

NICHOLAS D. ANDREWS

Appellant

v.

CROSS ATLANTIC CAPITAL PARTNERS,
INC.

NICHOLAS D. ANDREWS

Appellant

v.

DONALD R. CALDWELL

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1694 EDA 2014

Appeal from the Judgment May 22, 2014
In the Court of Common Pleas of Chester County
Civil Division at No(s): 2011-06164, 2011-09776-CT

NICHOLAS D. ANDREWS

v.

CROSS ATLANTIC CAPITAL PARTNERS,
INC.

Appellant

NICHOLAS D. ANDREWS

v.

IN THE SUPERIOR COURT OF
PENNSYLVANIA

DONALD R. CALDWELL

Appellant

No. 1825 EDA 2014

Appeal from the Judgment Entered May 22, 2014
In the Court of Common Pleas of Chester County
Civil Division at No(s): 2011-06164

NICHOLAS D. ANDREWS

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

v.

CROSS ATLANTIC CAPITAL PARTNERS,
INC.

NICHOLAS D. ANDREWS

Appellant

v.

DONALD R. CALDWELL

No. 1934 EDA 2014

Appeal from the Judgment Entered May 22, 2014
In the Court of Common Pleas of Chester County
Civil Division at No(s): 2011-06164-CT

BEFORE: FORD ELLIOTT, P.J.E., BENDER, P.J.E., BOWES, J., PANELLA, J.,
SHOGAN, J., LAZARUS, J., OLSON, J., OTT, J., and DUBOW, J.

OPINION BY LAZARUS, J.:

Filed: March 21, 2017

Cross Atlantic Capital Partners, Inc., and Donald R. Caldwell¹ (collectively Defendants) appeal and Nicholas D. Andrews (Andrews) cross-appeals from the judgment, entered in the Court of Common Pleas of Chester County, following a jury verdict in favor of Andrews in the amount of \$742,221.45² in damages, \$216,268.75 in prejudgment interest, and \$303,127.50 in attorneys' fees under the Wage Payment and Collection Law (WPCL).³ After careful review, we affirm in part, reverse in part and remand for calculation of liquidated damages.

We take the underlying facts and procedural history in this matter from the trial court's prior opinions and our review of the certified record.

Cross Atlantic is a corporation in the business of recruiting individual investors, institutional investors, and mutual fund managers who are seeking investment opportunities. These investors enter into a partnership agreement with Cross Atlantic[,] who holds the investors' funds and then uses those funds to invest in start-up companies. The partnership agreement between Cross Atlantic and the investors states how to disburse the investors' funds, any returns, fees, costs, etc., including the payment of any management fees due to Cross Atlantic.

Andrews worked for Cross Atlantic from the summer of 1999 through the summer of 2000. Cross Atlantic's [President] at the time, Glenn Rieger, hired Andrews to find, negotiate, and

¹ At all relevant times, Caldwell was the Chief Executive Officer (CEO) for Cross Atlantic, exercising the company's business decisions.

² This figure represents 1% of the aggregate proceeds returned to the fund as a result of its sales of shares in GAIN between 2006 and 2013.

³ 43 P.S. §§ 260.1-260.12.

manage investments for Cross Atlantic. The ultimate goal was to sell the investments at a price that was sufficient to repay the investors their funds and to allow both the investors and Cross Atlantic to realize a profit. During his employment with Cross Atlantic, Andrews did not have a written employment agreement, as is customary in the industry. Compensation is deferred until the investment funds become sufficiently profitable to make corporate distributions. However, Andrews'[] employment ended before his funds made any corporate distributions. Therefore, on July 5, 2000, the parties entered into the [s]eparation [a]greement. Paragraph 5 of the [s]eparation [a]greement ("[p]aragraph 5") stated how and when Andrews was to be compensated.

Trial Court Opinion, 1/16/15, at 2-3. Paragraph 5 of the parties' agreement states:

By the end of this Severance Period, you will have vested one year of service towards 1.0% of carried interest⁴ in Cross Atlantic Technology Fund, L.P. and 0.5% carried interest in The Co-Investment 2000 Fund, L.P. Therefore, you will receive 0.2% and 0.1% carried interest as your earned and vested carry in Cross Atlantic Technology Fund, L.P. and The Co-Investment 2000 Fund, L.P., respectively. In addition, **as special consideration for your effort put forth on GAIN Capital, we will offer you a full 1.0% and 0.5% carried interest on that particular transaction to be earned, paid and distributed at such time that the distribution is made to all other Limited Partners of the funds.** Distributions of your participation in these carried interests will be in all cases identical to what you would have received if still employed by the funds.

Andrews/Cross Atlantic Separation Agreement ("Agreement"), 7/5/00, at ¶ 5 (emphasis added). In exchange for the benefits under the separation agreement, Andrews agreed to enter into one-year non-compete and non-

⁴ Carried interest is an interest in the profits of a fund.

solicitation agreements, as well as a release of any claims he might have against Cross Atlantic. Cross Atlantic paid Andrews' three months of additional salary, as per the Agreement, as well as a bonus, and continued Andrews' health care and dental benefits for an additional three months.

