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

TJS BROKERAGE & CO, INC.	:	December Term, 1999
Plaintiff,	:	
	:	No. 2755
v.	:	
	:	Commerce Program
HARTFORD CASUALTY	:	
INSURANCE CO.	:	
Defendant.	:	

ORDER

AND NOW, on this 22nd day of April, 2002, upon the consideration of the motions for post trial relief of Hartford Casualty Insurance Co., the response thereto, the trial record, and in accordance with the Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that motion for a judgment notwithstanding the verdict on the business income loss claim, requests for a remittitur and/or a new trial are DENIED except that it is further ORDERED and DECREED that the motion for a judgment notwithstanding the verdict on the phone switch claim is GRANTED.

BY THE COURT:

_____
JOHN W. HERRON, J.

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OPINION

Defendant Hartford Casualty Insurance Company ("Hartford") filed these motions for post trial relief, following a jury verdict rendered in favor of plaintiff TJS Brokerage & Co., Inc. ("TJS") in the sum of $650,000 for business income loss and $2,488.60 for the phone switch claim. For the reasons stated below, this Court denies the motion for a judgment notwithstanding the verdict on the business income loss claim, requests for a remittitur and new trial. However, this Court grants the motion for a judgment notwithstanding the verdict on the phone switch claim.

BACKGROUND

TJS, a transportation broker, is a Pennsylvania corporation located at 4940 Disston Street, Philadelphia, Pennsylvania. Customers contact TJS with freight to be shipped, and TJS arranges for trucking companies to carry the freight. Thomas J. Sicalides ("Sicalides") is the president and sole shareholder of TJS. In addition, he owns or did own, in whole or in part, the following companies: Keystone Transportation Inc., Garden State Transportation Inc., Beverly Hills Sales and Marketing

Inc., Michael's Transport Inc. and T&T Freight Consolidators.

Hartford is an Indiana corporation, engaged in the business of selling insurance and located at Hartford Plaza, Hartford, Connecticut. Hartford sold a multi-risk insurance policy, no. 39UUCLE4914 to TJS. The policy was effective from June 18, 1998 to June 18, 1999. The named insureds under the policy were TJS, Keystone Transportation Inc., Garden State Transportation Inc., Beverly Hills Sales and Marketing Inc., Thomas Sicalides, Michael's Transport Inc. and T&T Freight Consolidators.

Among other coverage, the policy included: (a) business income loss coverage of $1,200,000 with 80 percent co-insurance, (b) business personal property coverage of $350,000 with a $500 deductible and 80 percent co-insurance, (c) computer equipment coverage of $350,000 with 80 percent co-insurance, and (d) valuable papers coverage of $100,000 with a $250 deductible and no co-insurance. TJS purchased additional coverage such that the policy covered the full replacement cost of business personal property and computer equipment that was actually replaced.

On April 2, 1999, Vincent Sicalides, Thomas Sicalides’s brother, vandalized the offices of TJS at 4940 Disston Street, the TJS warehouse, and the neighboring offices of T&T Freight Consolidators and Michael's Trucking at 6918 State Road. TJS employees Gary Krinick and Steven Horvay were present at the TJS offices during the vandalism. Police arrived and took Vincent Sicalides into custody. TJS submitted claims to Hartford for business personal property, computer equipment, valuable papers and business income losses. While most of these claims had been resolved by the time of trial, the business income loss and phone switch claims remained at issue.

Within days of the vandalism incident Alan Mycek, the Hartford adjuster who handled TJS's

claim, visited the TJS premises.[1] Between April 19, 1999 and June 18, 1999, Hartford processed TJS's claims and tendered eight checks to TJS totaling $533,297.15. On May 14, 1999, Hartford advanced $50,000 toward the April 1999 business income loss claim. On June 4, 1999, Hartford advanced $50,000 toward the May 1999 business income loss claim. Thereafter, Hartford refused to advance TJS any additional money toward the business income loss claim because TJS and the other named insureds in the policy had not provided Hartford with sufficient financial information to evaluate that claim.

