goodyear, in each of its five Motions *in Limine*, acknowledged that the issue whether the leased premises was rendered "totally untenantable" was a question of fact for the jury. The introduction in each of its Motions provided as follows:

> This entire controversy centers around *one common question of fact* i.e. whether or not the Plaintiff's building was rendered "totally untenantable" as a result of a truck accident on June 16, 1999.

(Emphasis added.)

However, in its Motion for Post-Trial Relief, Goodyear attempted to re-characterize this issue as a "matter of law", an issue of contract construction, to be decided by this court. This court disagrees with Goodyear's analysis. Moreover, the cases cited by Goodyear in support of their argument are inapplicable and therefore not persuasive.

Goodyear cites to Charles D. Stein Revocable Trust v. General Felt Industries, Inc., for the proposition that "interpretation of a contract . . . poses a question of law." 749 A.2d 978, 980 (Pa. Super. 2000), appeal denied, 563 Pa. 697, 761 A.2d 547 (2000). This case is distinguishable. In Charles D. Stein Revocable Trust, neither party disputed the material facts. Id. Accordingly, the court found that its determination was limited to the interpretation of the parties' contractual agreement. Id. Here, the factual issue whether the property at issue was untenantable was very much disputed. Indeed, Goodyear represented to this court in all of its Motions *in Limine* that the entire controversy centered around this question of *fact*.

Likewise, the facts of Halpin v. LaSalle University, a case cited to by Goodyear for the proposition that "[a] lease is a contract and is to be interpreted according to contract principles", are dissimilar to the case at bar. 432 Pa. Super. 476, 639 A.2d 37 (1994). In Halpin, the plaintiffs, two members of the faculty of LaSalle University were granted tenure under the contracts which elevated plaintiffs to the status of professor. Id at 479. These contracts provided that the College invited the plaintiffs "to continue as [members] of the faculty for the remainder of [their] active academic life." Id. Every year following the plaintiffs appointment as professors, separate employment contracts were entered into containing similar language except that (1) the salary was adjusted, and (2) the "appointment for life" clause was omitted. Id. In addition, a retirement policy was adopted by the University subsequent to the appointment of the plaintiffs as professors. Id. at 480. The trial judge was charged with deciding whether the plaintiffs could remain professors for as long as they were at the institution. The Superior Court stated that "the interpretation of a contract is a question of law." Id. at 481. The distinctions between the Halpin case and this case should be obvious.

In Halpin, the court was called upon to decide whether the initial contracts between the university and the plaintiffs that gave the plaintiffs an indefinite period of employment, superseded the subsequent employment contracts which called for mandatory retirement. In this case, the jury was asked to decide whether the property at issue was untenantable, an issue of fact, not whether a previous contract containing conflicting terms altered the contract that was in place at the time of the damage.

Goodyear, in its Brief in Support of Defendant's Motion for Post Trial Relief, states that "Paragraph 11(a) of the lease . . . is clearly worded and give both the landlord

and the tenant an unfettered right to terminate the lease immediately when an unavoidable casualty renders the lease premises totally untenantable." The issue before the jury was not the meaning of untenantable, but rather whether the property was untenantable. This court agrees with Goodyear's introduction in its Motions in Limine that the "one common question of fact, i.e. whether or not the [Property] was rendered totally untenantable . . .," was a question of fact to be decided by the jury.

This court submits that Spak met its burden of proof and provided sufficient evidence to sustain the verdict.

B. <u>The Evidence Presented to the Jury</u>

The jury heard from Albert Tantala, an engineer retained by Spak to evaluate the damages to the property,[1] that the damage from the June 16, 1999 truck accident was limited to less than three percent (3%) of the leased premises. N.T. 10/1/2004 at 119-120; Exh. P-105. Mr. Tantala also testified that that there was no structural damage to the building from the accident. <u>Id</u>. at 80-81, 113-115. Charles Wiel, the code enforcement official retained by Spak to evaluate the damages to the building,[2] testified that none of the major systems or functions of the building were impacted by the accident including gas service and HVAC service. N.T. 10/5/2004 at 121-123.

