MEDRDAD JON JAHANSHAHI, SHAHROKH NAGHDI and HAPPY VALLY ROASTERS, INC., Petitioners	:	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, Pennsylvania
vs.	:	NO. 99-00,899
CENTURA DEVELOPMENT CO., INC. and KEITH L. ECK, Individually and as President of Centura Development Co., Inc., Respondents	:	1925(a) OPINION

***Date*: February 7, 2002**

OPINION IN SUPPORT OF THE ORDER OF JUDGMENT ENTERED OCTOBER 29, 2001, IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

PROCEDURAL AND FACTUAL BACKGROUND

In this action Plaintiffs seek to recover loss of profits and reimbursement of expenses arising out of Defendants' breach of an agreement to lease Plaintiffs a restaurant building. A jury awarded Plaintiffs total damages of $77,850 after a jury trial held May 16 through 22, 2001. Both parties have now taken an appeal of this Court's trial and pretrial rulings, raising the same issues presented to this Court in their respective Post-Trial Motions.

1. Pretrial Proceedings

Plaintiffs initiated this action by filing a Complaint on June 11, 1999 asserting Defendant Centura Development Company, Inc. (hereafter "Defendant Centura") Defendant Keith L. Eck, (hereafter "Defendant Eck") individually, and as President of Defendant Centura had failed to consummate an agreement to enter into a lease for a commercial property at 1915 East Third Street, Williamsport, Lycoming County, Pennsylvania known as the Hardee's restaurant building, owned by Defendant Centura. Plaintiffs, as tenants, intended to use the

building to open a new Kenny Rogers Roasters' restaurant. The initial Complaint contained three counts against both Defendants. Count 1 asserted a breach of contract claim related to Defendants' failure to consummate the lease, which refusal was the basis of a claim for detrimental reliance under Count 2. Count 3 was also a breach of contract claim against both Defendants' for failure to reimburse Plaintiffs' out-of-pocket expenses incurred in anticipation of entering into the lease.

The Complaint allegations included that: negotiations for the lease of the building began in September of 1996 and continued through July 8, 1997 when Plaintiffs signed the Lease prepared by Defendants and given to them by Defendant Eck; Plaintiffs were orally assured at that time by Defendant Eck that the Defendant Centura had agreed to the Lease and would be executing it; from the time of the beginning of negotiations through and after July 9, 1997 Plaintiffs had done various acts and incurred various expenses in good faith reliance upon the assurances made by Defendants that the Hardee's building would be leased to them; Plaintiffs incurred $120,717 in damages -- $70,000 lost profit for the first year of operation, derived from site analysis and demographic studies; $50,717 expended in preparation to convert the building from a Hardee's restaurant and open a Kenny Rogers Roasters' restaurant consisting of: $18,000 paid to an architect to design the conversion; $28,000 for the purchase of equipment; $2,500 for attorney's fees to incorporate Happy Valley Roasters, Inc.; $2,000 minimum travel costs meeting with the upper management of Kenny Rogers Roasters, Inc.; and $217 for the costs of copies and postage Defendant charged Plaintiffs on or about July 12, 1997. The Complaint also sought court costs and interest from the date of the contract. The Complaint goes on to assert Defendant Eck, acting on behalf of

Defendant Centura notified Plaintiffs on or about July 22, 1997, that he had changed his mind and was withdrawing the agreement to lease the Hardee's building to Plaintiffs because he had received a purchase offer of $750,000 for the building from an undisclosed buyer. Plaintiffs, in Count 3, further contended that Defendant Eck, at the time he withdrew from the lease agreement, made statements to Plaintiffs promising that he and his corporation would pay Plaintiffs' out-of-pocket expenses "if Plaintiffs would hold on, not complain about the change in plans, and be ready to sign the lease agreement if the $750,000 [offer] did not germinate." Subsequently, the Hardee's building was torn down and replaced by an Eckerd Drug building.

Defendants filed preliminary objections to the Complaint on June 30, 1999, demurring to all claims and also moving to strike or obtain a more specific pleading as to the identity of the Plaintiffs, as well as to the damages sought in the Complaint. On November 8, 1999, an order with opinion was filed which denied Defendant Eck's demurrer as to personal liability. This Court held that Plaintiffs had not pleaded sufficient facts to justify piercing the corporate veil, but citing ***Village at Camelback v. Carr***, 538 A.2d 528, 533 (Pa. Super. 1988), found Plaintiffs had made minimal allegations to support a finding that Defendant Eck was personally liable on a participation theory. The Court also refused to grant Defendants' demurrer that because there was no lease signed by all the parties, there was no contract, determining that Pennsylvania law holds, if the parties orally agree to all the terms of a contract between them and mutually expect the imminent drafting of a written contract reflecting their previous understanding, the oral contract may be enforceable, as ***Kazanjian v. New England Petroleum Corp.*** 480 A.2d 1153, (Pa. Super. 1984) and ***Creeger Brick v. Mid-State Bank***, 560 A.2d 151 (Pa. Super. 1989). The Court also relied upon §205 of the Restatement (Second) of

Contracts suggests that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *See*, ***Creeger Brick*** at 153-154.

The motion for a more specific pleading was granted.

On December 17, 1999, Plaintiffs filed their "First Amended Complaint" which listed Mehrdad Jon Jahanshahi, Shahrokh Naghdi and Happy Valley Roasters, Inc. as Plaintiffs. Plaintiffs re-pleaded all their original claims. Plaintiffs also added a count of misfeasance to their original Complaint. Plaintiffs attached a copy of the Lease Agreement they had signed to the Amended Complaint.

