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

REGIONAL PRODUCE COOPERATIVE CORPORATION, d/b/a PHILADELPHIA WHOLESALE PRODUCE MARKET **Plaintiff(s)** **vs.** **DELBORRELLO FINANCIAL SERVICES, LLC, d/b/a DELBORRELLO CHECK CASHING, and UNITED FINANCIAL SERVICES GROUP, INC., d/b/a UNITED CHECK CASHING, and PETER DELBORRELLO, JR. d/b/a DELBORRELLO CHECK CASHING d/b/a UNITED CHECK CASHING** **Defendant(s)**	:	**PHILADELPHIA COUNTY COURT OF COMMON PLEAS** **Case No. 200801238** **Control No. 24115111** **COMMERCE PROGRAM**

ORDER

AND NOW, this 5th day of February, 2025, upon consideration of DelBorrello Financial Services, LLC d/b/a DelBorrello Check Cashing and Peter DelBorrello, Jr. d/b/a DelBorrello Check Cashing d/b/a United Check Cashing (Collectively, "Defendants") Motion for Post-Trial Relief and any response thereto, it is hereby **ORDERED** and **DECREED** that Plaintiff's Motion is **DENIED** in its entirety.

BY THE COURT:

PAULA A. PATRICK, J.

ORDOP-Regional Produce Cooperative Corporation, Vs Delb [RCP]

20080123800279

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

REGIONAL PRODUCE COOPERATIVE CORPORATION, d/b/a PHILADELPHIA WHOLESALE PRODUCE MARKET	:	**PHILADELPHIA COUNTY COURT OF COMMON PLEAS**
Plaintiff(s)	:	
	:	**Case No. 200801238**
vs.	:	
	:	**Control No. 24115111**
DELBORRELLO FINANCIAL SERVICES, LLC, d/b/a DELBORRELLO CHECK CASHING, and UNITED FINANCIAL SERVICES GROUP, INC., d/b/a UNITED CHECK CASHING, and PETER DELBORRELLO, JR. d/b/a DELBORRELLO CHECK CASHING d/b/a UNITED CHECK CASHING	:	**COMMERCE PROGRAM**
Defendant(s)	:	

OPINION

This matter stems from a Civil Conspiracy, Statutory Negligence, Aiding and Abetting Breach of Fiduciary Duty and Aiding and Abetting Fraud action. Defendants filed a Post-Trial Relief seeking the following remedies from this Court: (1) A new trial; (2) A molded verdict; and (3) Judgment notwithstanding the verdict.

For the reasons set forth below, Defendants' Motion for Post-Trial Relief is DENIED in its entirety.

BACKGROUND

Plaintiff Regional Produce is a Pennsylvania non-profit corporation. Defendants owned and operated the DelBorrello Check Cashing business located at 1123 South Broad Street, Philadelphia. Plaintiff contends that Between October 2011 and December 2017, Plaintiff's former President and CEO Caesar "Sonny" DiCrecchio embezzled more than $8 million from Regional

Produce, using the services of Defendants' check cashing business to conceal his theft. Defendants permitted DiCrecchio to cash at least 284 checks, some of which were drawn on a Regional Produce account and made payable to at least 37 separate corporate entities. Plaintiff alleged the theft was facilitated and abetted by Defendants. Plaintiff commenced this action via its original Complaint on August 14, 2020. Plaintiff filed its first amended Complaint on April 4, 2022 and its second amended Complaint on September 26, 2024. On October 24, 2024, Plaintiff filed a Motion in Limine to exclude the expert testimony of John O'Donnell at trial, and a Motion in Limine to Bar Defendants from presenting evidence or argument of subsequent remedial measures at trial. The Court granted the first motion in full and the second motion in part on November 8, 2024. After a three-day jury trial, held from November 12, 2024 to November 15, 2024 the Jury unanimously found Defendants liable for: (i) Civil Conspiracy; (ii) Statutory Negligence (13 Pa.C.S. § 3404); (iii) Aiding and Abetting of Fiduciary Duty; and, (iv) Aiding and Abetting Fraud. The jury awarded Plaintiff $4,800,000.01 in total.

