NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

151 FIRST SIDE ASSOCIATES, L.P., AND ZAMBRANO CORPORATION	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
ALAN B. HOSTETLER, INDIVIDUALLY, AND ALAN B. HOSTETLER INSURANCE AGENTS & BROKERS, INC., A PENNSYLVANIA CORPORATION	
APPEAL OF: 151 FIRST SIDE ASSOCIATES, L.P.	No. 938 WDA 2014

Appeal from the Order May 12, 2014
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): GD 08-019358

BEFORE: BENDER, P.J.E., JENKINS, J., and MUSMANNO, J.

MEMORANDUM BY JENKINS, J.: **FILED AUGUST 21, 2015**

151 First Side Associates L.P. ("151 First Side")[1] appeals from the order granting summary judgment to Alan B. Hostetler and Alan B. Hostetler Insurance Agents & Brokers, Inc. (together "Hostetler"). 151 First Side also challenges the trial court order, which sustained the preliminary objections

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[1] Zambrano Corporation is listed in the trial court caption, but is not listed as a plaintiff in the complaint and does not appear as a party in other documents filed in the trial court or in this Court. Zambrano, the general contractor and partner of 151 First Side, intervened in the federal litigation. Zambrano did not file an appeal.

of Hostetler and dismissed 151 First Side's breach of fiduciary duty claim. We affirm.

The trial court found the following facts:

> [151 First Side] hired [Hostetler] to procure a builder's risk policy for a project known as 151 First Side. In September 2005, a builder's risk policy was issued to [151] First Side by Peerless Risk Insurance Company [("Peerless")]. The policy contained a Soft Cost Endorsement in the amount of $3,764,385.00, which provided, in relevant part:
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> > Soft Costs — "we pay for the soft cost expenses that arise out of a 'delay' resulting from direct physical loss or damage to a building or structure described on the Soft Cost Schedule that is caused by a covered peril. . . ."
> >
> > Extra Expense — "we cover only the extra expenses that arise out of the 'delay' resulting from direct physical loss or damage to a building or structure described on the Soft Cost Schedule that is caused by a covered peril."
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> The only building or structure identified on the Soft Cost Schedule was the building located at the 151 First Side work site ("work site").
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> In May 2006, High Concrete was awarded a subcontract to manufacture custom-designed concrete panels which were to be installed on the exterior of the building located at the work site. On October 25, 2006, a fire at High Concrete's manufacturing facility damaged all of the panels that had been made specifically for [151 First Side's] project and prevented High Concrete from completing its contractual obligations. This, in turn, caused a significant delay to the [151] First Side project.
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> At the time of the fire, only approximately 55 of the 600 panels had been produced and [151 First Side] had not yet paid for any concrete panels. The damage to the panels was covered by High Concrete's insurance.

> [151 First Side] made claims under the Peerless policy for expenses caused by the delay.[1] Peerless denied coverage, asserting that the expenses incurred did not fall within the policy's scope of coverage for Soft Costs.
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> 1. [151 First Side] did not make any claims for damage to the concrete panels.
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> [151 First Side] filed a lawsuit against Peerless in this Court, which was removed to the Federal District Court for the Western District of Pennsylvania (***151 First Side, et al. v. Peerless Ins. Co.***, 2:08cv79). In this coverage dispute, summary judgment was entered in favor of Peerless. [The Honorable David Stewart Cercone] ruled that [151 First Side's] claims were not covered under the Soft Cost Endorsement of the Peerless policy because there was no direct loss to the building located at the 151 First Side work site. Judge Cercone also ruled that even assuming the policy covered property damage at storage locations, High Concrete's facility was a production facility, not a storage location.[2] In addition, Judge Cercone ruled that even if High Concrete's facility was considered a storage location, the Soft Cost Endorsement did not apply to delays caused by property damage at storage locations, but only covered delays caused by property damage at the 151 First Side work site. . . .
>
> 2. The Peerless policy provided coverage of $10,000 for property damage at storage locations.
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> On June 17, 2010, [151 First Side] initiated the instant action, alleging that [Hostetler] failed to procure proper insurance coverage for the 151 First Side project.

Opinion, 5/12/2014, at 1-2 (some internal footnotes deleted).