Hartford needed financial information from the other named insureds for two reasons: (1) to confirm that TJS was not shifting business to the other named insureds to decrease TJS's revenues and thus inflate its losses, and (2) to confirm that the co-insurance provision was satisfied. In the June 4, 1999 letter, Hartford made its first demand for a proof of loss for the business income. On July 28, 1999, Hartford faxed TJS a proof of loss form. In August 1999, TJS hired a public adjuster, Young Adjustment, to help prepare the business income loss claim. On August 20, 1999, Young Adjustment sent a proof of loss to Hartford on TJS's behalf. In a letter dated September 7, 1999, Mycek acknowledged receipt of the proof of loss. The letter did not reject the proof of loss or state that it was otherwise defective, but the letter made a reservation of rights.

Several factors complicated TJS's submission of the requested information. First, some of the requested financial information was purportedly stored on the hard drives of the damaged computers. Second, in July 1999, the Department of Transportation ("DOT") seized TJS's records. Third,

[1] Thomas Peterman, TJS's insurance broker, was also in attendance.

Hartford's requests for information were piecemeal such that it was not clear exactly what information Hartford needed. Fourth, TJS and the other named insureds appeared to have been less than meticulous record keepers. On December 6, 1999, Hartford's counsel informed TJS that the proof of loss that TJS submitted was incomplete. Between April 19, 1999 and June 18, 1999, Hartford advanced $433,297.15 for TJS's business personal property and computer equipment claims.

The second claim addressed by the jury involved TJS's Meridian phone switch which was damaged in the incident. The phone switch acts as a central server for TJS's phone system. The phones in TJS's office connect to the phone switch, which in turn connects to TJS's numerous outgoing phone lines. Sprint gave TJS an estimate of $248,860 (tax not included) to replace the phone switch. On April 15, 1999, TJS faxed the Sprint estimate to Mycek requesting permission to have the switch replaced and requesting a check for the replacement cost. On April 16, 1999, Mycek authorized the replacement. On April 15, 1999, TJS sent Hartford a copy of a Sprint sales agreement reflecting a price of $263,731.60, which included 6 percent sales tax, for replacement of the switch. On May 24, 1999, TJS sent Peterman a copy of the sales agreement with a typewritten footnote stating that the sales tax in the agreement had been calculated incorrectly since Philadelphia County has a sales tax of 7 percent, bringing the total cost to $266,280.20.

In accordance with an arrangement that Mycek authorized, Sprint installed a temporary phone switch in May 1999 to serve TJS while Sprint had a permanent switch custom manufactured. Though Hartford and TJS originally understood that Sprint would install the permanent switch two weeks after installing the temporary switch, there were several months of delay before Sprint installed the permanent switch. Eventually, in or about August 1999, Sprint installed the permanent phone switch, however,

TJS experienced problems, thereafter, with the operation of the permanent phone switch. In sum, Hartford paid TJS $210,985.28 for the phone switch, or $263,731.20 minus 20 percent depreciation. Hartford's first payment on the phone switch was an April 21, 1999 check for $133,000 intended as a down payment and the remainder was included as part of the later advances.

Hartford did not deny liability under the policy or assert any fraudulent conduct by TJS related to the April 2, 1999 vandalism incident until after TJS filed this lawsuit. Hartford first raised the fraud issue on February 23, 2000 during the preliminary injunction hearing. Hartford based its fraud theory on (a) Vincent and Thomas Sicalides' familial relationship; (b) discrepancies between the police report, the statements of on-the-scene witnesses and the testimony of Sicalides, Crisci and Eileen Thompson; (c) a single witness' testimony that TJS owed $1,000,000 in debts; and (d) the federal government's seizure of TJS's records.

On December 3, 2001, a jury awarded TJS the sum of $650,000 for business income losses as well as $2,488.60 associated with unpaid sales tax on the phone switch. On December 12, 2001, Hartford filed this timely motion for post trial relief.

DISCUSSION

I. The Motion for a Judgment Notwithstanding the Verdict as to the Business Income Loss Claim is Denied, but as to the Phone Switch Claim is Granted

The Pennsylvania Supreme Court recently espoused the standard in reviewing a motion for a judgment notwithstanding the verdict ("J.N.O.V."):

> [W]e 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 the movant."...

