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

PAUL H. MASCIANTONIO, ESQUIRE, Administrator of the ESTATE OF LATONYA BROWN, DECEASED **Plaintiff**	:	
	:	DECEMBER TERM, 2011
vs.	:	
	:	NO. 0653
U.S. SECURITY ASSOCIATES, INC. and YVONNE HILLER **Defendants**	:	

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DAY FORWARD

JUDGMENT ORDER

And Now, this 16th day of November, 2015, it is hereby **ORDERED** that,

JUDGMENT is entered in favor of the Estate of LaTonya Brown in the amount of **Four Million Three Hundred Seventy Four Thousand Dollars ($4,374,000.00)**, ($4,000,000.00 plus delay damages in the amount of $374,000.00) and against U.S. Security Associates, Inc. and Yvonne Hiller, **and,**

JUDGMENT is entered in favor of the Estate of LaTonya Brown in the amount of **Six Hundred Fifty Six Thousand One Hundred Dollars ($656,100.00)**, ($600,000.00 plus delay damages in the amount of $56,100.00) and against Yvonne Hiller only, **and,**

JUDGMENT is entered in favor of the Estate of LaTonya Brown in the amount of **Twenty Two Million Nine Hundred Ninety Two Thousand Twenty Two Dollars and Twenty Cents ($22,992,022.20)** and against U.S. Security Associates, Inc. only, **and,**

the **TOTAL JUDGMENT** entered in favor of the Estate of LaTonya Brown is **Twenty Eight Million Twenty Two Thousand One Hundred Twenty Two Dollars and Twenty Cents ($28,022,122.20).**

BY THE COURT:

FREDERICA A. MASSIAH-JACKSON, J.

Control No. 15062618
Control No. 15062627

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

PAUL H. MASCIANTONIO, ESQUIRE, Administrator of the ESTATE OF LATONYA BROWN, DECEASED **Plaintiff**	:	
	:	DECEMBER TERM, 2011
vs.	:	
	:	NO. 0653
U.S. SECURITY ASSOCIATES, INC. and YVONNE HILLER **Defendants**	:	
KHAALID AMIR WILSON and GABRIEL DESHAWN WILSON, Co-Administrators of the ESTATE OF TANYA RENEE WILSON, DECEASED **Plaintiff**	:	
	:	OCTOBER TERM, 2011
vs.	:	
	:	NO. 0971
U.S. SECURITY ASSOCIATES, INC. and YVONNE HILLER **Defendants**	:	

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MEMORANDUM in SUPPORT OF ORDERS DENYING MOTIONS FOR POST-TRIAL RELIEF and GRANTING PETITIONS FOR DELAY DAMAGES

MASSIAH-JACKSON, J.

November 16, **2015**

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I. FACTUAL BACKGROUND

On the evening of September 9, 2010, at a meeting with union stewards and supervisors at the Kraft Foods Global, Inc. facility, in Philadelphia, Ms. Yvonne Hiller was suspended from her job. Earlier that afternoon Ms. Hiller had been in a "fracas" with her co-workers, Tanya Renee Wilson, LaTonya Brown and Bryant Dalton. Plaintiffs' Complaints, Paragraphs 24, 31.

The U.S. Security site supervisor was called to provide a disciplinary escort to Ms. Hiller's vehicle. Damon Harris left her at the guard shack gate and Ms. Hiller walked alone to the parking lot into her car. Plaintiffs' Complaints, Paragraphs 33, 34, 35. Ms. Hiller sat in her car, retrieved a gun and returned to the security gate in her car. She pointed the weapon at U.S. Security officer Marc Bentley and demanded access through the gates. Plaintiffs' Complaints, Paragraphs 38, 39.

After Ms. Hiller re-entered the premises, the security supervisor, Mr. Harris, ran away. Mr. Bentley paced back and forth inside the guard shack. Both U.S. Security employees called 9-1-1 after several minutes of panic and confusion. Neither U.S. Security employee ever called or warned or communicated with any Kraft supervisors or employees inside the Kraft building by telephone or radio (walkie-talkie) or public address system. Plaintiffs' Complaint, Paragraphs 38-45.

Both Damon Harris and Marc Bentley had reason to know prior to September 9, 2010, that Yvonne Hiller posed a security threat at the Kraft facility. Plaintiffs' Complaint, Paragraphs 21, 51, 58.

Yvonne Hiller walked into the Kraft building to the third floor area where her disciplinary meeting had convened earlier. She confronted her three co-workers who were seated in the employee break room. Ms. Hiller pointed her gun and shot all three co-workers. She critically wounded Mr. Dalton and killed Ms. Wilson and Ms. Brown. Plaintiffs' Complaints, Paragraphs 46, 47.

U.S. Security acted or failed to act through its employees who at all times were acting within the course and scope of their employment. U.S. Security had a contractual arrangement with Kraft and was paid by Kraft to provide security and related services to the individuals at the Kraft plant. Plaintiffs' Complaints, Paragraphs 10-20.

These operative facts have remained unchanged since September 9, 2010. These operative facts are set forth in each of the Plaintiffs' Complaints. The Estate of Tanya Renee Wilson initiated this civil action on October 7, 2011. The Estate of LaTonya Brown commenced their civil action on December 2, 2011. These operative facts have been memorialized on Kraft's exterior and interior surveillance films.

II. PROCEDURAL HISTORY

Plaintiff-Estates filed these Wrongful Death and Survival Actions alleging that U.S. Security Associates, Inc. contractually agreed to provide a program of security for Kraft and its employees at the Roosevelt Boulevard Plant in Philadelphia. It was alleged that U.S. Security negligently and recklessly failed to provide the contracted security services, which caused and contributed to and did increase the risks of harm to Ms. Wilson and Ms. Brown.

From February 12, 2015 through February 26, 2015, this Court presided over the jury trial. The jury rendered a compensatory award in favor of both Plaintiff-Estates. From February 27, 2015 through March 3, 2015, that same jury was unable to agree on a verdict for punitive damages. Subsequently, with agreement of all Trial Counsel and the Court a new jury was selected on March 19, 2015. After a week-long trial, the second jury rendered a punitive damages award in favor of both Plaintiff-Estates on March 30, 2015.

When the trial transcripts were received, a post-trial briefing schedule was coordinated by the Court and counsel. Oral argument was heard on October 29, 2015.

From 2011 to the Fall of 2014, the Estate of Wilson and the Estate of Brown were represented by counsel ("Pre-Trial Counsel"). Shortly before trial was initially scheduled for November, 2014, new counsel entered an appearance ("Plaintiffs' Trial Counsel"). Similarly, U.S. Security was represented by Pre-Trial Counsel until the Fall of 2014. Defendant's Trial Counsel led the defense team until March/April, 2015, after the final verdict award. At this

juncture, U.S. Security's team representation is led by Post-Trial/Appellate Counsel. All of U.S. Security attorneys have also represented Damon Harris, Marc Bentley, Joseph LoBianco, and Michael Donopal throughout this litigation.

U.S. Security Associates, Inc. seeks judgment notwithstanding the verdict on the compensatory damages verdict. The Defendant-Security Company seeks judgment notwithstanding the verdict and/or new trial and/or remittitur on the punitive damages verdict. Both Plaintiff-Estates seek compensatory damages for pre-shooting fright and fear. When the trial records are read in a light favorable to the verdict winners the results here are clear and compelling. For all the reasons which follow, all of the post-trial motions filed by all of the parties are DENIED.

III. LEGAL DISCUSSION – COMPENSATORY TRIAL

A. Judgment Notwithstanding the Verdict is Not Appropriate in this Case.

Judgment notwithstanding the verdict (JNOV) may be entered only in a clear case. If any basis exists upon which the jury could have properly made its award, the verdict will not be overturned. Quinby v. Plumsteadville Family Practice, Inc., 907 A.2d 1061 (Pa. 2006) and cases cited at 1074; Somerset Community Hospital v. Allan B. Mitchell & Assoc., Inc., 685 A.2d 141, 146 (Pa. Superior Ct. 1996).

Although U.S. Security frames its arguments in the context of the Trial Court's refusal to grant a compulsory nonsuit or enter a directed verdict, the well-established proper procedure is that after a jury verdict, the issue is whether the Defendant is entitled to JNOV. Whitaker v. Frankford Hospital, 984 A.2d 512 (Pa. Superior Ct. 2009), citing Gbur v. Golio, 932 A.2d 203 (Pa. Superior Ct. 2007); Northeast Fence & Iron Works, Inc. v. Murphy Quigley Co., Inc., 933 A.2d 664, 667 (Pa. Superior Ct. 2007).

The Defendant-Security Company has articulated the bases for its JNOV claim by suggesting that it satisfied the services set forth in the "Post Orders" which were in the contract between Kraft and U.S. Security. At page 8 of the Post-Trial Brief:

> "Plaintiffs alleged that USSA security officer Damon Harris was negligent with respect to escorting Ms. Hiller after she was suspended (the 'negligent escort' theory) and that both officers Damon Harris and Marc Bentley were negligent for not directly notifying someone in the mixing room area that Hiller had returned to the plant with a gun (the 'negligent communication' theory). Both theories fail as a matter of Pennsylvania law, because the only duty owed by USSA was the duty set forth in the contract with Kraft and that duty was satisfied."

There are only two bases upon which a court may enter JNOV. The first is when the movant is entitled to judgment as a matter of law. The second is when the evidence is such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant. JNOV is an extreme remedy. Considering only the evidence which supports the verdict, the court must give the verdict winner the benefit of all doubt and of every fact and inference deducible from the evidence. JNOV is not appropriate here.

1. **U.S. Security Contract With Kraft.**

The security and services contract between U.S. Security and Kraft described the scope of services on which the employees of Kraft could expect and rely. The program of security was set forth in several written documents identified for the jury as the Service Agreement, the U.S. Security Associates, Inc. Officers Guide, and, Post Orders, dated August 1, 2010.

The Service Agreement states in part:

> "SUPERVISION:
>
> Supplier shall supervise and administer the Security Personnel through designated supervisory personnel. These supervisory personnel shall have the administrative and operations experience in security services at a level adequate to the scope of work of this Agreement and shall be responsible for maintaining high standards of performance, professional appearance and conduct of the Security Personnel. Security Personnel are to be inspected at least once weekly by supervisory personnel to ensure that high standards of performance, professional appearance, and conduct are being maintained.
>
> SPECIFICATIONS:
>
> Site Responsibilities are to be outlined in Attachment B, which include some, if not all of the following roles and responsibilities:

Core Responsibilities

1. Employee & Visitor Access Control
2. Unauthorized Access Control
3. Escort Services
4. Weighmaster Services
5. Facility Specific Log Books
6. Incident Reports
7. In-Depth Knowledge of Facility Specific Requirements, Expectations, And Emergency Procedures
8. Patrol Service Duties (Continuous Foot Patrol During Facility Specific Designated Hours, To Be Outlined In Later Section)
9. Alarm Response
10. Visual Inspection Of Building Exterior
11. Emergency and Accident Response
12. Routine Facility And Grounds Inspection
13. Security Gate Control
14. T.W.I.C. (Transportation Worker Identification Credential) Card
15. MARSEC Certification (Maritime Safety & Security)
16. SAP Truck Board

Non-Core Responsibilities

1. Operating Kraft SIMS Systems
2. CCTV Monitoring
3. MATRICS System
4. C-Cure System
5. CPR Certified"

The Post Order states in pertinent part:

"EMERGENCY SITUATIONS
AT
KRAFT

Number: 300-96-9
Subject: THREATENING SITUATIONS-PERSON TO PERSON
Effective: 12/96
Revised: 5/06

PURPOSE: To provide instruction on actions to be taken if you are a witness to a threatening situation.

PROCEDURE:

1. If you are a witness to a threating situation or become involved in a threatening situation, REMAIN CALM. If you are not a witness to the situation, inform the caller that you will contact building management and inform them of the problem.

2. If possible attempt to contact the client representative immediately or get another person's attention so they can notify the client representative and inform them of the problem.

3. If it is determined that the threat is immediate call 911 and be prepared to provide all necessary information.

4. If the threat is not immediate, attempt to isolate the situation, take the role as the peacekeeper. Do not become judgmental or take a particular side in the situation. Ask the individual if you can contact someone in Kraft management, who may be able to help.

5. If possible, the client representative, will provide you with detailed instructions on how to handle the incident.

6. Do not take a chance, if you feel the situation is escalating, after all attempts have been made to resolve the situation. Immediately call 911 and be prepared to provide all necessary information.

7. Someone should be available to direct the police to the appropriate area of the building. Ask for assistance from management in meeting the police in the lobby.

8. Be prepared to assist, if the situation becomes confrontational.

9. Note all facts regarding the incident in the security log and file a complete and accurate report."

2. Negligent Breach of Contractual Duties by U.S. Security.

Where a party assumes a duty to render services and performs that duty negligently, that party is liable for the resulting physical harm to others. Feld v. Merriam, 485 A.2d 742, 746 (Pa. 1984); Reider v. Martin, 519 A.2d 507, 511 (Pa. Superior Ct. 1987). In Feld v. Merriam, supra, the Supreme Court held that where a program of security is offered it must be performed in a reasonable manner, 485 A.2d at 746, applying Restatement (Second) of Torts §323:

> ". . . for although there is a general rule against holding a person liable for the criminal conduct of another absent a preexisting duty, there is also an exception to that rule, i.e., where a party assumes a duty, whether gratuitously or for consideration, and so negligently performs that duty that another suffers damage. *Pascarella v. Kelley,* 378 Pa. 18, 105 A.2d 70 (1954). *See Rehder v. Miller,* 35 Pa.Super. 344 (1908)."

