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

DOLLAR TREE STORES, INC.,	:	**OCTOBER TERM, 2009**
Plaintiff,	:	**NO. 2702**
vs.	:	**COMMERCE PROGRAM**
HOLIDAY SUPERMARKETS, INC. and USRP I, LLC,	:	
Defendants.	:	

PRESENTED FOR REVIEW
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<u>OPINION</u>

BY: Patricia A. McInerney, J. December 31, 2013

I. BACKGROUND

Plaintiff Dollar Tree Stores, Inc. ("Dollar Tree") operates a store in the Mayfair Shopping Center in Philadelphia, Pennsylvania (the "Shopping Center"). Defendant Holiday Supermarket, LLP ("Holiday") operates a retail supermarket in the Shopping Center. Defendant USRP I, LLC owned the Shopping Center and leased retail space to Holiday and Dollar Tree.

In March 1992, Sackett Development Company ("Sackett"), as the landlord, entered into a lease agreement with Fleming Foods East, Inc. ("Fleming"), as the tenant, for space as the anchor tenant in the Shopping Center. Originally, Holiday entered into a sublease with Fleming whereby Holiday leased Sackett's space at the Shopping Center to operate a Shop 'N Bag Supermarket. Following Fleming's bankruptcy, however, the United State Bankruptcy Court for the District of Delaware issued an order on December 8, 2003 that authorized Holiday's assumption of the 1992 lease. USRP I, LLC ("Landlord"), on the other hand, was a successor in

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interest to Sackett, having bought the Shopping Center at a certain point prior to the commencement of the instant action.

Under Holiday's lease, Landlord promised that it would "not permit any person other than [Holiday] to operate 'a retail supermarket of any nature' in the Shopping Center." (Build and Lease Agreement, Part II, ¶ 17.1 (quotations added).) On July 16, 2003, Dollar Tree entered into a lease agreement with Landlord that contained the same prohibitory language which restricted Dollar Tree from operating as a "retail supermarket of any nature" in the Shopping Center. Specifically, under Dollar Tree's lease, it was permitted to engage in the "retail sale of general merchandise, including … kitchen accessories, household supplies … [and] novelty candy and snacks and other incidental food items … provided … Tenant shall not use the premises [as a] Retail Supermarket of any nature." (Lease Agreement between Landlord and Dollar Tree ¶ A(3).)

On July 7, 2009, Holiday filed suit against Dollar Tree, Landlord, and others for, among other things, breach of contract (sometimes, the "Breach of Contract Action"). In the complaint, Holiday alleged Dollar Tree operated as a "retail supermarket of any nature" in the Shopping Center in violation of the restrictions contained in Holiday's lease and Dollar Tree's lease. (Compl. ¶¶ 7, 10, 18.) On September 28, 2009, Holiday filed an amended complaint that omitted Dollar Tree as a defendant.

On October 9, 2009, Dollar Tree filed a petition to intervene in Holiday's action against Landlord because "the allegations in the Amended Complaint are based on the contention that Dollar Tree continues to sell items and goods in alleged violation" of the restrictions contained in the lease between Holiday and Landlord. (Emergency Petition to Intervene ¶ 36.) Dollar Tree sought to intervene as a party defendant and as a counterclaim plaintiff. Regarding the counterclaim, Dollar Tree sought to obtain a declaratory judgment that it had not violated the restrictions by operating a retail supermarket of any nature in the Shopping Center. Holiday did not oppose the petition, and by order dated October 14, 2009, the late Honorable Albert Sheppard, Jr. granted the petition in part, allowing Dollar Tree to intervene as a party defendant, but requiring that a separate declaratory judgment action be filed. In his October 14, 2009 order, Judge Sheppard also noted that once the separate declaratory judgment action was filed, he would consolidate the actions for purposes of discovery and trial.

On October 20, 2009, Dollar Tree filed a separate declaratory judgment action against Holiday and Landlord, seeking a declaration that it had not operated as a retail supermarket of any nature at the Shopping Center (sometimes, the "Declaratory Judgment Action"). By order dated October 21, 2009, Judge Sheppard consolidated the two actions for purposes of discovery and trial. The trial of these consolidated cases was later bifurcated into liability and damages phases upon stipulation of the parties.

On September 20, 2010, Holiday filed a motion for partial summary judgment against Dollar Tree and Landlord. In the motion, Holiday asserted Dollar Tree was acting as a supermarket in violation of its lease and Landlord, to the detriment of Holiday, had failed to enforce the terms of said agreement. Holiday argued Dollar Tree sold "various food items that go well beyond the 'incidental food items' it [was] permitted to sell per the lease." (Holiday's Mot. for Summ. J. ¶ 28.) Holiday argued that "[b]y offering the same essential items, such as eggs, milk, cheese, bread, and many other food products, in addition to numerous household items typically sold at Holiday at discounted prices, Dollar Tree [was] indeed competing directly with Holiday, causing Holiday's sales to suffer." (Holiday's Mot. for Summ. J. ¶ 29.)

At or about that time, Dollar Tree and Landlord also filed their own motions for summary judgment against Holiday. Citing various definitions of "supermarket," Dollar Tree argued in its motion that it was not operating as a "supermarket" because it was not primarily selling food items nor selling a number of types of fresh food items. (*See, e.g.*, Dollar Tree's Mot. for Summ. J. ¶¶ 32-46.) Citing cases that hold restrictive covenants must be strictly construed, Landlord in turn argued in its motion that "[b]ecause Dollar Tree is not unambiguously a retail supermarket, there can be no violation of the restrictive covenant" and "Landlord ha[d] no duty to act with respect to the restrictive covenant and cannot be found liable for failing to enforce the exclusivity provision." (Landlord's Mot. for Summ. J. ¶¶ 32-33.)

On November 10, 2010, Judge Sheppard entered orders denying Holiday's motion for partial summary judgment, granting Dollar Tree and Landlord's motions for summary judgment, and declaring that Dollar Tree had not been operating as a supermarket and had not violated the supermarket restriction in the lease between Dollar Tree and Landlord.[1] "To determine the scope of the exclusive and restrictive use referenced in the leases, [Judge Sheppard] relied on dictionary and statutory definitions of 'supermarket'" and concluded "the term 'supermarket,' as used by the contracting parties meant 'a retail store selling especially foods, or primarily groceries, fresh produce, meat, bakery and dairy products, in a variety of volume.'" *Dollar Tree Stores, Inc. v. Holiday Supermarkets, Inc.*, 2 EDA 2011, 13-14 (Pa. Super. Ct. Dec. 9, 2011) (unpublished memorandum).

On December 9, 2010, Holiday appealed. On appeal, the Superior Court of Pennsylvania first reviewed the law applicable to properly interpreting the parties' lease agreements. The

1 On November 16, 2010, Judge Sheppard entered an amended order consolidating the rulings issues on November 10, 2010.

court noted that restrictive covenants in lease agreements are to be strictly construed, but also that they "must be construed in light of their language, their subject matter, the intent or purpose of the parties, and the conditions surrounding their execution[,]" and "[w]here an ambiguity exists [a fact finder] may consider extrinsic evidence of the parties' intent." *Id.* at 10.

Next, the court noted that by filing cross motions for summary judgment, the parties "maintained to the trial court that the disputed exclusive/prohibited use clause in the leases were clear in their reflection of the parties' intent relative to the scope of the activity reserved/restricted thereby." *Id.* at 10-11. The court also stated Holiday's argument before it was that the lower court ignored "the import of the qualifying phrase, 'of any nature,' on the definition of 'supermarket[,]'" which Holiday maintained expanded "the definition of supermarket to include retailers resembling supermarkets." *Id.* at 14. Dollar Tree and Landlord's argument, on the other hand, was that "the phrase 'supermarket of any nature' merely implicated subcategories of supermarket and that [Holiday's] broader interpretation is 'wrong, because a 'supermarket of any nature' must be a 'supermarket' in the first instance." *Id.* at 15.