On the issue of the revocation of the Certificate of Occupancy, Joel Preston, the real estate manager for Goodyear for the mid-Atlantic region in June of 1999, testified that Goodyear, as the user of the Property, was responsible for maintaining the Certificate of Occupancy. N.T 10/1/2004 at 179-182. Steven Mikolay, the Goodyear real estate

[1] N.T. 10/1/2004 at 94.
[2] N.T. 10/5/2004 at 106.

manager in 1999 who authorized the termination of the lease[3], and Albert Tantala testified similarly[4].

Both Mr. Tantala and Mr. Wiel testified that the Certificate of Occupancy was revoked by Montgomery Township because of hanging wires. Id. at 122-124; N.T. 10/5/2004 at 124-125. Similarly, Nicholas Basarab, the insurance adjuster who inspected the property for Goodyear,[5] testified that he told Kim Raines Sweitzer, a risk analyst for Goodyear[6] that the only reason for the building being untenantable was that electrical repairs needed to be completed. N.T. 10/1/2004 at 81.

The jury heard the testimony of Steve Mikolay with regard to the issue whether the Property was untenantable because of the loss of the Certificate of Occupancy. Mr. Mikolay testified that he did not recall seeing any documentation from Goodyear from June 16, 1999, the date of the accident, to July 1, 1999, the date Goodyear terminated the lease, stating that if Spak did not get the Certificate of Occupancy reinstated, Goodyear was going to terminate the lease. N.T. 10/4/2004 at 154.

On the issue of how long it would take to correct the electrical damage, Mr. Tantala testified that it would take three hours maximum to repair the electrical problems. N.T. 10/1/2004 at 138. Mr. Basarab testified that it would take approximately one or two days to remove the electrical hazard. Id. at 90. Mr. Wiel testified that turning off the circuit, cutting and capping the wires would take "possibly one hour." N.T. 10/5/2004 at 129.

[3] N.T. 10/4/2004 at 116.
[4] N.T. 10/1/2004 at 121-122.
[5] Id. at 68.
[6] Id. at 11-12.

With respect to the overall damage to the property resulting from the truck accident, Mr. Tantala testified that all of the damage could have been repaired within three to four weeks at the outside and two to four weeks on an expedited basis. N.T. 10/1/2004 at 127. Mr. Wiel testified that the building repairs would take two weeks. N.T. 10/5/2004 at 131. Goodyear's civil engineering expert, Harold Clemmer, testified that the repairs could have been completed in two weeks. Id. at 190.

As to how Goodyear's use of the property was impacted by the accident, Mr. Tantala testified that the truck damaged only the waiting room. N.T. 10/1/2004 at 115. Within one week of the accident, Goodyear's own adjuster, Mr. Basarab, reported that: (1) there was no structural damage at all, (2) the only reason that it was untenantable was due to the electrical repairs that needed to be completed, and (3) it was "not as major as everyone was making it out to be." Id. at 79-82. Additionally, the jury was presented correspondence, dated June 23, 1999 from Goodyear advising Spak that Goodyear was proceeding under Paragraph 11(b) of the lease which gave Spak 60 days from the date they received insurance proceeds to complete the repairs. Id. at 220. Exh. P- 22. A reasonable inference arising from this correspondence is that as of June 23, 1999, Goodyear did not consider the property to be untenantable.

The jury heard the testimony of Ernest "Chip" Sterosky, the general manager of retail east for Goodyear in 1999,[7] that one of the primary reasons for Goodyear's closing the store was that it was losing money. N.T. 10/4/2004 at 105. In fact, Mr. Sterosky testified that after the Certificate of Occupancy was revoked, Goodyear did nothing to reinstate the Certificate of Occupancy because Goodyear wanted to close the store. Id. at

[7] N.T. 10/4/2004 at 76-77.

105-106. Similarly, Mr. Mikolay testified that Goodyear wanted to close the store because it was losing money. Id. at 148.

As a result of the evidence presented, including that discussed above, the jury, after a seven day trial, found in favor of Spak in the amount of $902,407.00.

Viewing the evidence in the light most favorable to verdict winner Spak, and giving Spak the benefit of every reasonable inference arising there from, and rejecting all unfavorable testimony and inferences, as this court is directed to do by Pennsylvania law, it would be wrong to disturb the jury's verdict. Accordingly, this court denied Goodyear's Motion for Judgment Notwithstanding the Verdict.