On February 15, 2000, Defendants filed an Answer and New Matter. In their Answer, Defendants characterized the various meetings, including the one on July 7, 1997, as negotiations. Defendants maintained there could be no contract because Defendants never signed the Lease. In their New Matter, Defendants pleaded that Plaintiffs' Complaint failed to allege the necessary elements of a contract; the defense of a lack of consideration; and also that the Statute of Frauds barred Plaintiffs' claims. On February 25, 2000, Plaintiffs filed an answer to the New Matter, asserting all new matter was a legal conclusion.

The parties agreed in March 2000, by an Order entered March 13, 2000, that trial, which had originally been scheduled for the September 2000 trial term, would be postponed until the January 2001 trial term with pretrial conference in December 2000 and discovery to be completed by October 20, 2000.[1] On May 26, 2000, Plaintiffs filed a Motion to Compel Answers to Interrogatories and Request for Production of Documents. It was Plaintiffs' position that they needed corporation documents to demonstrate that Defendant Eck

[1] The Court's civil trial terms are held in January, May and September of each year.

should be held individually liable under the theory of piercing the corporate veil. Defendants objected to the requests as being overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. On June 20, 2000, the Court issued an Opinion and Order granting Plaintiffs' motion.

On June 28, 2000, Plaintiffs' counsel filed a Petition for Leave to Withdraw as Counsel. The reasons listed were that Plaintiffs had failed to pay their counsel and that disagreement had arisen as to how to resolve the matter. On July 10, 2000, the Court issued an order granting the petition. That Order noted the case was listed for the December 2000 trial term (pretrial in December and trial in January), and set dates for cutoff of discovery. As of December 2000, Plaintiffs had retained their eventual trial counsel.

On November 2, 2000, Defendants had filed a Motion for Summary Judgment. Argument was held on the summary judgment motion along with a pretrial conference on December 20, 2000. At the time of the pretrial conference the case was set for trial on the dates of January 8th-26th. At the conference a continuance request had been made by Plaintiffs in order to allow new counsel more time for discovery and trial reparation. Defendants opposed the continuance. The Motion was denied on December 22, 2000 (filed January 2, 2001). Subsequently, a request for a continuance because of Plaintiffs' mother being hospitalized, out of the country, was not opposed and a continuance to the May 2001 trial term was granted by an Order of January 4, 2001 (filed January 10, 2001).

In their summary judgment motion Defendants had asserted all Plaintiffs' claims should be dismissed as a matter of law because the Statute of Frauds requires a lease agreement such as the one in the instant case to be in writing. Defendants further argued the changes to

the lease marked on the copy attached to Plaintiffs first amended complaint conclusively indicated that there was never a meeting of the minds between the parties and as a result, no clear and definite terms emerged which could lead to the creation of a lease agreement. On the issue of personal liability of Eck, Defendants argued that Plaintiffs had not come forward with any evidence to support liability by piercing the corporate veil or by participation and, therefore, personal liability could not be imposed as a matter of law. Defendants also attacked Plaintiffs' claim of detrimental reliance on two fronts. First, Plaintiffs were experienced businessmen making their reliance on statements by Defendant Eck unreasonable. Secondly, when purchasing equipment, Plaintiffs could not have relied on the lease because some of the purchases were made before the signing and the other purchases were made with the knowledge that Defendants had not signed the lease. Defendants further argued the claim to reimburse Plaintiffs' out-of-pocket expenses should be dismissed because Plaintiffs had failed to provide sufficient proof of the damages alleged in their complaint. Defendants especially argued that Plaintiffs never provided any documentation to substantiate the purchase of equipment claim and could not prove damages even if a contract was found to exist between the parties. Defendants did not ask for summary judgment on the misfeasance count of the amended complaint.

Defendants in support of their Summary Judgment Motion submitted various pages of the deposition of Plaintiff Jahanshahi. Plaintiffs made no formal response to the summary judgment motion. Both parties briefed the motion. Plaintiffs' brief had attached copies of two resolutions of Defendant Centura showing Defendant Eck to be the sole operator of the corporation. Plaintiffs also relied on the deposition of Plaintiff Jahanshahi submitted by

Defendants to argue there was sufficient evidence on each claim that had been presented to create a genuine dispute of material facts on all issues.

The Court issued an Opinion and Order disposing of the Summary Judgment Motion on March 29, 2001. Relying on the principles of law enunciated in ***GMH Associate, Inc. v. Prudential Realty Group***, 739 A.2d 889, 900 (Pa. Super 2000) citing ***Shovel Transfer & Storage, Inc. v. PLCB***, 739 A.2d 133, 138 (1999), but distinguishing the factual basis for the decision in ***GMH*** this Court denied the Summary Judgment Motion based upon Defendants not having signed the lease. The Court found Plaintiffs had presented sufficient evidence from which a jury could conclude that the parties had agreed to the essential terms of the contract and also that Defendants had become obligated to execute the Lease and were bound by its terms as of July 9, 1997.

This Court also denied the Motion to Dismiss Plaintiffs' detrimental reliance claim on the basis that whether or not Plaintiffs were indeed sophisticated businessmen or did rely on Defendants' representations were issues for the trier of fact to decide. Further, the Court held even sophisticated businessmen may have a right to rely on the representation of similarly sophisticated businessmen.

This Court further found that a factual dispute existed as to whether or not Plaintiffs engaged in purchasing equipment for their venture based on Defendants' actions, which, once again, was a dispute for the trier of fact to decide.