Having considered the arguments of the parties and reviewed the entirety of the agreements between the parties, the Superior Court held "the term supermarket of any nature is reasonably susceptible of different constructions and consequently is ambiguous." *Id.* at 16 (quotations omitted). The court stated the lower court's singular focus on the word "supermarket" rendered the language "of any nature" superfluous or meaningless, but that nothing in the agreement readily defined the scope of the qualifying language. Thus, the court concluded "resolution of the ambiguity require[d] the finder of fact to determine the parties' actual intent after considering the surrounding circumstances, the situation of the parties, the objects they apparently have in view, … the nature of the subject-matter of the agreement, and other relevant extrinsic evidence" and that Judge Sheppard erred in granting summary judgment.[2] *Id.* at 17 (quotations omitted). The Superior Court then remanded these actions back for proceedings consistent with its opinion.

After the cases were remanded, Landlord and Dollar Tree both again filed for summary judgment; Landlord on September 21, 2012 and Dollar Tree on October 31, 2012. By this time, however, Landlord no longer owned the Shopping Center as it sold it and its interests in the leases in December 2010 to WP Mayfair Associates, L.P ("WP Mayfair").

In its motion for summary judgment, Landlord argued that because the Superior Court held as a matter of law that the restrictive covenants at issue are ambiguous, and under Pennsylvania law ambiguity in a restrictive covenant "must be construed against the party benefiting from the restriction[,]" "Holiday is unable to prevail on its claims against Landlord because any interpretation made by a finder of fact, by law, stems from ambiguity and cannot benefit Holiday over Landlord." (Landlord's (Second) Mot. for Summ. J. ¶¶ 15-19.) Landlord also argued, alternatively, that it was "entitled to summary judgment because the claims against it are no longer justiciable." (Landlord's (Second) Mot. for Summ. J. ¶ 21.) Essentially, Landlord argued because the Superior Court held as a matter of law that the restrictive covenants at issue are ambiguous, it "was precluded, as a matter of law, from making a determination of whether the Dollar Tree store [was] a 'retail supermarket of any nature.'" (Landlord's (Second) Mot. for Summ. J. ¶ 22.) Quoting *Baumgardner v. Stuckey*, 735 A.2d 1272, 1274 (Pa. Super. Ct. 1999), Landlord asserted "nothing short of a 'plain disregard' of [a] restrictive covenant's

2 The court also stated the fact finder in this case would be a jury, because while Dollar Tree filed a separate declaratory judgment action, and no demand for a jury trial was made in response thereto, Judge Sheppard had consolidated the two actions for purposes of trial and Holiday had demanded a jury trial with its complaint. Presumably, the court meant Holiday retained its right to a jury trial for the Breach of Contract Action, but that a lower court would still be the fact finder for the Declaratory Judgment Action.

express terms can create violation of the covenant" and here, as the express terms of the covenant were ambiguous, Landlord as a successor in interest was incapable of determining "whether its terms had been plainly disregarded." (*See* Landlord's (Second) Mot. for Summ. J. ¶ 22 (emphasis original).) Landlord also argued, in terms of itself, that the matter was now moot because it was "currently neither the owner nor the manager of the Shopping Center."[3] (Landlord's (Second) Mot. for Summ. J. Mem. p. 14.)

On October 24, 2012, Holiday responded to Landlord's motion for summary judgment. Addressing Landlord's argument that the Superior Court's finding of ambiguity dictated judgment in its favor, Holiday contended such an order "would amount to reversal of the Superior Court's decision." (Holiday's Mem. in Resp. to Landlord's (Second) Mot. for Summ. J. ("Holiday's Mem. in Resp. to Landlord") p. 3.) Holiday also argued: "Even worse, [Landlord's] motion is predicated on an evidentiary presumption that the Superior Court referenced in its decision and nevertheless concluded that Holiday was entitled to a … trial." (Holiday's Mem. in Resp. to Landlord p. 3.) In support of its argument and the Superior Court's decision, Holiday cited to cases such as *Books a Million, Inc. v. H & N Enterprises*, 140 F.Supp.2d 846, 858 (S.D. Ohio 2001) that have explained:

> when a restrictive-use provision is ambiguous, extrinsic evidence may be considered to determine the parties' intent, despite the general rule favoring the unrestricted use of real estate. In other words, extrinsic evidence may resolve the doubts about the meaning of an ambiguous restrictive covenant, thereby overcoming the general rule that such covenants must be narrowly construed against restrictions on the use of property.

(Holiday's Mem. in Resp. to Landlord p. 6 (quotations and emphasis removed).)

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[3] Regency Realty Corp., Inc. ("Regency") was the property manager of the Shopping Center for Landlord and is a defendant in the Breach of Contract Action.

Next, addressing Landlord's argument that as a successor in interest it was incapable of determining whether the terms of the restrictive covenants had been plainly disregarded because there was ambiguity, Holiday argued that "does not mean that [the] original parties did not know what they intended when they drafted and agreed to this provision" and that the original parties' intent is binding on Landlord as a successor in interest to the lease. (Holiday's Mem. in Resp. to Landlord pp. 7-8.) Lastly, regarding mootness, Holiday argued Landlord "failed to present any evidence that [it is] no longer liable for damages sought by Holiday in [the Breach of Contract Action,]" but even if it did "the mere fact that the [S]hopping [C]enter was sold after the lawsuit was filed does not erase [Landlord's] breach or the resulting damages to Holiday that occurred prior to the sale." (Holiday's Mem. in Resp. to Landlord pp. 11-12.)

In its motion for summary judgment, Dollar Tree made a number of arguments, including that even if the Court accepted Holiday's overly broad interpretation of the modifying phrase as "prohibit[ing] the sale of *all* competing products by any [co-tenant,]" the evidence "establish[ed] that Holiday's claims are barred by the statute of limitations." (Dollar Tree's (Second) Mot. for Summ. J. ¶ 69.) And similar to Landlord, Dollar Tree's arguments also included that Dollar Tree is entitled to judgment as a matter of law because the Superior Court found the restrictions ambiguous and "Pennsylvania law is clear that nothing will be deemed a violation of a restriction that is not in 'plain disregard of its express [words].'" (Dollar Tree's (Second) Mot. for Summ. J. ¶ 72 (quoting *Baumgardner v. Stuckey*, 735 A.2d at 1274, among others).) More specifically, Dollar Tree argued "because the Superior Court ruled the phrase 'of any nature' is ambiguous, it necessarily follows that Dollar Tree cannot be found to have 'plainly disregarded' a restriction that on its face has no definite scope or meaning that Dollar Tree (or anyone else besides the now defunct [original parties]) could have clearly understood." (Dollar Tree's (Second) Mot. for Summ. J. ¶ 72.)

On November 16, 2012, Holiday responded to Dollar Tree's motion for summary judgment. Regarding the statute of limitations argument, Holiday contended there were "clear issues of fact as to when Holiday discovered and reasonably should have discovered the facts giving rise to [its] lawsuit" and "the earliest Holiday … knew or should have known that [its] [l]ease rights were being violated was sometime in 2006." (Holiday's Mem. in Resp. to Dollar Tree's (Second) Mot. for Summ. J. ("Holiday's Mem. in Resp. to Dollar Tree") pp. 8-9.) Regarding the ambiguity argument, Holiday again asserted granting summary judgment to Dollar Tree would be "directly at odds with the Superior Court's determination that the ambiguous lease language is a question … to consider at trial after reviewing the relevant extrinsic evidence." (Holiday's Mem. in Resp. to Dollar Tree p. 9.)

By order entered November 2, 2012, this court denied Landlord's motion. And by order entered December 19, 2012, this court denied Dollar Tree's motion. These matters then proceeded to trial before this court and a jury on January 23, 2013. On January 29, 2013, the jury returned a verdict in favor of Holiday and against Landlord as to liability in the Breach of Contract Action.[4] On January 30, 2013, this court entered the jury's verdict on the docket and also entered a declaratory judgment in favor of Holiday and against Dollar Tree, making a number of declarations including that Dollar Tree had operated as a retail supermarket of any nature in the Shopping Center in violation of the restrictive covenants in the leases. Specifically, the court declared:

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4 As to liability in the Breach of Contract Action, the jury also returned a verdict against Regency. (*See* footnote 3.)