Birth Center v. St. Paul Companies, Inc, 787 A.2d 376, 383 (2001) (internal citations omitted). Further, the Supreme Court emphasized that "[w]hile 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 384.

A. Business Income Loss Claim

Hartford argues that TJS failed to meet its burden of proving essential elements of its claim of breach of contract in that TJS did not show that Hartford failed to perform in accordance with the business income loss terms of the insurance policy. Specifically, Hartford argues that:1) TJS "did not present evidence that linked the claimed amounts to a necessary suspension of its operations due to the alleged vandalism;" 2) TJS "never established a 'period of restoration', i.e., the date when the damaged property causing the alleged suspension of operations 'should be repaired, rebuilt or replaced with reasonable speed and similar quality...'" Def's Mem. of Law at 14. Hartford argues that the jury's award of $650,000 lacks evidentiary support. TJS counters and argues that "Defendant is hiding its head in the sand like an ostrich to the true facts of this case" and asserts that TJS presented evidence to support the verdict rendered by the jury. Pl's Reply Mem. of Law at 9.

The insurance policy at issue between Hartford and TJS states in pertinent part:

> BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM
> A. Coverage

Coverage is provided as described below for one or more of the following options for which a Limit of Insurance is shown in the Declarations:

(i) Business Income including "Rental Value"

(ii) Business Income other than "Rental Value"

(iii) "Rental Value."

If option (i) above is selected, the term Business Income will include "Rental Value." If option (iii) above is selected, the term Business Income will mean "Rental Value" only. If Limits of Insurance are shown under more than one of the above options, the provisions of this Coverage Part apply separately to each.

We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration." The suspension must be caused by direct physical loss of or damage to property, including personal property in the open (or in a vehicle) within 100 feet, at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.

If you are a tenant, your premises is the portion of the building which you rent, lease or occupy, including:

1. all routes within the building to gain access to the described premises; and
2. your personal property in the open (or in a vehicle) within 100 feet.

1. Business Income

Business Income means the:

a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and

b. Continuing normal operating expenses incurred, including payroll.

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D. Loss Conditions

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4. Loss Determination

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c. Resumption of Operations

We will reduce the amount of your:

(1) Business Income loss, other than Extra Expense, to the extent you can resume your "operations," in whole or in part, by using damaged or undamaged property (including merchandise or stock) at the described premises or elsewhere.

(2) Extra expense loss to the extent you can return "operations" to normal and discontinue such Extra Expense.

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G. Definitions
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2. “Operations” means:
a. Your business activities occurring at the described premises; and
b. The tenantability of the described premises, if coverage for Business Income including “Rental Value” or “Rental Value” applies.
3. “Period of Restoration” means the period of time that:
a. Begins:
(1) 72 hours after the time of direct physical loss or damage for Business Income coverage; or
(2) Immediately after the time of direct physical loss or damage for Extra Expense coverage;
caused by or resulting from any Covered Cause of Loss at the described premises; and
b. Ends on the earlier of:
(1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
(2) The date when business is resumed at a new permanent location.

Def’s Mem. of Law, Exh. A.

To recover under this policy, TJS has the burden of proving that the vandalism not only caused the damage to covered property and a necessary suspension of its operations, but also that the vandalism caused actual loss of business income during the period of restoration. See Berkeley Inn, Inc. v. Centennial Insurance Co., 282 Pa.Super 207, 422 A.2d 1078 (1980) (holding that the claimant has the burden of showing an actual monetary loss); Dictiomatic, Inc. v. U.S.Fidelity& Guaranty Co., 958 F.Supp. 594 (S.D. Fl. 1997) (holding that “it is [the claimant’s] burden to prove [its] entitlement to business interruption insurance proceeds under the insurance policy and the amount of such entitlement”)(citations omitted).