Hostetler filed a preliminary objection to 151 First Side's breach of fiduciary duty claim, which the trial court granted. Hosteler then filed a motion for summary judgment seeking dismissal of 151 First Side's negligence claim "on the ground that, after completion of discovery, including expert reports, [151 First Side] has failed to produce evidence of

facts essential to the [negligence] cause of action." Opinion, 5/12/2014, at 3. The trial court granted this motion.

151 First Side filed a timely notice of appeal. 151 First Side filed a concise statement of errors complained of on appeal pursuant Pennsylvania Rule of Appellate Procedure 1925(b). The trial court issued a Rule 1925(a) statement incorporating its May 12, 2014 memorandum accompanying the order granting summary judgment. It did not file a 1925(a) opinion or statement as to the preliminary objections.[2]

Appellant raises the following claims on appeal:

> A. Did the [trial] court err in granting summary judgment in favor of [Hostetler] and against the [151 First Side].?
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> B. Did the [trial] court err in failing to consider whether the law permits an insurance broker to be held liable for a breach of duty of ordinary care as per Section 299a of the Restatement of Torts (Second)?
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> C. Did the [trial] court err as a matter of law in sustaining [Hostetler's] preliminary objection to Count I pertaining to [Hostetler's] breach of fiduciary duty holding as a matter of law that no claim can ever be stated against an insurance broker for such a breach?

Appellant's Brief at 5.

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[2] In dismissing the claim with prejudice, the trial court handwrote the following: "[A]s a matter of law[,] a claim of a breach of a fiduciary relationship cannot be based upon justifiable reliance on specialized skill and expertise." Although the trial court did not provide an opinion outlining its reasons for sustaining the preliminary objections, the lack of statement or opinion does not hinder this Court's ability to review the preliminary objection claim, as the trial court's reasoning is clear from the order and handwritten note.

151 First Side's first two claims challenge the trial court's order granting Hostetler's motion for summary judgment.

"[S]ummary judgment is appropriate only in those cases where the record clearly demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." ***Summers v. Certainteed Corp.***, 997 A.2d 1152, 1159 (Pa.2010) (quoting ***Atcovitz v. Gulph Mills Tennis Club, Inc.,*** 812 A.2d 1218, 1221 (Pa.2002)). A "trial court must take all facts of record and reasonable inferences therefrom in a light most favorable to the non-moving party" and "must resolve all doubts as to the existence of a genuine issue of material fact against the moving party." ***Id.*** (citing ***Toy v. Metropolitan Life Ins. Co.,*** 928 A.2d 186, 195 (Pa.2007)). Therefore, a trial court "may only grant summary judgment 'where the right to such judgment is clear and free from all doubt.'" ***Id.*** (quoting ***Toy***, 928 A.2d at 195). This Court "may reverse a grant of summary judgment if there has been an error of law or an abuse of discretion." ***Id.*** (quoting ***Weaver v. Lancaster Newspapers, Inc.,*** 926 A.2d 899, 902–03 (Pa.2007)).

151 First Side maintains Hostetler was negligent for failing to include High Concrete as an insured on the builder's risk policy and failing to include it as a scheduled location for soft costs coverage. Appellant's Brief at 19-22.

To prevail in any negligence action, the plaintiff must establish the following: "the defendant owed [the plaintiff] a duty; the defendant breached the duty; the plaintiff suffered actual harm; and a causal

relationship existed between the breach of duty and the harm." ***French v. Commonwealth Associates, Inc.***, 980 A.2d 623, 630-31 (Pa.Super.2009) (quoting ***Merlini ex rel. Merlini v. Gallitzin Water Authority***, 934 A.2d 100, 104–05 (Pa.Super.2007)). Further, in a professional negligence action:

> [T]he determination of whether there was a breach of duty requires the plaintiff to additionally show that the defendant's conduct fell below the relevant standard of care applicable to the rendition of the professional services at issue. In most cases, such a determination requires expert testimony because the negligence of a professional encompasses matters not within the ordinary knowledge and experience of laypersons.

Id.