On September 3, 2003, Andrews read a press release indicating that a number of GAIN shareholders had sold a significant portion of their shares. The following day, Andrews sent Cross Atlantic's Chief Financial Officer (CFO) Brian Adamsky an email asking whether the Technology Fund was among those shareholders. Adamsky emailed Cross Atlantic's President, Glenn Rieger, about Andrews' query and told him to respond to Andrews. Over the next few days, an email exchange occurred between Andrews and Rieger. Rieger ultimately told Andrews that the Technology Fund had sold \$1.1 million worth of its shares in GAIN and, that under the Agreement, Andrews was not entitled to any compensation.

In February 2011, after he had repeatedly asked Defendants about information on the status of GAIN and Cross Atlantic, Andrews received an email from Adamsky providing him with the requested financial data. On September 2, 2011, Andrews filed two separate complaints,⁵ one against Cross Atlantic for breach of contract and violations of the WPCL, and one

⁵ Plaintiff Andrews sued Cross Atlantic and Caldwell separately. On January 9, 2012, upon Andrews' uncontested motion to consolidate actions, the court consolidated the actions at 2011-09776-CT and 2011-06164-CT.

(Footnote Continued) _____

result of Cross Atlantic's breach of the Agreement at the time of the January 14, 2008 distribution; (6) Andrews incurred \$149,936.16 in damages as a result of Cross Atlantic's breach of the Agreement at the time of the December 21, 2010 distribution; (7) Andrews incurred \$ 36,664.51 in damages as a result of Cross Atlantic's breach of the Agreement at the time of the March 15, 2012 distribution; (8) Andrews incurred \$ 31,284.23 in damages as a result of Cross Atlantic's breach of the Agreement at the time of the February 13, 2013 distribution; (9) Cross Atlantic violated the WPCL; (10) the three (3) year statute of limitations on Andrews' WPCL claim against Cross Atlantic for the distribution on April 4, 2006, was tolled by the discovery rule; (11) Andrews did not know or should not have known that he had a WPCL claim against Cross Atlantic for the April 4, 2006 distribution on or before June 2, 2008; (12) the three (3) year statute of limitations on Andrews' WPCL claim against Cross Atlantic for the distribution on January 14, 2008, was tolled by the discovery rule; (13) Andrews did not know or should not have known that he had a WPCL claim against Cross Atlantic for the January 14, 2008 distribution on or before June 2, 2008; (14) **Cross Atlantic did not act in good faith when it did not distribute money to [Andrews] pursuant to the Agreement between the parties;** (15) Caldwell directly participated in the decision to withhold payment from Andrews in violation of the WPCL; (16) the three (3) year statute of limitations on Andrews' WPCL claim against Caldwell for the distribution on April 4, 2006, was tolled by the discovery rule; (17) Andrews did not know or should not have known that he had a WPCL claim against Caldwell for the April 4, 2006 distribution on or before September 1, 2008; (18) the three (3) year statute of limitations on Andrews' WPCL claim against Caldwell for the distribution made on January 14, 2008, was tolled by the discovery rule; (19) Andrews did not know or should not have known that he had a WPCL claim against Caldwell for the January 14, 2008 distribution on or before September 1, 2008; and (20) **Caldwell did not act in good faith when he made a decision that Cross Atlantic should not distribute money to Andrews pursuant to the parties' Agreement.**

Jury Verdict Slip, 8/30/13, at 1-8 (emphasis added).

(Footnote Continued Next Page)

\$742,221.45 in damages⁷ under the WPCL.⁸ The verdict included a finding that Defendants did not act in good faith when they failed to distribute Andrews' severance pay according to the Agreement. Jury Verdict Slip, 8/30/13, at 6, 8. On September 9, 2013, Defendants filed a joint post-trial motion; that same day, Andrews filed a motion to mold the verdict to include pre-judgment interest, post-judgment interest, and liquidated damages under section 260.10 of the WPCL. Andrews also filed a petition for attorneys' fees and costs in connection with his successful WPCL claims.

On December 19, 2013, the trial court denied Defendants' post-trial motions and granted Andrews' motion in part, awarding him pre-judgment
(Footnote Continued) _____

⁷ The parties do not dispute that severance pay is considered "wages" under the WPCL.

⁸ The damages represent failure to pay Andrews on the following dates for the following amounts:

- April 4, 2006 (\$100,000);
- January 14, 2008 (\$424,336.51);
- December 21, 2010 (\$149,936.16);
- March 15, 2012 (\$36,664.51);
- February 13, 2013 (\$31,284.23).

Instantly, the trial court concluded that Andrews' cause of action accrued, for purposes of application of the statute of limitations, "at the time performance is due or when it is discovered the performance was due, not when the possibility of a future breach is known." Trial Court Opinion, 1/16/15, at 11. It was Defendants' failure to pay Andrews after each separate corporate distribution that gave rise to his claims and required a separate limitations period calculation.

interest in the amount of \$216,268.75, and denied the motion in part with respect to his request for liquidated damages. The court denied, without prejudice, Andrews' request for post-judgment interest. On May 5, 2014, the trial court granted Andrews' request for attorneys' fees, awarding him \$303,127.50, but denied his request for expert fees and out-of-pocket costs. On May 22, 2014, the Prothonotary entered judgment on the jury's verdict. **See** Pa.R.C.P. 227.4.