TJS has met its burden of proof under this insurance policy and has provided sufficient evidence

to sustain this verdict. TJS supplied the jury with sufficient and competent evidence to allow the jury to reasonably infer a link between the vandalism and the business income loss suffered by TJS. To begin with, TJS provided testimony from Thomas Sicalides listing all the property damaged by the April 2, 1999, vandalism. N.T. 11/26/01, 63 - 69; N.T. 11/27/01, 15 - 28. Further, Sicalides explained how the damage to all this equipment affected the day-to-day operations of various departments within TJS. For example, as a result of the damaged computer systems and phone switch, the sales, customer service, operations and accounting departments all experienced, inter alia, lowered efficiency and increased customer complaints. N.T. 11/27/01, 44, 46 - 48. TJS further offered evidence of how the vandalism was a covered cause of loss, as well as how the damaged property was covered by the insurance policy provided by Hartford. N.T. 11/28/01, 14, 49. Finally, in addition to the actual policy, TJS offered Thomas Peterman, its insurance broker, who testified that Hartford provided TJS with 1.2 million dollars in insurance for business income loss. N.T. 11/28/01, 18. On this record, there was sufficient evidence linking the vandalism to the business income loss.

The next questions to be addressed are whether, as a result of this vandalism, TJS provided: 1) sufficient evidence of a "necessary suspension" of its operations and, 2) proof of an actual loss of business income during the period of restoration. Although the insurance policy does not define "necessary suspension," courts have interpreted the "necessary suspension" language of similar insurance policies to mean "a total cessation of business activity." [2] See American States Insurance, Co.

[2] The proper construction and interpretation of an insurance policy is a question of law for the court to resolve. Madison Construction Co. v. Harleysville Mutual Insurance Co., 557 Pa. 595, 606, 735 A.2d 100, 106 (1999). Accordingly, where a policy provision is unclear and ambiguous, the court must construe the language in favor of the policyholder. Id. On the other hand, where the policy

v. Creative Walking, Inc., 16 F.Supp.2d 1062, 1065 (E.D. Mo. 1998) (holding that unlike policies providing "coverage for a 'total or partial suspension' of business activity," the language in those policies providing coverage for a "'necessary suspension of... operations'... unambiguously refers to a total cessation of [claimant's] business activities."); see also Home Indemnity Co. v. Hyplains Beef, 893 F.Supp. 987, 991 (D.Kan.1995) ("if one were to apply the plain, ordinary meaning to the use of the phrase 'necessary suspension' with the policy, in order for a claim to fall within the coverage provision it would require that any direct physical loss of or damage to property result in the cessation of [the insured's] operations); but see American Medical Imaging, Corp v. St.Paul Fire and Marine Insurance Co., 949 F.2d 690, 692-93 (3rd Cir. 1991) (an insurance company's obligation to indemnify for business facing a "necessary or potential suspension", the court concluded that this obligation "can arise while business continues, albeit at a less than normal level.").

TJS offered sufficient competent evidence that allowed a jury to reasonably infer that it suffered a "necessary suspension" of its business operations. TJS offered the testimony of Sicalides, who stated that after the vandalism had occurred, "[w]e didn't have the phone switch, we didn't have computers, we didn't have hardly the ability to even communicate at least for the first 45 days or so." N.T.

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language is clear and free from doubt, the court must give full effect to that policy provision. Id. "Contractual language is ambiguous 'if it is reasonably susceptible of different constructions and capable of being understood in more than one sense.'" Id (citations omitted). Moreover, in determining whether the policy terms or language is ambiguous or vague, the terms or language in question must be considered in the context of the entire policy and not set apart from the remaining provisions that are clear or free from doubt. Riccio v. American Republic Insurance Co., 453 Pa. Super. 364, 373, 683 A.2d 1226, 1231 (1996). Additionally, the court should not distort or alter the meaning of contractual terms in an effort to find an ambiguity in the contract. Madison Construction Co., 557 Pa. at 606, 735 A.2d at 106.