151 First Side's expert, Phillip T. Coffin, submitted an expert report in support of 151 First Side's negligence claims. Mr. Coffin made the following statements and conclusions:

> For a development project of this magnitude, it is very important the agent review all the contract documents to be sure the insurance placed is complete and in compliance with the requirements set forth in these documents. In this case, both the construction contract and the bank's finance agreement required all contactors and subcontractors be insured under this policy.
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> . . .
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> As requested by Mr. Falbo[3] and as indicated in the contract documents, Soft Cost coverage was to be included in the policy. Soft Cost coverage provides insurance for time element or business interruption losses incurred from a delay in the completion of a project resulting from a

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[3] Ralph Falbo was a principal in 151 First Side.

covered loss. This delay is referred to as the period of indemnity. Such a claim may include expenses incurred as a result of and stemming from the indemnity period such as lost rent, additional interest paid on loans, lost sales, and other extra expenses incurred as a result of the delay.

In October 2006, there was a fire at the plant of a subcontractor for the [151 First Side] project. At the time of the fire, this subcontractor, [High Concrete] was in the process of producing custom-designed panels to be installed as the part of the exterior of the [151 First Side] building. Many panels were destroyed in the fire and the [151 First Side] project was delayed due to the inability of High Concrete to deliver the panels needed to continue the project. This delay caused [151 First Side] to experience significant soft cost damages. These damages were not covered under the policy due to Hostetler's error.

As stated, the Peerless policy included Soft Cost coverage. However, the policy conditions state that Soft Cost coverage is only triggered if the covered loss (a fire is a covered loss) occurs at a scheduled location. The schedule of locations for the policy was left blank, therefore only the actual [151 First Side's] construction site was insured for any Soft Cost damages. Peerless did not pay for Soft Cost damages since that coverage only applied to a scheduled location. If High Concrete had been scheduled on the Builder's Risk policy, the policy would have responded properly with Soft Cost coverage to pay [151 First Side's] business interruption and or extra expense claim.

In summary, the owner requested Soft Cost coverage be included with a Builder's Risk insurance policy and provided ample documentation and instruction to the agent to allow for the proper placement of the policy. The agent placed the Builder's Risk policy with Soft Cost coverage, but without the proper scheduling of the contractors, subcontractors and storage locations. The incomplete (blank) schedule of locations on the policy caused there to be no Soft Cost coverage for a fire loss to a subcontractor which should have been scheduled. This error caused the insured to incur extensive uninsured Soft Cost damages.

> It is my opinion that Hostetler did not properly perform his responsibilities as agent for [151 First Side]. The policy he and his firm placed was incomplete and was unable to respond as the insured expected it would. In this case Hostetler breached his duties as an agent by failing to place a complete and proper policy as requested by the insured.
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> The opinion set forth in this report is based on reasonable degree of professional certainty. I reserve the right to amend this report based on review of any additional material that may be subsequently provided.

Letter from Phillip T. Coffin to Ronald H. Heck, dated May 14, 2013, at 2.

The builder's risk policy defines Soft Costs and Extra Expense as follows:

> Soft Costs — 'We' pay for the soft cost expenses that arise out of a 'delay' resulting from direct physical loss or damage to a building or structure described on the Soft Cost Schedule that is caused by a covered peril. . . ."
>
> Extra Expense — 'We' cover only the extra expenses that arise out of the 'delay' resulting from direct physical loss or damage to a building or structure described on the Soft Cost Schedule that is caused by a covered peril."

Complaint at Exh. A at "Soft Cost, Extra Expense, and Rental Income Endorsement."

The policy also provided coverage for certain property located at "storage locations": "Storage locations – 'We' cover direct physical loss caused by a covered peril to . . . materials and supplies that will become a permanent part of a covered building or structure in the course of construction, erection or fabrication . . . while they are at a storage

location." ***Id.*** at Supplemental Coverages. The Western District of Pennsylvania and the trial court found High Concrete was a production facility, not a storage facility. Opinion, 5/12/2014, at 12 n.4; ***151 First Side Assoc., L.P. v. Peerless Ins. Co.***, No. 2:08cv79, at 7-9 (W.D.Pa. filed Mar. 11, 2010) (memorandum opinion) (High Concrete not storage facility because not "space or place used for putting or keeping things for future use," and mere fact that "precast concrete panels were damaged post-production but pre-delivery[] does not transform a production or manufacturing facility into a 'storage location'"). We agree with the courts' conclusions.

Further, the builder's risk policy defined "you" and "your" as "the persons or organizations named as the insured on the 'schedule of coverages'" and defined "jobsite" as "any location, project, or work site where 'you' are in the process of constructing, erecting, or fabricating a building or structure." Complaint at Exh. A at Builder's Risk Coverage Scheduled Jobsite Form.