On June 3, 2014, Andrews filed a notice of appeal from the court's May 5, 2014 order denying his petition for expert fees and out-of-pocket costs under the WPCL. On June 18, 2014, Defendants filed a notice of appeal from the August 30, 2013 jury verdict, the court's December 19, 2013 order denying their post-trial motions and granting Andrews' petition for pre-judgment interest, the court's May 5, 2014 order awarding Andrews' attorneys' fees, and the court's final May 22, 2014 judgment.⁹ On June 25, 2014, Andrews filed a notice of cross-appeal challenging the court's May 5, 2014 order as well as the court's December 19, 2013 order denying his request for liquidated damages. This appeal and cross-appeal follow.

On appeal, Defendants raise the following issues for our consideration:

- (1) Did [D]efendants' absolute and unequivocal repudiation of its alleged obligations under a separation agreement start the accrual of the limitations period on [P]laintiff's entire

⁹ **See** Pa.R.A.P. 341(b) (final judgment for purposes of appeal is one that disposes of all claims and of all parties).

cause of action under the agreement, including for future payments allegedly due under the agreement?

- (2) Did payments that allegedly became due to plaintiff under a separation agreement negotiated and executed two months after the termination of [P]laintiff's employment; that were not earned by [P]laintiff during his employment; and that were allegedly given to [P]laintiff in exchange for entering into a non-compete agreement, constitute "wages" under Pennsylvania's Wage Payment and Collection Law?
- (3) Was [P]laintiff's interpretation of paragraph 5 of the separation agreement unreasonable as a matter of law when, among other things, his interpretation was irreconcilable with the paragraph's last sentence, required the assignment of two different meanings to the same term, and was inconsistent with the very relief he sought?

Defendants' Appeal

In their first issue on appeal, Defendants claim that the trial court improperly denied their motion for nonsuit because Andrews' entire cause of action was barred by the statute of limitations. Specifically, Defendants assert that because they had "absolutely and unequivocally repudiated" their contractual obligations under the Agreement in September 2003, and, consequently, would never agree to pay Andrews any "deal specific" carried interest, Andrews could have brought suit for breach of contract at that time.

We find this claim waived. In their Pa.R.A.P. 1925(b) concise statement of matters complained of on appeal, Defendants fail to list the legal theory of "absolute and unequivocal repudiation" of the parties' Agreement in support of their statute of limitations argument. As a result, the trial court did not address this claim in its Rule 1925(a) opinion.

While Defendants did include this issue in their post-trial motion, our appellate rules are clear that “[i]ssues not included in the [Rule 1925(b)] Statement . . . are waived.” Pa.R.A.P. 1925(b)(iv).¹⁰

¹⁰ The dissent asserts that Defendants “preserved th[e] defense [of the statute of limitations] at every stage of the proceeding” by raising the defense in their answer, motion for summary judgment, and motions for non-suit and a directed verdict. Dissenting Opinion at 9-12. While the jury was instructed on the defense of statute of limitations, **see** Pa.S.S.I (Civ.) 11.10, and the jury’s verdict slip did ask “whether the four (4) year statute of limitations on Plaintiff’s breach of contract claim, for the distribution made on April 4, 2006, was tolled or stopped running by the operation of the discovery rule,” and “whether Plaintiff knew or should have known he had a breach of contract claim for the April 4, 2006 distribution on or before June 2, 2007,” the legal theory proffered by this statute of limitations defense that was put before the jury was not that of anticipatory repudiation. **See McClelland v. New Amsterdam Casualty Co.**, 185 A. 198, 200 (Pa. 1936) (anticipatory breach is “an absolute and unequivocal refusal to perform or a distinct and positive statement of an inability to do so. If the promisor makes a definite statement to the promisee that he either will not or cannot perform his contract, that is a repudiation and will operate as an anticipatory breach unless the promisor had some justifying cause for his statement.”).

Rather, the Defendants raised the defense of statute of limitations based upon their claim that there was an *actual* breach of the separation agreement on September 9, 2003, when Andrews wrote his email to Defendants regarding distribution payments he sought under paragraph 5 of the Separation Agreement. **See** N.T. Jury Trial, 8/30/13, at 4 (when moving for a directed verdict, Defendants’ attorney states “It was not just anticipatory. It was an actual breach in the amount of \$11,000, that he knew –knew about.”); N.T. Jury Trial, 8/28/13, at 74 (Defendants’ attorney acknowledges that “this wasn’t just an anticipatory breach saying we are not going to honor you or your agreement in the future, there was an actual breach right then and there under his interpretation. . . . [O]nce you know you are not getting a benefit, that is when the statute of limitations starts to run. He knew in September of 2003 that he wasn’t getting this benefit, but he didn’t do anything about it. So his claim is barred by the statute.”). Because one cannot raise a new legal theory on appeal, this claim is waived. **See Steiner v. Markel**, 968 A.2d 1253, 1257-58 (Pa. 2009); Pa.R.A.P. 302.