The scope of a tortfeasor's liability under Restatement §323 is limited to the nature of the negligently performed undertaking. Feld v. Merriam, 485 A.2d at 747:

> "A tenant may rely upon a program of protection only within the reasonable expectations of the program. He cannot expect that a landlord will defeat all the designs of felonry. He can expect, however, that the program will be reasonably pursued and not fail due to its negligent exercise. If a landlord offers protection during certain periods of the day or night a tenant can only expect reasonable protection during the periods offered. If, however, during the periods offered, the protection fails by a lack of reasonable care, and that lack is the proximate cause of the injury, the landlord can be held liable. A tenant may not expect more than is offered. If, for instance, one guard is offered, he cannot expect the same quality and type of protection that two guards would have provided, nor may he expect the benefits that a different program might have provided. He can only expect the benefits reasonably expected of the program as offered and that that program will be conducted with reasonable care."

When considering a Motion for JNOV, the evidence must be considered in the light most favorable to the verdict winner. Every reasonable inference of fact and any conflict in the evidence must be resolved in favor of the Estate of Brown and Estate of Wilson. Here, the Defendant-Security Company is not entitled to judgment as a matter of law. Nor is this a case where no two reasonable minds could disagree that the outcome should have been rendered in favor of Defendant.

The Negligent Escort of a Disciplined Employee

Defendant-Security Company presented its Region President, Joseph LoBianco, to explain the meanings of the security contract entered into with Kraft. Feb. 20, 2015, P.M., N.T. 5-97. Mr. LoBianco was the individual who first sold the account in 2003 to Kraft Foods. He had personal knowledge of the security officers and supervisors who were assigned to the Kraft facility. They ultimately reported to him. Mr. LoBianco visited the Kraft plant at least six times each year from 2003 through 2010. Feb. 20, 2015, P.M., N.T. 21-24.

Mr. LoBianco testified that Kraft's Environmental Safety and Security Supervisor was Ms. Rhonda Mowday. She was U.S. Security's "immediate client." Feb. 20, 2015, P.M., N.T. 34, 48-49. Mr. LoBianco explained that she directed all activities, decisions, procedures and policies of the Defendant-Security Company. Feb. 20, 2015, P.M., N.T. 48-49. She had the ability to determine how to do escort services. Mr. LoBianco was familiar with the Post Orders which were in effect in 2010. Feb. 20, 2015, P.M., N.T. 46. He testified that the contract remained essentially unchanged from 2003 through 2010.

While U.S. Security agrees that it assumed a duty to reasonably perform escort services, the Defendant asserts that Plaintiffs were unable to demonstrate the contractual meaning of "escort services" as it relates to disciplinary escorts. This Court does not agree. The program of security was presented to the jury by several witnesses. See, Pa. Rule Evidence 402[8].

The Superior Court noted in Reider v. Martin, supra, 519 A.2d at 511:

> "From our reading of [Feld v. Merriam] we find that the touchstone in determining if a 'program of security' exists is whether or not the program promises to provide an additional factor of safety. This is a substantive analysis."

Damon Harris, U.S. Security supervisor guard, was on duty on the evening of September 9, 2010. Feb. 17, 2015, P.M., N.T. 6-100; Feb. 18, 2015, A.M., N.T. 10-62. He explained to the jury that Rhonda Mowday (Kraft Manager) and Mike Upshur (U.S. Security Manager) worked together to formulate the Kraft procedures to deal with emergencies. Mr. Harris confirmed Mr. LoBianco's testimony and said Ms. Mowday gave the orders to the Defendant-Security Company of what was to be done. Feb. 17, 2015, P.M., N.T. 30-31. Mr. Harris testified that Mike Upshur trained him to walk employees to their car when performing disciplinary escorts. Feb. 17, 2015, P.M., N.T. 79-82.

This longtime U.S. Security employee had worked in the security field for fifteen years. Mr. Harris told the jury he was assigned to the Kraft facility since 2000, and was promoted to supervisor in 2004 by U.S. Security. Feb. 17, 2015, P.M., N.T. 12-14. Among his responsibilities was to escort disciplined employees outside of the building. Feb. 17, 2015, P.M., N.T. 15-16. He was instructed to walk them to their car. Feb. 17, 2015, P.M., N.T. 76.

Damon Harris testified that he had several conversations with Kraft employees and knew Yvonne Hiller had problems with female Kraft employees. Feb. 18, 2015, A.M., N.T. 19. He had heard her co-workers describe her as "psychotic", "crazy" and "deranged." Feb. 17, 2015, P.M., N.T. 42, 47. Mr. Harris had prior personal experiences with Ms. Hiller and found her to be "disruptive" and "irritating." He explained that she has no respect for his authority. Feb. 17, 2015, P.M., N.T. 66-67.

Mr. Harris told the jury that on September 9, 2010, when he was called to the mixing room to escort Ms. Hiller out, he knew she was being suspended. Feb. 18, 2015, A.M., N.T. 25. Mr. Harris did not walk her to her car. Feb. 18, 2015, A.M., N.T. 45.

Additional evidence was presented to the jury by U.S. Security's corporate designee, Michael Donapel, Feb. 20, 2015, A.M., N.T. 97-102, the Human Resources Manager. Mr. Donapel was familiar with the Post Orders related to the Kraft-U.S. Security contract. N.T. 99. His evidence to the jury was that when Kraft Managers told Damon Harris (the site supervisor) to escort Yvonne Hiller off the premises, Mr. Harris' responsibility was to walk her to her car and retrieve her ID card. Feb. 20, 2015, A.M., N.T. 101-102.

Sufficient evidence was presented for the jury to determine the contractual duties relating to the program of security for disciplined employees. Sufficient evidence was presented for the jury to determine that the Defendant-Security Company breached its duties. One of the "Core Responsibilities" in the Service Agreement was to provide "escort services" and the jury had ample evidence to assess a proper escort and then to determine that Damon Harris was negligent.

The Negligent Failure to Communicate To Kraft Management.

According to Joseph LoBianco, in September, 2010, Ms. Rhonda Mowday, Kraft's Safety and Security Supervisor, was the "immediate client" for U.S. Security. Ms. Mowday directed all activities, decisions, procedures and policies on behalf of Kraft to the Defendant. Feb. 20, 2015, P.M., N.T. 48-49. Damon Harris, the site supervisor for U.S. Security, testified that in 2010, the Kraft instructions to U.S. Security required that in the event of an emergency the guards were to call a Kraft supervisor first:

Feb. 17, 2015, P.M., N.T. 87:

> "Yes, it would have been on me if I didn't call Carl Rivers first. Rhonda Mowday said if any incidents happened, you're suppose to call the supervisor first."

Feb. 17, 2015, P.M., N.T. 89:

> "Because Rhonda Mowday told us that we're suppose to call the acting supervisor in the building first."

At trial, on February 17 and 18, 2015, it was established that Damon Harris had submitted and signed a false police report; he prepared a false Kraft Incident Report; and, he provided false testimony at both of his pre-trial depositions. In each instance Mr. Harris proffered a story that he either telephoned or radioed Kraft manager, Carl Rivers, immediately after Ms. Hiller returned to the guard shack with a gun at 8:41 p.m. Mr. Harris falsely wrote or stated that he called 9-1-1 after he spoke to Carl Rivers. See also, 18 Pa. C.S.A. §4906.

Feb. 17, 2015, P.M., N.T. 98:

> "**Q.** Sir, you knew that if you didn't make a call to your supervisor in an event like this, you could be fired . . . correct?
> **Harris:** Correct.

> **Q.** And you were told that by Rhonda Mowday, that if you don't call a manager in a situation like this, an emergency, first, you could be fired . . . correct?
> **Harris:** Correct."

Feb. 17, 2015, P.M., N.T. 99:

> "**Q.** And when you talked to the police in your emergency call, you didn't tell them that you had called upstairs to a manager because it hadn't happened . . . correct?
> **Harris:** Correct.
>
> **Q.** That's why you said this [the written police statement], not because it was true, but because you were concerned about being fired . . . correct?
> **Harris:** Correct."

Prior to these trial admissions from Mr. Harris, Mr. LoBianco explained that the 2010 contractual expectation was that if the two security employees did not report to Kraft management in an emergency situation, they were not doing their jobs. Feb. 20, 2015, P.M., N.T. 61-62, 71-76. At this post-trial juncture, it is uncontroverted that neither of the Defendant's employees either called or radioed any Kraft manager or supervisor when the emergency unfolded at 8:41 p.m. U.S. Security has apparently abandoned that contractual defense.

The jury heard from David Ciarlante, a Kraft maintenance mechanic. Mr. Ciarlante was a defense witness. He testified that he saw Mr. Harris and Mr. Bentley run outside the guard shack in different directions. Feb. 23, 2015, P.M., N.T. 75-76, 104-105. Mr. Harris ran away from the guard shack. He fell as he ran toward the boiler room. Feb. 23, 2015, P.M., N.T. 81-82. Mr. Bentley was yelling and talking as he ran out of the guard shack. Feb. 23, 2015, P.M., N.T. 89-91, 98.

Mr. Ciarlante had been standing outside of the Kraft building in the smoking area. When he saw Mr. Harris and Mr. Bentley run outside the guard shack and spoke to them, he learned that Ms. Hiller had gone into the Kraft building with a gun. Feb. 23, 2015, P.M., N.T. 90. Mr. Ciarlante went in the Kraft building and warned co-employees, Feb. 23, 2015, P.M, N.T. 83-84, including Rhonda Mowday. He also testified that he alerted employees on his radio that a woman with a gun had entered the building. The jury observed Mr. Ciarlante become emotional as he described the events. The jury heard that neither of the U.S. Security employees knew how to respond. He explained at Feb. 23, 2015, P.M., N.T. 105:

> "Because one ran behind the dumpster and the other one -- one ran behind the company store and the other one ran to a boiler room, and they didn't know what to do. And there was a lot of people in there, and I just reacted. I just wanted to try to warn somebody and try to get ahold of our security lady, who was at the time Rhonda Mowday, just to try to let some people know to get out of the way. That's why."

When considering Post Order Number 1 which directs security guards "REMAIN CALM" and to ". . . contact building management" in emergency situations, the record reveals that Marc Bentley missed a specific opportunity to communicate with the highest ranking Kraft manager present during that situation. Jeffrey Smith testified that he heard "chatter" on his radio. Smith, N.T. 51-53. He returned to the mixing office to use the telephone landline and called the extension to the security office directly. Smith, N.T. 54:

> "**Q.** What did you indicate when you placed that call from the mixing office?
> **Smith:** I asked, 'Is Yvonne Hiller back on the premises?' The person on the other end said, 'Yes.' I said, 'Where is she?' The person on the other phone said, 'I can't talk', put the phone down."

Thus, the jury learned that Mr. Bentley picked up the telephone receiver in the guard shack and answered the phone. When he was directly questioned, Mr. Bentley failed to alert the caller that Ms. Hiller had a gun. Rather, Mr. Bentley told the jury that he needed to protect himself first. He stated that he did not remember receiving Jeff Smith's phone call and he denied sobbing. Feb. 18, 2015, P.M., N.T. 81. Nearly two hours later Marc Bentley was still sobbing according to Mr. LoBianco. Feb. 20, 2015, P.M., N.T. 66.

In Feld v. Merriam, supra, the Appellate Court held that personnel charged to protect premises may be expected to perform their duties with reasonable care. 485 A.2d at 747. The evidence presented in this compensatory trial was sufficient for the jury to conclude that the Defendant's contractual duty to communicate to a Kraft manager or building management or client representative was breached by Marc Bentley and/or Damon Harris.

Finally, it must be noted that U.S. Security apparently created a new defense theory mid-trial: that as long as the Defendant's employee contacted "anybody at Kraft", Feb. 20, 2015, P.M., N.T. 74, or, "anybody that was affected," N.T. 75, 92, its contractual duty was satisfied. No evidence was presented that Kraft (the client) had knowledge of or agreed to this new theory.

3. The Multiple Failures By U.S. Security Employees Were Substantial Factors in Bringing About The Injuries and Deaths.

Generally, whether plaintiffs have demonstrated that the defendant's negligent conduct is a substantial factor in bringing about plaintiffs' harm is a question of fact for the jury. LaTonya Brown and Tanya Wilson had a right to expect U.S. Security employees to perform the contractual program for security in a reasonable fashion. Feb. 25, 2015, A.M., N.T. 84.

This Court concludes that the jury was provided sufficient factual evidence to establish that U.S. Security's breach of their duties increased the risk of harm and was the cause of harm to Tanya Wilson and LaTonya Brown.

The parties agree that the surveillance video shows Ms. Hiller exiting the guard shack at 8:39 p.m., while security guard Harris is peering from behind a door. The parties also agree that approximately eight minutes elapsed from the time Ms. Hiller was seen returning to the guard shack at 8:41 p.m. and when she is first observed on the surveillance video on the third floor at 8:49 p.m. The shootings occurred shortly thereafter.

Bryant Dalton, the third person shot by Ms. Hiller on September 9, 2010, suffered visible and permanent catastrophic physical and psychological injuries. The jury observed his obvious distress as he was assisted to and from the witness stand. In response to Defendant's cross-examination, Mr. Dalton told the jury how the actions and inactions of the security guards caused and contributed to the deaths of his co-workers. Feb. 18, 2015, P.M., N.T. 31:

> ". . . the security officers or the security guards knew we were sitting in that room like sitting ducks because if they came up and they escorted Ms. Hiller off the floor and out of the plant, they knew that we were in that room waiting. . . . You know he left us there to die. That's the way I look at it."

Restatement (Second) of Torts §323 provides that liability attaches when a party fails to exercise reasonable care in the contractual undertaking:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking."

Where, as here, Plaintiff-Estates have demonstrated the actions and inactions of Defendant's employees have increased the risk of harm, the basis exists for the jury to find that the increased risk was a substantial factor in bringing about the resultant harm and the proximate cause has been established. Restatement (Second) of Torts, §§323, 324A; Hamil v. Bashline, 392 A.2d 1280, 1286 (Pa. 1978); Feb. 25, 2015, P.M., N.T. 71.