1. Dollar Tree has operated a retail supermarket of any nature at the [Shopping Center] during the term of the Dollar Tree [l]ease;

2. Dollar Tree has violated the Dollar Tree Supermarket Restriction [(the restrictive covenant in Dollar Tree's lease with Landlord that prohibited it from operating a "retail supermarket of any nature" in the Shopping Center)] and the Holiday Supermarket Exclusive [(the restrictive covenant in Holiday's lease with Landlord that prohibited anyone other than Holiday from operating a "retail supermarket of any nature" in the Shopping Center)] during the term of the Dollar Tree [l]ease;

3. the doctrine of laches does not preclude Holiday from enforcing the Dollar Tree Supermarket Restriction and the Holiday Supermarket Exclusive with respect to Dollar Tree;

4. the doctrine of waiver does not preclude Holiday from enforcing the Dollar Tree Supermarket Restriction and the Holiday Supermarket Exclusive with respect to Dollar Tree;

5. the applicable statute of limitations does not preclude Holiday from enforcing the Dollar Tree Supermarket Restriction and the Holiday Supermarket Exclusive with respect to Dollar Tree;

6. the doctrine of estoppel does not preclude Holiday from enforcing the Dollar Tree Supermarket Restriction and the Holiday Supermarket Exclusive with respect to Dollar Tree; [and]

7. as at issue in the above-captioned matters, the Dollar Tree Supermarket Restriction and the Holiday Supermarket Exclusive are not unreasonable in scope.

(Declaratory J. ¶¶ 1-7.)

Dollar Tree and Landlord filed timely motions for post-trial relief from this court's decision in the Declaratory Judgment Action. Following the denial of their post-trial motions, Defendants filed timely appeals and Pa. R. App. P. 1925(b) statements. In its 1925(b) statement, Dollar Tree complains this court erred as follows:

1. [I]n declaring that Dollar Tree operated a "retail supermarket of any nature" within the meaning of, and in violation of, the Dollar Tree and Holiday [l]eases.

   a. The court failed to apply controlling Pennsylvania law which requires that restrictive covenants be strictly and narrowly construed, and that nothing will be deemed a violation that is not in plain disregard of the express terms of the restriction. To the extent the trial court analyzed the issue of "plain disregard" at all, it appears to have erroneously done so from the perspective of the Landlord, rather than from the perspective of Dollar Tree. Dollar Tree could not have "plainly disregarded" the unexpressed or undisclosed intent of the ambiguous restriction at issue in this case.

b. There was no competent, admissible extrinsic evidence to establish what the original parties to the Holiday [l]ease meant when they used the phrase "retail supermarket of any nature" at the time they executed the Holiday [l]ease. Neither Ed Heller[, an attorney for Fleming for over thirty years who negotiated all of Fleming's leases including the Holiday lease at issue in this case,] nor Harry Gilbert[, the owner of Holiday who took part in the lease negotiations between Sackett and Fleming as Fleming's intended sublessee,] offered competent, admissible evidence on this issue; their testimony was based on inadmissible hearsay, lacked appropriate predicate and foundation, was irrelevant, and constituted improper lay opinion testimony. [Landlord] conceded that [it] had no evidence of the original parties' intent; Dr. Richard George[, Holiday's expert,] conceded that he was not offering any opinion about the original parties' intent; and there was no other competent, admissible evidence of the original parties' intent. Therefore, the [c]ourt should have construed the ambiguous restrictive covenant against Holiday.

2. [I]n declaring that neither the statute of limitations nor the doctrines of waiver and estoppel precluded Holiday's enforcement of the restrictive covenants in the Dollar Tree and Holiday [l]eases. The undisputed evidence showed (a) that Holiday knew and/or should have known, more than four years before filing its suit, that Dollar Tree was making sales which Holiday believed were in violation of the restrictive covenant; (b) that Holiday nevertheless intentionally and voluntarily chose not to pursue any claim relating to the alleged violation until years later; and (c) that in 2005 Holiday executed a Tenant Estoppel attesting that no breach existed at that time.

3. [I]n denying Dollar Tree's motion for post-trial relief based on newly acquired evidence. During discovery in the damages phase of the related breach of contract action, new evidence came to light establishing that Holiday had failed to disclose the existence of a witness (Donald Irwin) with knowledge relevant to this action, including what Holiday knew about Dollar Tree's business operations and when. Mr. Irwin's knowledge is properly imputed to Holiday, and this after-acquired evidence justifies at least a new trial.

4. [I]n admitting the expert opinion and testimony of Dr. George because (a) he had no relevant expertise; (b) his opinions were not a proper subject for expert testimony; (c) his opinions were based on an improper and unfounded assumption

that the restrictive covenants prohibit Dollar Tree from selling any items in competition with Holiday; and (d) his opinions were irrelevant to the construction of the restrictive covenants.

5. [I]n sustaining Holiday's improper objections to Dollar Tree's cross-examination of: (a) Dr. George regarding the language of the restrictive covenant; and (b) Mr. Gilbert regarding his deposition testimony comparing the ... Dollar Tree's business operations [at the Shopping Center] to a CVS drugstore.

(Dollar Tree's 1925(b) Statement ¶¶ 1-5.)

In its 1925(b) statement, Landlord complains this court erred as follows:

1. [B]y not dismissing this action for lack of subject matter jurisdiction because WP Mayfair ... , the owner and landlord of the ... Shopping Center since December 2010, is an indispensable party and has not been joined as a party to this action.

2. [B]y not defining of the term "retail supermarket of any nature" in ... the 1992 [l]ease [a]greement between Sackett ... and Fleming ... as required by the Pennsylvania Superior Court's Memorandum Opinion dated December 9, 2011.

3. [B]y not describing the activity, items offered for sale or the manner in which Dollar Tree ... operated as a "retail supermarket of any nature" at the Dollar Tree store located in the ... Shopping Center ... as required by the law of the case and Pennsylvania law regarding restrictive covenants.

4. [B]y not specifically determining the date when the Dollar Tree [at the Shopping Center] began operating as a "retail supermarket of any nature" as required by the law of the case and Pennsylvania law regarding restrictive covenants.

5. [B]y declaring that Dollar Tree violated Section A(3) ... in the Dollar Tree [l]ease (the "Dollar Tree Supermarket Restriction") and Section 17.1 in the Holiday [l]ease (the "the Holiday Supermarket Exclusive") because the trial court did not properly apply the law of the case and Pennsylvania law requiring that restrictive covenants be strictly and narrowly construed, and that nothing be deemed a violation that is not in plain disregard of the express terms of the restriction.

6. [B]y not identifying or describing how Dollar Tree violated the Dollar Tree Supermarket Restriction and the Holiday Supermarket Exclusive.

7. [B]y declaring that the Dollar Tree violated Dollar Tree Supermarket Restriction because, until January 30, 2013, the terms of the of the Dollar Tree

Supermarket Restriction were ambiguous under the law of the case and there was no notice or opportunity to cure pursuant to Section P(1)(d) of the Dollar Tree [l]ease.

8. [B]y declaring that the Dollar Tree violated the Holiday Supermarket Exclusive because, until January 30, 2013, the terms of the Holiday Supermarket Exclusive were ambiguous under the law of the case and there was no notice or opportunity to cure pursuant to Section 15.2 of the Holiday [l]ease.

9. [B]y declaring that the Dollar Tree Supermarket Restriction and the Holiday Supermarket Exclusive are not unreasonable in scope because the trial court did not define the term "retail supermarket of any nature."