However, even if we were to find this claim preserved on appeal, Defendants would not be entitled to relief. Under Pennsylvania law, anticipatory repudiation or breach requires “an absolute and unequivocal refusal to perform or a distinct and positive statement of an inability to do so.” ***Harrison v. Cabot Oil & Gas Corp.***, 110 A.3d 178, 184 (Pa. 2015) (quoting ***McClelland, supra*** at 200). Here, the trial court recognized that the parties disagreed over the interpretation of paragraph 5 of the Agreement. In fact, in their Rule 1925(b) statement, Defendants aver that “[t]he evidence established that Defendants had *an honest disagreement* with Plaintiff’s interpretation of the third sentence of paragraph 5 of the Separation Agreement[.]” Defendants’ Rule 1925(b) Statement, 7/15/14, at 7 ¶(4)(a). We fail to equate an honest disagreement over the language of an agreement with an “absolute and unequivocal refusal to perform.” ***See Restatement of Contracts, Second***, § 250 (Comment (b)) (“[R]epudiation is a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach[.]”).

In their next claim on appeal, Defendants assert that any monies promised to Andrews under the parties’ Agreement were not compensation for employment but, rather, consideration for agreeing to enter into a non-compete agreement. Therefore, Defendants claim that this amount is not

considered “wages”¹¹ that Andrews earned while employed by Defendants and, as a result, his WPCL claim must fail. We find this claim waived as well.

At trial and in their post-trial motions, Defendants put forth a different legal argument to support their claim that the monies owed under the Agreement were not considered “wages” under the WPCL. Specifically, at trial and post-trial, Defendants posited that the payments due under the Agreement were not an obligation of Cross Atlantic, but rather monies that would come from Andrews’ carried interest in the Fund itself. Therefore, because the payments were not coming from his employer, they are not wages under the WPCL. **See** 43 Pa.C.S.A. § 260.3 (under WPCL every *employer* is required to pay wages within certain periods of time).

Because Defendants’ argument on appeal advances a different legal theory than that offered at trial and post-trial, we find this claim waived on appeal. **See *Estate of Witthoeft v. Kiskaddon***, 733 A.2d 623, 630 n.8

¹¹ Wages are defined, under the WPCL as:

[A]ll earnings of an employe[e], regardless of whether determined on time, task, piece, commission or other method of calculation. The term “wages” also includes fringe benefits or wage supplements whether payable by the employer from his funds or from amounts withheld from the employe[e’s] pay by the employer.

43 Pa.C.S.A. §260.2a.

(Pa. 1999) (holding that appellant waived legal theory raised for first time on appeal to Superior Court); **see also** Pa.R.A.P. 302.

In their final claim on appeal, Defendants contend that Andrews' interpretation of the "carried interest" language in the third sentence of paragraph 5 of the Agreement (as it relates to GAIN) is internally inconsistent with both the term as used in the rest of the paragraph and the relief he sought. Specifically, Defendants disagree with Andrews' testimony that the parties intended the carried interest in GAIN to differ from the Fund-leveled carried interests.

"[T]he interpretation of the terms of a contract is a question of law for which our standard of review is de novo, and our scope of review is plenary."

McMullen v. Kutz, 985 A.2d 769, 773 (Pa. 2009) (citation omitted).

Furthermore, it is well-established that:

[w]hen the parties have reduced their agreement to writing, the writing is to be taken to be the final expression of their intention. Where the contract evidences care in its preparation, it will be presumed that its words were employed deliberately and with intention. In determining what the parties intended by their contract, the law must look to what they clearly expressed. Courts in interpreting a contract do not assume that its language was chosen carelessly. Neither can it be assumed that the parties were ignorant of the meaning of the language employed.

Steuart v. McChesney, 444 A.2d 659, 662 (Pa. 1982) (citations and quotation marks omitted). Moreover,

[c]ontractual language is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense. That is not a question to be resolved in a vacuum. Rather, contractual terms are ambiguous

if they are subject to more than one reasonable interpretation when applied to a particular set of facts. A court will not, however, distort the meaning of the language or resort to a strained contrivance in order to find an ambiguity.

Madison Construction Co. v. The Harleysville Mut. Ins. Co., 735 A.2d 100, 106 (Pa. 1999).

Defendants claim that the trial court erroneously concluded that the Agreement's language was ambiguous on its face and that "the phrase 'carried interest'^[12] in sentence 3 could mean either carried interest in its usual sense or 'deal-specific' carried interest in GAIN." Defendants' Substituted En Banc Brief, at 58. Defendants contend that under the Agreement they would never pay Andrews *deal-specific* carried interest, but that they "left open the possibility that it might one day pay Andrews a different kind of carried interest (that is, fund-level carried interest)."¹³ ***Id.*** at 47.

¹² Carried interest represents a share in the residual claim on a private equity fund's distributions after the return of invested capital and the payment of management fees and accrued preferred returns. **See** <http://www.srr.com/article/carried-interest-and-performance-fee-incentives>. Commonly, a manager will not be entitled to carried interest until each investor in the fund recoups its applicable capital contributions (whether for a specific deal or for the whole fund) and achieves a preferred return thereon. Thereafter, a manager will begin to receive carried interest distributions equal to a percentage (or percentages) of remaining fund profits. **See** Nathaniel M. Marrs, Louis D. Hellebusch and Krishnakshi Das, ***Variations In Structuring "Whole Fund" And "Deal By Deal" Carried Interest Or Promote In Real Estate Funds And Joint Ventures***, The Real Estate Finance Journal, Spring 2009, at 5.