151 First Side claims Hostetler should have included the subcontractors, including High Concrete, on the "schedule of coverages," and, if it had done so, the soft costs would have been covered. Appellant's Brief at 21. It further claims 151 First Side instructed Hostetler to include the project's owners, contractors, and subcontractors as insureds. ***Id.*** at 151

The trial court found:

> I do not understand how the inclusion of High Concrete as an additional insured would have had any impact on the breadth of coverage that the Peerless Builder's Risk Policy afforded [151] First Side for soft cost losses. [151 First Side] has not referred to any provisions within the policy that support the expert's statement or otherwise explains how a policy extending the protections afforded a policyholder to a third person provides greater insurance coverage for the policyholder. Consequently, [151] First Side has not met its burden of offering evidence sufficient to support a finding that [151] First Side was injured because of [Hostetler's] failure to list High Concrete as an additional insured.

Opinion, 5/12/2014, at 3.

The trial court opinion next addressed 151 First Side's argument that Hostetler should have included High Concrete as a "Scheduled Location." The court noted the policy covered Soft Costs for locations listed on two schedules, the soft cost schedule and the schedule of locations. Opinion, 5/12/2014, at 4. Each schedule form permits an insured to list only "jobsites." ***Id.*** A "jobsite" is defined as "any location, project, or work site where 'you' are in the process of constructing, erecting, or fabricating a building or structure." ***Id.*** at 6. The trial court noted "[151 First Side] does not contend that it was constructing or erecting a building at High Concrete's manufacturing facility. Furthermore, [151 First Side's] expert does not explain how or why [Hostetler] could have listed High Concrete's manufacturing facility as a 'Jobsite.'" ***Id.***

The trial court also noted the Peerless Claims Adjuster, Michael Griffin, testified that "Soft Cost coverage applies to the building that is being erected . . . [and] on a large project where there are multiple buildings, maybe

multiple lots, then they would have other locations listed." Opinion, 5/12/2014, at 8 (quoting Griffin Dep. at 28-29). The trial court then outlined the various paragraphs of the expert report and explained that the paragraphs relied on the naming of High Concrete as an additional insured, listing the High Concrete location on the schedule, or claiming that "Soft Cost coverage was to be included in the policy," which it was. ***Id.*** at 8-12. The trial court concluded 151 First Side's claims failed because it did not offer expert testimony that Hostetler could have obtained soft cost coverage for losses arising out of property damage at a sub-contractor's production facility and, if such insurance could be obtained, it offered no expert testimony that failure to obtain the coverage constituted professional negligence. ***Id.*** at 12.

151 First Side appears to base its claim that High Concrete should have been listed as a named insured on the following requirements from LaSalle National Bank: "Under the Evidence of Property form – The builder[']s risk coverage should make the following statement: 'The General Contractor (name) and all subcontractors of any tier are named insured with respect to builder[']s risk." Defendant's Brief in Opposition to Motion for Summary Judgment at Exh. 2. The insurance documents do not contain an "Evidence of Property" form. Further, even if High Concrete was a "named insured," the location where it manufactured the panels still would not

qualify as a "jobsite" or "storage facility," and, therefore, 151 First Side would not be entitled to soft costs.[4]

151 First Side also relies on the AIA Construction contract, which includes the following clause:

> Unless otherwise provided this Owner shall purchase and maintain, in a company authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builder's risk 'all-risk' or equivalent policy form in the amount of the initial Contract Sum, plus modifications and cost of materials supplied or installed by others, comprising total value site on a replacement cost basis without optional deductibles. Such property insurance otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Section 9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Section 11.4 to be covered, whichever is later. **This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-sub contractors in the Project.**

Brief in Opposition to Summary Judgment at Exh. 9, at § 11.4.1. This provision requires the building to have insurance that includes the interests of the owner, contractor, and all subcontractors. There is no indication that

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[4] Further, the policy was effective on September 21, 2005, and High Concrete did not become a subcontractor until May of 2006. Complaint at ¶ 8, Falbo Dep. 113-14. 151 First Side never informed Hostetler of High Concrete or its role. Falbo Dep. 113-114, 208-09, Keirn dep. at 116. With the language LaSalle requested, this timing might not have mattered, but 151 First Side continually argued High Concrete, not "all subcontractors of any tier," should have been listed as a named insured.

the policy did not cover such interests for events that occurred at the "jobsite," i.e., where the building was being constructed.