In the case at bar, the jury could reasonably conclude that Ms. Hiller would have been less likely to linger and brood in her vehicle if she had been accompanied to her car in the parking lot. Yvonne Hiller's statement to the police describes her thoughts when she sat alone in her car. Feb. 24, 2015, P.M., N.T. 9:

> "Security came and took my badge and escorted me out. I then went to my car in the parking lot, and I had my gun in the car. I kept my gun under the seat. I planned on going right home, but I started to think about the 15 years that I have spent there that somebody was just taking away from me. I started to drive out, but I turned and went back in."

Accordingly, the failure to complete a proper escort increased the risk of harm to the decedents.

The jury could reasonably conclude that direct notice by the security guards to Kraft management would have enabled timely and coherent warnings to Ms. Wilson and Ms. Brown on the third floor. At 8:41 p.m. when Ms. Hiller was returning to the Kraft building, Carl Rivers, Jeff Smith and other Kraft managers were still in the mixing room completing their discussions about the Hiller suspension, and getting ready to walk to the elevator. Feb. 18,

2015, A.M., N.T. 112-115. At 8:47 p.m., the surveillance video revealed that Mr. Rivers and Mr. Smith were at the elevator hallway. Feb. 18, 2015, A.M., N.T. 87-89. Two minutes later, at 8:49 p.m. Ms. Hiller was seen on the third floor.

When the security guards saw Ms. Hiller at 8:41 p.m., Damon Harris had just left the Kraft managers a few minutes earlier. He testified that he knew they were in the mixing room. He ran to hide in the boiler room and did not call or radio to the third floor. Prior to trial, Mr. Harris falsely testified at deposition that he did call Carl Rivers in the mixing room. He also falsely told police that he used his radio to contact Kraft managers.

His security partner, Marc Bentley, did not know how to use the telephone landline in the guard shack. He did not use his radio to call any Kraft employee. When the landline rang in the guard shack prior to 8:47 p.m., Mr. Bentley failed to warn the caller. He did not know he should call the mixing room to alert the Kraft managers and decedents. During those crucial minutes from 8:41 p.m. through 8:49 p.m., the jury heard consistent and unequivocal testimony that confusion reigned inside and outside the guard shack. The failure to call Kraft managers increased the risk of harm to the decedents.

After considering the 2010 contractual program of protection encompassed in the Kraft-U.S. Security Agreement, the Post Orders and the U.S. Security Officer's Guide, this Court concludes that the Plaintiff-Decedents of Kraft had the right to rely on reasonable protection from the two U.S. Security guards. The Defendant's "program of security" did

promise to provide an additional factor of safety. This Court concludes that the record established at a minimum, the negligent exercise of the contractual duties by the Defendant's employees. The Motion for Judgment Notwithstanding the Verdict is DENIED.

B. Special Interrogatories Were Submitted to The Jury In Order to Preserve The Parties' Legal Challenges.

During the trial it became apparent that the parties had two areas of disagreement: U.S. Security's Motion to Preclude Recovery for Pre-Impact Fright, and U.S. Security's Motion to Allocate Liability Between Defendant-U.S. Security and Defendant-Hiller. The Plaintiff-Estates and U.S. Security submitted bench memoranda and presented oral argument. The Trial Court ruled that the Plaintiffs are not entitled to damages to pre-impact fright under the Survival Act. Feb. 11, 2015, A.M., N.T. 54-65, 68. The Trial Court also ruled that liability cannot be apportioned between U.S. Security and Ms. Hiller.

Counsel and the Court recognized that these issues related to post-trial decisions to mold the verdict and enter judgment. With that in mind, all counsel agreed to prepare a jury verdict sheet which reflected special findings. Feb. 24, 2015, P.M., N.T. 67-80. A request for special interrogatories lies within the discretion of the Trial Court. Special interrogatories serve a useful purpose when the circumstances of a case require them. Greet v. Arned Corporation, 194 A.2d 343, 345 (Pa. 1963); Walsh v. Pa Gas & Water Co., 449 A.2d 573, 577, n. 1 (Pa. Superior Ct. 1982). In this case the special findings enable the Court to determine a logical and reasonable understanding of the verdict award. The Trial Judge is able to mold the verdict without the necessity for a new trial.

On February 26, 2015, the total compensatory jury award was $8,020,000.00.

- In response to special interrogatories the jury awarded Estate of Brown, $600,000.00 and Estate of Wilson $720,000.00 "for fear and fright suffered by [decedents] before she was shot." The Plaintiffs assert these awards should be included in the molded verdict in favor of the Plaintiff-Estates. This Court disagrees.

- In response to special interrogatories the jury attributed 30% liability to U.S. Security and 70% liability to Ms. Hiller. The Defendant-Security Company asserts that the molded verdict and judgment should reflect the reduction by 70% of the compensatory damage award. This Court disagrees.

For the reasons which follow Judgment Orders will be entered in favor of Plaintiffs and against U.S. Security Associates, Inc. and Yvonne Hiller without reduction:

Estate of LaTonya Brown	**$4,000,000.00**
Estate of Tanya Wilson	**$2,700,000.00**

Judgment Orders will be entered in favor of Plaintiffs and against Yvonne Hiller (assault) only:

Estate of LaTonya Brown	**$600,000.00**
Estate of Tanya Wilson	**$720,000.00**

Delay damages will be added to compensatory damages awards.

1. Plaintiffs Are Not Entitled to Damages for Pre-Shooting Fright and Fear.

The Plaintiff-Estates brought these civil suits against U.S. Security claiming, inter alia, damages under the Survival Act, 42 Pa. C.S.A. §8302. In Frey v. Pennsylvania Electric Co., 607 A.2d 796 (Pa. Superior Ct. 1992), the elements of a survival action were examined at 798:

> "An action for survival damages is completely unlike the action for wrongful death brought by appellant. Under the survival statute, survival damages are essentially those for pain and suffering between the time of injury and death. 42 Pa.C.S.A. § 8302. The survival action has its genesis in the decedent's injury, not his death. In the survival action, the decedent's estate sues on behalf of the decedent, upon claims the decedent could have pursued but for his or her death. The recovery of damages stems from the rights of action possessed by the decedent at the time of death. *Nye v. Com., Department of Transportation,* 331 Pa.Super. 209, 480 A.2d 318 (1984). In other words, the survival action simply continues, in the decedent's personal representative, the right of action which accrued to the deceased at common law. *Id.* The measure of damages in a survival action is the decedent's pain and suffering prior to death and loss of gross earning power from the date of injury until death, less the probable cost of maintenance as proved by evidence and any amount awarded for wrongful death. *Krock v. Chroust,* 330 Pa.Super. 108, 478 A.2d 1376 (1984)."

These Plaintiffs assert that where, as here, they have presented substantial factual and expert evidence of the fear and terror experienced by Ms. Brown and Ms. Wilson before they were shot, then their Estates are entitled to the pre-impact fright awards under the Survival Act.

In Pennsylvania, the measure of survival action damages is compensation for mental suffering and physical pain **from the moment of injury to the moment of death.** e.g. Kiser v. Schulte, 648 A.2d 1, 4 (Pa. 1994). Estate of Mecca v. Estate of Lukasik, 530 A.2d 1334

(Pa. Superior Ct. 1987), where the moment of injury occurred at impact on a guardrail jury charge on pain and suffering affirmed; Nye v. Commonwealth/Dept. of Transportation, 480 A.2d 318 (Pa. Superior Ct. 1984), damages are proper only for conscious pain and suffering from moment of injury to moment of death; Slaseman v. Myers, 455 A.2d 1213 (Pa. Superior Ct. 1983), survival action award must include amount for conscious pain and suffering after physical injuries; Commonwealth/Dept. of Transportation v. Phillips, 488 A.2d 77 (Pa. Commonwealth Ct. 1985), when decedent died instantly jury award was adequate.

With this in mind, this Trial Court is not in a position to revise Pennsylvania precedent. Plaintiffs' Post-Trial Motion for a molded verdict to include the Security Company is Denied. The damages for the assault by Yvonne Hiller only is Granted.

2. The Defendant-Security Company is a Joint Tortfeasor Liable to the Plaintiffs for the Entire Compensatory Verdict.

Yvonne Hiller was not an agent, servant or employee of Kraft at the time settlement and release documents were executed in 2011. Settlement agreements are governed by contract law principles. When the terms of a contract are clear and unambiguous we look at the document itself to determine the intent of the parties. Lesko v. Frankford Hospital-Bucks County, 15 A.3d 337 (Pa. 2011), citing Mazzella v. Koken, 739 A.2d 531, 536 (Pa. 1999).

In this case, the Plaintiffs entered into settlement agreements with "Kraft Foods Global, Inc. . . . and their agents, servants . . . and employees of said companies [PAYORS]." See, U.S. Security Associates, Inc. Exhibits. The Plaintiffs "expressly reserve their right to make

any and all claims against any and every other person other than PAYORS . . . ." The Estate of Wilson signed the Kraft documents on February 2, 2011. The Estate of Brown signed the documents on November 22, 2011.

U.S. Security asserts in its Post-Trial Memorandum, page 22:

> "Here, Plaintiffs released Co-Defendant Yvonne Hiller from any liability through their respective releases of Kraft and its agents and employees." (emphasis in original)

The Defendant-Security Company presented evidence of the certified record of the conviction of Yvonne Hiller to the Court on February 24, 2015, P.M., N.T. 11. It indicates in pertinent part:

> ". . . arrest date, September 9, 2010; disposition date, September 10, 2012; disposition judge, Judge Benjamin Lerner; defense attorney, Defender Association of Philadelphia; . . . description, murder of the first degree; disposition, guilty; sentence date, September 24, 2012; sentence type, confinement; program period, for life."

As of September 9, 2010, the date of her incarceration for murder, aggravated assault and related charges, Ms. Hiller was not an agent, servant or employee of Kraft Foods Global, Inc. Ms. Hiller's employment status terminated as of September 9, 2010. In Powell v. Retirement Board of Allegheny County, 246 A.2d 110 (Pa. 1968), the Supreme Court held that an individual's arrest and imprisonment for a homicide resulted in the termination of employment at 113:

> "As stated in 56 C.J.S. Master and Servant, §38 (1948), the general rule is 'a contract of employment for personal services is terminated by the death of the servant, or where by reason of insanity, sickness or other disability, or conviction of a felony he is unable to perform his contract, unless the parties have

> contracted to the contrary.' This same section indicates that where an employee is absent for an appreciable length of time from his employment, it is unnecessary for the employer to notify the employee of termination since the failure on the part of the employee to perform services for that length of time works a termination automatically."

See also, Becker v. Butler County Memorial Hospital, 378 A.2d 316 (Pa. Superior Ct. 1977), employment terminates when employee remains away from work for an unreasonable period of time. **Note:** Both cases hold that the final date of employment is the last date employee was present at the job site.

The primary focus in contract law is on the intent of the parties to the agreement at the time they form the contract. These Plaintiffs did expressly reserve their right to file a claim against "every other person" who was not released. Yvonne Hiller was not released by the settlement. Maloney v. Valley Medical Facilities, Inc., 984 A.2d 478 (Pa. 2009). U.S. Security is not entitled to a reduction in the judgment against it by Ms. Hiller's pro rata share of 70% under the Uniform Contribution Among Tortfeasors Act, 42 Pa. C.S. §8326.

Yvonne Hiller and U.S. Security Associates, Inc. are joint tortfeasors who caused a single, indivisible harm (death). They are each liable for the entire compensatory verdict award ($6,700,000.00). A joint tortfeasor who has discharged more than its pro rata share of a common liability may seek contribution from any other tortfeasor who contributed to the loss. See, 42 Pa. C.S. §8324(b).

On February 24, 2015, in its Bench Memorandum, Defendant-Security Company stated that the reason they were seeking the jury's special verdict was not to limit responsibility to Plaintiffs for the amount of damages they caused. Rather, this Defendant stated at page 5:

> "The jury must allocate the percentage of liability between USSA (if any) and Hiller to determine, among other things, the parties' rights of contribution and the percentage reduction of the judgment to which USSA is entitled because of Plaintiffs' releases with Kraft and its agents and employees."

At the February 24, 2015, Charging Conference the Defendant asserted that "if the jury found that USSA was liable, then USSA and Hiller were joint tortfeasors and the jury must allocate fault between them." Defendant's Post-Trial Memorandum, page 19. The jury determined: "the parties percentage contributions to an indivisible harm." Defendant's Memorandum, page 20, n. 3.

The jury could not and did not allocate fault or liability, the jury did apportion damages for the purpose of establishing the parameters of the right of contribution between the co-defendants. e.g. Carroza v. Greenbaum, M.D., 916 A.2d 553, 566, n. 21 (Pa. 2007); Svetz v. Land Tool Co., 513 A.2d 403, 407, (Pa. Superior Ct. 1986); Wade v. S.J. Groves & Sons Co., 424 A.2d 902, 906-908 (Pa. Superior Ct. 1981).

Under the circumstances present in 2011, because Ms. Hiller was not an agent, servant or employee of Kraft, she was not released by the Plaintiffs in their settlement with Kraft. The two Defendants are joint tortfeasors and each joint tortfeasor is liable to Plaintiffs for the entire verdict award of $6,700,000.00.

IV. TRANSITION

On February 25, 2015, counsel gave their closing arguments and the jury was instructed on negligence and compensatory damages issues. They rendered their verdict on Thursday, February 26, 2015, P.M., N.T., 33-37.

The jury returned on Friday morning, February 27, 2015, to hear the closing arguments and charge on punitive damages. By the end of the day on Tuesday, March 3, 2015, the jury sent three notes indicating "deadlocked vote". The jurors were discharged.

On Thursday, March 19, 2015, counsel selected a new jury for our second trial on punitive damages only. A Motions in Limine hearing was held on March 23, 2015. That morning the jury heard opening statements, and then they were presented with a week of evidence and 16 witnesses -- live, by video and by transcript designations. The jury saw maps, photos and surveillance video. On Monday, March 30, 2015, this punitive damages jury rendered its verdict for punitive damages.