10. [B]y declaring that the applicable statute of limitations does not preclude Holiday … from enforcing the Dollar Tree Supermarket Restriction and the Holiday Supermarket Exclusive because Holiday possessed sufficient facts to put it on notice that a wrong may have been committed and it needed to investigate prior to July 6, 2005.

11. [I]n admitting the testimony of Edward Heller regarding the intent of original parties to the Holiday [l]ease with respect to the meaning of the phrase "retail supermarket of any nature" because Mr. Heller's testimony on this issue was based on inadmissible hearsay and lacked appropriate predicate and foundation.

12. [I]n admitting the testimony of Dr. Richard George to determine the meaning of the phrase "retail supermarket of any nature." Dr. George's opinion that Dollar Tree competes with Holiday is irrelevant to the construction of the Holiday's lease. The trial court also erred by admitting Dr. George's testimony because it was based on the assumption that the Supermarket Exclusive prohibits all competition and the terms of the Holiday [l]ease were breached by competition that the Dollar Tree [in the Shopping Center] gave to Holiday.

13. [I]n admitting the testimony of Harry Gilbert regarding the intent of the original parties to Holiday's regarding the intent of original parties to the Holiday [l]ease with respect to the meaning of the phrase "retail supermarket of any nature" because Mr. Gilbert's testimony on this issue was based on inadmissible hearsay and lacked appropriate predicate and foundation.

14. [B]y denying [Landlord's] Motion for Summary Judgment filed on September 21, 2012 because [Landlord] is entitled to a declaration that no violation of either the Holiday Supermarket Exclusive or the Dollar Tree Supermarket Restriction has occurred. The law of this case is that the terms of the Holiday Supermarket Exclusive or the Dollar Tree Supermarket Restriction ambiguous. Because any ambiguity must be construed against the party benefiting from the restriction, the restriction at issue can never be interpreted to

allow Holiday to prevail over [Landlord] and Dollar Tree by declaring that a violation of the leases occurred.

> 15. [B]y denying [Landlord's] Motion for Summary Judgment filed on September 21, 2012 because the claims based on a violation of either the Holiday Supermarket Exclusive or the Dollar Tree Supermarket Restriction asserted against [Landlord] are not justiciable. Such claims are unripe because, under the law of this case, the scope of the restrictive covenant was not defined until January 30, 2013. Thus, any duty to act was not established until the declaratory judgment was entered. In the alternative, such claims are moot because, under the law of this case, the scope of the restrictive covenant was not defined until January 30, 2013 and [Landlord] sold the ... Shopping Center in December 2010.
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> 16. [I]n denying [Landlord's] Joinder to the Supplemental Motion for Post-Trial Relief filed on July 22, 2013 because of the newly discovered evidence established that Holiday was aware that the ... Dollar Tree [at the Shopping Center] was selling certain food item from 2003 onward. Thus, the four-year statute of limitations for breach of contract actions bars Holiday's claims as a matter of law because Holiday did not file its complaint until July 7, 2009.

(Landlord's 1925(b) Statement ¶¶ 1-16.)

II. DISCUSSION

A. Standards and Scopes of Review

"The entry of summary judgment is only proper where the uncontroverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *Rush v. Philadelphia Newspapers, Inc.*, 732 A.2d 648, 650-51 (Pa. Super. Ct. 1999). "[I]n determining whether summary judgment should enter, the record is … viewed in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." *Manzetti v. Mercy Hosp. of Pittsburgh*, 776 A.2d 938, 945 (Pa. 2001). Additionally, summary judgment should only be granted "in those cases which are free and clear from doubt." *Washington v. Baxter*, 719 A.2d 733, 737 (Pa. 1998). An appellate court's scope of review of an order granting or denying summary judgment is plenary, and its standard of review is clear: "the trial court's order will be reversed only where it is established that the court committed an error of law or abused its discretion." *QBE Ins. Corp. v. M & S Landis Corp.*, 915 A.2d 1222, 1225 (Pa. Super. Ct. 2007), *quoting Pappas v. Asbel*, 768 A.2d 1089, 1095 (Pa. 2001).

Judgment n.o.v. is an extreme remedy and should only be entered in the clearest of cases. *Moure v. Raeuchle*, 604 A.2d 1003, 1007 (Pa. 1992). "There are two bases upon which a judgment n.o.v. can be entered: one, the movant is entitled to judgment as a matter of law, and/or two, the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant." *Id.* (citations omitted). An appellate court will reverse a trial court's grant or denial of a judgment n.o.v. "only when the appellate court finds an abuse of discretion or an error of law." *Dooner v. DiDonato*, 971 A.2d 1187, 1193 (Pa. 2009).

A new trial should only be granted when the verdict is so contrary to the evidence so as to shock one's sense of justice. *Barrack v. Kolea*, 651 A.2d 149, 152 (Pa. Super. Ct. 1994). The decision of the trial court to refuse to grant a new trial will only be reversed when "there has been a clear abuse of discretion or an error in law determinative to the outcome of the case." *Id.*

During a bench trial, the trial court acts as the finder of fact and has the authority to make credibility determinations and resolve conflicts in evidence. *Ruthrauff, Inc. v. Ravin, Inc.*, 914 A.2d 880, 888 (Pa. Super. Ct. 2006). The appellate court will not reweigh the evidence. *Adamski v. Miller,* 681 A.2d 171, 173 (Pa. 1996). Rather, the trial court's findings made after a bench trial will be given the same weight and effect as a jury verdict and "will not be disturbed on appeal absent an abuse of discretion, error of law, or lack of support in the record." *Ruthrauff*, 914 A.2d at 888 (quotations omitted).

B. Dollar Tree's Appeal

Dollar Tree has asserted five complaints of error regarding this court's declaratory judgment against it. We categorized its complaints of error as follows: (1) interpretation of restrictive covenants; (2) statute of limitations, waiver, and estoppel; (3) newly acquired evidence; (4) the expert opinion and testimony of Dr. George; and (5) miscellaneous evidentiary rulings.

1. Interpretation of Restrictive Covenants

The primary issue of this appeal is the interrelationship between the rule of strict construction for restrictive covenants and the use of extrinsic evidence to determine the intent behind an ambiguous restrictive covenant. Here, Dollar Tree complains this court "failed to apply controlling Pennsylvania law which requires that restrictive covenants be strictly and narrowly construed, and that nothing will be deemed a violation that is not in plain disregard of the express terms of the restriction." (Dollar Tree's 1925(b) Statement ¶ 1.) Dollar Tree argues that "[t]o the extent the trial court analyzed the issue of 'plain disregard' at all, it appears to have erroneously done so from the perspective of the Landlord, rather than from the perspective of Dollar Tree." (Dollar Tree's 1925(b) Statement ¶ 1.) Dollar Tree further argues it "could not have 'plainly disregarded' the unexpressed or undisclosed intent of the ambiguous restriction at issue in this case." (Dollar Tree's 1925(b) Statement ¶ 1.)

While creative, the entire premise of Dollar Tree's complaint of error is in direct contraction with the Superior Court's December 9, 2011 opinion, which considered all of the relevant law at issue and reversed the granting of summary judgment and entering of judgment in favor of Dollar Tree in the Declaratory Judgment Action despite finding the phrase "supermarket of any nature" to be ambiguous. In its December 9, 2011 opinion, the Superior Court noted the following as additional considerations for construing the restrictive covenants in the parties' lease agreements. First, citing *Baumgartner v. Stuckey*, 735 A.2d 1272, 1274 (Pa. Super. Ct. 1999), the Superior Court stated:

> In interpreting the foregoing restrictive covenant, we are guided by the well-reasoned principles announced by our supreme court in *Great A. & P. Tea Co. v. Bailey*, 421 Pa. 540, 220 A.2d 1 (1966):
>
> > It is a general rule of contract interpretation that the intention of the parties at the time of the contract is entered into governs. This same rule also holds true in the interpretation of restrictive covenants. However, in Pennsylvania, there is an important difference in the rule of interpretation as applied to restrictive covenants on the use of land. It is this. Land use restrictions are not favored in the law, are strictly construed, and nothing will be deemed a violation of such a restriction that is not in plain disregard of its express words.
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> *Id.* at 544, 220 A.2d at 2-3. *** Additionally, we note that this court cannot enlarge a restriction by implication for the restriction must be strictly construed against the one asserting it.