Based on the above, the trial court did not err as a matter of law or abuse its discretion when it granted Hostetler's motion for summary judgment. 151 First Side's first claim lacks merit, as 151 First Side failed to provide expert testimony to support its professional negligence claim.

151 First Side's second claim maintains, even without the expert testimony, the trial court should have found Hostetler negligent based on Restatement (Second) of Torts § 299A.[5] Appellant's Brief at 23-27.

The trial court did not err when it required 151 First Side to support its negligence action against Hostetler with expert testimony.

In ***Powell v. Risser***, 99 A.2d 454 (Pa. 1953), the Supreme Court of Pennsylvania stated: "[E]xpert testimony is necessary to establish negligent practice in any profession." 99 A.2d 454, 456 (Pa.1953). In ***Storm v. Golden***, this Court stated that although the general statement in ***Powell*** "is not a concrete pronouncement as to any one profession, it exhibits a

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[5] Restatement (Second) of Torts § 299A provides:

> Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

recognition that when dealing with the higher standards attributed to a professional in any field[,] a layperson's views cannot take priority without guidance as to the acceptable practice in which the professional must operate." 538 A.2d 61, 64 (Pa.Super.1988).

In ***Storm***, the plaintiff alleged that her former attorney breached duties owed to her as part of a real estate transaction and argued she did not need to provide expert testimony due to the transaction's simplicity. This Court stated:

> Generally, the determination of whether expert evidence is required or not will turn on whether the issue of negligence in the particular case is one which is sufficiently clear so as to be determinable by laypersons or concluded as a matter of law, or whether the alleged breach of duty involves too complex a legal issue so as to warrant explication by expert evidence. . . . Here, the underlying question of whether legal malpractice occurred revolves around a lawyer's duty and responsibility in connection with representing a client in a real estate transaction. We do not agree with appellant's assertions that the sale of real estate is an elementary and non-technical transaction which requires only simple common sense. . . . At issue is not the simplicity of the transaction but the duty and degree of care of the attorney. Whether an attorney failed to exercise a reasonable degree of care and skill related to common professional practice in handling a real estate transaction is a question of fact outside the normal range of the ordinary experience of laypersons.

Storm, 538 A.2d at 64-65. The Court in ***Storm*** reasoned "[e]xpert testimony becomes necessary when the subject matter of the inquiry is one involving special skills and training not common to the ordinary layperson." ***Id***. at 64.

151 First maintains Hostetler was negligent when it procured for 151 First Side a builder's risk insurance policy that did not provide soft cost coverage for soft costs incurred due to damage to materials created for use in the building which were still located in the sub-contractors building.

The standards of practice and skills of an insurance broker are not necessarily matters of common knowledge. ***See Storm***, 538 A.2d at 64-65. ***See also Industrial Valley Bank and Trust Co. v. Dilks Agency***, 751 F.2d 637, 640 (3d Cir. 1985) (under Pennsylvania law, insurance broker under a duty to exercise care that reasonably prudent businessperson in brokerage field would exercise under similar circumstances); ***cf. Al's Café, Inc. v. Sanders Insurance Agency***, 820 A.2d 745, 752 (Pa. Super. 2003) (court reversed summary judgment where plaintiff's expert reports raised genuine issue of material fact as to whether insurance agent deviated from "knowledge and skill required of an insurance agent or broker in procuring [liquor liability] insurance coverage for a client."). An insurance broker possesses expertise in the insurance industry, particularly where the insurance sought is specialized insurance, such as a builder's risk policy. Because 151 First Side's failed to provide an expert report sufficient to support its negligence claim, its claim fails. ***See Storm***, 538 A.2d at 65. Although there may be negligence actions against insurance brokers in which expert testimony would not be required, this is not such a case.

151 First Side's third issue challenges the trial court's order sustaining Hostetler's preliminary objection to 151 First Side's breach of fiduciary duty claim.

Our standard of review for overruling or granting preliminary objections is:

> [T]o determine whether the trial court committed an error of law. When considering the appropriateness of a ruling on preliminary objections, the appellate court must apply the same standard as the trial court.
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> Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.

Richmond v. McHale, 35 A.3d 779, 783 (Pa.Super.2012) (quoting ***Feingold v. Hendrzak,*** 15 A.3d 937, 941 (Pa.Super.2011)).