This Court, however, granted the summary judgment motion and dismissed the claim of personal liability made against Defendant Eck based on piercing the corporate veil but permitted the personal liability claims based on the participation theory to proceed to trial. In

so holding this Court again relied upon ***Village of Camelback v. Carr***, 538 A.2d 528, 532-33 (Pa. Super. 1988) aff'd 572 A.1d 1 (1990). In ***Village at Camelback***, *supra*, at p.13, the Pennsylvania Supreme Court contrasted "piercing the corporate veil" from "participation theory," stating:

> There is a distinction between liability for individual participation in a wrongful act and an individual's responsibility for any liability-creating act performed behind the veil of a sham corporation. Where the court pierces the corporate veil, the owner is liable because the corporation is not a bona fide independent entity; therefore, its acts are truly his. Under the participation theory, the court imposes liability on the individual as an actor rather than as an owner. Such liability is not predicated on a finding that the corporation is a sham and a mere alter ego of the individual corporate officer. Instead, liability attaches where the record establishes the individual's participation in the tortuous activity.

A further pretrial conference was held on April 3, 2001. The case was listed for trial in the May trial term. Defendants filed a Motion in Limine on April 30, 2001, seeking to exclude any testimony from Plaintiffs concerning claims for future lost profits and expert testimony concerning lost profits and to limit Plaintiffs' evidence in the case to documents that had been produced during discovery. For reasons noted on the record after argument, *see* N.T., May 17, 2001, pp. 5-44, an Order of May 17, 2001, granted the Motion in Limine precluding Plaintiffs from introducing evidence and obtaining damages relating to expenses made for equipment purchases in anticipation of opening the restaurant in the Hardee's building. This same Order denied Defendants' Motion in Limine, which sought to exclude testimony and dismissal of Plaintiffs' claim for loss of profits.

During trial, on May 21, 2001, the Court entered an Order, which granted Defendants' Motions for Non-Suit as to the personal responsibility of Defendant Eck under

Count I relating to the failure to enter into the original lease for the Hardee's building. The Court also ruled in favor of Defendants that Plaintiffs could not recover loss of profits as an item of damage under Count III, which related to the oral contract of July 22, 1997, in which it was asserted Defendants had promised Plaintiffs to reimburse them for their out-of-pocket expenses. Also, by a separate Order entered at trial on that date, the Court denied Defendants' Motions for a compulsory non-suit, directed verdict and dismissal of Plaintiffs' claims.

2. Trial Testimony (Facts).

At trial the testimony was sufficient to establish the following facts. In September 1996, Plaintiff Mehrdad Jon Jahanshahi entered into negotiations with Defendant Eck, owner of Defendant Centura to lease Defendant Centura's property located at 1915 East Third Street, Loyalsock Township, Lycoming County, Pennsylvania, which was then a vacant Hardee's Restaurant. Plaintiffs intended to remodel the Hardee's into a Kenny Rogers Roasters' restaurant and then operate it. To this end, Plaintiff Jahanshahi and Plaintiff Naghdi joined as business partners in January 1997. In February 1997, Plaintiffs Jahanshahi and Naghdi incorporated as Happy Valley Roasters, a Pennsylvania corporation. Plaintiffs paid $2,500 in legal fees for this incorporation and other legal services during the negotiations. Between September 1996 and July 1997, Defendant Eck orally assured Plaintiffs the property would be leased to them so that Plaintiffs could operate the Kenny Rogers Roaster restaurant. Defendant Eck led them to believe they were the only prospective tenant. However, during the time Defendant Eck was negotiating with Plaintiffs he also was actively soliciting at least two others to lease or buy the building. Also during this period, September 1996 to March 1997, Plaintiffs

and members of the Kenny Rogers Roasters main office performed several site inspections, site analysis, and demographic studies.

Plaintiff Jahanshahi, using this information, undertook the preparation of a business plan to demonstrate the economic vitality of the proposed restaurant. The plan was based upon the demographic information he had gathered and his experiences with the restaurant business. The plan also included information given to him by Kenny Rogers Roasters. The plan was used by Plaintiffs to obtain financing and also presented to Defendants during the lease negotiations. Defendant Eck reviewed the business plan and thought it was good and that in fact profits would exceed what was shown in the plan. For example, *see*, N.T. 5/20/01, pp. 322-33; *see also*, N.T. 5/21/01, pp. 330-334. The business plan projected first year profits at $140,000. Plaintiffs testified they were only asking the jury to order Defendants to pay them $70,000 for loss profits for one year to be fair and conservative. Defendant Eck also testified regarding lost profits that in his personal opinion the profits that a restaurant makes would be 7-10% of the gross receipts. *See,* for example, N.T. 5/21/01, p. 333. The rent receivable by Defendant Eck was to increase under the terms of the lease contract when gross sales increased. *See,* for example N.T. 5/18/01, pp. 108-110.

In early June 1997, Plaintiffs hired an architect to draft building drawings necessary for the renovations. Both parties agreed that an architect was hired but there was disagreement concerning exactly when it occurred. Defendants maintained that the architect was hired at a "much earlier time." Plaintiffs produced a receipt for these fees.

Between September 1996 and July 1997, the parties exchanged drafts of leases to confirm the final details. Defendant Eck had given Plaintiffs a lease to sign in January and/or

February 1997. Plaintiffs declined Defendants' request to sign that version of the lease and requested changes in the base rent provisions.

A version of the lease was prepared by Defendants and stored on the computer in Defendants' office. By July 9, 1997 all the major terms of the lease had been agreed to and incorporated into a writing ready for the party's signatures. On that date, Plaintiffs and Defendant Eck met in Defendants' office. Defendants presented Plaintiffs with a printed copy of the lease, which had been generated by Defendants' computer. At that time, Plaintiffs requested certain changes be made to the lease, some of which they maintained Defendant Eck had previously agreed upon. The changes Plaintiffs requested and Defendant Eck agreed upon were then made by handwritten notations and inter-lineations and then initialed by Plaintiffs. Plaintiffs signed the lease. After Plaintiff Naghdi signed, he pushed the lease toward Defendant Eck for him to sign. Defendant Eck did not sign but indicated he would mail Plaintiffs a signed copy.