Our Dedicated Jury

Defendant-Security Company does a disservice to our trial jury from the first trial. In its Post-Trial Memorandum, page 43:

> "The inability of the jurors in the first trial -- who heard all of the liability evidence -- to reach agreement on whether there was any 'outrageous' conduct, is a further indication that the evidence was inadequate as a matter of law to support a claim for punitive damages. Those jurors deliberated from approximately 1:00 p.m. to 4:00 p.m. on Friday, February 27, 2015, from 9:30 a.m. to 4:30 p.m. on Monday, March 2, 2015, and from 9:30 a.m. to 3:00 p.m. on Tuesday, March 3, 2015, before this Court declared a mistrial over USSA's objection."

For two and a half weeks fifteen citizens (12 jurors and 3 alternates) came to our City Hall courtroom each day to hear 19 witnesses presented by several teams of lawyers in this case. The jurors were not told that the trial was bifurcated between compensatory and punitive damages.

The jurors were selected on Thursday and Friday, February 12 and 13, 2015. The Philadelphia winter weather was cold, and public transportation was an ongoing challenge. On Tuesday, February 17th, many of the ladies and gentlemen called chambers as early as 8:00 a.m. stating that they were experiencing delays. N.T. 3. That first day of opening statements and trial testimony was also the beginning of sub-zero weather endured by the fifteen individuals who were participating in their duties of citizenship.

We had jurors with significant financial pressures -- including bankruptcy. Feb. 18, A.M., N.T. 4. The City Hall pipes burst causing inconveniences and major flood damage to several floors, including our Law Library. Feb. 19, 2015, A.M., N.T. 16-17. The outside temperature for most of the trial was single digits and sub-freezing. Even food vendors stopped coming into town. We ordered lunch for the jurors to encourage them to stay with us for the duration. Feb. 20, 2015, A.M., N.T. 28, "it's 3 degrees outside", Feb. 23, A.M., N.T 22.

By Tuesday, February 24, 2015, the weather was a complicating factor to a major fire which caused more disruption of public transit. A.M., N.T. 5, 7. The jurors worked hard on February 25 and 26th, they listened to closings, they asked questions, and, returned the compensatory verdict. February 26, 2015, P.M., N.T. 37. By the time they arrived on Friday, February 27, 2015, they were weary and worn out. That morning they were surprised that their

service was not complete. They were disappointed that they did not receive their checks and they wanted to leave early. Feb. 27, 2015, N.T. 92. They were asked to continue jury duty and to deliberate on the punitive damage phase.

The inability of the jurors to reach agreement was not a reflection of the merits of evidence. The jurors asked questions and thought about the evidence and about their deliberative process even when they were not in the jury room. They were conscientious. They were asked to and expected to consider other jurors' opinions and to think about their own determinations at night and over the weekend. Feb. 27, 2015, P.M., N.T. 93.

The jurors were stressed and tired. They presented us with time and consideration. The weather and travel took a toll. On Tuesday, March 3, 2015, by 4:00 p.m. after the jurors were excused and finally received their checks, Center City Philadelphia experienced a significant hail, sleet and ice storm. The courts of the First Judicial District, the schools of the Archdiocese of Philadelphia, and, the School District of Philadelphia were officially closed on Thursday and Friday, March 5 and 6, 2015, due to a very major snow fall which started on Wednesday, March 4th. See, March 2, 2015, P.M., N.T. 5.

Our jurors provided exemplary service to all of the litigants and to all counsel and to the Court of Common Pleas in Philadelphia.

V. LEGAL DISCUSSION – PUNITIVE DAMAGES TRIAL

A. Punitive Damages Are Appropriate To Punish and Deter Reckless Indifference To The Rights of Others.

Pennsylvania's standard for punitive damages is well-established. The Supreme Court provided an overview in Hutchinson v. Luddy, 870 A.2d 766 (Pa. 2005) at 770-771:

> "The standard governing the award of punitive damages in Pennsylvania is settled. 'Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.' *Feld v. Merriam,* 506 Pa. 383, 485 A.2d 742, 747 (1984) (*quoting* Restatement (Second) of Torts § 908(2) (1979)); *see also Chambers v. Montgomery,* 411 Pa. 339, 192 A.2d 355, 358 (1963). As the name suggests, punitive damages are penal in nature and are proper only in cases where the defendant's actions are so outrageous as to demonstrate willful, wanton or reckless conduct. *See SHV Coal, Inc. v. Continental Grain Co.,* 526 Pa. 489, 587 A.2d 702, 704 (1991); *Feld,* 485 A.2d at 747-48; *Chambers,* 192 A.2d at 358. *See also* Restatement (Second) of Torts § 908, comment b. The purpose of punitive damages is to punish a tortfeasor for outrageous conduct and to deter him or others like him from similar conduct. *Kirkbride v. Lisbon Contractors, Inc.,* 521 Pa. 97, 555 A.2d 800, 803 (1989); Restatement (Second) of Torts § 908 (1) ('Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.'). Additionally, this Court has stressed that, when assessing the propriety of the imposition of punitive damages, '[t]he state of mind of the actor is vital. The act, or the failure to act, must be intentional, reckless or malicious.' *See Feld,* 485 A.2d at 748; *see also Martin v. Johns-Manville Corp.,* 508 Pa. 154, 494 A.2d 1088, 1097 n. 12 (1985) (plurality opinion)."

A punitive damage claim must be supported by evidence that the actor had a subjective appreciation of the risk of harm to the plaintiff, and, that the actor acted or failed to act in conscious disregard of that risk of harm.

The function of punitive damages it to punish and deter the defendant for extreme or egregious behavior. Martin v. Johns-Manville Corporation, 494 A.2d 1088 (Pa. 1985). Thus, a Trial Court must carefully consider whether there exists sufficient factors to create a jury question. SHV v. Continental Grain Co., 587 A.2d 702 (Pa. 1991). The Court must not look at the end result or a third party's criminal conduct, rather, the Court must examine the actor's conduct. e.g. Weston v. Northampton Personal Care, Inc., 62 A.3d 947, 961, 1021-1023 (Pa. 2013); Feld v. Merriam, 485 A.2d 742, 747-749 (Pa. 1984).

Reckless disregard of the safety of others has been defined in Restatement (Second) of Torts, §500:

> "The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent."

It has often been repeated that in Pennsylvania, only the first type of reckless conduct described in **comment a** to Section 500 is sufficient for a Court to send to the jury:

> "(1) where the 'actor knows, or has reason to know, . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk;'"

See also, Martin v. Johns-Manville Corporation, supra, Concurring Opinion at 494 A.2d 1101-1102.

1. What Did Marc Bentley and/or Damon Harris Know and When Did They Know It?

When making the determination of whether Plaintiffs' punitive damage claim could be presented to the fact-finders, the Court must evaluate: (1) whether the Defendant-employees had a subjective appreciation of the risk of harm to which the plaintiff was exposed, and, (2) whether the Defendant-employees acted or failed to act in conscious disregard of that risk of harm. Once that threshold has been met and the case is presented to the jury, the determination of whether the Defendant's actions rise to outrageous conduct will not be disturbed by the Courts.

Contrary to the argument of the Defendant, the measure of the security program is not how Mr. Harris or Mr. Bentley worked during the quiet times, in the evening hours of tedium and boredom when the guard shack was silent. The Defendant-Security Company posits that the "emotionally charged atmosphere of that evening" excused the behaviors and state of mind of its employees. Feb. 11, 2015, A.M., N.T. 75. Again, in Defendant's Post-Trial Memorandum, page 83, the Company justifies the conduct by stating, ". . . this was an emergency situation. It was not planned or intentional, and there was no consciousness of any monetary penalty or gain." And again, "the compressed time frame." October 29, 2015, N.T. 41, l. 4-5, 20-21.

Pennsylvania law mandates that the analysis must focus on behaviors in the urgent situation after the two guards were confronted by Ms. Hiller and her silver gun and before the shooting on the third floor. "The state of mind of [Harris/Bentley] is vital. The act, or the failure to act, must be intentional, reckless or malicious." Feld v. Merriam, supra, 485 A.2d 748. This Trial Court concluded that ample evidence was presented to permit the jury to consider whether punitive damages should be awarded for actions and/or failures to act by the U.S. Security guards in conscious disregard of known risks of harm.

This Trial Court, in its gatekeeping role, was by necessity sitting as a fact-finder to evaluate the behaviors, demeanor and credibility of the U.S. Security employees in order to reach legal conclusions. To comport with the strict judicial overview required by case law, the written submissions from the parties were inadequate. Feb. 11, 2015, N.T. 86-87. Both the Plaintiffs' Motion to Amend the Complaint to Add Punitive Damages, filed October 31, 2014, and U.S. Security Associates, Inc. Response in Opposition to the Motion, filed November 20, 2014, attached a few pages from lengthy depositions taken out-of-context as exhibits to their Memoranda. There were inconsistencies and discrepancies within and between deposition designations of U.S. Security employees and Kraft employees. There were contradictions within and between Police Statements signed by individuals. In addition, there were descriptions in the Memoranda submitted by counsel which did not necessarily match the

sworn deposition pages. For example, inter alia:

Plaintiffs' Motion to Amend:

> "19. Rather than remain at his post or provide even the slightest amount of protection for Kraft employees (or his co-worker, newly hired security officer Marc Bentley), Harris abandoned his post.
>
> 20. The surveillance screen shots inserted below shows Harris running away, abandoning his responsibilities and leaving Bentley, a security guard with only a few months of experience and no relevant training, to fend for himself.
>
> 23. Instead of alerting the workers, supervisor Harris ran away, providing warnings to no one, allowing Hiller to locate and shoot her intended targets. Harris knew Hiller was angry, armed, psychotic, bore a grudge, was after specific people and was headed their way. He knew he had a duty to protect these people. He knew he could do simple things to prevent their deaths. But intentionally, recklessly and outrageously he failed to do so.
>
> 24. This was not just a momentary lapse. Harris and Bentley had plenty of time to do the right thing. From the moment Hiller deviated from her path to travel and veered towards the guard house with her car, at approximately 8:30 p.m.-8:40 p.m., and before she re-entered the plant, at least 9-10 minutes elapsed before the shootings took place. See still shots from surveillance video, attached hereto as Exhibit 'K'.
>
> 26. Once Hiller drove up to the guard post unobserved, and returned to the plant at 8:41 p.m., USSA's security guards failed to follow the most basic protocols, including their failure to take action to notify workers inside the plant (approximately 120) that Hiller had returned with a gun.
>
> 27. Instead of remaining calm and taking measures to prevent the loss of life, Harris literally abandoned his post, and afforded Hiller all the time she need needed to perpetrate killings eight minutes later."

U.S. Security's Response in Opposition:

"1. . . . Damon Harris, another USSA security guard who was also in the guard shack when Hiller returned with the gun, ran to a safe area within the Kraft building where he called Kraft supervisor Carl Rivers to alert him that Hiller had returned with a gun and then called 911. See deposition transcript of Damon Harris dated March 27, 2013 ('Harris Deposition (Day Two)'), pp. 78:6-25, 79:14-24, attached hereto as Exhibit 'B'."

"3. . . . Damon Harris, another USSA security guard who was also in the guard shack when Hiller returned with the gun, ran to a safe area within the Kraft building where he called Kraft supervisor Carl Rivers to alert him that Hiller had returned with a gun and then called 911. See Harris Deposition (Day Two) at pp. 78:6-25, 79:14-24."

"10. . . . The scope of the 'escort services' is not defined in the Kraft contract documents. Mr. Harris escorted Hiller in the manner in which Kraft directed by escorting her to the employee locker room so she may collect her belongings, walking her to the guard shack, taking her employee card key and observing her leave the secure portion of the premises through the guard shack leading to the employee parking lot. See Harris Deposition (Day Two) at pp. 228-23-229:22; 230:4-19. It is denied that Mr. Harris' statement to the police indicates he had knowledge of any dispute between Hiller and her co-workers when he escorted her. This knowledge was acquired after the shooting. In his sworn testimony at deposition, Mr. Harris explicitly denied have any such knowledge prior to the incident. Id. at pp. 93:7-13. It is also denied that Mr. Harris believed Hiller to have 'mental problems' or was 'psychotic.' In fact, Mr. Harris testified that he did not believe she was 'crazy'. See deposition transcript of Damon Harris dated February 1, 2013. ('Harris Deposition (Day One'), at pp. 115:11-17, attached hereto as Exhibit 'C'."

"19., 21. In fact, Mr. Harris fled the guard shack as a reasonable means to eliminate the direct threat Hiller made to his life and find a secure location within the Kraft building from which he contacted Kraft supervisor Mr. Rivers to alert him of Hiller's return to the premises and call 911."

> "25. Mr. Harris contacted Mr. Rivers immediately after Hiller gained reentry through the guard shack after she threatened the lives of Mr. Bentley and Mr. Harris to warn of Hillers' return to the premises."

In fact, by the date of trial on February 11, 2015, the Defendant disclosed that U.S. Security employees had executed at least four different versions of events: First, the Police Statements; Second, Internal U.S. Security/Kraft Incident Reports; Third, sworn testimony at first pre-trial deposition; Fourth, sworn testimony at second pre-trial depositions. During the trial testimony in February, 2015, this Court learned of subsequent versions.

Our Appellate Courts have reiterated that a claim for punitive damages requires strict judicial oversight and control before a decision is made to permit such a claim to go to a jury. The Supreme Court held in Philadelphia Traction Co. v. Orbann, 12 A. 816 (Pa. 1888), that in vicarious liability situations, ". . . the plainest principles of justice require great caution should be observed in its application." 12 A. at 819. Accordingly, by taking the opportunity to assess all of the witnesses presented during the first week of the compensatory trial, direct and cross-examination, witnesses from Plaintiffs and Defendant, photos, surveillance of videos, and experts, this Trial Court was able to make a reasoned assessment and an informed decision about whether these Plaintiff-Estates had the right to seek punitive damages. See, Weston v. Northampton Personal Care, Inc., 62 A.3d 947, 961 (Pa. Superior Ct. 2013).