DISCUSSION

I. DEFENDANTS ARE NOT ENTITLED TO A NEW TRIAL.

The trial court is required to grant a new trial only where a jury verdict is "against the clear weight of the evidence or [where] the judicial process has effected a serious injustice.", where the jury's verdict is "so contrary to the evidence as to shock one's sense of justice. *Educ. Res. Inst., Inc. v. Cole*, 827 A.2d 493, 499 (Pa. Super. 2003)(quoting *Austin v. Ridge*, 255 A.2d 123, 124 (Pa. 1969)); *Armbruster v. Horowitz*, 813 A.2d 698, 703 (Pa. 2002) (citation omitted). "The admission of evidence is solely within the discretion of the trial court, and a trial court's evidentiary rulings will be reversed on appeal only upon an abuse of that discretion." *Commonwealth v. Reid*, 627 Pa. 151, 99 A.3d 470, 493 (2014).

A. DEFENDANTS ARE NOT ENTITLED TO A NEW TRIAL BECAUSE THE COURT'S AGENCY INSTRUCTION CLEARLY AND ADEQUATELY INSTRUCTED THE JURY UNDER PENNSYLVANIA LAW.

Pennsylvania Trial Courts have broad discretion in phrasing its instructions, so long as the directions given 'clearly, adequately, and accurately' reflect the law." *Commonwealth v. Lesko*, 609 Pa. 128, 15 A.3d 345, 397 (2011) (internal citation omitted).

> Error in a charge is sufficient ground for a new trial, if the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue. A charge will be found adequate unless 'the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to fundamental error.'" *Stewart v. Motts*, 654 A.2d 535, 540 (Pa. 1995) (citations omitted). Further, "[a] reviewing court will not grant a new trial on the ground of inadequacy of the charge unless there is a prejudicial omission of something basic or fundamental. In reviewing a trial court's charge to the jury, we must not take the challenged words or passage out of context of the whole of the charge, but must look to the charge in its entirety. *Id.*

Grove v. Port Auth. of Allegheny Cnty., 218 A.3d 877, 887 (Pa. 2019).

Pennsylvania common law provides that an employer is vicariously liable for the wrongful conduct of its employee if that conduct was committed "during the course of and within the scope of employment." *Fitzgerald v. McCutcheon*, 410 A.2d 1270 (Pa. Super. Ct. 1979). See also, *Brezenski v. World Truck Transfer, Inc.*, 755 A.2d 36, 39 (Pa. Super. Ct. 2000). The mere existence of a personal motivation, however, is insufficient to relieve the employer of liability. Restatement (Second) of Agency § 236. The Restatement (Second) of Agency, which has been adopted in Pennsylvania, provides:

> (1) Conduct of a servant is within the scope of employment if, but only if:
> (a) it is of the kind he is employed to perform;
> (b) it occurs substantially within the authorized time and space limits;
> (c) it is actuated, at least in part, by a purpose to serve the master, and
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Restatement (Second) of Agency § 228.

The scope of employment for purposes of vicarious liability "includes [a situation] in which the servant, although performing his employer's work, is at the same time accomplishing his own objects or those of a third person which conflict with those of the master." Restatement (Second) of Agency § 236, Comment a.

Here, the Court gave the following instruction on Agency:

> Now, in this case the plaintiff here seeks money damages from the defendants because of the harm that was caused for the wrongful conduct of the defendants. More specifically in this case, Regional Produce is seeking damages, money damages, from DelBorrello Check Cashing business for harm caused by the defendants' and Thomas DelBorrello's wrongful conduct. Thomas DelBorrello was an employee of DelBorrello Check Cashing business and acted as their agent. An employee and/or agent is someone who agrees to act for someone else called the principle under the principle's control. A principle may legally be responsible for harm by their employee's or agent's wrongful conduct

See Day 3 PM Transcript 80:14-81:3.