The written lease agreement, as it was signed by Plaintiffs on July 9, 1997, is entitled "Lease Between Centura Development Co., Inc. [address omitted] and Happy Valley Roasters, Inc. [address omitted] for Loyal Plaza 1915 East Third Street, Williamsport, Pa 17701." It is 43 pages in length. It contains detailed and extensive rent provisions. It also contains clauses pertaining to taxes, use of premises, insurance, construction of new building, restoration of fire damage, repairs and maintenance by tenant, landlord's right of entry, non-abatement of rent, net lease, utility charges, governmental regulations, mechanic's liens, indemnification of landlord, quiet enjoyment, condemnation, assignment and subletting, tenant's certificate, subornation and atonement, curing tenant's defaults, notices, adverse

possession, surrender, bankruptcy, events of default, brokers, access by landlord, miscellaneous, rules and regulations, no merger, captions, entire agreement, interpretation, definition of landlord, and definition of tenant. Plaintiffs initialed every page and both Plaintiffs signed and dated (July 9, 1997) the signature blocks on page 43. On page 2, there are two changes. The first change is a date change, the "1" in the 1st day of July is being crossed out and the "9th" handwritten in above it. The second change is on line 44 where 90 days was scratched out and the number 120 were handwritten above it. Plaintiffs testified this change gave them an additional 30 days to complete renovations before opening for business and was agreed by Defendants, both prior to and on July 9th. On page 12 line 719, there is a similar change wherein "90" was scratched out and "120" inserted. This clause also pertained to the time period when the Plaintiffs were scheduled to open the restaurant. There is a change on pages 41-42 lines 2797 to 2801 where a clause was completely scratched out. The remaining portion of the clause reads, "tenant shall have the absolute right to assign, sublet or otherwise transfer its interest in the Lease to a Kenny Rogers Roasters licensee, franchisee, or to Roasters Corporation or any subsidiary of Roasters Corp. without Landlord's approval[,]." Plaintiffs testified they had requested the deletion from the lease because the deleted portions were not within the standard terms of Kenny Rogers Roasters' leases and that Defendants had agreed to change to satisfy the Kenny Rogers requirements.

Prior to the July 9, 1997 meeting at which Plaintiffs had signed the lease, Plaintiffs had purchased some equipment to be used in the restaurant. They had also made many trips to Kenny Rogers Roasters headquarters and to the building site and Defendants' offices. On or around July 12, 1997, Plaintiffs used Defendants' office to make ten sets of

copies of the building drawings and using postage purchased from Defendants mailed out five sets to contractors. Defendants charged the Plaintiffs $217 for the use of the copier and postage. On July 18, 1997, Plaintiffs, believing they had a valid lease, traveled to New York to attend a Kenny Rogers Roasters restaurant auction, where they purchased equipment and made a commitment to purchase more the following week.

On July 22, 1997, Defendant Eck orally informed Plaintiff Jahanshahi that he had changed his mind and was not going to lease the premises to them. Instead Defendant Eck stated he had received an offer to purchase the building from an undisclosed buyer for $750,000, a deal he had always wanted. Defendant Eck was always looking to use a signed lease to negotiate a better deal, one that he was always looking for with Eckerd Drug Company. *See* for example N.T. 5/18/01, pp. 14-15.

Defendants subsequently constructed a new building at the Hardee restaurant site and leased it to Eckerd Drugs, Incorporated.

3. ***Jury Findings.***

In answering special verdict questions the jury found that Defendant Centura had formed an oral contract with Plaintiffs to enter a written lease agreement for the Hardee's building and also found there was a sufficient writing as related to that lease agreement so as to satisfy the Statute of Frauds. The jury then found that Defendant Centura breached the oral contract to enter into the lease and also breached the lease contract that was supported by the Statute of Frauds. The jury's verdict further found that Defendants Centura and Eck had formed an oral contract with Plaintiffs to reimburse them for out-of-pocket expenses and breached that contract, also.

The jury went on to find that Defendants did make fraudulent misrepresentation of material facts to Plaintiffs, which Plaintiffs relied upon, and that the misrepresentations were a substantial factor in bringing harm to Plaintiffs. The jury further found that in doing so Defendants Centura and Eck committed misfeasance. The jury rejected the claims that the conduct of Defendants were outrageous and did not award any punitive damages. The jury's verdict on the claims where liability was established awarded Plaintiffs $70,000 for loss of profits and $7,850 for out-of-pocket expenses.

4. Post-Trial Proceedings.

Defendants' Motion for Post-Trial Relief was timely filed on May 30, 2001 (being incorrectly docketed as a "Petition for Injunctive Relief Filed"). Plaintiffs filed Post-Trial Motions on May 31, 2001. The Motions were set for argument on August 21, 2001, by Orders filed on June 12th and 14th, respectively. The Orders also included a briefing schedule. Plaintiffs, in compliance with the schedule, filed a brief on July 30, 2001. Defendants did not file a brief on post-trial motions until October 24, 2001, the date the arguments were eventually held, as set forth below.

On May 30th Defendants also filed a request that the entire transcript be prepared, including argument of counsel, and the charge to be prepared to aid in the disposition of the post-trial motions. On June 29th Defendants paid the necessary deposit for the preparation of the transcripts. At that time the Court Reporter responsible for three of the four days of the trial was on an extended leave. The Court Reporter who was not on extended leave completed the transcript of the May 17th proceedings on or about August 7, 2001 and it was then made available to counsel, although not filed of record until November 19, 2001. The

remaining portions of the transcript were completed in stages with transcripts finally being completed and filed of record as of October 1, 2001.