11/26/01, 70. Specifically, Sicalides testified that "[f]rom April 2nd until some time in May" TJS was without a phone switch which, as discussed above, provided the technology permitting automated matching of trucking loads throughout the country. Further, Anthony Gangemi, a TJS employee, testified that following the vandalism, but before the DOT document seizure, the vandalism affected his ability to work as he "had no computer or even the phone lines, we were limited to one or two lines." N.T. 11/27/01, 186-187. TJS also offered testimony of Stephen Horvay, a former TJS employee, who stated that for several weeks following the vandalism, many of TJS's employees were unable to work because of the damaged equipment. N.T. 11/28/01, 80-82. This court must view this evidence in the light most favorable to TJS and give it the benefit of every reasonable inference arising therefrom. This court concludes that TJS provided sufficient evidence for a jury to reasonably infer that it suffered a "necessary suspension" of its business following the vandalism.

The remaining question is whether TJS offered sufficient evidence to support its claim that it suffered an actual business loss during the period of restoration. First, it is important to focus on the policy language defining the period of restoration as "the date when the property... should be repaired, rebuilt or replaced with reasonable speed and similar quality." Def's Mem of Law, Exh. A. (emphasis supplied). While the parties agree that this period began on April 2, 1999, the date of the alleged vandalism, Hartford argues that the period unequivocally ended on July 13, 1999, the date of the DOT document seizure. TJS, on the other hand, argues that "the period of restoration is continuing" as its business has yet to return to normal. Pl's Reply Mem. of Law at 9.

Since the jury, as fact finder in this trial, rendered a verdict of $650,000, it must have determined that the period of restoration was longer than the approximately 3 months argued by

Hartford, yet not continuing indefinitely as TJS argued. Clearly, the determination of when the property "should" be repaired, with "reasonable" speed, and "similar" quality was a jury question and this court may not invade the province of the jury and hold that as a matter of fact that the period of TJS's restoration ended earlier. See Foflygen v. Allegheny General Hosp., 723 A.2d 705, 711 (Pa.Super.Ct. 1999) ("[j]udgment notwithstanding the verdict may not be employed to invade the province of the fact-finder; questions of fact must be resolved by the jury.") (citations omitted).

Further, TJS did offer evidence of business income loss, resulting from the vandalism, during the period of restoration. TJS's public adjustor testified that between April 2, 1999 and August 31, 1999, TJS's business income loss was $251,000. N.T. 11/29/01, 75. Further, between April 2, 1999 and December 31, 1999, TJS lost $908, 892 in business income. N.T. 11/29/01, 65. Finally, the public adjustor testified that between April 2, 1999 and June 30, 2000, as well as between January 1, 2000 and June 30, 2000, TJS's business income losses were $1,468,996 and $560,104, respectively. N.T. 11/29/01, 71, 66. Therefore, viewing the evidence in the light most favorable to TJS, as the court must do on a motion for J.N.O.V., since the date of the vandalism was April 2, 1999, the jury, in rendering the $650,000 verdict, reasonably inferred that TJS's evidence of business income loss dating back to April 2, 1999 was linked to the vandalism. While Hartford argues that there may have been other reasons for TJS's business income loss, such as poor management and the DOT document seizure, this court "may not grant a motion for J.N.O.V. simply because [it] would have come to a different conclusion." Birth Center, 787 A.2d at 384.

B. Phone Switch Claim

Hartford requests that this court enter a J.N.O.V. on TJS's claim for the phone switch, as the

jury verdict of $2,488.60 "was a clear misapplication of the facts to the legally binding provisions of the insurance contract." Def's Mem. of Law at 21-22. This court agrees.

The insurance policy provides in pertinent part:

> e. We will not pay more for loss or damage on a replacement cost basis more than the least of (1), (2), or (3) subject to f. below:
>
> (1) The Limit of Insurance applicable to the lost or damaged property;
>
> (2) The cost to replace, on the same premises, the lost or damaged property with other property:
>
> (a) Of comparable material and quality;
>
> (b) Used for the same purpose; or
>
> (3) The amount you actually spend that is necessary to repair or replace the lost or damaged property.
>
> f. The cost of repair or replacement does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property.

Def's Mem. of Law at 21 (citations omitted). Under the policy, Hartford would only be required to pay the amount TJS "actually" spent to repair or replace the phone switch.