Dollar Tree, 2 EDA 2011 at 9. Next, citing *Eckerd Corp. v. Glen Eagle Retail L.P.*, 853 A.2d 385, 387 (Pa. Super. Ct. 2004), the Dollar Tree court noted:

> Our Supreme Court has acknowledged the importance of a landlord's non-compete promise. In *Teodori v. Werner,* 490 Pa. 58, 415 A.2d 31 (1980), the Court stated:
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>> It is obvious that a landlord's non-competition promise is critical to a commercial lease agreement like the one here. The mere presence in a lease of a noncompetition promise by the landlord justifies the conclusion that it is essential that the promise be observed if the tenant is to conduct his business on the leased property profitably.
>
> *Id.* at 65, 415 A.2d at 34.

Dollar Tree, 2 EDA 2011 at 10. Finally, citing *Perrige v. Horning*, 654 A.2d 1183, 1188 (Pa. Super. Ct. 1995), the Dollar Tree court noted: "Restrictive covenants must be construed in light of their language, their subject matter, the intent or purposes of the parties, and the conditions surrounding their execution [and] [w]here an ambiguity exists a court may consider extrinsic evidence of the parties' intent." *Dollar Tree*, 2 EDA 2011 at 10. With all of these principles in mind, the Dollar Tree court held "resolution of the ambiguity [in this case] require[d] the finder of fact to determine the parties' actual intent after considering the surrounding circumstances, the situation of the parties, the objects they apparently have in view, … the nature of the subject-matter of the agreement, and other relevant extrinsic evidence" and that Judge Sheppard erred in granting summary judgment and entering judgment in favor of Dollar Tree in the Declaratory Judgment Action.

In this case, the Superior Court has already concluded the phrase "supermarket of any nature" was ambiguous. As such, this court properly considered extrinsic evidence of Fleming's and Sackett's intent that, as will be discussed below, established Dollar Tree has operated as a retail supermarket of any nature in the Shopping Center in violation of the Dollar Tree

Supermarket Restriction and the Holiday Supermarket Exclusive. Thus, in contradiction to Dollar Tree's complaint of error, it was not necessary to strictly construe the restrictive covenants so that nothing will be deemed a violation that is not in "plain disregard" of their express words. The extrinsic evidence resolved the doubts about the meaning of the ambiguous restrictive covenants, thereby overcoming the general rule that such covenants must be strictly construed so that nothing will be deemed a violation that is not in plain disregard of their express words. As explained by the Superior Court, the fact that the restrictive covenants were found to be ambiguous simply means the intent of the parties had to be determined from extrinsic evidence, not that the parties did not know the intent of the restrictive covenants or that there can be no breach as a matter of law.

In addition to controlling Pennsylvania law rejecting Dollar Tree's complaint of error, a district court in Ohio addressed this issue at length, explaining that:

> when a restrictive-use provision is ambiguous, extrinsic evidence may be considered to determine the parties' intent, despite the general rule favoring the unrestricted use of real estate. In other words, extrinsic evidence may resolve the doubts about the meaning of an ambiguous restrictive covenant, thereby overcoming the general rule that such covenants must be narrowly construed against restrictions on the use of property.

See Books a Million, 140 F.Supp.2d at 847-49. Dollar Tree's complaint of error not only ignores the above case law, but it did not cite a single case from anywhere that the rule of strict construction and plain disregard compels judgment in its favor even when there is clear evidence of intent to the contrary. There was no basis for turning a rebuttable evidentiary presumption into a conclusive one, and reversing the Superior Court's holding that Holiday was entitled to have the finder of fact determine the actual intent of the parties after considering the surrounding circumstances, the situation of the parties, the objects they apparently have in view, the nature of the subject-matter of the agreement, and other relevant extrinsic evidence.

Further, to the extent Dollar Tree argues it cannot be found to have violated the Dollar Tree Supermarket Restriction and the Holiday Supermarket Exclusive because it was not a party to the original Holiday lease and could not have possibly know or "plainly disregarded" the unexpressed or undisclosed intent of the ambiguous restrictions at issue in this case, Dollar Tree's argument is irrelevant for two reasons.

First, as discussed above, because the extrinsic evidence resolved the doubts about the meaning of the ambiguous restrictive covenants, thereby overcoming the general rule of strict construction and plain disregard, there was no reason to analyze the issue of "plain disregard." Second, even if analyzing the issue of "plain disregard" was necessary, doing so from perspective of Dollar Tree is of no moment.

Here, Dollar Tree entered into a lease that contained the following restriction on Dollar Tree's permitted use based on Holiday's exclusive use:

> Permitted Use. The retail sale of general merchandise including, but not limited to, home accessories, [etc.], provided however, [that Dollar Tree] acknowledges that (1) Landlord has or may have granted to various tenants in the [Shopping Center] the right to use their premises for exclusive purposes which no other tenants ... may perform ("Exclusive Uses") and (2) Landlord has or may have agreed to restrict or prohibit certain uses at the [Shopping Center] ("Prohibited Uses").... [Dollar Tree] covenants that ... (i) [it] shall in no event use the [Shopping Center] for any of the exclusive and Prohibited Uses....

(Lease Agreement between Landlord and Dollar Tree ¶ A(3).) Dollar Tree's lease then went on to list "[r]etail supermarket of any nature" as an exclusive and prohibited use.

It is clear from these provisions that if there was any ambiguity as to an exclusive use, it is the intent of the parties to that agreement (in this case, the original parties to the Holiday lease) that controlled. As the tenant (Dollar Tree) acknowledged, the landlord (Landlord) has or may have granted another tenant (in this case, Holiday) the right to use its premises for exclusive purposes which no other tenants may perform. And in this case, there was competent, admissible extrinsic evidence to establish what the original parties to the Holiday lease meant when they used the phrase "retail supermarket of any nature" at the time they executed the lease.

Regarding its objections to Mr. Heller's testimony on the issue, Dollar Tree argued:

> Mr. Heller could not provide any competent evidence to establish what Fleming and Sackett meant in 1992 when they used the phrase "retail supermarket of any nature" because: (a) Mr. Heller did not draft or negotiate the terms of Holiday's lease; (b) Mr. Heller did not draft or negotiate the language of the operative restriction contained in Holiday's lease; (c) Mr. Heller's client, Fleming, simply provided the language of the restriction to him to include in Holiday's lease; (d) Mr. Heller had no specific recollection of speaking with anyone at Sackett regarding the terms of Holiday's lease; and (e) Mr. Heller's testimony regarding the intent of the restriction was his subjective impressions, and *not* that of the original parties (which is also why Mr. Heller's testimony constituted an improper lay opinion).

(Dollar Tree's Post-Trial Br. p. 23 (emphasis original).) Dollar Tree's objections all go to the weight, not the admissibility of this testimony.

First, Dollar Tree's arguments have nothing to do with Mr. Heller's competency; they deal strictly with credibility, which is an issue solely within the province of the trier of fact. Mr. Heller's testimony was derived from his own personal knowledge of the lease negotiations between Sackett and Fleming as well as his knowledge of his client's intent relative to the lease restriction as he represented Fleming for over three decades. Specifically, the video-taped trial testimony of Mr. Heller established the following facts.