The parties stipulated to a continuance of the argument date and the post-trial motions were reset for argument on September 25, 2001 to allow the transcripts to be completed. On September 25, 2001, at the request of both counsel, argument was again continued until October 24, 2001. The briefing schedule was re-established. Argument was held on October 24, 2001. At that time more than 120 days had passed since the post-trial motions had been filed. Either party would have had the right to file a praecipe for judgment to be entered upon the verdict pursuant to Pa. R.C.P. 227.4. Therefore, the parties entered into a stipulation at the post-trial motions argument, as evidenced by this Court's Order of October 24, 2001 (filed October 26, 2001), which permitted Plaintiffs until November 2, 2001 to file a responsive brief and the Court to then render a decision not later than November 21, 2001. Nevertheless, Plaintiffs filed a praecipe for judgment to be entered on the verdict pursuant to Pa. R.C.P. 227.4 on October 29, 2001 and immediately filed a Notice of Appeal to Superior Court that same date. Defendants filed a notice of cross-appeal on November 4, 2001. This Court issued Orders under Pa. R.A.P. 1925(b) Order directing that a Concise Statement of Matters Complained of on Appeal be filed within fourteen days. Plaintiffs filed such a statement on November 27, 2001 and Defendants filed a statement of the appeal issues on December 13, 2001.

DISCUSSION

Essentially in this Appeal, Plaintiffs are seeking to obtain additional damages for equipment purchases, travelling expenses, punitive damages and pre-judgment interest while

Defendants seek to have judgment N.O.V. entered in their favor. The issues raised on appeal iterate the post-trial motions of the parties. Plaintiffs' Appeal raises two pretrial matters: first, that the Court erred in denying a continuance request (in December 2000) to permit further discovery and amended complaint to possibly be developed by their new counsel. (*See* Plaintiffs' Concise Statement of Matters Complained of on Appeal, paragraph 9); secondly, the Court was in error in its summary judgment ruling which dismissed their claim against Defendant Eck, individually, on the theory of piercing the corporate veil (***Id***., at paragraph 6). Plaintiffs also assert that the Court erred during the trial in the following ways: first, by excluding evidence and precluding Plaintiffs from testifying concerning damages for the purchase of equipment bought in anticipation they would receive the lease because: the decision reversed a summary judgment ruling; there was sufficient evidence to sustain this claim; and, further, Plaintiffs had not committed any discovery violation from failing to disclose this evidence to Defendants prior to trial and even if there was a discovery violation that exclusion of the evidence was an improper sanction. ***Id***, at paragraphs 2, 3 and 4). The second error asserted by Plaintiffs is the ruling dismissing Plaintiffs' claim of loss of profits as a damage element under the third count of the Complaint, the oral promise made on July 22, 1997, Defendants' promise to reimburse Plaintiffs for out-of-pocket expenses (***Id.***, at paragraph 7). The third asserted trial error is that the Court gave an improper punitive damages instruction (***Id***., at paragraph 5). The fourth claimed trial error is that the Court erred in failing to allow Plaintiffs to amend their Complaint regarding fraud, misrepresentation, liability of Defendant Eck, loss of profits, punitive damages and the like, including an improper amendment as would relate to civil fraud and misfeasance claims (***Id***., at paragraph 8). Finally,

Plaintiffs assert a post-trial error was made by the Court refusing to modify the verdict by awarding prejudgment interest at the rate of 6% from the date of the breach of the contract, July 22, 1997. (***Id***., at paragraph 9).

Defendants, on appeal, primarily assert the Court erred in permitting Plaintiffs to pursue their claim as to loss of profits on three grounds: 1) the evidence was insufficient and based upon hearsay; 2) the loss of profits claim evidence was presented only by Plaintiff Jahanshahi, who was not qualified as an expert and was not identified in discovery as an expert who would give this testimony; and 3) the amount of the award was based upon sympathy and lack of evidence since it was only for $70,000, the amount specifically requested at trial by Plaintiffs, as Plaintiffs' only evidence indicated a potential loss of profits of double that amount. (*See*, Defendants' Concise Statement of Matters Complained of on Appeal at paragraphs 2, 3, 4, 5, 8, 9, 11, 12, 14, 15 and 16). Defendants also allege the Court erred in refusing to permit Defendant Eck to testify as an expert in commercial real estate transactions. (***Id.***, at paragraph 13.) Defendants further claim trial error occurred when the Court permitted claims of civil fraud and misfeasance to be presented to the jury because: 1) these claims essentially allowed an amendment of the Complaint which was not requested by Plaintiffs; 2) there was no evidence to support civil fraud or misfeasance; and, 3) misfeasance could not be presented to the jury as an independent cause of action for the award of damages. (***Id***., at paragraphs 19, 20 and 21.) In addition, Defendants challenge the sufficiency of the evidence overall in that there was no factual basis to find them liable and the damages awarded were based on sympathy and the proof of damages was so speculative as to not sustain a verdict. (***Id.***, at paragraphs 1 and 21) and state the Court erred in refusing to grant a directed verdict.

In determining these issues, the evidence must be considered in the light most favorable to Plaintiffs, with Plaintiffs receiving the benefit of every reasonable inference of fact arising from the evidence and with any conflict in the evidence also being resolved in favor of Plaintiffs. *See,* ***Marion Spring Co. v. Muelles Hnos. Garcia Torres, S.A.*** In discussing the appeal issues this Court will group the issues as determined by its rulings during the proceedings, as follows: Part A -- Pretrial Proceedings (summary judgment motion and motion in limine); Part B – Trial Rulings; Part C – Post-Trial Issues.