¹³ Under the deal-by-deal model, returns are generally calculated for each investment, and the manager receives its carried interest as profits are (Footnote Continued Next Page)

The polestar of our inquiry, therefore, is the relevant language of the parties' Agreement, which states:

By the end of this Severance Period, you will have vested one year of service towards 1.0% of carried interest in Cross Atlantic Technology Fund, L.P. and 0.5% carried interest in The Co-Investment 2000 Fund, L.P. Therefore, you will receive 0.2% and 0.1% carried interest as your earned and vested carry in Cross Atlantic Technology Fund, L.P. and The Co-Investment 2000 Fund, L.P., respectively. In addition, *as special consideration* for your effort put forth on GAIN Capital, we will offer you a full 1.0% and 0.5% carried interest on that particular transaction to be earned, paid and distributed at such time that the distribution is made to all other Limited Partners of the funds. **Distributions of your participation in these carried interests will be in all cases identical to what you would have received if still employed by the funds.**

Andrews-Cross Atlantic Separation Agreement ("Agreement"), 7/5/00, at ¶ 5 (emphasis added).

Defendants assert that the above-bolded language in the Agreement clearly shows that they intended Andrews to receive the same kind of carried interest that he would have received had he remained at Cross Atlantic, i.e., "carried interest." Defendants also posit that Andrews' interpretation gives

(Footnote Continued) _____

realized on the particular investment. In contrast, under a whole-fund model, the manager does not receive carried interest distributions until the investors receive distributions equal to their total capital contributions to the entire fund and a preferred return on all such contributions. **See** Nathaniel M. Marrs, Louis D. Hellebusch and Krishnakshi Das, **Variations In Structuring "Whole Fund" And "Deal By Deal" Carried Interest Or Promote In Real Estate Funds And Joint Ventures**, The Real Estate Finance Journal, Spring 2009, at 6.

the same phrase “carried interest” different meanings among the individual sentences of paragraph 5 of the Agreement.

We recognize that the Agreement does not define the term “carried interest.” Therefore, by inserting the term “as special consideration” in the third sentence of paragraph 5, it is reasonable to find the subsequent term “carried interest” ambiguous when viewed in the context of the remainder of the paragraph and in particular use of that term in sentences one and two. Accordingly, we can look to the parties’ intent in drafting paragraph 5 of the Agreement. The trial court’s conclusion that the parties intended to treat the carried interest and distribution manner in sentence three differently from those in sentences one and two of paragraph 5 is not only reasonable, but probable. We find, therefore, that the trial court properly declined to enter judgment in Defendants’ favor on this issue.

Andrews’ Cross Appeal

On cross-appeal, Andrews claims that the court improperly denied his request for liquidated damages under section 260.10 of the WPCL. Specifically, he asserts that he is entitled to statutory liquidated damages when the jury determined that Defendants did not establish a good faith dispute to his requested wage payment.¹⁴ Moreover, Andrews posits that an award of pre-judgment interest and an award of liquidated damages are not

¹⁴ **See** Jury Verdict Slip, 8/30/13, at 6, 8.

mutually exclusive remedies for a successful breach of contract plaintiff and that they “are not intended to compensate for the same loss.” Cross-Appellant’s Brief, at 74.¹⁵ We agree.¹⁶

Instantly, the trial court awarded Andrews more than \$200,000 in pre-judgment interest on his breach of contract claim against Cross Atlantic. However, the trial court denied Andrews’ request for liquidated damages

¹⁵ We note that Andrews’ cross-appeal is timely, and, thus, we have jurisdiction to consider his liquidated damages claim. On June 18, 2014, Defendants filed a timely notice of appeal from the trial court’s May 22, 2014 final judgment entered on the jury’s August 30, 2013 verdict. Andrews filed his notice of cross-appeal on June 25, 2014. Because Andrews’ cross-appeal was filed within 14 days of the Defendants’ timely notice of appeal, his cross-appeal is timely. **See** Pa.R.A.P. 903(b) (“If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was served, or within the time otherwise prescribed by this rule, whichever period expires last.”).

¹⁶ As the trial court acknowledges, on July 23, 2014, it ordered Andrews to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal in relation to his June 25, 2014 cross-appeal. On August 11, 2014, Andrews complied with this order, raising the propriety of the trial court’s denial of his request for liquidated damages, expert fees and other costs in connection with his claims under the WPCL. **See** Appellant’s Pa.R.A.P. 1925(b) Statement, 8/11/14, at 1-2. We take note of this filing because the trial court states in its Rule 1925(a) opinion that Andrews has waived this issue due to his failure to include it in his earlier Rule 1925(b) statement filed in connection with his separate, June 3, 2014 appeal contesting the denial of expert fees and costs. As Andrews properly acknowledges, the judgment entered on May 22, 2014 acted to finalize all claims and all parties, thus, his cross-appeal raising the liquidated damages issue is now properly before us and preserved for our review. **See** Pa.R.A.P. 341. For that reason, we decline to find his claim waived.

under the WPCL finding that if it awarded those damages, in addition to pre-judgment interest, Andrews would face a “windfall.”