Mr. Heller practiced law for over 40 years and his practice focused on real estate law, including the representation of commercial clients in lease negotiations. (Heller Trial Dep., October 2, 2012, at pp. 5-6.) Relevant to this case, Mr. Heller testified he personally represented Fleming, the original lessee to the Holiday lease, for over 30 years. (Heller Trial Dep., October 2, 2012, at pp. 7-9.) Mr. Heller also testified he negotiated all of Fleming's leases, including the Holiday lease at issue in this case, and there was a certain consistency in all of these lease negotiations. (Heller Trial Dep., October 2, 2012, at pp. 9-13.) He explained Fleming had a lot of power as the anchor tenant and that every lease he negotiated on behalf of Fleming had an exclusive use provision to protect Fleming and its sublessees from competition. (*See* Heller Trial Dep., October 2, 2012, at pp. 11-12, 20-21, 26-27.) Mr. Heller testified that Fleming would not enter into any lease without this protection. (Heller Trial Dep., October 2, 2012, at p. 23.) As such, Mr. Heller explained he was familiar with Fleming's intent relative to the exclusive use provision in Holiday's lease and the intent was the same in every lease. (*See* Heller Trial Dep., October 2, 2012, at pp. 26-27, 29, 31.) In fact, Mr. Heller repeatedly testified he was familiar with the intent of both parties to the exclusive use provision in the Holiday lease having participated in the negotiation and finalization of the lease on behalf of Fleming. (*See* Heller Trial Dep., October 2, 2012, at pp. 30-31, 34-35.)

With respect to the issue of intent, Mr. Heller clearly testified both parties intended and understood the phrase "supermarket of any nature" was not limited to protecting Fleming and its sublessee from competition from another supermarket, but rather provided broad protection from competition from any business selling the same types or categories of products offered for sale by the supermarket. (*See* Heller Trial Dep., October 2, 2012, at pp. 30-35.) For example, in testifying the clause was intended to limit competition from more than just a traditional supermarket, Mr. Heller testified that it "[o]bviously … was to protect them from another supermarket, but it was also to protect them from someone else coming in and competing with them in terms of the product lines they have or supermarkets normally have…." (Heller Trial Dep., October 2, 2012, at pp. 30-35.) And Mr. Heller testified there was no doubt in his mind that both parties understood that this was the intent. (Heller Trial Dep., October 2, 2012, at pp. 34-35.)

The above testimony was based upon Mr. Heller's personal knowledge having participated in the lease negotiations as Fleming's attorney, not his own lay opinion. He knew the parties' intent because this same language was used in every lease negotiation; it was an important clause always discussed by the parties; and it was a clause that was non-negotiable from Fleming's perspective. Testimony about the lease negotiations from the attorney who was present at the negotiations and represented one of the original parties to that lease is acceptable extrinsic evidence to resolve the ambiguity at issue.

Nor was Mr. Heller's testimony "rank hearsay" as claimed by Dollar Tree. Once again, Dollar Tree glossed over the fact that Mr. Heller's testimony was based upon his own personal knowledge, having representing Fleming in this and all of its lease negotiations for over 30 years. Having participated in the negotiation and finalization of the leases, Mr. Heller has personal knowledge about the intent relative to the exclusive use provision. And contrary to Dollar Tree's argument, a person like Mr. Heller with personal knowledge of negotiations is permitted to testify to resolve an ambiguity in a contract. *See*, *e.g.*, *Mun. Auth. of Borough of Edgeworth v. Borough of Ambridge Water Auth.*, 936 A.2d 538, 546 (Pa. Commw. Ct. 2007) (stating that the testimony of "Kerchner, who represented Edgeworth in contract negotiations, and Brown, who did the same for Ambridge, both testified regarding the intent and circumstances behind the Agreement" was properly considered and sufficient to resolve an ambiguity in a contract.)

The testimony on original intent by Mr. Gilbert was also properly admitted. Dollar Tree's objections to Mr. Gilbert's testimony regarding original intent ignore that he was personally involved with the lease negotiations and testified about a meeting he attended to clarify the parties' intent concerning the restrictive covenant at issue. (*See* Trial Tr., January 25, 2013, Morning Session, at pp. 110-14.) His testimony about this meeting is admissible for the same reasons Mr. Heller's testimony was admissible, as evidence of original intent.

Specifically, Mr. Gilbert established he had personal knowledge of the original lease negotiations between Sackett and Fleming. (Trial Tr., January 25, 2013, Morning Session, at pp. 110-14.) Thus, Mr. Gilbert's testimony was not based upon his personal interpretations or opinion of the lease. Nor was his testimony hearsay as it represented extrinsic evidence of the parties' intent as testified to by someone with personal knowledge of the lease negotiations between those parties and who was an intended beneficiary of the lease. These statements are not hearsay because they have independent legal significance relating the intent of an ambiguous, disputed contract provision.

Presentation of extrinsic evidence is the reason the Superior Court remanded this case to the trial court. The above testimony was competent extrinsic evidence to establish what the original parties to the Holiday lease meant when they used the phrase "retail supermarket of any nature" and there was no error in admitting it.

2. Statute of Limitations, Waiver, and Estoppel

Regarding its time-based defenses, Dollar Tree complains this court erred in declaring that none of them—statute of limitations, waiver, and estoppel—"precluded Holiday's enforcement of the restrictive covenants in the Dollar Tree and Holiday [l]eases." (Dollar Tree's 1925(b) Statement ¶ 2.) Dollar Tree argues the undisputed evidence showed "that Holiday knew and/or should have known, more than four years before filing its suit, that Dollar Tree was making sales which Holiday believed were in violation of the restrictive covenant . . . ." (Dollar Tree's 1925(b) Statement ¶ 2.) Specifically, Dollar Tree argued in its post-trial brief that this court "ignored that Dollar Tree established its statute of limitations (and its other improperly rejected time-based defenses) based on the clear and unambiguous testimony of Mr. Gilbert, who readily admitted that 'Holiday has known since 2003 that the Dollar Tree in the … Shopping Center has been selling various food items.'" (Dollar Tree's Post-Trial Br. p. 44 (*quoting* Trial Tr., January 28, 2013, at p. 63).)

Contrary to Dollar Tree's assertions, the record for the Declaratory Judgment Action as established by the parties is clear that the earliest Holiday or Mr. Gilbert knew or should have known Holiday's lease rights were being violated was sometime in 2006. Here, Mr. Gilbert testified he had absolutely no knowledge in 2003, 2004, or 2005 that Dollar Tree was selling substantial amounts of food and grocery items, making them a retail supermarket of some nature within the intent of the original parties to the Holiday lease. (Trial Tr., January 25, 2013, Morning Session, at p. 131.) While Mr. Gilbert stated on cross-examination that Holiday has known since 2003 that the Dollar Tree at the Shopping Center had been selling various food items, (Trial Tr., January 28, 2013, Morning Session, at pp. 62-63), it was clear from his direct testimony that what Mr. Gilbert knew in 2003 was that the Dollar Tree was probably selling gum and candy in terms of food items, (Trial Tr., January 25, 2013, Morning Session, at p. 126). In fact, Mr. Gilbert specifically testified he and Holiday did not have any knowledge in 2003 that this Dollar Tree store was selling anything other than gum and candy in terms of food items; the credibility of which the court (and jury) as finder or fact was entitled to accept. (Trial Tr., January 25, 2013, Morning Session, at p. 126.)

The evidence at trial did not support finding that Holiday knew and/or should have known, more than four years before filing its suit, that Dollar Tree was making sales which Holiday believed were in violation of the restrictive covenants. Rather, the evidence supported finding the earliest Holiday or Mr. Gilbert knew or should have known Holiday's lease rights were being violated was sometime in 2006. As the Breach of Contract Action was commenced in July 2009, there was no error in declaring that neither the applicable statute of limitation nor the doctrines of waiver or estoppel precluded Holiday from enforcing the Dollar Tree Supermarket Restriction and the Holiday Supermarket Exclusive against Dollar Tree.

3. Newly Acquired Evidence

Next, Dollar Tree complains this court erred in denying its motion for post-trial relief based on newly acquired evidence. In this motion for post-trial relief, Dollar Tree argued that during discovery in the damages phase of the Breach of Contract Action, new evidence came to light regarding its time-based defenses discussed above. Specifically, Dollar Tree argued it discovered that a then Holiday store assistant manager, Donald Irwin, knew since 2003 that Dollar Tree was selling food items and other consumables beyond gum and candy in the Shopping Center. Dollar tree argues "Mr. Irwin's knowledge is properly imputed to Holiday, and this after-acquired evidence justifies at least a new trial." (*See* Dollar Tree's 1925(b) Statement ¶ 3.)