Part A – Pretrial Proceedings

1. *Piercing the Corporate Veil*

The Court's summary judgment Opinion and Order of March 23, 2001 denied Plaintiffs the right to recover against Defendant Eck, individually, on the basis that the corporate veil should be pierced. Although Defendant Eck was the President and Chief Executive Officer and together with his wife, the sole shareholder and she the only other officer, the Court found that the evidence of the corporation being a sham was not sufficient to allow the presumption of no personal liability on the part of Defendant Eck to be overcome. There was no evidence made available by Plaintiffs to show Defendant Centura was insufficiently capitalized nor that it was the mere personal extension or alter ego of Defendant Eck. Instead, if anything, the corporate resolutions of Defendant Centura submitted through Plaintiffs' summary judgment brief tended to establish that Defendant Eck followed corporate procedures in dealing with important transactions as opposed to acting personally. The Court's reasoning in this regard is set forth fully in the summary judgment opinion, of March 29, 2001, at pages 11-13.

2. ***Plaintiffs' Special Damage Claims*.**

Defendants sought to prevent Plaintiffs from recovering special damages through both their summary judgment motion and motion in limine. As special damages Plaintiffs claimed out-of-pocket damages in the amount of $26,581.50 expended to purchase equipment in anticipation of opening a restaurant under the Lease Agreement. Plaintiffs also sought to recover $2,500 in traveling expenses incurred by them in preparing to open the restaurant, plus architect fees, attorney and incorporation fees and for costs of copies and postage paid to Defendants.

Defendants' summary judgment motion (filed November 2, 2000) asserted Plaintiffs had not developed any evidence in pretrial discovery which supported their claim to the $50,717 damage figure in the Complaint for individual expenses. (*See*, Summary Judgment Motion, Count IV, paragraphs 30-36.) The Motion was denied by Order of March 23, 2000, on the basis the claim was a factual dispute to be raised at trial. Defendants' Motion in Limine, (filed April 30, 2001), argued at the beginning of trial, again sought to preclude Plaintiffs from giving testimony of or recovering damages for these items. The basis of Defendants' Motion in Limine objection was that Plaintiffs had never disclosed any evidence that formed the basis of these damage claims nor how they were calculated, nor had they forwarded any documentary evidence in support of these damages at any time prior to the commencement of trial despite Defendants' diligently pursuing that information in pretrial discovery. *See*, N.T. 5/17/01, pp. 5-17 and Motion in Limine filed April 30, 2001.

Defendants asserted prejudice as a result of the information not being timely disclosed prior to trial in that they had no way to investigate or verify the validity of these items

of damage nor obtain evidence which could challenge the asserted amounts. Plaintiffs contended the request for the information was not made in pretrial discovery. When the Motion in Limine was argued this Court found otherwise based upon the interrogatories and pretrial depositions of Plaintiffs. It became clear at trial Plaintiffs had made no response in pretrial discovery, which established any documentary basis for awarding damages for equipment purchases nor travel expenses. Such information was sought by Defendants so as to prepare a defense at trial as early as the June 2000 deposition of Plaintiffs. It was also sought through interrogatories in April 2000 and again in July 2000. The interrogatories were specific enough to require the Plaintiffs to produce to Defendants information as to which equipment had been purchased and the cost thereof and what equipment had been subsequently disposed of after the breach occurred. The interrogatories also required Plaintiffs to disclose what trips and travel expenses were incurred, as they specifically asked for the basis of calculating the damage claims of the Complaint. This Court in ruling on the Motion in Limine found the only response made to the Defendants' damage calculation interrogatories was that on April 30, 2001, after the pretrial conference, Plaintiffs' counsel informally handed Defendants' counsel a list of equipment offered at a sale, (Plaintiffs' Exhibits 56 and 57) with asterisks marked as to some of the many items. (*See* N.T., 5/17/01, pp. 9-12, 18-21.) On the day prior to trial Plaintiffs' counsel further clarified orally to defense counsel the specific equipment on the lists, which Plaintiffs had actually purchased, the prices paid and that the items were subsequently sold for $20,000. (*See*, N.T., 5/17/01, p. 12.)

After extensive argument this Court concluded the defense was substantially prejudiced by the failure of Plaintiffs to furnish information as to their equipment purchases

and subsequent sale of its equipment timely (*see*, N.T. 5/17/01, pp. 33-44 for the Court's reasons). The original discovery deadline was in October 2000. There was no testimony by Plaintiffs as to why the information was not made available by that deadline, nor – more importantly – why the information was not disclosed between October 2000 and April 2001, when new trial counsel had been retained as of December 2000. All parties were aware in December 2000 the case would be pre-tried the first week of April and tried in May 2001. The unexcused failure of Plaintiffs to disclose this information before the trial was flagrant and extremely prejudicial. The trial had been delayed five months to benefit Plaintiffs. A further continuance would have meant delaying the trial until September 2001. Even if a continuance had been granted until September, it became clear to this Court that even then Plaintiffs would not be able say with specificity from whom and when they bought equipment nor to whom nor when they sold the equipment. (*See*, N.T. 5/17/01, p. 30.) A continuance was not likely to cure the prejudice to Defendants. Exclusion of the evidence was a proper remedy.