♦ **Marc Bentley** had worked as a Corrections Officer at the Delaware County Prisons for nine years prior to starting his employment with U.S. Security Associates, Inc. in May, 2010. He knew Yvonne Hiller because on August 18, 2010 he was surprised and puzzled when she told him that someone sprayed her car with deer urine. He wrote the Incident Report, signed it, and gave it to his supervisor, Damon Harris.

On September 9, 2010, Mr. Bentley observed Mr. Harris let Ms. Hiller exit the gates of the guard shack. Mr. Bentley opened the gates when she left and walked to the parking lot. When Ms. Hiller came back with a gun, at 8:41 p.m., Mr. Bentley opened the gate for her, then dropped to the floor. He then paced back and forth. He stated he did not know where she was going inside the Kraft building. He tried to use the office landlines, but could not get an outside telephone line to call 9-1-1. He did not know how. He was aware this was an emergency. He did not try to reach his supervisor, Damon Harris, on his radio. Eventually, he did use his personal cell phone to call 9-1-1 and provide a police report. At trial, he claimed that he did not remember that the landline telephone rang. He stated that he did not remember that the caller (Jeff Smith) asked him if Ms. Hiller was back in the building. He testified he did not remember that he put the telephone receiver down without giving a warning of the imminent threat with the gun. Feb. 18, 2015, N.T. 46-47, 52, 54-56, 63-64, 70.

This Court concluded that Marc Bentley did have a subjective appreciation of the high level of risks and dangers to which Plaintiff-Decedents were exposed and he intentionally and recklessly failed to act in conscious disregard of those risks. Mr. Bentley had personal knowledge that Ms. Hiller exhibited bizarre, unstable behavior. On September

9, 2010, he saw her gun. He knew it was highly probable that harm would ensue inside the Kraft facility. When Kraft Manager Jeff Smith called to the guard shack, Mr. Bentley had a contractual responsibility and direct opportunity to warn the caller of imminent danger. Mr. Bentley deliberately, callously and egregiously simply told the caller "I can't talk now." He recklessly failed to use his radio to warn anyone of the risk of harm.

♦ **Damon Harris** was a ten year employee of U.S. Security Associates, Inc. The Defendant-Company elevated him to supervisor in 2004. Mr. Harris knew Yvonne Hiller over several years; he knew she was a problem employee; knew she was "psychotic"; and, he signed the August 18, 2010 Incident Report when she claimed that someone sprayed "deer piss" on her car. Kraft employees told Mr. Harris that Ms. Hiller was "crazy" and "deranged". He personally found her to be irritating, disruptive and disrespectful of his position as a security guard.

On the night of September 9, 2010, Mr. Harris knew Ms. Hiller was being suspended. He was concerned about Ms. Hiller's reactions and response if he had asked her to walk more slowly. He did not want her to "ruin his day", thus, although he was trained to escort disciplined employees to their cars, he did not do so with Ms. Hiller. When Ms. Hiller returned with a gun at 8:41 p.m., he was scared. Mr. Harris knew that he should call Carl Rivers because Mr. Rivers was still up in the mixing room at that time. Mr. Harris knew where Ms. Hiller was going with the gun. Mr. Harris knew there was a very high risk that people in the mixing area would get killed. Mr. Harris knew Kraft Post Order protocol was to call a Kraft manager first in the event of emergency. Mr. Harris testified that he ran to the boiler room to hide; that

there were no phone numbers in the boiler room; and, he knew the mixing department was where the problem was. He called the police. He did not return to the guard shack to call upstairs. During those minutes after he saw Ms. Hiller with a gun, he was in panic. "The only thing I was thinking is call 9-1-1 and run for cover." Feb. 17, 2015, P.M., N.T. 41-44, 46, 47, 49, 67, 69, 72, 88-89, 94, 96; Feb. 18, 2015, A.M., N.T. 14-20, 41-42, 60.

This Court concluded that Damon Harris did have a subjective appreciation of the high level of risks and dangers to which Plaintiff-Decedents were exposed and he intentionally and recklessly failed to act in conscious disregard of those risks. Mr. Harris had personal knowledge that Ms. Hiller was mentally unstable. He knew it was highly probable that harm would ensue inside the Kraft facility. Mr. Harris knew the location where Ms. Hiller was going. He knew the people she was hunting. It was clear to this Trial Court that even as he ran away from the guard shack, Mr. Harris was aware of and appreciated that his failure to escort Ms. Hiller to her car set off this chain of events. Mr. Harris' failure to call by telephone or to communicate by radio to the people in the mixing department was reprehensible and egregious and did, in fact, demonstrate a reckless indifference and conscious disregard of the lives of others.

* * * * *

In conclusion, after considering all of the trial witnesses presented by the time of the non-suit stage (including defense evidence), this Trial Court had a full and fair opportunity to make the requisite substantive analysis of whether the U.S. Security program "promised to provide an additional factor of safety" to Kraft employees. Reider v. Martin, 519 A.2d 507,

511 (Pa. Superior Ct. 1987). The danger to Ms. Wilson and Ms. Brown was "easily perceptible." Feld v. Merriam, supra, 485 A.2d at 748. Both men saw the silver revolver in Ms. Hiller's hands. Significantly, both men knew that when she left the gate area and walked into the Kraft building, neither man was in danger. This Court considered the state of mind of the two security guards after they were confronted by Ms. Hiller with a lethal weapon. There was nothing presented to support the notion that the actions of Damon Harris and/or Marc Bentley was simple inadvertence or ordinary incompetence or mere unskillfulness. There was no danger to either guard after Ms. Hiller entered the Kraft building because the guards remained in the guard shack area. They were not being threatened. They were not in fear for their own lives. Each guard was able to and did call 9-1-1.

This Trial Court was able to make a reasoned assessment and an informed decision that there was sufficient evidence of wanton indifference and outrageous conduct (intentional and/or reckless disregard) for a jury to consider whether to award punitive damages and to determine the amount of punitive damages. The Plaintiff-Estates did have a right to seek punitive damages. It would be up to a jury to determine whether and in what amount punitive damages would be awarded. See, Restatement (Second) of Torts, §908, **comment d**. "Whether to award punitive damages and the determination of the amount are within the sound discretion of the trier of fact, whether judge or jury."

B. This Record Supports the Jury's Decision That The Conduct of Defendant's Employees Was Outrageous As A Matter of Law.

U.S. Security Associates, Inc.'s Motion for Judgment Notwithstanding the Punitive Damages Verdict is Denied. If any basis exists upon which the jury could have properly had made its award, the verdict will not be overturned. Quinby v. Plumsteadville Family Practice, Inc., 907 A.2d 1061, 1074 (Pa. 2006).

Since before 1886, the Pennsylvania Appellate Courts have held that a corporation is liable for punitive damages for the acts of its servants. Restatement (Second) of Torts, §908; Lake Shore & M.S.R. Co. v. Rosenweig, 6 A. 545, 552-553 (Pa. 1886); Dean Witter Reynolds, Inc. v. Genteel, 499 A.2d 637, 643 (Pa. Superior Ct. 1985).

The determination of whether a person's actions arise to outrageous conduct lies within the sound discretion of the fact-finder and will not be disturbed by the courts. In Weston v. Northampton Personal Care, 62 A.3d 947 (Pa. 2013), the Supreme Court described once again what constitutes "outrageous conduct" at 1121:

> "Punitive damages will lie only in cases of outrageous behavior, where defendant's egregious conduct shows either an evil motive or reckless indifference to the rights of others. Punitive damages are appropriate when an individual's actions are of such an outrageous nature as to demonstrate intentional, willful, wanton, or reckless conduct.
>
> *J.J. DeLuca Co., Inc. v. Toll Naval Associates,* 56 A.3d 402 (2012) (citation omitted).

> Outrageous conduct is an 'act done with a bad motive or with a reckless indifference to the interests of others.' 'Reckless indifference to the interests of others', or as it is sometimes referred to, 'wanton misconduct', means that 'the actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.'
>
> *Smith v. Brown,* 283 Pa.Super. 116, 423 A.2d 743, 745 (1980) (citations omitted)."

See also, Hutchinson v. Luddy, 870 A.2d 766 (Pa. Superior Ct. 2005).

In the case at bar, there was substantial testimony at trial to establish that (1) the Defendant's employees did have a subjective appreciation of the risks of harm to which Ms. Brown and Ms. Wilson were exposed, and that (2) the employees acted or failed to act in conscious disregard of that risk. The jury also knew that the punitive damages derived from liability for the negligent breaches of the Kraft-U.S. Security Associates, Inc. Security Agreement.

Defendant-Security Company asserts the basis for JNOV in Defendant's Post-Trial Memorandum, page 47 (Mr. Harris):

> "Mr. Harris fled the guard shack after Hiller's threat with the gun, sought cover in the boiler room, and called 911. There is no dispute that Mr. Harris contacted 911 approximately one (1) minute later and reported the emergency. The police arrived at the Kraft facility within minutes of the call to 911. The undisputed evidence confirmed that Mr. Harris entered the Kraft facility several minutes after Hiller threatened his life at gun point and before the first police officer arrived on the scene. Mr. Harris entered the facility in order to warn employees of Hiller's presence and to assist employees evacuating the Kraft facility. Taken collectively, the undisputed actions of Mr. Harris in calling 911, accurately reporting the necessary information, and re-entering the Kraft facility to warn employees of Hiller's presence

and assist with the evacuation, all demonstrate that he did not intentionally fail to act in conscious disregard to the lives of Plaintiffs. His actions, while not perfect in retrospect, demonstrate an individual who affirmatively tried to protect lives - not an individual who intentionally acted in a conscious disregard for the safety of others." (emphasis in original)

And, at page 48 (Mr. Bentley):

> "Mr. Bentley's actions likewise do not demonstrate any intentional failure to act in conscious disregard to the lives of Plaintiffs. Mr. Bentley attempted to contact 911 through the landline phone in the guard shack, but was unable to obtain an outside line. After several failed attempts in his panicked and frightened state, Bentley called 911 on his cell phone and reported the emergency. There was no dispute that Bentley immediately thereafter reported to Kraft mechanic David Ciarlante that there was a woman in the building with a gun. Mr. Ciarlante testified that after he received this information, he immediately contacted Kraft management inside the facility on his radio to report a woman in the building with a gun. Mr. Ciarlante further testified that he broadcasted this information over the radio system before he followed Hiller into the Kraft facility. According to camera 7 surveillance footage, Ciarlante entered 52 seconds after Hiller entered the Kraft facility. There can be no dispute that the critical information broadcast over the radio by Mr. Ciarlante - that there was a woman in the building with a gun - was provided by Mr. Bentley. Taken as a whole, Mr. Bentley's actions in calling 911, and advising a Kraft employee that Hiller returned with a gun, with the result that that Kraft employee communicated that information to all Kraft management within the building no later than 52 seconds after Hiller entered the Kraft facility, is insufficient as a matter of law to conclude that Bentley intentionally failed to act in conscious disregard for the lives of Plaintiffs."

Plaintiffs respond by providing an accurate overview of the evidence. The record permitted the punitive damages jury to conclude that Mr. Harris and Mr. Bentley did exhibit conscious disregard and indifference to the lives of Ms. Wilson and Ms. Brown. Plaintiffs' Post-Trial Memorandum, pages 85-87:

> "Especially when viewed in the light favorable to the verdict, the evidence introduced at the punitive damages trial permitted the jury to find:
>
> - USSA sent two men to provide security and safeguard 120 people at the Kraft bakery with no training on how to use key communications systems or how to handle an armed and disgruntled employee.
>
> - Harris knew that Hiller posed a potential security risk given her suspension because of an altercation with fellow employees Tanya Wilson, LaTonya Brown, and Bryant Dalton.
>
> - Harris failed a basic security protocol by not escorting Hiller all the way to her car and waiting there until she left the premises. Instead he let her go at the employee gate and allowed her to walk to her car by herself, and stay in the parking lot while developing her plan.
>
> - Harris knew that Ms. Wilson, Ms. Brown, and Mr. Dalton were Hiller's targets when she returned to the building;
>
> - Harris and Bentley were obliged to call Kraft management to warn that Hiller had returned to the bakery with a gun. They were also obliged to attempt to monitor Hiller's progress through the facility so they could advise on her location and help those inside move to safety. Instead, they abandoned the security post and (apart from Bentley's initial unsuccessful effort to place a telephone call) made no effort to call those inside the building and warn them of the impending threat, even though they could have used the phone, the walkie-talkie radio, and the public address system

to provide warning information. They voiced concern only for themselves, even after they were not themselves in physical danger from Hiller and easily could have made the requisite efforts to contact those inside.

- Harris and Bentley did not attempt to contact Kraft personnel inside the bakery, and only called the police, even though they recognized that police would not have had the time and opportunity to intervene before Hiller reached the third floor.

- Harris and/or Bentley had plenty of opportunity to contact management and other persons inside the building by telephone, radio, or public announcement system. They just did not do so.

- Harris and Bentley understood their failures increased the risk of physical harm to those inside the building, and acknowledged that the deaths of Ms. Wilson and Ms. Brown easily would have been prevented had they attempted to contact those inside the building. Harris's lies to the police and during his deposition (about his escort of Hiller and purported contacts with management), which he admitted during both the first and second trial, illustrated Harris' personal awareness of the depth of his failures and the role those failures played in the deaths of Ms. Wilson and Ms. Brown.

- In spite of Harris's and Bentley's outrageously poor performance, USSA's management considered them to have gotten the job done and gave them an 'A plus' for their efforts.