II. Goodyear's Motion for a New Trial is Denied

Goodyear urges that its Motion for a New Trial should be granted because this court made several "prejudicial and reversible" errors.

The Pennsylvania Supreme Court set out the standard for the granting of a new trial.

> Trial courts have broad discretion to grant or deny a new trial . . . "The grant of a new trial is an effective instrumentality for seeking and achieving justice in those instances where the original trial, because of taint, unfairness or error, produces something other than a just and fair result, which, after all, is the primary goal of all legal proceedings." . . . Although all new trial orders are subject to appellate review, it is well established law that, absent a clear abuse of discretion by the trial court, appellate courts must not interfere with the trial court's authority to grant or deny a new trial.

Harman v. Borah, 562 Pa. 455, 465, 466, 756 A.2d 1116, 1121-1122 (2000) (citations omitted). Further, "when deciding to grant or deny a new trial, the trial court must first engage in a two-part analysis: (1) whether a mistake occurred at trial; and (2) whether the mistake was prejudicial to the moving party." Slappo v. J's Development Assoc., 791

A.2d 409, 414 (Pa. Super. 2002), citing Harman, 562 Pa. at 467, 756 A.2d at 1122. The court in Slappo further stated that "if the court's rulings were legally correct, no bias or prejudice can be inferred." Slappo, 791 A.2d at 416.

Additionally, in reviewing a challenge to the admissibility of evidence, an appellate court will only reverse a ruling by the trial court upon a showing that it abused its discretion or committed an error of law. Kehr Packages, Inc. v. Fidelity, 710 A.2d 1169, 1172 (Pa. Super. 1998). For evidence to be admissible, it must be both competent and relevant. Peled v. Meridian Bank, 710 A.2d 620, 625 (Pa. Super. 1998), appeal denied, 556 Pa. 711, 729 A.2d 1130 (1998). Evidence is competent if it is material to the issue to be determined at trial and relevant if it tends to prove or disprove a material fact. Turney Media Fuel, Inc. v. Toll Brothers, 725 A.2d 836, 839 (Pa. Super. 1999.)

With regard to relevancy, Pa.R.E. 401 titled "Relevant Evidence" defines "relevance" as follows:

> [E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Furthermore, relevant evidence is admissible if its probative value outweighs its prejudicial impact. Commonwealth v. Schwartz, 419 Pa. Super. 251, 269, 651 A.2d 350, 359 (1992), appeal denied, 535 Pa. 617, 629 A.2d 1379 (1993). See Ratti v. Wheeling Pittsburgh Steel Corp., 758 A.2d 695, 707-708 (Pa. Super. 2000).

Within the context of these standards, the alleged errors will be discussed.

A. Evidence That the Goodyear Store was Unprofitable

Goodyear argues that evidence that the store was not profitable was irrelevant to the contractual issue of whether the accident had rendered the property untenantable within the meaning of lease. Goodyear further argues that the unprofitablity of the store was a "prejudicial distraction in the litigation."[8]

Goodyear took the position that it elected to terminate the lease under paragraph 11(a) which provided:

> If the improvements on the premises shall be damaged by fire, the elements of unavoidable casualty so they are rendered totally untenantable, *either party shall have the right, if it so desires, to terminate this Lease . . .*

(Emphasis added.) The court found that the issue of the store's profitability was admissible in that it went to Goodyear's credibility, because the evidence that Goodyear sought to be precluded at trial, that is, that Goodyear elected to close the store because it was unprofitable, directly contradicted its argument that it elected to terminate the Lease because the Property was untenantable.

As to Goodyear's argument that the admission of this evidence was prejudicial, the determination that the evidence related to the profitability was legally relevant means that "no bias or prejudice can be inferred." Slappo, 791 A.2d at 416.

B. The Rejected Proposed Jury Instructions Provided by Goodyear

The primary duty of a trial judge in charging a jury is to clarify the issues so that the jury may comprehend the questions they are to decide. Lilley v. Johns-Mansville Corp., 408 Pa. Super. 83, 95, 596 A.2d 203, 209 (1991) citing Rivera v. Philadelphia Theological Seminary, 398 Pa. Super. 264, 269, 580 A.2d 1341, 1344, (1990), quoting

[8] The evidence pertinent to this issue is set out in Section I. B. of this Opinion at pp. 7-10, supra.