The evidence presented at trial showed that Sprint's original sales price for the phone switch was $263,731.60, or $266,280.20 including tax. N.T. 11/27/01, 109; 11/30/01, 55. Although TJS submitted a claim for $263,731.60 to Hartford, after some conflicting evidence as to the phone switch specifications, the original sales price was later reduced to the amount of $213,699 plus sales tax. N.T. 11/27/01 110-111; 11/30/01, 34. Although TJS paid Sprint $152,000, the remaining balance owed Sprint is $87,000. N.T. 11/27/01, 124; 11/30/01, 40. Therefore, TJS will pay no more than $239,000, which is less than the $263,731.60 paid by Hartford on the claim. N.T. 11/27/01 55-62.

Following testimony, the jury awarded $2,488.60 for the phone switch, which undoubtedly

represents the 1% sales tax not paid by Hartford in adjusting the claim based on the original sales price. N.T. 12/3/01, 96. However, the clear and unambiguous insurance policy language provides that TJS would only be able to recover what it "actually" spent on the phone switch. Since the total billed to TJS was actually a credit of $35,161 on the original sales price and not the total of $266, 280.20, there is no legal basis for the jury to have awarded $2,488.60. Birth Center, 787 A.2d at 384 (in reviewing a motion for J.N.O.V. "the verdict must stand unless there is no legal basis for it."). As such, Hartford's motion for a J.N.O.V. on the phone switch claim is granted.

II. The Remittitur Requested by Hartford on the Issue of TJS's Business Income Loss Claim is Denied

Hartford requests a remittitur, as it asserts that the jury verdict of $650,000 "was unsupported by the evidence and, therefore, had to be the result of a mistake, partiality or prejudice." Def's Mem. of Law at 16. This court disagrees.

When "[t]he assessment of damages is peculiarly within the province of the jury" a remittitur will not be granted "unless [the verdict] is so excessive as to shock the conscience of the court or unless it is clearly based on partiality, prejudice or passion." Wasserman v. Fifth & Reed Hospital, 442 Pa.Super. 563, 660 A.2d 600, 607 (1995). Further, "'damages need not be proved if an intelligent estimate is arrived at without conjecture.'" Paves v. Corson, 765 A.2d 1128, 1135 (Pa.Super.Ct 2000) (citing Delahanty v. First Pennsylvania Bank, 318 Pa.Super. 90, 464 A.2d 1243, 1257 (1983)). Finally, "[i]t is only required that the proof afford a reasonable basis from which the fact-finder can calculate the

plaintiff's loss." Id.

The jury verdict is not so excessive as to shock the conscience of the court, nor is it based on partiality, prejudice or passion. Although Hartford argued that the period of restoration was about 3 months, and for this reason TJS would have only sustained $230,000 in business income loss, the jury came to a very different conclusion. Instead, the jury found more credible the evidence presented by TJS that it is continuing to sustain significant business income losses as a result of the vandalism. TJS's evidence clearly afforded a reasonable basis from which the jury could render its verdict of $650,000. Accordingly, this court denies Hartford's request for a remittitur.

C. Request for A New Trial is Denied

Alternatively, Hartford requests that this court grant a new trial on the issue of the business income loss claim, or because of false and prejudicial comments made by the plaintiff to the jury. Our Supreme Court has stated that:

> 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, 756 A.2d 1116,1121-1122 (2000) (internal citations omitted). Further, "[w]hen 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.Ct. 2002) (citing Harman, 562 Pa. at 467, 756 A.2d at 1122).

Although never expressly argued, implicit in Hartford's first request for a new trial is that the jury made a mistake in determining the period of restoration. Def's Mem. of Law at 16. Hartford asserts that "the actual restoration period... was less than 3.3 months, i.e. April 2, 1999 (date of loss) until July 12, 1999 (day before the DOT records seizure)." Id at 17. Hartford argues that TJS's losses would have been $330,000, and not the $650,000 the jury rendered. However, even if true and it is not, this is not the kind of prejudicial mistake required to grant a new trial that was contemplated by our Supreme Court in Harman. As discussed at length above, whether the period of restoration was 3 months or continuing, was an issue of fact, for the jury to decide. Here, the jury ultimately concluded that the period of restoration was longer than that which Hartford argued, but shorter than that period argued by TJS, and therefore rendered a verdict accordingly. Hartford's frustration with the jury's finding, alone, does not meet the standard, as espoused in Harman, for granting a new trial.