Taken together, this evidence permitted a jury to conclude that Harris and Bentley , and thus USSA, had exhibited conscious disregard or indifference to the risk posed by Hiller to Kraft employees, notably Ms. Wilson and Ms. Brown; and hence USSA had demonstrated 'reckless indifference' as described by Pennsylvania law. *See SHV Coal*, 587 A.2d at 704; *Martin*, 494 A.2d at 1097-98; *see also Hall v. Jackson*, 788 A.2d 390, 403 (Pa. Super. 2001) (punitive damages proper where the defendant had knowledge of 'an easily perceptible danger of death or substantial

> physical harm'); *see also Delahanty v. First Pennsylvania Bank, N.A.*, 464 A.2d 1243, 1263 (Pa. Super. 1983) (whether punitive damages are warranted is for the fact finder). The Court committed no error in allowing punitive damages to reach the jury based on the evidence introduced at the second trial. Jnov should not be granted now."

The punitive damages jury heard and evaluated the testimony from the two U.S. Security employee guards. Mr. Harris, the security supervisor, testified that on the evening of September 9, 2010, he knew that he should call the Kraft mixing office on the third floor; and, that he knew he should contact Rhonda Mowday or Carl Rivers first before he called 9-1-1; and, that he knew Ms. Hiller had a gun and the "people upstairs" should be told. March 23, 2015, P.M., N.T. 11-12, 48; March 24, 2015, P.M., N.T. 7. He acknowledged that he took none of those actions to attempt to effectuate the program of security as per his contractual duties.

The jury heard consistent and inconsistent testimony from witnesses. As in Daley v. John Wanamaker, Inc., 464 A.2d 355, 361 (Pa. Superior Ct. 1983), it was the decision of the fact-finders as to what actually took place. It was up to the jurors to reconcile disparate written Incident Reports and Police Statements, divergent pre-trial depositions, and conflicting trial testimony from February, 2015, and trial testimony provided in March, 2015.

The punitive damages jury was aware that Mr. Harris told them a rendition of facts that was completely at odds with and markedly different than testimony he gave several weeks earlier at the first trial. This tribunal heard:

> "**March 23, 2015, P.M.,** N.T. 11-14, we followed [Kraft] post-orders to the exact 'T'; N.T. 18, we did our job; N.T. 19, we did our job; N.T. 27, knows all the extensions of the telephone 'by

> heart'; N.T. 31, as a supervisor, he formulated procedures to cover emergences; N.T. 34, 35, call 911, then supervisor/call supervisor first, then 911; N.T., 37, 39, did have adequate and sufficient training; N.T. 43, 44, 45, we did our job; N.T. 48, 'I made a call and let the people know upstairs that Yvonne Hiller had a gun'. 'I did that after I let Rhonda Mowday know'; N.T. 49, 'I told Carl Rivers that'; I did call Carl Rivers; N.T. 50, 'I called Carl Rivers . . . I remember that. Carl Rivers got the word, he ran out the back door. He didn't escort anyone down the building outside. Carl Rivers did that sir'; N.T. 51, Police Statement: 'I did radio to the manager on the mixing floor that she was on her way up there with the gun'; N.T. 52, I put the call out to Carl Rivers to let him know . . . I called Carl Rivers; he got the word from me . . . I notified him first; N.T. 55, I did make a call to Carl Rivers . . . I called Carl Rivers; N.T. 56, I called Carl Rivers . . . I called Carl Rivers; N.T. 60, radioed Carl Rivers; N.T. 67, 'I did my job. I know I did my job'; N.T. 69, 'I did get the word up to him'; N.T. 71, 'I made the call . . . I know I did . . . I made the call to Carl Rivers.'
>
> **March 24, 2015, A.M.,** N.T. 76, 'I didn't hide . . . I was instructing the police'; N.T. 79, 'I did my job'; N.T. 82, 'I used a radio to call Carl Rivers'; N.T. 87, 'Okay. The point in time I made the call to Carl Rivers at the point in time before I called anybody else. That's the truth.'
>
> **March 24, 2015, P.M.,** N.T. 18, By the time the police came the ladies were dead."

This testimony from U.S. Security's site supervisor articulated the defense position throughout the years of pre-trial process and through the jury trials in February and March, 2015. For reasons that are known only to Defendant-Security Company, no reference has been made in the oral or written Post-Trial proceedings to Mr. Harris' testimony even though Mr. Harris provided the employer's contractual defense, causation defense and liability defense.

The punitive damages jury heard from Kraft Manager Carl Rivers, the Business Unit Leader. He coordinated the disciplinary hearing on September 9, 2010 held in the mixing office. March 24, 2015, A.M., N.T. 11-15. After interviews with Ms. Wilson, Ms. Brown, Mr. Dalton, and Ms. Hiller, he called for the security escort. March 24, 2015, A.M., N.T. 22-23. He knew that Ms. Brown, Ms. Wilson and Mr. Dalton were sitting in the "break room", next to the mixing office. March 24, 2015, A.M., N.T. 37. Following the disciplinary meeting and after Ms. Hiller left, Carl Rivers, Jeff Smith and others remained in the mixing office for several minutes to discuss what transpired. March 24, 2015, A.M., N.T. 15, 29-30.

The surveillance video shows Mr. Rivers and Mr. Smith waiting for the elevator at 8:47:24 p.m. Mr. Rivers got onto the elevator, then turned on his radio, and got off at the first floor. March 24, 2015, A.M., N.T. 16-17, 31-36. **Mr. Rivers consistently testified that Damon Harris never called him or spoke to him to alert him of the danger to Ms. Wilson or Ms. Brown.**

The punitive damages trial jury observed that Mr. Bentley was unwilling to respond to any of the questions propounded by counsel for the Plaintiffs. March 24, 2015, P.M., N.T. 66-106; March 25, 2015, N.T. 4-90. This security guard once again claimed that he did not recall receiving a telephone call from the senior manager from Kraft. March 25, 2015, N.T. 90.

Mr. Jeffrey Smith, the Business Unit Manager at Kraft's Philadelphia Bakery, testified by video taken on February 16, 2015. His testimony was presented to this jury on March 25, 2015. Mr. Smith explained that the walkie-talkie radio had so many people talking ("chatter"), that he could not get a clear message. N.T. 53. He went to the mixing room to use a landline to call the extension to the security office directly.

> "N.T. 50: I asked, 'Is Yvonne Hiller back on the premises?' The person on the other end said, 'Yes.'
> I asked, 'Where is she?' The person said, 'I can't talk.'"

Mr. Smith testified that the person in the security office put the telephone down and was sobbing. N.T. 55, 95-97. That person who did not respond or warn Mr. Smith was security guard Marc Bentley. Note: Defendant is incorrect in its Post-Trial Memorandum, pages 53-54: "Jeff Smith admittedly heard Marc Bentley say . . . that there was a problem with Yvonne."

The claim for punitive damages was established as a matter of law. A claim for punitive damages arises out of the underlying cause of action and the negligent breach of the contractual duties. The determination of whether a person's actions arise to outrageous conduct lies within the sound discretion of the fact-finder and will not be disturbed unless discretion has been abused. Dillow v. Myers, 916 A.2d 698 (Pa. Superior Ct. 2007) citing SHV Coal, Inc. v. Continental Grain Co., 587 A.2d 702 (Pa. 1991).

The punitive damages jury chose to believe Carl Rivers and Jeff Smith. The trial record supports the jury decision. Daley v. John Wanamaker, Inc., supra, 464 A.2d at 361.

Delahanty v. First Pennsylvania Bank, 464 A.2d 1243 (Pa. Superior Ct. 1983) provides a comprehensive review of the right to punitive damages in Pennsylvania, 464 A.2d at 1262-1267, including the standards to impose vicarious liability against a corporation for an employee's tort. Pennsylvania has not adopted Restatement (Second) of Torts §909. See also, Pennsylvania Suggested Standard Civil Jury Instruction, Sections 8.10 and 6.00; Dean Witter Reynolds, Inc. v. Genteel, supra, 499 A.2d at 643, where the Court declined the invitation to adopt Section 909, in favor of the traditional Section 908; Shiner v. Moriarty, 706 A.2d 1228, 1240 (Pa. Superior Ct. 1998).

Pennsylvania has not adopted Federal Court dicta for a "clearly outrageous" standard. Defendant-Security Company relies on Skeels v. Universal C.I.T. Credit Corporation, 335 F.2d 846 (3rd Cir. 1964), however, a reading of the Skeels case does not sustain an interpretation for a new or different standard in Pennsylvania. Defendant's Post-Trial Memorandum, page 67. The Skeels Court cites Funk v. H.S. Kerbaugh, Inc., 70 A. 953, 954 (Pa. 1908) and Chambers v. Montgomery, 192 A.2d 355, 358 (Pa. 1963) neither of which contain the term "clearly outrageous". A more relevant reference is Achey v. Crete Carrier Corporation, 2009 WL9083282 at *10, which explores and then rejects Defendant-Security Company's misleading misuse of the term "clearly outrageous". **In Pennsylvania the standard for both direct and vicarious punitive damages is ordinary outrageousness.** The Plaintiff-Estates met their burden of proof. Judgment notwithstanding the punitive damages verdict is not appropriate here.

C. An Amendment of the *Ad Damnum* Clause is Permissible at Any Point in The Litigation.

Rule 1033 of the Pennsylvania Rules of Civil Procedure states:

> "A party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, add a person as a party, correct the name of a party, or otherwise amend the pleading. The amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense. An amendment may be made to conform the pleading to the evidence offered or admitted."

It is well-settled that amendments to pleadings are liberally granted. Small v. Columbia Gas of Pennsylvania, 525 A.2d 424, 428 (Pa. Superior Ct. 1987). An amendment which introduces a new and different cause of action after the statute of limitations has run is not allowed. e.g. Horowitz v. Universal Underwriter Insurance Co., 580 A.2d 395 (Pa. Superior Ct. 1990).

It is also well-settled that the right to punitive damages is incident to a cause of action and is not the subject of an action in itself. e.g. DiGregorio v. Keystone Health Plan East, 840 A.2d 361, 369-370 (Pa. Superior Ct. 2003); Kirkbride v. Lisbon Contractors, Inc., 555 A.2d 800 (Pa. 1989); Hilbert v. Roth, 149 A.2d 648 (Pa. 1959).

The Defendant-Security Company acknowledges that in this case, Plaintiff-Estates filed the Motion to Amend the *Ad Damnum* Clause only. On February 11, 2015, N.T., 74, defense counsel commented:

> "The proposed amended complaint does not add any new factual content. It simply seeks to revise the ad damnum clause to seek, in addition to compensatory damages, punitive damages."

At this post-trial juncture, the Defendant-Security Company continues to oppose the amendment to the *ad damnum* clause. It refers to the statute of limitations, positive rule of law and even situations where operative facts have been added. None of those factors are implicated herein because an amendment to the *ad damnum* clause is permissible at any point in the litigation. Sullivan v. City of Philadelphia, 460 A.2d 1191 and cases cited at 1192 (Pa. Superior Ct. 1983). See also, Daley v. John Wanamaker, Inc., 464 A.2d 355, 359 (Pa. Superior Ct. 1983), permitting an amendment to the *ad damnum* clause only to pray for punitive damages.

Finally, in a related argument offered in opposition to the Plaintiffs' amendment, the Security Company asserts that a stipulation signed by the parties to withdraw punitive damages is analogous to Rule 231 Voluntary Discontinuance. A Voluntary Discontinuance permits a second action to be commenced only within the original statute of limitations period. Defendant's Post-Trial Memorandum, pages 33-39.

Here, unlike Williams Studio Division of Photography v. Nationwide Fire Ins. Co., 550 A.2d 1333 (Pa. Superior Ct. 1988), the Plaintiffs' amendment is not a second action but rather a request for an element of damages incident to an existing cause of action. See also, Boardakan Restaurant, LLC v. Atlantic Pier Associates, LLC, 2013 WL 5468264 (E.D. Pa. 2013), where Honorable Joel Harvey Slomsky reviewed and affirmed an Order entered by Honorable Albert W. Sheppard, Jr. Judge Slomsky noted that in the Williams Studio case, the Plaintiffs discontinued their claims and filed new, separate actions after expiration of the statute of limitations. Although not binding, the reasoning of Boardakan is pertinent here: These

Plaintiffs have not instituted a new cause of action or new operative facts, they have revived their original filing incident to an existing civil action. Rule 231 is inapplicable because that Rule governs the filing of a second action, and does not govern an amendment raising damages incident to the existing cause of action. See also, Feb. 11, 2015, A.M., N.T. 79.

Where, as here, the prayer for punitive damages is not a second or separate or new or different cause of action, Defendant's assertion must fail. Somerset Community Hospital v. Mitchell & Assoc., Inc., 685 A.2d 141, 147 (Pa. Superior Ct. 1996); Daley v. John Wanamaker, Inc., supra. The fact that "boiler-plate" language in the Complaint was removed by the Stipulation does not change the substantive appellate precedent ("reckless, outrageous, intentional and/or wanton" conduct). Defendant's Post-Trial Memorandum, page 37. The Trial Court did not abuse discretion or commit an error of law by granting the Plaintiff-Estates' Motion to Amend the *ad damnum* clause of these two complaints to add the prayer for punitive damages.

D. The Evidentiary Rulings Were Neither Incorrect Nor Prejudicial to the Parties.

In reviewing the evidentiary challenges, the Post-Trial Court will consider whether U.S. Security has demonstrated that rulings were erroneous, and then whether the error, if any, prejudiced the Defendant. e.g. Hart v. W.H. Stewart, 564 A.2d 1150, 1152 (Pa. 1989); Fletcher-Harlee Corporation v. Szymanski, 936 A.2d 87, 93 (Pa. Superior Ct. 2007); Gunn v. Grossman, 748 A.2d 1235, 1243 (Pa. Superior Ct. 2000), all cases holding that decisions relating to the introduction of evidence are well within the discretion of the Trial Court.