Brandimarti v. Caterpillar Tractor Co., 364 Pa. Super. 26, 29, 527 A.2d 134, 136, appeal denied, 517 Pa. 629, 539 A.2d 810 (1987). So long as the trial judge chooses a form of expression which adequately and clearly covers the subject, he or she is not required to use the exact language of a requested point. Id.; Lilley v. Johns-Manville Corp., 408 Pa. Super. 83, 95, 596 A.2d 203, 209 (1991).

A faulty jury instruction may only be sufficient grounds 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. Boutte v. Seitchik, 719 A.2d 319, 324 (Pa.Super. 1998).

1. Goodyear's Claim That the Court Should Have Instructed the Jury That the Certificate of Occupancy Rendered the Property Untenantable

Goodyear argues that the court committed error because it did not specifically instruct the jury that the property was rendered untenantable when the Certificate of Occupancy was revoked. The court's instruction to the jury that covered this issue was:

> Now, the essence of the claim here is that Spak claims that Goodyear breached the contract in that it had no right to terminate the lease. Your crucial determination when you take the potent distillation of all of this, and there's a lot, it comes down to simply whether you determine that the property leased to Goodyear was or was not rendered totally untenantable as a result of the truck accident. . . . Now, under the lease I want to just make sure you understand that the lack of the certificate of occupancy in and of itself, just that point, should not determine in and of itself, that is, it's not enough by itself to determine that the place was totally untenantable, but it's a factor. And it's a factor that you should consider in trying to reach your decision.

N.T. 10/6/2004 at 92.

The Pennsylvania Supreme Court has addressed the specific issue of the purpose of a court's jury charge:

> The purpose of the court's charge is to provide guidance to the jury on the relevant *legal issues* arising from the claims before the jury. *The instructions to the jury are not intended to supplement the arguments of the opposing parties. This is the function of the attorneys who represent the parties, not the court.*

Ferrer v. Trustees of the University of Pennsylvania, 573 Pa. 310, 346, 825 A.2d 591, 612-613 (2002). (Emphasis added.)

The foregoing charge to the jury adequately covered the subject of the revocation of the Certificate of Occupancy and its relationship to Spak's overall breach of contract claim. This instruction was not unclear, nor was it confusing. Additionally, whether the revocation of the Certificate of Occupancy rendered the property totally untenantable was a question of fact, and was, therefore, the province of the jury, not the court.

2. Goodyear's Claim That Jury Should Have Been Instructed That Even if the Damage to the Building Could Have Been Quickly and Inexpensively Repaired, the Property was Totally Untenantable

The court instructed the jury that: "[i]n determining whether or not the building was totally untenantable, you may consider whether the building could have been restored in a reasonable period of time." N.T. 10/6/2004 at 91.

This portion of the charge addressed the issue whether the property was untenantable even if the damage could have been repaired quickly and inexpensively. Again, this part of the charge related to a question of fact for the jury to decide. As noted, the purpose of the court's charge is to "provide guidance to the jury on the relevant *legal issues* arising from the claims before the jury." Ferrer, 573 Pa. at 346. Moreover, in

charging the jury, the court should not "supplement the arguments of the opposing parties." Id.

3. Goodyear's Claim That the Jury Should Have Been Charged That in Deciding Whether the Property was Untenantable They Should Consider Whether the Business Could Operate Until the Damages Were Repaired

For the purpose of addressing this claim, the court relies upon its general charge to the jury regarding the building's alleged untenantability.

> Now, the essence of the case here is that Spak claims that Goodyear breached the contract in that it had no right to terminate the lease. Your crucial determination when you take the potent distillation of all of this, and there's a lot, it comes down to simply whether you determine that the property leased to Goodyear was or was not rendered totally untenantable as a result of the truck accident.

N.T. 10/6/2004 at 90-91.

The jury, as fact finder, had the duty to decide questions of fact, and specifically whether the property was untenantable as the result of the June 16, 1999 accident. The court clearly and without causing confusion instructed the jury on the legal issues regarding Spak's claim. The issue whether or not Goodyear could not operate its business until the damages were repaired fell under the broader issue of whether the property was untenantable such that Goodyear could rightfully terminate its lease under paragraph 11(a) of the lease. As such, the court adequately charged the jury on the legal issue, allowing the jury to render its decision based on the facts presented at trial.