"The legal requirements for the grant of a new trial based upon after-discovered evidence are well established: the evidence must have been discovered after the trial and must be such that it could not have been obtained at the trial by reasonable diligence, must not be cumulative or merely impeach credibility, and must be such as would likely compel a different result." *Daniel v. Wyeth Pharm., Inc.*, 15 A.3d 909, 916 (Pa. Super. Ct. 2011). In its motion for post-trial relief, Dollar Tree argued each of these elements was satisfied.

First, Dollar Tree argued it could not have obtained Mr. Irwin's testimony during discovery in the liability phase because (1) Holiday did not disclose Mr. Irwin as a person with relevant information in response to its interrogatory request No. 2 and (2) Mr. Gilbert did not mention Mr. Irwin during his deposition as corporate designee. Second, Dollar Tree argued this evidence is not cumulative as it contradicts Mr. Gilbert's testimony that he "had no idea that the [Dollar Tree at the Shopping Center] was selling anything other than gum and candy in 2003." (Dollar Tree's Supplemental Mot. for Post-Trial Relief ("Dollar Tree's Supplemental Mot. ¶ 18.) Third, Dollar Tree argued "Mr. Irwin's testimony would not be introduced to impeach other evidence[,]" but rather as "substantive evidence—indeed, an **admission**—that Holiday knew as of 2003 that the [Dollar Tree at the Shopping Center] was selling food items beyond candy and gum." (Dollar Tree's Supplemental Mot. ¶ 19 (emphasis original).) Dollar Tree based this argument on its assertion that under Pennsylvania law, the knowledge of Mr. Irwin, as Holiday's employee, should be imputed to Holiday, as his employer. Finally, Dollar Tree argued this evidence would likely have compelled a different result as it would have precluded Holiday from maintaining at trial that it only knew in 2003 that the Dollar Tree at the Shopping Center was selling gum and candy.

Dollar Tree's motion for post-trial relief was properly denied for two reasons. First, Dollar Tree failed to establish it could not have been obtained Mr. Irwin's testimony during the first phase of this matter with the exercise of reasonable diligence. For example, Dollar Tree suggested it did not discover Mr. Irwin had knowledge of what Dollar Tree was selling in 2003 because Holiday did not disclose Mr. Irwin in response to its interrogatory request No. 2.

Dollar Tree's interrogatory request No. 2 broadly asked Holiday to "[i]dentify the names and addresses of all Persons who have knowledge of any facts asserted by Holiday in" the complaint it filed in the Breach of Contract Action. (Dollar Tree's Supplemental Mot., App. N.) Dollar Tree argued certain allegations in the complaint asserting Dollar Tree was selling food and grocery items in violation of Holiday's lease rights compelled disclosure.

The evidence, however, before this court was that Mr. Irwin had absolutely no knowledge about either Holiday's or Dollar Tree's lease. (Holiday's Opp'n to Dollar Tree's Supplemental Mot. for Post-Trial Relief ("Holiday's Opp'n to Supplemental Mot."), Ex. B.) In fact, Mr. Irwin had never seen either of the leases. (Holiday's Opp'n to Supplemental Mot., Ex. B.) As such, Mr. Irwin had no idea whether the sale of food and grocery items by Dollar Tree was in violation of Holiday's lease rights and his identity did not have to be disclosed in response to Dollar Tree's interrogatory request No. 2.

Dollar Tree could have sought discovery relating to its time-based defenses, but it declined to do so. As such, Dollar Tree failed to exercise reasonable diligence to obtain this evidence and cannot now obtain post-trial relief based on the same.

Second, even if Holiday should have identified Mr. Irwin during discovery (by answers to interrogatories or during Mr. Gilbert's deposition as corporate designee), Dollar Tree only established Mr. Irwin's testimony may have possibly impeached Mr. Gilbert's testimony, which alone does not warrant a new trial based upon after-discovered evidence. Dollar Tree failed to establish on the record before this court its other argument that Mr. Irwin's knowledge of what it was selling at the Shopping Center in 2003 could be imputed to Holiday and deemed an admission, which may have warranted a new trial based upon after-discovered evidence.

Here, Dollar Tree established Mr. Irwin's testimony that he knew Dollar Tree was selling food items and other consumables beyond gum and candy in 2003 may have impeached Mr. Gilbert's testimony that he did not know Dollar Tree was selling food items and other consumables beyond gum and candy until 2006, at the earliest, as it may have called into question the veracity of Mr. Gilbert's statement given that Mr. Irwin was at that time an assistant manager and Mr. Gilbert's son-in-law and that they talked about other matters, etc. But evidence that merely potentially impeaches credibility does not warrant a new trial based upon after-discovered evidence. Thus, Dollar Tree argued for more—that Mr. Irwin's testimony be imputed to Holiday and deemed an admission.

Regarding imputation of knowledge, "[i]t is well settled in the law of this jurisdiction that knowledge of an agent, acting within the scope of his authority, real or apparent, may be imputed to the principal, and therefore, knowledge of the agent is knowledge of the principal." *W.C.A.B. v. The Evening Bulletin,* 445 A.2d 1190, 1192 (Pa. 1982). "However, the agent's awareness of a given fact is not imputed to the principal if knowledge of the fact is not material to his duties to the principal." *Rosenberry v. Evans*, 48 A.3d 1255, 1262 (Pa. Super. Ct. 2012), *citing* Restatement (Third) of Agency § 5.03.

In this case, Mr. Irwin was at the relevant time an assistant store manager for Holiday at the Shopping Center and had no responsibility to monitor competition. (Holiday's Opp'n to Supplemental Mot., Ex. B.) Mr. Irwin further had no responsibility to enforce Holiday's restrictive covenants and/or ensure other tenants in the Shopping Center were not violating Holiday's lease rights. (Holiday's Opp'n to Supplemental Mot., Ex. B.) Moreover, Mr. Irwin never saw Holiday's lease and had no idea what Dollar Tree was and was not allowed to sell. (Holiday's Opp'n to Supplemental Mot., Ex. B.)

Dollar Tree failed to establish Mr. Irwin's knowledge of what it was selling at the Shopping Center in 2003 was material to his duties to Holiday. Mr. Irwin's knowledge of the same could, therefore, not properly be imputed to Holiday and deemed an admission. Dollar Tree, thus, only established Mr. Irwin's testimony could potentially impeach Mr. Gilbert's testimony, which alone does not warrant a new trial based upon after-discovered evidence.

4. Expert Opinion and Testimony of Dr. George

Dollar Tree complains this court erred in admitting the opinion and testimony of Holiday's expert, Dr. George, because:

> (a) he had no relevant expertise; (b) his opinions were not a proper subject for expert testimony; (c) his opinions were based on an improper and unfounded assumption that the restrictive covenants prohibit Dollar Tree from selling any items in competition with Holiday; and (d) his opinions were irrelevant to the construction of the restrictive covenants.

(Dollar Tree's 1925(b) Statement ¶ 4.)

Regarding Dr. George's expertise, Dollar Tree does not challenge his credentials as a marketing expert generally, but rather his qualifications to offer testimony about the meaning, intent, or scope of the restrictive covenants at issue in this case. The fundamental problem with Dollar Tree's argument is that Dr. George offered no such testimony, but rather based all his opinions upon his assumptions of the meaning, intent, and scope of the restrictive covenants. (*See* Trial Tr., January 25, 2013, Morning Session, at pp. 35-36 (stating his opinions were based on his assumptions "that the original lease was designed to protect supermarkets from competitors selling the same types or categories of products as a supermarket might sell.".) And such testimony is permissible under Pennsylvania law. *See, e.g., Commonwealth v. Britcher*, 563 A.2d 502, 508 (Pa. Super. Ct. 1989) (holding that "[u]nder Pennsylvania law, an expert may not base an opinion on conjecture or guesswork, however, an expert opinion may be given in response to a hypothetical question posed by counsel so long as the assumed set of facts upon which the opinion is to be based is eventually supported by competent evidence and the reasonable inferences derivable therefrom.").