Furthermore, after argument on the Motion in Limine, as to the items of equipment , when the issue was addressed at trial (*see*, N.T. 5/17/01, pp. 5-44) this Court became convinced it had erred in refusing to grant the summary judgment motion. In retrospect it became clear Plaintiffs' response to the Motion had not come forward with any such evidence to support their claim, as they were required to present under Pa. R.C.P. 1035.3. To defeat a motion for summary judgment a party who bears the burden of proof on an issue must introduce sufficient evidence so as to defeat a motion for non-suit on that issue. *See, inter alia,* Pa. R.C.P. 1035.2 and Note thereto. Plaintiffs had not presented any such evidence in response to the Summary Judgment Motion. When the Summary Judgment Motion had been

argued the Court and counsel had concentrated mostly upon the issues related to Defendant Eck's personal liability and the statute of Frauds defense. The Summary Judgment Order holding the factual dispute as to damages should be resolved at trial did not bar this Court from correcting the erroneous ruling in response to Defendants' Motion in Limine.

Accordingly, this Court entered an Order at trial on May 17, 2001 granting Defendants' Motion in Limine excluding Plaintiffs' evidence as would relate to equipment purchases. The Order also reversed its summary judgment Order and excluded Plaintiffs' claims for damages based on equipment purchases. This evidence was also excluded by the Order, as a sanction for failure to disclose the information about equipment purchases in discovery.

Part B – Trial Rulings

1. Evidence of Loss of Profits

The matters complained of on appeal by Defendants for the most part challenge the propriety and sufficiency of Plaintiffs' testimony supporting their claim for loss of profits. *See*, paragraphs 2-5, 8, 9, 11, 12, 14-16 and 21 of Concise Statement of Matters Complained of on Appeal. Defendants' allegations of error assert the testimony concerning loss of profits was insufficient as a matter of law, was speculative, was based upon hearsay, came from Plaintiff Jahanshahi who was improperly qualified as an expert and such testimony was introduced in contravention of discovery.

Defendants also argue the jury's award of lost profits of $70,000 was based on conjecture and sympathy. Defendants initially sought to limit Plaintiffs' evidence about lost profits in their Motion in Limine filed April 30, 2001, which asserted that such a claim

required introduction of expert testimony and that at no time during discovery had Plaintiffs supplied the name and/or report of an expert witness to testify as to future lost profits. The Motion, therefore, sought to preclude all testimony of Plaintiffs regarding the claim for future lost profits and asserted Plaintiffs themselves were not competent to testify to the matter. The Motion in Limine issue relating to lost profits was argued to the Court on the first day of trial. *See,* N.T. 5/16/01, pp. 5-24 and 25-27. The Court set forth its essential reasons for rejecting the Defendants' Motion in Limine to dismiss the loss of profits' claim on the record when the ruling was entered. *See,* N.T., 5/16/01, pp. 25-27. The Court permitted Plaintiffs to proceed with testimony on the issue but the final ruling was deferred pending testimony by Plaintiff Jahanshahi. The Court again addressed the issue in ruling against Defendants' Motion for a directed verdict on this claim on May 20, 2001.

Defendants' argument was that in order to establish a claim for lost future profits for a business that had not come into existence specific testimony, aided by expert testimony, is necessary. Defendants primarily relied upon the Restatement of Contracts. 2nd, sections 331 and 352. There is no clear holding of Pennsylvania law stating that expert testimony as to lost profits must be introduced. Certainly Pennsylvania law requires that damages as to lost profits cannot be speculative. Again, Pennsylvania law clearly requires that testimony as to lost profits must be reasonably certain but does not require mathematical certainty. ***Marion Spring Co. v. Torres,*** 462 A.2d 686 (Pa. Super. 1983); *see also* ***First Center v. St. Paul***, 727 A.2d 114 (Pa. Super. 1999). Certainly, it can be perceived in a general way that lost profits of a new business are not something that can easily be calculated or the basis therefore easily understood and comprehended by a typical layperson. Therefore, as the

Restatement suggests, lost profits from a new business may be established with the aid of expert testimony but also through economic and financial data, market surveys and analyses, and business records of similar enterprises. In this case, Plaintiff Jahanshahi testified as to his experience working for various restaurants and food industry operators. He testified as to ownership interest in various restaurants including other restaurant franchises. He testified that he consulted with the Kenny Rogers' corporate people as to how to go about determining whether or not the restaurant would be profitable. He testified of using comparative histories of other restaurant franchises and applying them to the demographic information he had obtained for the area of the proposed restaurant and that the source of that data was considered reliable in the industry. This type of testimony from the owner of the new business was approved as a proper basis for loss of profit damages in ***Marion Spring Co.,*** *supra.*

Plaintiff Jahanshahi also testified that he was successful in obtaining financing using the plan that he had prepared, and also, very importantly, that he submitted the plan to Defendants with Defendant Eck who, upon reviewing the plan, stated he believed Plaintiffs' profitability would in fact be higher than that set forth in the plan.

Defendants acknowledged they had been provided the business plan submitted and prepared by Plaintiffs, well in advance of litigation. Plaintiffs provided testimony that this plan was shown to Defendant Eck, President of Defendant Centura early in the lease negotiations and that he reviewed it in determining whether or not the Kenny Rogers' restaurant they proposed was going to be profitable enough so as to make Plaintiffs a viable tenant. *See,* for example, N.T. 5/20/01, pp. 322-23 and N.T. 5/21/01, pp. 330-334. In addition, testimony established the profitability of the business of Plaintiffs as projected in the plan was

an issue in negotiating the correct amount of rent, since rent that was to be paid would depend in part upon the profitability of Plaintiffs' proposed restaurant.