C. Goodyear's Motions *in Limine* to Exclude the Report of Jay B. Rosen, P.E. and Spak's Pre-Trial Memorandum in a Related Case

The Report of Jay B. Rosen, P.E.

Without citing to any legal precedent, Goodyear, in its Motion for Post Trial Relief urges the court erred in not permitting the introduction of evidence of: (a) the involvement and opinions of Jay B. Rosen, P.E. and (b) Spak's Pre-Trial Memorandum in the case Spak brought against the truck driver, since, according to Goodyear, Mr. Rosen's opinion and the Pre-Trial Memorandum contradicted Spak's claims in this case. Goodyear contends that this ruling constituted prejudicial error, requiring a new trial.

By way of background, Spak had retained Jay B. Rosen as an expert to investigate the accident and provide a report regarding damage to the property for use in the anticipated litigation against Goodyear and the truck driver. Spak decided not to use Mr. Rosen as an expert witness in the present action. Spak filed a Motion *in Limine* to preclude all reference to the involvement and opinions of Jay B. Rosen, P.E. This court granted Spak's Motion *in Limine*.

Pennsylvania Rule of Civil Procedure 4003.5 entitled "Discovery of Expert Testimony" subpart (a)(3) provides:

> A party may not discover facts known or opinions held by an expert *who has been retained or specifically employed by another party in anticipation of trial and who is not expected to be called as a witness at trial* . . . except on order of court . . . upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means . . .

(Emphasis added.)

Our appellate courts have consistently upheld this rule, precluding an adverse party from discovering and using opinions held by an expert who was retained by a party in anticipation of litigation and not called to testify as a witness. See e.g., Columbia Gas Transmission Corp. v. Piper, 150 Pa. Commw. 404, 615 A.2d 979 (1992); Westinghouse Electric Corporation v. Bond of Property Assessment, 138 Pa. Commw. 30, 587 A.2d 820 (1991).

In Cruz v. Wanamaker, the court held:

> [W]e believe that when a party has somehow discovered an expert opinion rendered for his adversary that it is unfavorable to his adversary, the spirit and purpose of [Pa.R.C.P. 4003.5(a)(3)] should prevent him from using it at trial.

18 Pa. D&C 410 (1993).

Goodyear argues that the preclusion of the evidence of the involvement and opinions of Jay B. Rosen, P.E. was prejudicial. This argument fails for two reasons: (1) the jury heard testimony regarding the damage to the building as a result of the June 16, 1999 accident from Harold Clemmer who was accepted by the court as Goodyear's expert in the fields of civil engineering and the causes of structural damage, and (2) the court's preclusion of Mr. Rosen's opinion was proper under the rules, thus, no prejudice can be inferred. Slappo, 791 A.2d at 416.

The court properly granted Spak's Motion *in Limine* regarding Jay B. Rosen, P.E.

Spak's Pre-Trial Memorandum in a Related Case

Goodyear claims that the court committed "prejudicial and reversible error" in granting Spak's Motion *in Limine* to preclude all reference to Spak's Pre-Trial Memorandum which it filed in the related litigation against Goodyear and Dorosh, the

driver of the truck that struck the Property. In its Motion for Post-Trial Relief, Goodyear characterized this Pre-Trial Memorandum as a "judicial admission".

According to Goodyear, Spak's Pre-Trial Memorandum filed in the related case contended that the accident caused "substantial" structural damage to the property, a position which Goodyear stated was contradictory to the claims made by Spak at trial. However, these same areas were covered by Goodyear in its cross examination of Herbert Pressman, Esquire who testified at length regarding the position taken by Spak in the case against the truck driver. In fact, Goodyear introduced as an exhibit the verified Complaint filed by Spak in the related case and quoted paragraphs 11, 13, 16, 17 and 18 from this Complaint which covered the same evidence that was set out in the Pre-Trial Memorandum at issue.

This court found that the introduction of the Pre-Trial Memorandum would have amounted to cumulative evidence, in that it embodied essentially the same facts and issues as Mr. Pressman's testimony[9]. Therefore, it was not error to preclude Spak's Pre-Trial Memorandum filed in the case against the truck driver.