The court also instructed the jury to consider whether Thomas DelBorrello intended for his conduct to serve the DelBorrello business as part of its instruction on vicarious liability. See Day 3 PM Transcript at 81:4-82:18. Defendants argue that the instruction was a mistake because Thomas DelBorrello's criminal conduct was not foreseeable and was not in furtherance of his father's business. However, the law of vicarious liability does not focus upon foreseeability, but the connection of the acts with the course of business being conducted by an employee on an employer's behalf. In the *Herr v. Simplex Paper Box Corp* case, cited by Plaintiff and Defendant, the Court distinguishes between acts taken by an employee for pleasure and acts of employees in connection with the Employer's business. Defendants argue that Thomas Delborrello's acts exceeded the scope of authority his father entrusted to him because they were not taken in furtherance of the business, and that the *Herr* case stands for this proposition. Plaintiff argues that the vicarious liability will attach where an employee's actions are taken in furtherance of or in

connection with his employer's business. Plaintiff's argument is consistent with *Herr*, which goes to great lengths to illustrate scenarios where an employee committed acts unconnected to their employment as those that are not within the scope of employment, such as kindling a fire to warm a meal, dropping a lit cigarette while loitering after performing a delivery job, or smoking in a gasoline store where the employer has sent an employee to make a purchase, distinguishing with an example of a scenario where an employee smokes while in the midst of moving flammable material for his employment. *Herr v. Simplex Paper Box Corp*, 198 A. 309, 310-12 (Pa. 1938).

Having instructed the jury to consider whether the intention of the fraud was to advance the DelBorrello business, The supplemental instruction remedies concerns of a basic or fundamental omission. The Court instructed the jury clearly, adequately, and in accordance with Pennsylvania vicarious liability and agency law.

Therefore, Defendants are not entitled to a new trial.

B. DEFENDANTS ARE NOT ENTITLED TO A NEW TRIAL FOR THE ABSENCE OF "MERE MISTAKE, MISUNDERSTANDING, OR LACK OF KNOWLEDGE IS INSUFFICIENT" FROM ITS INSTRUCTION ON FRAUDULENT CONCEALMENT.

Pennsylvania Trial Courts have broad discretion in phrasing its instructions, so long as the directions given 'clearly, adequately, and accurately' reflect the law." *Commonwealth v. Lesko*, 609 Pa. 128, 15 A.3d 345, 397 (2011) (internal citation omitted).

> Error in a charge is sufficient ground for a new trial, if the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue. A charge will be found adequate unless 'the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to fundamental error.'" *Stewart v. Motts*, 654 A.2d 535, 540 (Pa. 1995) (citations omitted). Further, "[a] reviewing court will not grant a new trial on the ground of inadequacy of the charge unless there is a prejudicial omission of something basic or fundamental. In reviewing a trial court's charge to the jury, we must not take the challenged words or passage out of context of the whole of the charge, but must look to the charge in its entirety. *Id.*

Grove v. Port Auth. of Allegheny Cnty., 218 A.3d 877, 887 (Pa. 2019).