Under the WPCL, a party is entitled to liquidated damages:

Where wages remain unpaid for thirty days beyond the regularly scheduled payday, or, in the case where no regularly scheduled payday is applicable, for sixty days beyond the filing by the employe of a proper claim or for sixty days beyond the date of the agreement, award or other act making wages payable, or where shortages in the wage payments made exceed five percent (5%) of the gross wages payable on any two regularly scheduled paydays in the same calendar quarter, and no good faith contest or dispute of any wage claim including the good faith assertion of a right of set-off or counter-claim exists accounting for such non-payment, the employe shall be entitled to claim, in addition, as liquidated damages an amount equal to twenty-five percent (25%) of the total amount of wages due, or five hundred dollars (\$ 500), whichever is greater.

43 P.S. § 260.10 (emphasis added). The proper interpretation of section 260.10 is a question of law for which our standard of review is *de novo* and our scope of review is plenary. ***Krebs v. United Refining Co. of Pennsylvania***, 893 A.2d 776, 787 (Pa. Super. 2006).

The underlying purpose and intent of the WPCL is to remove some of the obstacles employees face in litigation by providing them with a statutory remedy of an employer’s *breach of its contractual obligation* to pay wages. ***See Laborers Combined Funds v. Mattei***, 518 A.2d 1296 (Pa. Super. 1986) (emphasis in original); ***compare*** 43 P.S. § 260.1 (WPCL authorizes legal action to collect *contractually agreed upon* wages) ***with*** 43 P.S. §§ 333.101 (Pennsylvania’s Minimum Wage Act authorizes legal action to collect

employees' *statutorily* guaranteed wages). "The WPCL does not create an employee's substantive right to compensation; rather, it only establishes a statutory vehicle to enforce payment of wages and compensation to which an employee is otherwise entitled by the terms of an agreement." **Scungio Borst & Assocs. v. 410 Schurs Lane Dev., LLC**, 106 A.3d 103, 109 (Pa. Super. 2014) (en banc). Therefore, the right to recover wages "earned" by employees upon separation from employment under the WPCL is a statutory remedy which *supplements* rather than *supplants* a common law action for breach of contract. 43 P.S. § 260.9a(a); **Laborers Combined Fund, supra** at 1299.

In **Thomas Jefferson Univ. v. Wapner**, 903 A.2d 565 (Pa. Super. 2006), our Court noted that:

The WPCL is not only a vehicle for recovery of unpaid wages; *it also provides for damages in the event an employer withholds compensation in the absence of good faith.* Thus, if for instance an employer withholds wages based on a dispute with the employee that would result in a set-off, the employer's reliance on the set-off must be held in good-faith. *Otherwise, the employee is entitled to additional, liquidated damages pursuant to the statute[.]*

Id. at 574 (emphasis added). Good faith, under section 260.10, must be proven by the employer by clear and convincing evidence. **Id. Cf. Oberneder v. Link Computer Copr.**, 674 A.2d 720 (Pa. Super. 1995), *aff'd*, 696 A.2d 148 (Pa. 1997) (by contrast, WPCL attorneys' fees provision, section 260.9a(f) not conditioned upon finding of bad faith by employer and fees are mandatory for successful plaintiff).

Instantly, the trial court relied upon ***Signora v. Liberty Travel***, 886 A.2d 284, 298 (Pa. Super. 2005), to support its decision to deny Andrews' request for liquidated damages. In ***Signora***, a jury awarded the plaintiff overtime pay and interest, in addition to punitive damages and compensatory damages on her wrongful termination claim. The trial court refused to instruct the jury on the issue of liquidated damages under the WPCL.¹⁷ On cross-appeal, the plaintiff argued that she was entitled to both pre-judgment interest pursuant to the WPCL and Pennsylvania's Minimum Wage Act (PMWA) and liquidated damages under the WPCL. Ultimately the ***Signora*** court concluded that the trial court properly restricted the plaintiff's right to recover only interest *under the PMWA*. In so holding, the Court noted that "the [WPCL's] provision for liquidated damages applies to instances where interest is not separately awardable" and that because the plaintiff was entitled to interest, "the additional award of liquidated damages would constitute dual payment, or a windfall." ***Id.***

In ***Frederich v. U.S. Computer Sys., Inc.***, 1995 U.S. Dist. LEXIS 9791 (E.D. Pa. July 10, 1995), the case relied upon by the ***Signora*** Court, plaintiffs sought both interest on the back pay awarded under the PMWA and

¹⁷ Notably, the PMWA does not provide for liquidated damages as a civil remedy.