D. Goodyear's Motion *in Limine* to Preclude Evidence of the June 23, 1999 File Notes of Kim Raines Sweitzer

Goodyear maintains that this court committed prejudicial and reversible error in denying its Motion *in Limine* to preclude evidence of the June 23, 1999 file notes of Kim Raines Sweitzer, an employee of Goodyear's Risk Management Department. Goodyear argues that the notes were "both hearsay and irrelevant."

[9] In Eldridge v. Melcher, the Superior Court held that the trial court did not commit error in precluding a statement made by plaintiffs' attorney at a pre-trial conference because the statement addressed the same issues and facts as the testimony of defendant's expert. 226 Pa. Super. 381, 392, 313 A.2d 750, 756 (1973).

Ms. Raines Sweitzer assigned the investigation of the accident claim to GAB Robbins[10] who directed its adjuster Nick Basarab to investigate and prepare a report of the resulting damages and cost to repair the damage[11]. The notes at issue were prepared by Ms. Raines Sweitzer in her capacity as the risk analyst for Goodyear assigned to this file[12]. The June 23, 1999 note was recorded contemporaneously with Ms. Raines Sweitzer's conversation with Nick Basarab. N.T. 10/1/2004 at 40. Mr. Basarab had inspected the building prior to his conversation with Ms. Raines Sweitzer. Id. at 41.

Under Pa.R.E. 803(6), the notes were not excludable under the hearsay rule, "even though the declarant [was] unavailable as a witness" because the notes were "Records of Regularly Conducted Activity", and therefore were an exception to the hearsay rule. According to Pa.R.E 803(6), the notes fell under the category of:

> A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course if a regularly conducted business activity . . .

In addition, Ms. Raines Sweitzer's deposition was read to the jury without objection. In her deposition, Ms. Raines Sweitzer testified regarding the contents of her June 23, 1999 notes. Furthermore, Mr. Basarab testified at trial and was subject to examination regarding the accuracy of the information testified to by Ms. Raines Sweitzer. Accordingly, this assignment of error is without merit.

[10] N.T. 10/1/2004 at 34.
[11] Id. at 37-39.
[12] Id. at 40.

E. Goodyear's Motions *in Limine* to Preclude the Testimony of Albert Tantala and Charles Wiel Regarding the Lack of Structural Damage, the Reason for the Revocation of the Certificate of Occupancy, and the Repairability of the Building

Goodyear claims that permitting Albert Tantala, Spak's civil engineering expert, and Charles E. Wiel, the code enforcement official retained by Spak, to testify that the building was not rendered totally untenantable, because, in their view: (1) there was no structural damage to the building and the actual damage affected only a minor percentage of the building's space, (2) that the Certificate of Occupancy was revoked by Montgomery Township only because of minor electrical problems with the building, and (3) that the necessary repairs to put the store back in operation could have been done "with an investment of very little time or money", constituted "prejudicial error", requiring a new trial. Brief in Support of Defendant's Motion for Post-Trial Relief at p.30.[13]

In its Motion *in Limine* to preclude this evidence, Goodyear stated that "[t]he accident caused substantial structural damage to the building and solely as a result of the accident, the Montgomery Township revoked the certificate of occupancy." Moreover, on December 12, 2002, counsel for Goodyear wrote to Spak's counsel, stating that Goodyear terminated the lease for the following reasons: "(a) [t]he local authorities had revoked the certificate of occupancy; (b) [t]here was serious structural damage which interfered with the operation of the facility for the purposes for which it was leased; [and] (c) [t]he structural damage was a potential source of harm to Goodyear employees and customers and it posed a significant risk of collapse." Exh. P-93.

[13] The specific testimony complained of is set forth in Section I.B. of this Opinion, at pp. 7-10, supra.

Thus, the issues of: (1) the circumstances surrounding the revocation of the Certificate of Occupancy, (2) the extent of the structural damage, if any, to the building as a result of the accident, and (3) the effect, if any, the structural damage had on Goodyear, were clearly subsumed in the claims made by Goodyear. Thus, the testimony of Mr. Wiel and Mr. Tantala was relevant and admissible.

III. Spak's Post-Trial Motion was Granted in Part and Denied in Part.

Spak filed its cross-appeal to the court's denial of its Post-Trial Motion requesting pre-judgment and post-judgment interest at the rate of fifteen percent (15%) per annum.