Alternatively, Hartford argues that it is entitled to a new trial based on false and prejudicial comments made by the plaintiff to the jury. To determine whether a reasonable likelihood of prejudice exists, a trial court should look, in part, at "1) whether the extraneous influence relates to a central issue in the case or merely involves a collateral issue; 2) whether the extraneous influence provided the jury with information they did not have before them at trial; and 3) whether the extraneous influence was emotional or inflammatory in nature." Carter v. U.S. Steel Corp., 529 Pa. at 421-22, 604 A.2d at 1017 (1992). Thus, the burden of establishing a reasonable likelihood of prejudice is a relatively severe one.

Hartford has failed to establish that it suffered a reasonable likelihood of prejudice. Hartford alleges it was prejudiced after several comments were made to the jury by both the plaintiff and

plaintiff's counsel. For example, the first comment to the jury occurred during opening statements when plaintiffs counsel stated:

> After Hartford stopped adjusting this claim after the case was filed TJS also had to file for preliminary injunction to get Hartford to start paying. Preliminary injunction was granted April of 2000, but TJS still didn't receive any money from Hartford until August of 2000 after several letters. Again they received some money because of the automatic dispatchers and some other incidental expenses, but Hartford– and you will hear testimony about this– has refused to even abide by that preliminary injunction.

N.T. 11/26/01, 35. Following this comment, this court sustained Hartford's objection, and specifically told counsel for TJS "[y]ou may not refer to that." Id. At several points thereafter during the trial, the plaintiff, Sicalides, stated that Hartford was "ordered to pay." N.T. 11/27/01, 19-20. And each time, this court sustained Hartford's objections and cautioned Sicalides from testifying beyond the questions posed to him. N.T. 11/27/01, 19-20, 31-38.

While Sicalides did testify to and express his frustration with Hartford's processing of TJS's claim, merely stating that Hartford was "ordered to pay" is not the kind of emotional or inflammatory comments our Supreme Court in Carter sought to prevent. For example, in Carter, two jurors had watched a television broadcast regarding a subsequent accident on the defendant's property and communicated with other jurors about the broadcast. Even though evidence of similar subsequent accidents had been precluded at trial, the Pennsylvania Supreme Court reversed the trial court's order granting a new trial because a reasonable likelihood of prejudice had not been shown. See also Orndoff v. Wilson, 760 A.2d 1, 3-4 (Pa.Super.Ct.2000) (Jury foreman's visit to scene of accident, despite instructions not to do so, was not prejudicial.); Passarelli v. Shields, 191 Pa.Super. 194, 156 A.2d 343, 348 (1959) (Where jurors read newspaper article of arbitration board's earlier verdict for plaintiff,

the court's instruction that the jurors were not to consider the article ensured that the defendant was not prejudiced.). Cf. Commonwealth v. Miller, 247 Pa.Super. 132, 139, 371 A.2d 1362, 1366 (1977) (Defendant convicted for involvement with robbery and shooting was not entitled to a mistrial even though juror stated that guns are dangerous and that juror hated guns because this did not "indicate such bias by the juror which would affect his impartiality or ability to fairly consider the evidence in determining guilt or innocence."). Since Hartford has not met the severe burden of showing a reasonable likelihood of prejudice, this Court denies Hartford's request for a new trial.

CONCLUSION

For the reasons state above, this Court denies the motion for a judgment notwithstanding the verdict on the business income loss claim, requests for a remittitur and new trial. However, this Court grants the motion for a judgment notwithstanding the verdict on the phone switch claim.

BY THE COURT:

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JOHN W. HERRON, J.

DATE: April 22, 2002