In Pennsylvania, the discovery rule tolls the statute of limitations "when an injury or its cause is not reasonably knowable," so the claim does not accrue until after the plaintiff reasonably knows about his or her injury. *Rice v. Dioceses of Altoona-Johnston*, 255 A.3d 237, 247 (Pa. 2021). "Fraudulent concealment "is rooted in the recognition that fraud can prevent a plaintiff from even knowing that he or she has been defrauded," so failing to alter the applicable statute of limitations accrual date would inequitably reward fraudulent conduct." *Id.* "[W]here fraud has prevented the plaintiff from knowing of his or her cause of action, that cause of action simply does not even exist [or accrue] until the plaintiff becomes aware of, i.e., discovers the fraud." *Id.* at 247-48." Pennsylvania law does not consider the "mere mistake, misunderstanding or lack of knowledge is insufficient for fraudulent concealment", a "necessary element" for a fraudulent concealment jury warranting a new trial. *See Fine v. Checcio*, 870 A.2d 850, 860 (Pa. 2005); *Molineux v. Reed*, 532 A.2d 792, 794 (Pa. 1987); *Bohus v. Beloff*, 950 F.2d 919, 924 (3d Cir. 1991); *Urland v. Merrell–Dow Pharm., Inc.*, 822 F.2d 1268, 1272 (3d Cir. 1987). Here, the Court excluded the phrase "mere mistake, misunderstanding or lack of knowledge is insufficient however" from its jury instruction on fraudulent concealment, instead instructing the following:

> With regard only to the plaintiff's specific claims for statutory negligence and conversion of instruments under the Pennsylvania Uniform Commercial Code, Regional Produce Cooperative must prove that DelBorrello Check Cashing business or their agents through fraud of deceit or the aiding and abetting of fraud and deceit caused the plaintiff to relax their individual vigilance or deviate from their right of inquiry into the facts. A finding of fraudulent concealment does not require fraud in the strictest sense. The DelBorrello Check Cashing business or the agents intended to deceive Regional Produce Cooperative. Rather fraudulent concealment means fraud in the broadest sense which includes an unintentional deception.

See Day 3 PM Transcript 94:15-95:4.

The instructions given by the Court reflect the state of Pennsylvania law regarding fraudulent concealment, recognizing that the nature of fraud can overcome the exercise of due diligence in knowing the existence of the injury and its cause. *Rice*, 255 A.3d at 247 (Pa. 2021);

Bohus, 950 F.2d at 924 (3d Cir. 1991). This satisfies the requirement that the instructions clearly, adequately, and accurately reflect the law under *Lesko*. To justify a new trial, a jury verdict must be "against the clear weight of the evidence or [where] the judicial process has effected a serious injustice.", and "so contrary to the evidence as to shock one's sense of justice. *Cole*, 827 A.2d at 499 (Pa. Super. 2003). Such is not the case here. The weight of the evidence states that DelBorrello never sought authorization from Regional Produce regarding DiCrecchio's authority to cash checks on behalf of Regional Produce, and (2) that when DelBorrello knew that they lacked the proper paperwork related to Regional Produce, they never informed Regional Produce, and (3) DiCrecchio mischaracterized his transactions within Regional Produce records to conceal his fraud. See, Day 1 PM Transcript at 31:4-7, 76:24-77:17; Day 3 AM Transcript at 50:18-51:3; See Day 3 PM Transcript 40:22-42:14. Furthermore, the jury heard expert testimony that expert testimony it was reasonable and commonplace for a Board of Directors to rely on officers and professionals and that the Regional Produce Bylaws entitle the Board to rely in good faith on the information, reports, and statements of its professionals. Day 2 PM Transcript at 15:23-17:13 ; Day 1 PM Transcript at 58:1-10, 58:25-59:6. The fact that the jury concluded fraudulent concealment took place is not against the clear weight of the evidence, nor is it contrary. The jury afforded credibility to the many testimony of Plaintiff's witnesses, both expert and not.

Thus, Defendants are not entitled to a new trial.

C. DEFENDANTS ARE NOT ENTITLED TO A NEW TRIAL BECAUSE THE COURT PROPERLY EXCLUDED JOHN O'DONNELL'S EXPERT TESTIMONY.

Under Pennsylvania Rule of Civil Procedure 702, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson and knowledge will help the trier of fact to understand the

evidence or to determine a fact in issue; and the expert's methodology is generally accepted in the relevant field. Pa. R.E. 702. "Expert testimony is required where the subject of inquiry is one involving special skills or training not common to the ordinary person." *Cipriani v. Sun Pipe Line Co.*, 574 A.2d 706 (Pa. Super. Ct. 1990). A witness may qualify as an expert "if his or her experience or education logically or fundamentally embraces the matter at issue." *See Montgomery v. South Philadelphia Medical Group*, 656 A.2d, 1385, 1388 (Pa. Super. 1995).