In its Motion for Post-Trial Relief, Spak claimed that since the jury agreed that Goodyear improperly terminated the lease[14] and awarded Spak $902,407.00, an amount which corresponds to Spak's prayed for damages, Spak, as a matter of law is entitled to the fifteen percent (15%) interest provided for in the lease[15].

This court entered its Order on May 12, 2005 addressing the Post-Trial Motions. In that Order, this court granted Spak pre-judgment interest in the statutory amount of six percent (6%) per annum.

As a threshold matter and in accord with this court's May 12, 2005 Order, this court believes that, after being presented with documentary evidence, the testimony and the arguments from both sides over the course of the seven day trial, the jury has spoken with respect to the amount of damages due Spak. Keep in mind that the jury was aware

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[14] See the Jury Verdict Sheet, attached as Exhibit "C" to Spak's Motion for Post-Trial Relief.

[15] The relevant portion of the lease relied upon by Spak in its Post-Trial Motion provides:

> Late Charge
>
> If at any time Lessee owes two(2) or more rental payments under this Lease Agreement, Lessor shall be entitled to receive interest on all unpaid rental arrearages until paid at whichever of the following rates is greater: (a) fifteen percent (15%) per annum, or (b) three percent (3%) over prime as charged by Continental Bank, or its successors or assigns.

of Exh. P-106 which claimed a right to interest at fifteen (15%) percent (i.e., $720,798).[16] But notably, the jury tacitly said **no** to the interest claim presented through this exhibit. This court remains convinced that it would be improvident to disturb the jury verdict.

Additionally, despite the case law cited to by Spak that stands for the proposition that parties may stipulate in a contract to an interest rate higher than the statutory interest rate of six percent (6%)[17], and the case law relied upon by Spak that holds that Spak as the verdict winner is entitled to post-judgment interest as a matter of law[18], this court properly ordered that the jury award not be disturbed, with the exception of this court's addition of pre-judgment interest at the statutory interest rate of six percent (6%).

Given the hotly disputed issues surrounding Spak's duty of mitigation and the difficulty confronting the jury to calculate in a meaningful way a lesser amount of damages, this court believes it is reasonable to infer that the jury's verdict was likely a compromise verdict.

"Compromise verdicts are verdicts where the fact-finder is in doubt as to the defendant's liability *vis-à-vis* the plaintiff's actions in a given suit but, nevertheless, returns a verdict for the plaintiff in a lesser amount than it would have if it was free from doubt." Morin v. Brassington, 871 A.2d 844, 852-853 (2005) (citation omitted). According to the Pennsylvania Superior Court, "[c]ompromise verdicts are favored in the law." Austin v. Harnish, 227 Pa. Super. 199, 323 A.2d 871 (1974). Furthermore, "compromise verdicts are both expected and allowed", and "the compromise may arise

[16] See, supra., pp. 2-3.
[17] Pittsburgh Construction Company v. Griffith, 834 A.2d 572 (Pa. Super. 2003), citing Reliance Security Service, Inc. v. 2601 Realty Corp., 383 Pa. Super. 608, 557 A.2d 418 (1989); see also Daset Min. Corp. v. Industrial Fuels Corp., 326 Pa. Super 14, 473 A.2d 584, 595 (1984).
[18] Pittsburgh Construction Company, 834 A.2d at 590-591 (Pa. Super. 2003) citing 41 Pa.C.S.A. § 202, In re Estate of Braun, 437 Pa. Super. 372, 650 A.2d 73, 78 (1994).

out of damages or negligence or the balance of evidence concerning either or both." Elza v. Shovan, 396 Pa. 112, 115, 152 A.2d 238, 240 (1959). The Court in Morin additionally noted that "[a]lthough more commonplace in negligence cases tried before juries, [compromise] verdicts are equally appropriate in contract cases tried before the bench." Morin, 871 A.2d at 853 (citation omitted). Based upon these precedents, this court suggests that compromise verdicts are also appropriate in contract cases tried to a jury. In summary, this jury has spoken and this court listened.

Accordingly, this court denied Spak's Post-Trial Motion for the application of a fifteen (15%) percent interest award.

CONCLUSION

For the reasons discussed, this court respectfully submits that its Order of May 12, 2005, should be affirmed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.