Here, Dr. George assumed the lease restriction was not limited to competition from other supermarkets, but included protection from competition by any business selling the same types of items offered for sale by Holiday. Thus, Dollar Tree's argument mischaracterizes the foundation of the testimony as he assumed the meaning, intent, and scope of the restrictive covenants. Moreover, this assumption was supported by the testimony of Mr. Heller and Mr. Gilbert. And thus, permitting the Dr. George's testimony was proper.

Next, Dollar Tree argues Dr. George's opinions were not a proper subject for expert opinion. Dr. George testified about the various publications, including from the Food Marketing Institute, that have examined the issue of competition by dollar stores. (*See, e.g.*, Trial Tr., January 25, 2013, Morning Session, at p. 41-43.) Dr. George's testimony about the nature of the business operations of Dollar Tree generally and at the Shopping Center specifically in terms of whether and how it competes with supermarkets clearly involved specialized knowledge beyond that possessed by a lay person. The testimony also assisted the trier of fact to understand the evidence or to determine a fact in issue as specified by *Pennsylvania Rule of Evidence* 702. No error was committed in allowing Dr. George to offer his opinions.

Further, Dr. George's opinions were based on a proper and founded assumption that the restrictive covenants prohibit Dollar Tree from competing with Holiday. This argument ignores the testimony of Mr. Heller and Mr. Gilbert that preventing competition from other shopping center tenants is exactly what the original parties to Holiday's lease intended to prevent by including the restrictive phrase "supermarket of any nature." Thus, the assumption was proper and founded as facts supported by competent evidence and the reasonable inferences derivable therefrom supported it.

Lastly, Dollar Tree argues Dr. George's opinions were irrelevant to the construction of the restrictive covenants. Again, the fundamental problem with Dollar Tree's argument is that Dr. George based all his opinions upon his assumptions of the meaning, intent, and scope of the restrictive covenants. Dr. George assumed the lease restriction was not limited to competition from other supermarkets, but included protection from competition by any business selling the same types of items offered for sale by Holiday. Such assumptions are permitted and this one was ultimately supported by the testimony of Mr. Heller and Mr. Gilbert. Permitting the testimony of Dr. George was proper.

5. Miscellaneous Evidentiary Rulings

Dollar Tree also complains about the following evidentiary rulings: sustaining Holiday's objections to Dollar Tree's cross-examination of Dr. George regarding the language of the restrictive covenant and sustaining Holiday's objections to Dollar Tree's cross-examination of Mr. Gilbert regarding his deposition testimony comparing Dollar Tree's business operations at the Shopping Center to a CVS drugstore.

First, Dollar Tree argued this court erred in sustaining Holiday's objections to Dollar Tree's cross-examination of Dr. George about the language of the restrictive covenants because "Dr. George rendered an opinion that the restriction was breached." (Dollar Tree's Mot. for Post-Trial Relief ¶ 13.) There was no error here because, again, Dr. George was not offering any opinions about his interpretations of the lease restrictions. (Trial Tr., January 25, 2013, Morning Session, at pp. 35-36.) To the contrary, Dr. George assumed the intent of the lease restrictions based upon the testimony of two witnesses involved in the original lease negotiations and Dollar Tree cross-examined both of these witnesses about their understanding of the intent of the restrictions. It is one thing to challenge Dr. George about whether his assumptions were supported by the testimony of Mr. Heller and/or Mr. Gilbert, it is another to cross-examine him as if he is was offering his own opinion of the lease restrictions, which is exactly what this court properly prevented Dollar Tree from doing.

Next, Dollar Tree argued this court erred in sustaining Holiday's objections to Dollar Tree's cross-examination of Mr. Gilbert about his deposition testimony comparing Dollar Tree's business operations at the Shopping Center to a CVS drugstore, including that "the product mix and assortment at the [Dollar Tree at the Shopping Center] was more comparable to that of a CVS drugstore than a supermarket like Holiday … ." (Dollar Tree's Mot. for Post-Trial Relief ¶ 14.) In its post-trial brief, Dollar Tree failed to brief this issue. Therefore, it is waived. *See, e.g.*, *Bell v. City of Philadelphia*, 541, 491 A.2d 1386, 1389 (Pa. Super. Ct. 1985) (concluding failure to argue an issue in the brief filed with the trial court in support of a post-trial motion resulted in waiver of the issue on appeal).

C. Landlord's Additional Issues

Landlord's 1925(b) statement delineates sixteen complaints of error. Many of Landlord's complaints of error are addressed above within the context of Dollar Tree's appeal. This court, however, will individually address the following two additional issues raised by Landlord: (1) subject matter jurisdiction and (2) the generality of the declarations.

1. Subject Matter Jurisdiction

Landlord complains this court erred in not dismissing the Declaratory Judgment Action "for lack of subject matter jurisdiction because WP Mayfair … , [as] the owner and landlord of the … Shopping Center since December 2010, [was] an indispensable party and [had] not been joined as a party to this action." (Landlord's 1925(b) Statement ¶ 1.)

"In the absence of an indispensable party, a court lacks jurisdiction over matters before it." *Grimme Combustion, Inc. v. Mergentine Corp.*, 595 A.2d 77, 81 (Pa. 1991). The Declaratory Judgments Act provides that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings." 42 Pa. C.S. § 7540(a). Thus, if the court's declaration did not prejudice WP Realty, it was not an indispensable party.

Here, there is no concern with the declaration affecting the due process rights or otherwise prejudicing WP Realty as the declaration is limited to the rights and obligations of Dollar Tree. Specifically, whether Dollar Tree violated the Dollar Tree Supermarket Restriction and the Holiday Supermarket Exclusive during the term of its own lease and whether Holiday could enforce the same against Dollar Tree were addressed. The court's declaration is limited to Dollar Tree and does not prejudice WP Realty. In fact, the court found in favor of Landlord and Holiday and against Dollar Tree for the declaratory judgment aspects of the case. Thus, even if Dollar Tree continues to operate as a supermarket of some nature in the Shopping Center, it is Dollar Tree who is risking exposure based on the declaratory judgment, not WP Realty, and thus there is no prejudice to WP Realty.

Moreover, WP Realty is also not an indispensable party because WP Realty is in privity with Landlord for purposes of Holiday's lease. As such, WP Realty is legally bound by the jury's verdict in the Breach of Contract Action that found Dollar Tree is a supermarket of some nature operating in violation of the lease agreements. As WP Realty is collaterally estopped from challenging that finding, it suffered no prejudice when this court agreed and found that Dollar Tree has operated in the Shopping Center as a retail supermarket of any nature in violation of the Dollar Tree Supermarket Restriction and the Holiday Supermarket Exclusive.

2. Generality of the Declarations

Landlord also complains about the generality of this court's declarations. This is an appeal from the disposition of Dollar Tree's action for a declaratory judgment. In the

Declaratory Judgment Action, Dollar Tree sought general declarations such as "that during the term of the Dollar Tree [l]ease, Dollar Tree has not operated a retail supermarket of any nature at the [Shopping Center]." (Dollar Tree's Compl. p. 15.) Disagreeing, this court made general declarations such as "Dollar Tree has operated a retail supermarket of any nature at the [Shopping Center] during the term of the Dollar Tree [l]ease[.]" (Declaratory J. ¶ 1.) There was no error in doing so here. While the generality of the jury's verdict from the liability phase of the Breach of Contract Action may cause issues with calculating damages in the damages phase, those issues are not before the Superior Court at this juncture, and Dollar Tree's Declaratory Judgment Action did not seek, nor require more specific declarations.

BY THE COURT:

McINERNEY, J.