U.S. Security seeks a new punitive damages trial. An abuse of discretion will not be found merely because the Defendant-Security Company might have desired a different result. Bernstein, 2015 Pa. Rules of Evidence, Pa. R.E. 103 (Gann) and numerous cases cited therein; Wolfe v. Pickell, 205 A.2d 636 (Pa. Superior Ct. 1964). First, the Defendant argues that the Trial Court precluded Mathew Rockenbach from testifying that he reported to Kraft personnel on the third floor that he believed Ms. Hiller had a weapon. Defendant's Post Trial Memorandum, page 55:

> "This ruling prevented the jury from hearing evidence that Kraft management knew that Hiller had returned with a gun or other weapon in advance of her arrival at the third floor, from which the jury could have concluded that the causal connection between any 'outrageous' conduct by Bentley and Harris was broken."

This defense argument is obviously flawed because no such evidence exists from the first trial.

Mr. Rockenbach, a mixer, told the compensatory damages jury that the first time he told any of his co-workers that Ms. Hiller had a gun was after he heard the fatal gunshots. He was on the 2nd Floor bake shop at that time. Feb. 23, 2015, P.M., N.T. 54. In addition, Mr. Rockenbach's testimony at Ms. Hiller's criminal proceedings did not indicate that he warned any Kraft managers that Ms. Hiller had a weapon. Feb. 23, 2015, P.M., N.T. 46-55. The Security Company's argument of "no causation" and "evidence preclusion" is baseless.

The trial record also reflects that the Security Company's own employees did provide extensive evidence over two days on March 24 and 25, 2015, about their communication with several Kraft managers and other Kraft workers. Damon Harris, security supervisor, repeatedly explained that he made the call to the "people" upstairs on the third floor. He stated

numerous times that he called the Kraft Business Unit Leader Carl Rivers. Mr. Harris also testified that he made the call to the third floor and he did the job he was trained to do. March 24, 2015, A.M., N.T. 87, "That's the truth."

Significantly, Defendant-Security Company has chosen to not refer to or rely on any evidence from any of its own employees in support of its "causation" or "timing" arguments or any other argument at this Post-Trial juncture.

A jury is free to believe all or part or none of the evidence. The jurors were free to consider and weigh the testimony of Mr. Harris and Mr. Bentley. The jurors heard from Kraft employees who described their knowledge of events that evening. Defendant's selective assertions at page 55 of "evidence preclusion" is simply not supported in the transcripts. Defense counsel's questions relating to "timing" were permitted over vigorous objections from counsel for Plaintiff's Estates.

On **March 26, 2015**, Sherry Jennings Barsamian, the Kraft Plant Manager and the highest ranking Kraft employee on September 9, 2010, testified that while driving in her car she overheard on Jeff Smith's radio that a person was in the building with a gun. A.M., N.T. 79, 80, 94. The jury could conclude that information was heard at 8:47:24 while Mr. Smith was standing in the elevator/mixing area and the machines were noisy. On the other hand, Mr. Smith testified that he did not hear the radio information. Rather, he returned to the mixing office to call the guards on a landline, at which time Marc Bentley put the telephone down, "I can't talk now."

On, **March 26, 2015**, the jury also heard from Derrick Hart, Margaret Depew, and David Ciarlante. All three Kraft employees observed Yvonne Hiller enter the Kraft building with a gun. Mr. Ciarlante used his own radio to try to warn his fellow employees, "there's a woman in building with gun." P.M., N.T. 69. Mr. Ciarlante also described for the jury the actions/inactions of the two U.S. Security employees who had run out of the guard shack, at P.M., N.T. 90:

> "They were standing outside. They were just standing around. They didn't know what to do. They were in shock. They didn't know what to do."

Mr. Ciarlante, a mechanic, went into the building at 8:46:57 p.m. and followed Yvonne Hiller. March 26, 2015, P.M., N.T. 62. Meanwhile, Derrick Hart who weighed at least 400 pounds in 2010, stated that it took him only three to four minutes to walk to his car before calling 9-1-1 and the third floor. By the time he called the mixing office the Kraft supervisors had left and neither Carl Rivers nor Jeff Smith testified that the phone rang in that room. Ms. Depew did not call anyone inside the Kraft building.

On **March 27, 2015**, the jury saw the video of Karen Fowler, a former Kraft employee, who heard on a radio about Yvonne Hiller returning with a gun. A.M., N.T. 65. See also, March 23, 2015, P.M., N.T. 55-57. Thus the jury was well aware that some Kraft employees knew that Ms. Hiller had returned to Kraft building. See also, March 26, 2015, A.M. 93; P.M., N.T. 16, 76-80; March 27, 2015, A.M., N.T. 4-14. There was no evidence at either trial that the two security employees or anyone else contacted the "people" on the third floor. This post-trial contention claiming "evidence preclusion" is meritless.

Next, Defendant contends that Robert M. Toborowsky, M.D., a psychiatrist, should have been permitted to testify as an expert witness. Plaintiffs filed a Motion in Limine, as follows at Memorandum page 3:

> "**Question Presented:** Should this Honorable Court preclude the opinions of Robert Toborowsky, M.D., when those opinions were offered late, when those opinions are not beyond the ken of a typical layperson, when those opinions are based upon testimony from another expert witness who will not testify, and when those opinions are wholly irrelevant to the issue of punitive liability.
>
> **Suggested Answer: Yes.**"

See, Plaintiffs' Motion to Preclude Testimony of Robert Toborowsky, M.D., dated March 17, 2015; Defendant's Memorandum in Opposition, dated March 20, 2015; March 23, 2015, A.M., N.T., 4-12, 28-30; (Control No. 15032123). In a related Motion in Limine the Defendant requested that it should be permitted to use the compensatory trial testimony of Plaintiffs' pathology expert during the punitive damages trial, at Memorandum page 2:

> "**QUESTION PRESENTED**
>
> Should the Court permit the jury in the punitive damages phase of trial to consider the relevant portions of the trial testimony offered by Bennet Omalu, M.D. during the compensatory damages phase of trial, which testimony explains the relative states of mind of USSA employees Damon Harris and Marc Bentley after their lives were threatened at gun point by Defendant Yvonne Hiller?
>
> **Suggested Answer: YES.**"

See, Motion in Limine of Defendant U.S. Security Associates, Inc. to Permit Use of February 20, 2015 Trial Testimony of Bennet Omula, M.D. During the Punitive Damages Phase of the Trial, dated March 17, 2015; Plaintiffs' Response in Opposition, dated March 18, 2015; March 23, 2015, A.M. N.T. 13-18, 29-30; (Control No. 15032124).

Following oral argument from all counsel, this Court concluded that the parties would be permitted to use "as much or as little" of Dr. Omalu's testimony as needed, however, the late disclosure of Dr. Toborowsky would not be accepted. This Trial Court determined that Dr. Toborowsky's area of expertise (psychiatrist) was entirely different than and distinguishable from other identified experts (security experts, pathologists and forensic economists). Plaintiffs argued that the surprise and late disclosure, only 8 days prior to the punitive damages trial, would not provide them sufficient time to prepare or make meaningful response. All other experts who submitted reports had been identified several months prior to the first trial. The Trial Court concluded that if the psychiatrist had been permitted to testify at such late notice, Plaintiff-Estates would not have the opportunity to cure the prejudice by locating another expert in the same field.

In the Post-Trial Memorandum, at page 60, the Security Company proffers that Dr. Toborowsky's conclusions were "consistent with . . . Dr. Omalu." In fact, the psychiatrist confirms that the pathologist's opinions were also his own:

> "He [Dr. Toborowsky] has reviewed and agrees with Dr. Bennett Omalu's trial testimony concerning how individuals react in extremely stressful situations, what Dr. Omalu refers to as "intense neurologic anguish," and in this regard it is his opinion that Dr. Omalu's trial testimony is directly applicable to the reaction of the involved security officers."

After careful consideration of the circumstances of these two Motions in Limine, the Court granted U.S. Security's Motion for permission to use Dr. Omalu's testimony in the punitive damages trial and granted the Motion from the Plaintiff-Estates to preclude Dr. Toborowsky's testimony. See generally, Kaminski v. Employers Mutual Casualty Co., 487 A.2d 1340 (Pa. Superior Ct. 1985); Kemp v. Qualls, M.D., 473 A.2d 1369 (Pa. Superior Ct. 1984), thirteen days to investigate; Augustine v. Delgado, M.D., 481 A.2d 319 (Pa. Superior Ct. 1984), fifty days.

The Security Company presented evidence from Plaintiffs' expert witness to opine about "extreme fright, psychological distress . . . and primitive fears". March 23, 2015, A.M., N.T. 15-16. This Trial Court permitted the punitive damages jury to hear extensive and detailed testimony on March 25, 2015, P.M., N.T., 65-83, about the extreme psychological responses experienced. See also, March 30, 2015, A.M., N.T. 94-98, defense power point presentation and argument about terror and primitive reactions to justify and excuse the conduct of Damon Harris and Marc Bentley "in those few minutes after Yvonne Hiller left the guard shack".

Finally, Defendant-Security Company seeks a new trial by raising challenges to the closing arguments of Plaintiffs' attorney. No objections were made at any time by trial counsel. March 30, 2015, A.M., N.T. 9-66; 117-133. Issues raised for the first time in post-trial motions are deemed waived. Harman v. Borah, M.D., 756 A.2d 1116 (Pa. 2000) and

numerous cases cited at 1124-1125; Craley v. Jet Equipment & Tools, Inc., 778 A.2d 701, 707 (Pa. Superior Ct. 2001). Litigants are expected to make timely and specific objections during trial. Takes v. Metropolitan Edison Co., 695 A.2d 397, 400 (Pa. 1997).

E. The Jury Charge Accurately Reflected The Law and The Evidence in This Litigation.

It is well settled that when reviewing a Trial Court's instructions, the charge must be viewed as a whole. Jury instructions will be upheld if they adequately and accurately reflect the law and if they are sufficient to guide the jury in its deliberations. See generally, Cooper ex rel. Cooper v. Lankenau Hospital, 51 A.3d 183, 187 (Pa. 2012); Quinby v. Plumsteadville Family Practice, Inc., 907 A.2d 1061, 1069 (Pa. 2006); Stewart v. Moss, 654 A.2d 535, 540 (Pa. 1995); Gorman v. Costello, 929 A.2d 1208, 1211-1212 (Pa. Superior Ct. 2007).

Defendant-Security Company argues error ". . . in submitting the issue of punitive damages to the second jury without any requirement that the second jury also find causation." Post-Trial Memorandum, page 51. Defendant contends that because several theories of liability were presented by Plaintiffs, there is no way to know the basis of the first jury's compensatory verdict. "That first jury knew which conduct they had found to be a cause of the harm." Post-Trial Memorandum, page 54. See, March 27, 2015, P.M., N.T. 29-32.

A reading of the jury charge on February 27, 2015, reveals that the first jury was never advised that punitive damages were to be imposed only on a "theory" or conduct which formed the basis for their determination of compensatory liability. Nor did Defendant-Security Company seek special interrogatories in the compensatory trial to identify certain conduct or

theories of liability which formed the basis of the award in February, 2015. Significantly, the Security Company has been unable to locate any Pennsylvania authority either on March 27, 2015, P.M., N.T. 29-31, or in its Post-Trial submissions to support this contention.

Restatement (Second) of Torts, §908, **comment a**, states "The purpose of awarding punitive damages, or 'exemplary damages' as they are frequently called, are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future." In this case, the purpose is not to deter or punish Mr. Harris or Mr. Bentley. Rather, their employer is being punished for the harm its employees caused and contributed to.

By agreement of the parties, the compensatory damages verdict was a general damages verdict. The verdict slip did not differentiate the several Plaintiff theories and Defendant did not request special interrogatories. (The pre-impact fright claims were afforded special questions at the request of counsel for Plaintiff, as discussed supra.) Neudrella v. Weaver Corporation, 703 A.2d 480 (Pa. Superior Ct. 1997); Walsh v. Pa. Gas & Water Company, 449 A.2d 573 (Pa. Superior Ct. 1982). A defendant who fails to request a special verdict form is barred on appeal from complaining that the punitive damage jury may have relied on a factual theory not relied on by the compensatory damages jury. There was ample evidence presented at the compensatory damages trial to support the conclusion that U.S. Security was vicariously liable for all of the harm its employees caused or contributed to Plaintiff-Decedents. Halper v. Jewish Family & Children's Service of Greater Philadelphia, 963 A.2d 1282, 1288-1290

(Pa. 2009). The general compensatory damages verdict was supported by the evidence and the punitive damages verdict must stand. Halper, supra at 1289, adopting the general verdict rule in Pennsylvania.

Next, Defendant contends that the punitive damages jury should have been told the dollar amounts and percentages of the compensatory verdict. At our Hearing on March 23, 2015, the Trial Court noted that both the case law and the Restatement §908 guide us. It is not necessary that any compensatory damages be awarded in order to assess punitive damages. See generally, Kirkbride v. Lisbon Contractors, Inc., 555 A.2d 800 (Pa. 1989), citing Lanieki v. Polish Army Veterans Association, 480 A.2d 1101 (Pa. Superior Ct. 1984); Rhoads v. Heberling, 451 A.2d 1378 (Pa. Superior Ct. 1982). See also, Joseph v. Scranton Times, 89 A.3d 251, 270 (Pa. Superior Ct. 2014). There is no requirement/mandate that a punitive damages jury know dollar amounts.

At March 23, 2015, A.M., N.T. 45, this Court added that in light of the particular circumstances of this case it would have been impractical to discuss the myriad of unresolved legal issues with the jury:

> "And I think it's especially appropriate that they not hear all those dollars and percentages, because as a practical matter neither the plaintiffs nor the defendants and perhaps even the Court know exactly what the judgment will be . . . there's a dispute in this case . . . Plaintiffs think its $6.7 . . . Defendants say its only $2.1 or $2.3 . . . ."