Here, Defendants sought to have John O'Donnell testify regarding Plaintiff's internal financial controls. Mr. O'Donnell has practiced forensic accounting for more than three decades, meeting the criteria for possessing the knowledge, skill, experience, and training to testify in the form of an opinion requiring technical knowledge not common to the ordinary person. His technical knowledge is limited to his area of expertise, however. In his deposition, Mr. O'Donnell admitted that he is not an expert in law or legal matters. (O'Donnell Deposition at 16:20-17:10.) Additionally, Mr. O'Donnell has never testified in court with respect to the governance of nonprofit corporations. (*See* O'Donnell CV at 1-3; O'Donnell Deposition at 42:12-13 ("Of the 36 cases, there's no nonprofits.")). Defendants argue that that Plaintiff's expert, Mr. Scherf was allowed to testified about the same internal controls as a basis for his analysis. However, when DelBorrello asked Mr. Scherf about internal controls, Regional Produce objected, and Mr. Scherf was not permitted to opine on those internal controls. See Day 2 PM Transcript at 54:9-17. Mr. Scherf explained to the jury that he looked for indicia of fraud on the checks that he was reviewing such that he had a reasonable basis for assuming liability, which happened to include his observation that the fraudulent checks DiCrecchio cashed at the DelBorrello Check Cashing Business often had only one signature where it appeared from the face of the checks that Regional

Produce had a two-signature requirement for corporate checks. See, e.g., Day 2 PM Transcript at 31:14-32:12, 39:3- 42:19.

Because the area of the testimony was outside of Mr. O'Donnel's expertise, it was proper for the Court to exclude it. Defendants are not entitled to a new trial, because the Court ruled in accordance with Pennsylvania law.

D. DEFENDANTS ARE NOT ENTITLED TO A NEW TRIAL BECAUSE THE COURT PROPERLY EXCLUDED CHRISTOPHER DELBORRELLO'S TESTIMONY AS HEARSAY.

Hearsay evidence is inadmissible, except as otherwise provided by the Pennsylvania Rules of Evidence, Pennsylvania Supreme Court, or statute. Pa. R.E. 802. Hearsay is defined as an out of court statement offered for the truth of the matter asserted in the statement. Pa. R.E. 801. Under Pa. R.E. 803(1), a present sense impression, a statement describing or explaining an event or condition, made while or immediately after the declarant perceived it, is not excluded by the rule of hearsay. Pa. R.E. 803(1). The present sense impression exception requires independent corroborating evidence when the declarant is unidentified. *See Commonwealth v. Hood*, 872 A.2d 175, 182-184 (Pa. Super. 2005).

However, the declarant of the statement was an unidentified FBI agent whose identity could not be revealed in light of a grand jury subpoena. The law requires independent corroboration where the declarant is not identified under *Hood*. Defendants did not offer any other evidence than the statement to corroborate the claim that Mr. DelBorrello was instructed not to discuss the investigation, nor did Defendants provide the identity of the agent who conveyed the instruction. The evidence was properly excluded because the Defendant failed to provide independent corroboration as to the FBI Agent's identity as required under PA R.E. 803(1) to qualify the statement as a present sense impression.

Therefore, Defendants are not entitled to a new trial, because the exclusion was based in Pennsylvania law.