A fiduciary relationship may arise out of (1) a confidential relationship between the parties or (2) a principal/agent relationship between them. ***eToll Inc. v. Elias/Savion Advertising Inc.***, 811 A.2d 21-22 (Pa. Super.2002). There is no allegation a principal/agent relationship existed. This Court has stated the following regarding confidential relationships:

> A "special relationship" is one involving confidentiality, the repose of special trust or fiduciary responsibilities. ***See*** [***Commonwealth v. E-Z-Parks, Inc.,*** 620 A.2d 712, 717

> (Pa.Commw.1993)]. It generally involves a situation where by virtue of the respective strength and weakness of the parties, one has the power to take advantage of or exercise undue influence over the other. [***Estate of Evasew***, 584 A.2d 910, 913 (Pa.1990)]. ***Also see, e.g.,*** [***Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz***, 602 A.2d 1277, 1283 (Pa. [1992])] (special relationship exists between attorney and client); [***Frowen v. Blank***, 425 A.2d 412, 418 (Pa.1981)] (special relationship exists between 86 year old widow with no formal education and her sole business counselor); [***Estate of Thomas***, 344 A.2d 834, 836 (Pa.1975)] (special relationship between attorney-scrivener and testator); [***Silver v. Silver***, 219 A.2d 659, 662 (Pa.1966)] (special relationship between widow and sons upon whom she relied to manage her property); [***Leedom v. Palmer***, 117 A. 410, 412 (1922)] (special relationship between guardian and ward).

eToll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 22-23 (Pa.Super.2002) (quoting ***Valley Forge Convention & Visitors Bureau v. Visitor's Servs., Inc.***, 28 F.Supp.2d 947, 952-953 (E.D.Pa.1998)). A special relationship does not exist between parties to an arms-length business contract. This Court has reasoned: "If parties to routine arms[-] length commercial contracts for the provision of needed goods or services were held to have a 'special relationship,' virtually every breach of such a contract would support a tort claim." ***Id.*** (citing ***L & M Beverage Co. v. Guinness Import Co.***, 1995 WL 771113, *5, 1995 U.S. Dist. LEXIS 19443 (E.D.Pa. Dec. 29, 1995) (parties to exclusive sales contract did not have type of "special relationship" necessary to support negligent interference claim); [***Elliott v. Clawson***, 204 A.2d 272, 273 (Pa.1964)] (no special relationship between parties to arms[-]length business contract); [***Creeger Brick & Bldg. Supply, Inc. v. Mid-State Bank & Trust Co.***, 560 A.2d

151, 154 (Pa.Super.1989)] (no special relationship between lender and borrower); [***E-Z Parks,*** 620 A.2d at 717] (no special relationship between parties to arms[-]length commercial lease agreement)).

In ***eToll***, this Court found no confidential relationship, even though the plaintiff alleged it "gave defendant 'substantial control of its advertising support,'" noting "[t]here is a crucial distinction between surrendering control of one's affairs to a fiduciary or confidant or party in a position to exercise undue influence and entering an arms[-]length commercial agreement, however important its performance may be to the success of one's business." ***eToll, Inc.*** 811 A.2d at 23.

Similarly, this Court has stated:

> The essence of such a [confidential] relationship is trust and reliance on one side, and a corresponding opportunity to abuse that trust for personal gain on the other. Accordingly, [a confidential relationship] appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed[.]

Basile v. H & R Block, 777 A.2d 95, 101 (Pa.Super.2001) (internal citations and quotation marks deleted).

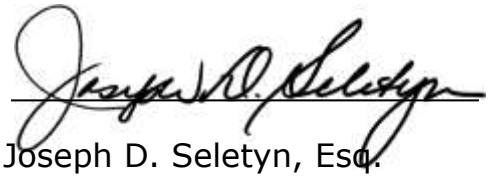
Although whether a confidential relationship exists is often a factual issue, here, it was clear from the complaint that a confidential relationship, such that 151 First Side placed total control of its insurance needs in Hostetler's hands, did not exist. This was corroborated during discovery, where more evidence of the parties' relationship was discovered and no

evidence would have altered the finding that no confidential relationship existed.

The trial court did not err in granting Hostetler's preliminary objection and dismissing the breach of fiduciary duty claim.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/21/2015