liquidated damages under the WPCL.¹⁸ Because the PMWA is silent on the issue of interest, the court looked to provisions of the Fair Labor Standards Act (FLSA)¹⁹ to analyze whether interest on unpaid overtime wages was recoverable under the PMWA. The court recognized that the case involved “the interplay between recoveries available under the WPCL and PMWA[,]” *id.* at *3, and noted that the issue had not yet been decided by the Pennsylvania Supreme Court. Quoting a United States Supreme Court decision, ***Brooklyn Savings Bank v. O’Neil***, 324 U.S. 697 (1945), the ***Frederich*** Court stated, “the liquidated damages provision [of the FLSA] is not penal in nature but constitutes compensation for the retention of a workman’s pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages.” ***Brooklyn***, 324 U.S. at 707. The Court found that it would be inconsistent to allow an employee to recover basic statutory wage and liquidated damages under section 16(b) of the FLSA, with interest, “in view of the fact that interest is customarily allowed as compensation for delay in payment.” *Id.* at 716.²⁰

¹⁸ Because the action was before the court based on diversity jurisdiction, it was decided under Pennsylvania state law. ***Erie R. Co. v. Tompkins***, 304 U.S. 64 (1938).

¹⁹ 29 U.S.C.S. § 201, et seq.

²⁰ Unlike the liquidated damages provision of the WPCL, the liquidated damages provision of the FLSA does not require an employer to prove that he or she acted in good faith in order to prevent an employee from recovering liquidated damages. Rather, the relevant FLSA subsection provides that when an employer violates section 6 or 7 of the Act, “he or she
(Footnote Continued Next Page)

In **Braun v. Wal-Mart Stores, Inc.**, 24 A.3d 875 (Pa. Super. 2011), *aff'd*, 106 A.3d 656 (Pa. 2014),²¹ our Court also addressed the liquidated damages provision of the WPCL, stating:

Pennsylvania courts have . . . acknowledged the compensatory purpose of the WPCL's liquidated damages provision. The **Signora** Court, for example, adopted the rationale of **Friedrich v. U.S. Computer Sys., Inc.**, [] 1995 U.S. Dist. LEXIS 9791 (E.D. Pa. July 10, 1995), which relied on **Brooklyn Sav. Bank v. O'Neil**, 324 U.S. 697 [] (1945)], and concluded that "both the liquidated damages and pre-judgment interest are intended to compensate for the loss of use of the proper amount of wages payable" and such damages are not "punitive in nature." **Signora**, [at] 296; **see also Oberneder v. Link Computer Corp.**, [] 674 A.2d 720, 722 (Pa. Super. 1996) ("**Oberneder I**") (noting "the primary goal of the WPCL is to make whole again[] employees whose wages were wrongfully withheld by their employers"); **accord Ambrose v. Citizens Nat'l Bank of Evans City**, [] 5 A.3d 413, 420 (Pa. Super. 2010) [].

Id. at 961.

(Footnote Continued) _____

shall be liable to the employee . . . affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C.S. § 216(b). Therefore, we find that these two provisions are not analogous as one is an automatic recovery once a plaintiff establishes a right to pay under the FLSA and the other statute requires a separate finding that an employer did not act in good faith.

²¹ Our Supreme Court granted allowance of appeal on the following issues: (1) whether Wal-Mart was subjected to a "trial by formula"; and (2) whether Appellees were thereby improperly relieved of their burden to produce class-wide common evidence on key elements of their claims. **Braun**, 106 A.3d at 659. Therefore, the issues of liquidated damages and prejudgment interest were neither before the Court nor decided by the Court.

Although not binding on this Court, we find instructive a United States Court of Appeals for the Third Circuit decision that determined whether a good faith dispute under the WPCL precludes a successful plaintiff from collecting attorneys' fees under the statute. In concluding that a prevailing party may still recover attorneys' fees in such a situation, the court noted:

A careful analysis of the WPCL indicates that a finding of a good faith dispute between and employer and an employee should not preclude a plaintiff from filing a claim for attorney[s'] fees and costs. 43 P[.S.] § 260.9a(f) expressly authorizes the payment of reasonable attorney[s'] fees and costs for any action brought pursuant to the statute. Conversely, the liquidated damages statute, § 260.10, does not mention attorney[s'] fees at all. **The liquidated damages statute [of the WPCL] is essentially a penalty provision aimed at deterring employers who, in bad faith, withhold legitimate payment to its employees** – it is not applicable to the issue of attorney[s'] fees. The good faith/bad faith issue relates to the liquidated damages provisions under § 260.10 which stands separately from the issue of attorney[s'] fees and costs.

Barnhart v. Compugraphic Corp., 936 F.2d 131, 133 (3d Cir. 1991)