II. DEFENDANTS ARE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.

"[A] judgment notwithstanding the verdict can be entered upon two bases: (1) where the movant is entitled to judgment as a matter of law; and/or, (2) the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered for the movant." *Karden Constr. Servs., Inc. v. D'Amico*, 219 A.3d 619, 627 (Pa. Super. 2019) (internal citations omitted). The Trial Court considers the admitted evidence "to decide if there was sufficient competent evidence to sustain the verdict." *Parker v. Freilich, M.D.*, 803 A.2d 738, 744 (Pa. Super. Ct. 2002). "[T]he entry of a judgment notwithstanding the verdict... is a drastic remedy. A court cannot lightly ignore the findings of a duly selected jury." *Educ. Res. Inst., Inc. v. Cole*, 827 A.2d 493, 497 (Pa. Super. Ct. 2003). Mere speculation is insufficient to overturn a jury verdict. *See Advanced Tel. Sys.*, Inc. 846 A.2d 1264, 1279 (Pa. Super. 2004) ("Concerning questions of credibility and weight accorded the evidence at trial, we will not substitute our judgment for that of the finder of fact... A JNOV should be entered only in a clear case.")

A. DEFENDANTS ARE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFF'S STATUTORY NEGLIGENCE CLAIM.

Under 13 Pa. C.S. § 3404(b),

> If a person whose intent determines to whom an instrument is payable does not intend the person identified as payee to have any interest in the instrument or the person identified as payee of an instrument is a fictitious person:
>
> (1) Any person in possession of the instrument is its holder; or
>
> (2) An indorsement by any person in the name of the payee stated in the instrument is effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

13 Pa.C.S. § 3404(b).

Under § 3404(d), the person who bears the loss may recover from the person who failed to exercise ordinary care to the extent that the failure contributed to the loss if a person paying the instrument or taking it for value or collection fails to exercise ordinary care in doing so, and that failure substantially contributes to the loss resulting from payment of the instrument. 13 Pa. C.S. § 3404(d). Under Pennsylvania law, in the case of statutory negligence under the Pennsylvania Commercial Code where the presenter of checks uses a fictitious payee, the standard for analyzing the respective parties' responsibility is a comparative negligence standard, rather than a contributory negligence standard. *See Nestle USA, Inc. v. Wachovia Corp.*, August Term 2005 No. 01026, 2006 WL 1462927 (Phila. Cnty. Ct. Comm. Pleas, May 11, 2006) (stating the Pennsylvania Commercial Code "contains its own 'comparative negligence' provisions with respect to imposters and fraudulent endorsements," citing 13 Pa. C.S. §§ 3404, 3405); *Victory Clothing Co., Inc. v. Wachovia Bank*, N.A., February Term 2004 No. 1397, 2006 WL 773020 (Phila. Cnty. Ct. Comm. Pleas, March 21, 2006) (holding plaintiff's allegation under fictitious payee provision of the statute triggered "comparative fault" approach); *H.G. Silverman Litig. Grp, P.S. v. TD Bank, N.A.*, 622 F. Supp. 3d 15, 20 (E.D. Pa. 2022) ("The fictitious payee provision's comparative negligence cause of action applies . . . when a fraudster writes a check as payable to an entity whom the fraudster does not intend to receive the monies payable."); *Universal Premium Acceptance Corp. v. York Bank & Trust Co.*, 69 F.3d 695, 704 n.4 (3d Cir. 1995) (noting the Pennsylvania Commercial Code as revised in 1990 "provided for the imposition of comparative negligence liability.") .