Further, the Defendant-Security Company is a joint tortfeasor with Co-Defendant Yvonne Hiller, and is responsible for the entire compensatory verdict to the Plaintiffs.

At the Post-Trial Hearing on October 29, 2015, N.T. 63-67, Defendant's Post-Trial/Appellate Counsel submitted the case of White v. Ford Motor Company, 500 F.3d 963 (9th Cir. 2007), which shares a "unique procedural history" with this litigation. A United States District Court in Nevada empaneled a jury to award punitive damages. The second jury was not aware of the amount awarded by an earlier compensatory damages jury. The record before the Ninth Circuit Court of Appeals permitted a remand for a new trial on punitive damages when the Circuit Court concluded the second jury should have been told the amount of the compensatory damages award.

The circumstances in Nevada were not present here in the Court of Common Pleas of Philadelphia in February and March, 2015. First, U.S. Security, unlike Ford Motor Company, never requested special interrogatories from the compensatory damages jury. The second jury was not "able to be focused on the conduct found culpable" by the first jury. See, 500 F.3d at 970-972, 975. Second, in Philadelphia there was no agreement among the parties or the Court about the amount of the compensatory award. Third, there was no acknowledgement by U.S. Security that it was fully liable and financially responsible for the deaths of two Plaintiff-Decedents. Fourth, comparative negligence was not a factor in the Philadelphia litigation. Fifth, in Pennsylvania, unlike Nevada, a compensatory damage award is not a predicate to punitive damages and there are no statutory limits on punitive awards. Compare, NRS 42.005; Evans v. Dean Witter Reynolds, Inc., 5 P.3d 1043, 1053 (Nev. 2000).

U.S. Security asserts in its Memorandum at pages 56-57 that if the punitive damages jury had known percentages and dollar amounts that would have encouraged the second jury to provide a smaller award and minimize the Defendant's level of culpability and reprehensibility. A similar scheme to depress the punitive award was rejected by the Superior Court in Shriner v. Moriarty, 706 A.2d 1228 (Pa. Superior Ct. 1998) which held that a jury need not be instructed that an award should bear a reasonable relationship to the harm caused by the tortfeasor. 706 A.2d at 1242. In the event of an excessive award, remittitur would cure the matter.

Next, the Defendant challenges a jury instruction on vicarious liability. Post-Trial Memorandum, pages 63-67. At the first trial, the Court's instruction to the jury was given by agreement and without objection on February 27, 2015, N.T. 84-85:

> "You may also award punitive damages against U.S. Security Associates if you find that the actions of Damon Harris and/or Marc Bentley were, **First**, outrageous, and **Next**, were not committed to satisfy their personal ill will or malice but instead were committed with the intent to further U.S. Security Associate's interests."

One month later on March 27, 2015, this Defendant voiced objections to an instruction, 1) that the security guards were employees, and, 2) that they were engaged in the business of their employer. March 27, 2015, P.M., N.T. 46-61. Compare, Feb. 20, 2015, A.M., N.T. 59-60, "A-Plus." See also, Feb. 25, 2015, P.M., N.T. 66.

The Security Company objected to SSJI No. 6.70 "Vicarious Liability – Relationships Not in Dispute." This employer could be held vicariously liable for the actions of its employees. Sokolsky v. Eidleman, 93 A.3d 858, 864-867 (Pa. Superior Ct. 2014). There is

no inconsistency or inaccuracy in the jury charge given. When read in its entirety, the instructions were adequate, accurate and properly guided the jurors in their deliberations. See, Cooper ex rel. Cooper, supra, 51 A.3d at 187-192.

At the Post-Trial Hearing, held October 29, 2015, counsel for Plaintiff-Estates provided the dispositive observation, at N.T. 116-117:

> "I would suggest, first of all, that any tension within these instructions is slight, especially, since there was no real contest as a practical matter about the employment relationship. In other words, this was not a case where anybody was arguing that Harris and Bentley were not acting within the scope of their employment. So to the extent that there is a tension, it's just without consequence with respect to how the case was tried and the issues that were charged to the jury and presented to the jury.
>
> Further, to the extent there's a prejudice, it flows to the plaintiffs because it invites the jury to decide that Harris and Bentley were not acting within the scope of their employment. And if they weren't acting within the scope of their employment, then maybe there is no basis for punitive damages at all. So to the extent that there is any tension there, it cuts against us -- I'm sorry. It cuts against the plaintiffs, not against USSA.
>
> But for the points I've indicated earlier, this was just an issue where there was really no dispute at trial. And in reading your instructions as a whole, there simply is no basis for a new trial here."

This Post-Trial challenge is without merit.

Finally, Defendant-Security Company contends that its Proposed Jury Instruction No. 21 should have been read to the jury. Although the wording of Proposal No. 21 refers to "training", the Post-Trial Memorandum at page 58, sets forth a series of objections to the closing arguments of counsel for Plaintiffs. Again, there were no contemporaneous or timely

objections during trial. Harman v. Borah, 756 A.2d 1116 (Pa. 2000). The charging conference was held prior to closing arguments of counsel. The Defendant did not renew its request for this "curative" instruction at any time during the trial or after closing arguments. Dilliplaine v. Lehigh Valley Trust Co., 322 A.2d 114, 117 (Pa. 1974).

VI. THE PUNITIVE DAMAGES AWARD MEETS THE CRITERIA AND GUIDEPOSTS OF THE PENNSYLVANIA SUPREME COURT AND THE UNITED STATES SUPREME COURT

This Post-Trial Court concludes that the Post-Trial objections to the amount of the punitive damage award have been waived by U.S. Security Associates, Inc. Nevertheless, a review of Federal and Pennsylvania case law follows.

* * * * *

	Punitive Award	Compensatory Award	Ratio
Brown/Wilson	$38,512,600.	$6.7 million	**5.7:1**
Tanya Wilson	$19,256,300. (½)	$2.7 million	**7.1:1**
Survival Act Tanya Wilson	$19,256,300. (½)	$1.2 million	**16:1**
LaTonya Brown	$19,256,300. (½)	$4 million	**4.8:1**
Survival Act LaTonya Brown	$19,256,300. (½)	$2 million	**9.6:1**

* * * * *

The Security Company argues that the amount of punitive damages was unreasonably disproportionate to the compensatory award, excessive when compared to the character of their employees' conduct and the nature of the harm suffered by Ms. Wilson and Ms. Brown, and, violative of the Defendant's Due Process. The Security Company argues at Defendant's Post-Trial Memorandum, page 86:

> "The security officers are victims in their own right and the damages assessed against them must be evaluated accordingly."

Here, as in J.J. DeLuca Company, Inc. v. Toll Naval Associates, Inc., 56 A.3d 402 (Pa. Superior Ct. 2012), these arguments must fail where the Trial Court has calculated the proper measure of compensatory damages and correctly calculated the applicable ratios. 56 A.3d at 417.

In Kirkbride v. Lisbon Contractors, supra, the Pennsylvania Supreme Court rejected an argument that punitive damages must bear a reasonable relationship to a compensatory award. The Court held that to require a reasonable relationship would not be a deterrent from future misconduct. 555 A.2d at 803. The Kirkbride Court noted that in Feld v. Merriam, 485 A.2d 742 (Pa. 1984), Pennsylvania adopted Restatement (Second) of Torts, §908(2), and commented at 555 A.2d 803:

> "Noticeably missing from Section 908(2) is any requirement that an award of punitive damages be proportional to compensatory damages. Section 908(2) sets forth three factors to be considered in awarding punitive damages: **1)** the character of the act; **2)** the nature and extent of the harm; and **3)** the wealth of the defendant. It is for the jury to weigh these factors in arriving at an appropriate punitive damage award."

See also, State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003), Dissenting Opinions at 429-439; Daley v. John Wanamaker, Inc., 464 A.2d 355 (Pa. Superior Ct. 1983).

In recent years the Superior Court holds that the size of a punitive damages award must be reasonably related to the Commonwealth's interest in punishing and deterring particular conduct. Shiner v. Moriarty, 706 A.2d 1228, 1241 (Pa. Superior Ct. 1998). When faced with a Due Process challenge, the Appellate Court expands the post-trial review to consider three

guideposts: **1)** the degree of reprehensibility of the defendant's misconduct; **2)** the disparity between the harm suffered by the plaintiffs and the punitive damage award, and; **3)** the difference between the punitive damages awarded by the jury and the civil penalties authorized in comparable cases. Grossi v. Travelers Personal Insurance Co., 79 A.3d 1141, 1157 (Pa. Superior Ct. 2013); Hollock v. Erie Insurance Exchange, 842 A.2d 409, 419-423 (Pa. Superior Ct. 2004).

♦ **Section 908(2) Factors:**

1. ***The character of the act*** – Both security guards demonstrated subjective and reckless disregard for the safety of Ms. Wilson and Ms. Brown. Restatement (Second) of Torts, §500, **comment d** is applicable: ". . . the fact that [the actors] knows or has reason to know that [Ms. Wilson and Ms. Brown] are within such [danger zone] is conclusive of the recklessness of his conduct toward them . . . ." The conduct of both employees was outrageous.

2. ***The nature and extent of the harm suffered*** – The death of the two women caused seven children to lose the services and tender solicitude of their mothers. Tulewicz v. SEPTA, 606 A.2d 425, 426, (Pa. 1991). Compensatory damages were awarded on February 26, 2015.

3. ***The wealth of the defendant*** – It was stipulated by the parties that the international corporate Defendant has a net worth of $192,256,300.00 ($192 million).

♦ **Due Process Clause Guideposts:**

1. ***Degree of reprehensibility*** – In State Farm Mutual Automobile Ins. Co. v. Campbell, supra, the United States Supreme Court stated that the "most important indicum of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." 123

S.Ct. at 1521. In Viener v. Jacobs, 834 A.2d 546 (Pa. Superior Ct. 2003), our Superior Court stated that "the polestar of the trial court's analysis is the degree of reprehensible conduct." 834 A.2d at 560-562 and cases cited.

When focusing on the misconduct toward the decedents: the harm here was physical; the tortious conduct evidenced subjective and conscious disregard; and, the harm was not a mere accident. When considering the standards of BMW of North America v. Gore, 116 U.S. 1589 (1996) as expressed in Shiner v. Moriaty, supra, 706 A.2d at 1241, this Court does not hesitate to conclude that the actions were reprehensible: when Mr. Harris was able to call 9-1-1, but intentionally failed to call the "people" on the third floor; when he knew Ms. Hiller was en route to the third floor; **and**, when Mr. Bentley squandered his opportunity to warn the Kraft employees inside the building by intentionally placing the telephone receiver down saying "I can't talk now."

The issue of reprehensibility cannot be swept away, justified, rationalized or excused by suggesting the two employees were "unarmed" or were "scared". Each guard had the ability and opportunity for a telephone warning or radio call to the people on the third floor at Kraft at 8:41 p.m. Neither guard ever warned the people on the third floor. Neither guard ever called or communicated to Kraft managers before the shootings.

2. The ratio between the compensatory harm and the punitive damages award – In Hollock v. Erie Insurance Exchange, supra, the Superior Court explained the second guidepost at 842 A.2d 421, and reiterated that there is no "bright-line ratio" requirement. In the case at bar, with the correctly calculated ratios set forth above, there is little doubt that the single digit

constitutional guideposts have been met. The punitive damage award is not contrary to law. Willow, Inc. v. Public Service Mutual Insurance Co., 399 F.3d 224 (3rd Cir. 2005); Empire Trucking Co., Inc. v. Reading Authracite Coal Co., 71 A.3d 923 (Pa. Superior Ct. 2013).

When considering the proper measure of damages it must not go unnoticed that the punitive damages jury relied on reasoned and thoughtful calculations. The award was not arbitrary or capricious. There are two victims of the tortfeasors' harm: LaTonya Brown and Tanya Renee Wilson. **It is apparent that the jurors concluded that Ten Percent of the net worth of U.S. Security Associates, Inc. was a sufficient amount for deterrence and punishment on behalf of each Plaintiff-Decedent. Defendant never objected to this mathematical formula prior to Post-Trial submissions. See, Feb. 27, 2015, A.M., N.T. 33-35; March 30, 2015, A.M., N.T. 62-65. All post-trial arguments challenging the amount of the punitive damages award have been waived.**

Note: The Judgment Orders reflect an artificial division of the punitive damages award and have no bearing on the substance of this Memorandum.

To the extent Defendant-Security Company challenges the punitive damage award under the Survival Act, the ratio is not violative of Due Process. See chart above.

3. Disparity between punitive damages and civil penalties authorized – This guidepost may be inapplicable based on the circumstances of this case. See Post-Trial Hearing, October 29, 2015.

The two security guards were not the victims of reckless, reprehensible and outrageous conduct on September 9, 2010, and no damages were assessed against them. The punitive damages award was rendered against U.S. Security Associates, Inc. The amount of the punitive damages award is not disproportionate to the compensatory damage award. It is not excessive when compared to the character of the conduct and the nature of the harm suffered. The punitive damage award does not violate the Due Process Clause of the 14th Amendment of the Constitution. Neither remittitur nor a new punitive damages trial is warranted.

VII. CONCLUSION

The operative facts and factual content did not change throughout this litigation. For all of the reasons set forth above, the U.S. Security Associates, Inc. Motions for Post-Trial Relief relating to Compensatory Damages Trial are **DENIED**. The Motions of Estate of Latonya Brown and Estate of Tanya Renee Wilson for a Molded Verdict to Include Pre-Impact Fright and Fear Damages under the Survival Act are **DENIED**. The Plaintiff-Estates' Petitions for Delay Damages are **GRANTED**. The U.S. Security Associates, Inc. Motions for Post-Trial Relief relating to the Punitive Damages Trial are **DENIED**.

BY THE COURT:

FREDERICA A. MASSIAH-JACKSON, J.
Nov. 16, 2015