(emphasis added).²² We find the ***Barnhart*** Court's analysis of the WPCL, in

²² Recently, Senator Christine M. Tartaglione co-sponsored a bill to amend the WPCL; the bill was referred to the Committee Labor and Industry on January 28, 2015. **See** 2015 Pennsylvania Senate Bill No. 198, Pennsylvania One Hundred Ninety-Ninth General Assembly – 2015-2016 (Jan. 28, 2015). The amendments were proposed in order to "improve employer adherence to the law with regard to payment of employee wages . . . [and] to establish a self-funding means of increasing enforcement of and reporting on this law by the Department of Labor and Industry." Senate Co-Sponsorship Memoranda, Sen. Christine M. Tartaglione, (posted Dec. 1, 2014). To accomplish the purpose of "bring[ing] the [Act] into alignment with wage payment laws in other states," the legislation would "rais[e] penalties for violators and repeat offenders under the law." ***Id.***
(Footnote Continued Next Page)

particular regarding the liquidated damages provision, to be consistent with the purpose behind the Act. Specifically, the WPCL is intended to provide a vehicle for successful plaintiffs to be compensated for unpaid back wages based upon an existing contractual obligation; however, the statute's liquidated damages provision is available to only a subset of those prevailing plaintiffs who can also prove that they are entitled to damages as a result of an employer having no good faith defense to wages remaining unpaid for a set amount of time under the statute.²³ Section 260.10 is intended to be a disincentive or penalty for employers to withhold wages in bad faith.

(Footnote Continued) _____

The following bolded text represents the proposed amendments to section 260.10:

[T]he employe shall be entitled to claim, in addition, as liquidated damages an amount equal to [~~twenty-five percent (25%) of the total amount of wages due, or five hundred dollars (\$500), whichever is greater.~~] **twice the underpaid wages due or one thousand dollars (\$1,000), whichever is greater. Each week in which an employe is paid less than the applicable wage under this act shall constitute a separate violation which shall be subject to a separate penalty.**

Notably, the text indicates that the award of liquidated damages is penal in nature.

²³ In adopting this reasoning, we implicitly overrule our Court's analysis of section 260.10 in *Signora* where the panel looked to unrelated federal statutes and whether interest on unpaid overtime wages was recoverable under them. **See *M.A.T. v. G.S.T.***, 989 A.2d 11 (Pa. Super. 2010) (Superior Court, sitting en banc, may overrule the decision of a three-judge panel of the Court).

Instantly, the court awarded Andrews interest on his breach of contract action, not his WPCL claim. It is well-established that in a contract action, an award of prejudgment interest does not depend upon discretion, but is a legal right and must be awarded despite the good faith of the party contesting the claim. ***Gold & Co., Inc. v. Northeast Theater Corporation***, 421 A.2d 1151, 1154 (Pa. Super. 1980). The purpose of awarding interest as damages is:

to compensate an aggrieved party for detention of money rightfully due him or her, and to afford him or her full indemnification or compensation for the wrongful interference with his or her property rights. The allowance of interest as an element of damages is not punitive, but is based on the general assumption that retention of the money benefits the debtor and injures the creditor.

Cresci Constr. Servs. v. Martin, 64 A.2d 254, 261 (Pa. Super. 2011), citing 25 C.J.S. Damages, § 80. ***See Fernandez v. Levin***, 548 A.2d 1191, 1193 (Pa. 1987) (right to interest upon money owing upon contract, or prejudgment interest, begins at time payment is withheld after it has been duty of debtor to make such payment). ***See also Pittsburgh Constr. Co. v. Griffith***, 834 A.2d 572 (Pa. Super. 2003) (in contract cases, statutory prejudgment interest awardable as of right).

Although Andrews received prejudgment interest under his breach of contract claim for unpaid wages, he is not precluded from recovering liquidated damages under the WPCL. As noted, the WPCL is **a supplementation to and not a substitute for one's common law cause of action for breach of contract. *Laborers Combined Funds, supra.***

Moreover, the two recoveries, prejudgment interest and liquidated damages, are distinct awards made for different purposes. Prejudgment interest compensates an employee for the injury sustained due to delayed payment of wages and a liquidated damages award represents damages due to an employer's lack of good faith in withholding past wages. To read section 260.10 any other way would render the liquidated damages provision meaningless where statutory interest is a legal right under a breach of contract action and would result in a constrictive interpretation of the WPCL. **See Braun, supra** at 960 (in line with purpose of making employees whole, we must "construe the WPCL liberally.").

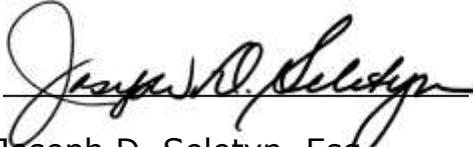
Instantly, the trial court charged the jury with regard to the burden of proof for liquidated damages under the WPCL. N.T. Jury Trial, 8/30/13, at 96-97. Because the jury returned a verdict finding that Defendants did not act in good faith when they failed to pay Andrews under the Agreement, **id.** at 121, 123; **supra** note 6, Defendants did not meet their burden of proof to show, by clear and convincing evidence, that they acted in good faith. **Thomas Jefferson, supra**; 43 Pa.C.S. § 240.10. Accordingly, Andrews is entitled to liquidated damages under the WPCL. Therefore, we reverse that portion of the judgment denying his request for liquidated damages and remand for the proper calculation of such damages in accordance with section 260.10 of the WCPL.

Order affirmed in part and reversed in part in accordance with the dictates of this decision. Jurisdiction relinquished.

President Judge Emeritus Ford Elliott, President Judge Emeritus Bender, Judge Panella and Judge Ott join in this Opinion.

Judge Bowes files a Dissenting Opinion joined by Judge Shogan, Judge Olson and Judge Dubow.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/21/2017