It was the opinion of Regional Produce's damages expert, Stephen Scherf, that Regional Produce suffered $8,686,300.63 in damages, leaving the jury to determine the appropriate measure of damages that were caused by or could have been prevented by DelBorrello's conduct. Day 2 PM Transcript at 44:18-46:5; 47:11-48:16 (Scherf explaining that he broke the damages down by

year to assist the trier of fact in calculating what damages could have been avoided had the scheme been detected and reported sooner); Day 2 PM Transcript at 46:8-48:24. During the trial, John Vena and Louis Penza testified to: (1) the Regional Produce Board's Monthly Meetings where Regional Produce's finances were discussed, (2) Regional Produce's appropriate reliance on its professional staff to review its bank statements, and (3) Regional Produce's appropriate reliance on its accountants to oversee its professional staff. *See*, e.g., Transcript from Day 1 PM Transcript at 45:2-70:22; Day 2 AM Transcript at 9:7-16:15. The Motion focuses solely on John Vena's ("Vena") testimony and his purported dereliction of duty as Regional Produce's Treasurer. *See* Defendant's Motion for Post-Trial Relief at ¶ 6. Further, in Mark Lee's expert opinion, he opined that it was entirely appropriate and consistent with the Regional Produce's Board of Director's fiduciary duties to rely on its professional staff, attorneys and accountants. *See* Day 2 PM Transcript at 12:14-17:12. The jury issued its verdict in consideration of the evidence before it. The evidence consisted of extensive expert testimony from Plaintiff's experts regarding whether it exercised ordinary care during the course of the scheme. The decision of whether to assign credibility to the witnesses of both parties belonged to the Jury. The Court must respect the findings of the jury under the law. *Cole*, 827 A.2d at 497. The Court cannot ignore its findings based on the Defendant's speculation that it did not attribute fault to the Plaintiff for purposes of a comparative fault calculation. Based on the above evidence, the case is not clear, and fails the standard.

Therefore, Defendants are not entitled to judgment as a matter of law, and thus cannot be granted Judgment Notwithstanding The Verdict.

B. DEFENDANTS ARE NOT ENTITLED TO JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFF PROPERLY ESTABLISHED THE MALICE ELEMENT OF CIVIL CONSPIRACY.

"To prove a civil conspiracy, it must be shown that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means."

Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 472 (Pa. 1979) (quoting *Landau v. Western Pennsylvania National Bank*, 282 A.2d 335 (Pa. 1971)) (internal citation omitted). "Proof of malice, i.e., an intent to injure, is essential in proof of a conspiracy." *Id.* at 472 (Pa. 1979). "Unlawful intent must be absent justification." *Id.* It is necessary that plaintiff show that that the defendant acted unlawfully; that they acted intentionally, and that there was no legal justification or excuse for what they did. *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d at 472 (Pa. 1979); *Rosenblum v. Rosenblum*, 181 A. 583, 585 (Pa. 1935).

Here, Defendants argue that they are entitled to judgment as a matter of law. The jury was presented with evidence that Defendants had knowledge of DiCrecchio's embezzlement, and that Defendants intentionally chose not to alert Regional Produce to DiCrecchio's inability to provide federally mandated documentation. See Day 2 AM Transcript at 50:19-51:2, 62:19-67:4, 76:13-84:25. Mr. Delborrello further testified that he was not present at 1123 South Broad Street for several years. Day 2 AM Transcript at 34:17-35:3. The jury issued its verdict in consideration of the evidence. From the above evidence, it can be established that Peter DelBorrello Jr.'s knowledge of the investigation for Mr. DiCrecchio's fraud, the lack of investigation surrounding the checks, and Mr. DiCrecchio's continued successfully cashed checks was enough to supply the conclusion that there was no justifiable conclusion for the acts of Defendants, that they intentionally aided DiCrecchio's fraud, and that they acted unlawfully. Defendants have not explained why they did not investigate the fraud, nor why they did not cease to issue the fraudulent checks to a man under investigation, only that they did not investigate, inform, or cease cashing the checks. The decision of whether to assign credibility to the witnesses of both parties belonged to the Jury. Without explanation or justification for the illegal act committed with intent to injure, there is malice. *Thompson,* 412 A.2d at 472 (Pa. 1979); *Rosenblum,* 181 A. at 585 (Pa. 1935). This is competent

evidence to establish a finding under *Parker*. *Parker*, 803 A.2d at 74. The Court must respect the findings of the jury under the law. *Cole*, 827 A.2d at 497. A Judgment Notwithstanding The Verdict can only be entered in a clear case for the movant. *See Advanced Tel. Sys.*, Inc. 846 A.2d at 1279. Based on the above evidence, the case is not clear, and fails the standard.

Therefore, Defendants are not entitled to Judgment Notwithstanding the Verdict.

C. DEFENDANTS ARE NOT ENTITLED TO A MOLDED VERDICT BECAUSE THE JURY PROPERLY AWARDED DAMAGES FOR PROXIMATELY CAUSED HARM.

A jury verdict may be set aside as inadequate "when it appears to have been the product of passion, prejudice, partiality, or corruption, or where it clearly appears from uncontradicted evidence that the amount of the verdict bears no reasonable relation to the loss suffered by the plaintiff." *Kiser v. Schulte*, 538 Pa. 219, 648 A.2d 1, 4 (Pa. 1994). "A motion for a molded verdict should only be granted in a clear case." *Kardibin v. Associated Hardware*, 426 A.2d 649, 654 (Pa. Super. 1981)

Pennsylvania common law provides that "[t]wo or more causes may contribute to and thus be the legal or proximate cause of an injury. Where an act or force actively operates in producing harm to the plaintiff after the defendant's negligent act has been committed, that intervening force does not necessarily relieve the defendant of liability. Instead, for an act to break the causal chain and relieve the defendant of liability, the act must be so extraordinary as not to have been reasonably foreseeable." *Straw v. Fair*, 187 A.3d 966, 995 (Pa. Super. 2018) (internal citations and quotations omitted). The Pennsylvania Supreme Court has long held that a defendant is not relieved from liability because another concurring cause is also responsible for producing injury, and that "where a jury could reasonably believe that a defendant's actions were a substantial factor in bringing about the harm, the fact that there is a concurring cause does not relieve the defendant

of liability." *Powell v. Drumheller*, 653 A.2d 619, 622 (Pa. 1995) (internal citations and quotations omitted).

Pennsylvania has adopted the Restatement (Second) of Torts, which states, "The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm." Restatement (Second) of Torts § 431. The following considerations are in themselves or in combination with one another important in determining whether the actor's conduct is a substantial factor in bringing about harm to another:

> (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
> (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;
> (c) lapse of time.

Restatement (Second) of Torts § 433.

This case is not a clear one, regarding Defendants' argument that the allocation of damages does not bear any reasonable relation to the actions of Defendants. The jury heard Defendants' testify that its owners were aware of the investigation surrounding DiCrecchio's fraud and did not take steps to seek the needed information in processing the transactions, that Thomas DelBorrello was unsupervised in the interim where he fraudulently cashed the checks, and that checks were cashed even after the discovery of the fraud and Thomas DelBorello's subsequent firing. *See* Day 2 AM Transcript at 50:19-51:2, 76:13-84:25; Day 2 AM Transcript at 34:17-35:3. Had Defendants merely called Regional Produce to secure the information it needed to process the transactions, the embezzlement would have been uncovered much sooner. Defendants neither called nor investigated, it went a step beyond and cashed the checks without question, to the detriment of Plaintiffs. Without intervention, Plaintiff suffered more financial damage, totaling $8,686,300.63

in the end This is enough for a jury to conclude that Defendants acts were a substantial factor in bringing about the harm for purposes of proximate cause. Plaintiff's own negligence does not break the chain of causation where the defendant's acts were a substantial factor in bringing about the harm. Here, there are enough facts to conclude such. This is enough to contest Defendants' assertion of a clear case, and that is enough to deny its request for a molded verdict. This is not a clear case.

Therefore, Defendants are not entitled to a molded verdict, and the Court must deny the motion.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Post-Trial Relief is **DENIED** in its entirety.

BY THE COURT:

PAULA A. PATRICK, J.