The objections by Defendants that they could not, prior to trial, prepare a defense to the loss of profits claim since they did not know what the claim was based upon, is without merit. There was no question that Defendants were well aware that the claim for lost profits in the litigation was being made on the same basis. By summary judgment motion filed November 2, 2000 (which did not question the issue of lost profits being an element of damage in the case) Defendants attached the deposition of Plaintiff Jahanshahi (taken on June 6, 2000) which at page 47 thereof establishes that Plaintiffs were seeking $70,000 for lost profits for the first year of operation on the basis of testimony of Plaintiff Jahanshahi that the amount was, "to the best of my knowledge, when I did the business plan based on the numbers that I received I was – you know it was a projection. It wasn't – you know, it wasn't my tax return that year; it was a projection."

Defendants also objected to the testimony and the business plan upon calculations of the first year of lost profits because the plan was not specifically prepared for that purpose but was prepared to attempt to obtain financing. This, of course, was in addition to it having been prepared in order to convince Defendant Eck to lease the building to them. This makes little difference. The fact is that the documents were prepared to show the basis of Plaintiffs' projection of profits far in advance of any anticipated litigation and as part of the normal conduct of business by both Plaintiffs and Defendants.

Defendants also objected because the plan used demographic figures in preparation of the projections that were prepared by third parties, specifically an entity Urban

Decision Systems, Inc. Again, this was part of Plaintiffs' business plan and well known to and accepted as reasonable and legitimate by Defendants in advance of trial or any litigation. Nevertheless, Defendants argued this would be hearsay. Testimony was presented by Plaintiffs that this was the type of information typically used and relied upon by those in the restaurant business, particularly the fast-food industry and specifically it was an entity referred to them by Kenny Rogers' Roasters corporate headquarters. It clearly appears to be the type of document that those involved with making projections for future profits would rely upon in preparing the projections, *c.f.* Pa.R.E. 703. In addition, it would seem appropriate to have allowed the testimony of Plaintiff Jahanshahi as lay witness opinion testimony based upon his perception and understanding of the issues and inasmuch as it is derived from a source where the witness has demonstrated a special knowledge and experience as to the opinion offered. *See*, Pa.R.C.P. 701 and *see also* ***Eisenberg v. Gagnon***, 766 F.2d 770 (3rd Cir. 1985, at 1201-1202 discussing F.R.E. 701. *See also* ***Lewis v. Miller***, 393 A.2d 941 (Pa. Super. 1978); ***Kremer v. Janet Fleisher Gallery, Inc.,*** 467 A.2d 377 (Pa. Super. 1983).

Defendants never introduced any testimony to indicate that the method of analysis used by Plaintiffs was improper or that the demographics were incorrect even though they were well aware in advance of trial the basis upon which the lost profits would be claimed. The matters raised by Defendants certainly go to the credibility and weight to be given to the loss of profits testimony but not its admissibility. It is obvious the jury found Plaintiffs' testimony of loss of profits credible.

Certainly this testimony established that Plaintiff Jahanshahi had much more knowledge about determining lost profits in the restaurant business than the typical layperson.

It also showed that he had made a study of the basis for his calculations. It is significant that prior to trial Defendants were willing to accept Plaintiffs' expertise in determining the amount of profits likely to be earned by this restaurant when negotiating the terms of the lease as to rental payment. All of these factors show that Plaintiff Jahanshahi had the necessary qualifications to present this testimony and that he relied upon appropriate documentation and methods of analysis.

Defendants also asserted that the business plan testimony should not have been admitted and that it led to speculative damages because the actual calculations of Plaintiffs' business plan would project lost profits of $140,000 for one year rather than the $70,000, which Plaintiffs testified to at trial they were seeking as fair compensation for loss of profits for a period of one-year (the time necessary for them to reasonably pursue the opening of such a restaurant at another location). Given Plaintiffs' ability to demonstrate twice their claim on paper, was this shrewd trial factors? Was this a reasonable way for prudent investors to approach a new business? Regardless, this objection again goes to the weight and credibility of the testimony. The jury obviously found that Plaintiffs cutting their projection of possible future profits in half in asserting their claim to be reasonable and awarded that amount in damages. The jury's determination in that regard should not be disturbed on appeal.

2. Exclusion of Damages for Loss of Profits From Count III.

In response to Motion for Non-Suit made by Defendants at the close of Plaintiffs' case this Court granted Defendants' motion only so as to Exclude Lost Profits as an element of damages under Count III. *See*, N.T. 5/21/01, pp. 296, 297 and 307. To a large extent this Court based its reasoning for granting this aspect of Defendants' motion upon the

testimony of Plaintiff Jahanshahi relating to the circumstances surrounding the alleged oral contract under consideration in Count III. This agreement arose out of the conversation between Plaintiff Jahanshahi and Defendant Eck, on July 22, 1999, when Defendant Eck advised them he was not going to follow through with his agreement to lease the Hardee's building to Plaintiffs but instead was going to sell the building. Plaintiff Jahanshahi's testimony concerning Defendant Eck's representations at that time were to the effect that Defendant Eck ". . . reassured me he was going to reimburse us for whatever we had spent. . . . He said, I'll make sure you get back the money you lost out of your pocket." *See*, N.T. 5/21/01, pp. 172-173. There was no testimony introduced by Plaintiffs that would substantiate any contention that in making the oral promise to reimburse Plaintiffs on July 22, 1999, that Defendant Eck had made any promises concerning paying them for the profits that they would have made had he stayed committed to the Lease.

3. The Evidence Was Not Sufficient to Justify the $7,850 Verdict for Un-reimbursed Expenses.

Defendants' Concise Statement of Matters Complained of on Appeal, No. 21, in addition to questioning the sufficiency of evidence as to lost profits also questioned the jury's award of $7,850 on account of un-reimbursed expenses. Initially this was also challenged by Defendants' Motion in Limine at least as to $2,500 in travel expenses. *See*, N.T. 5/17/01, pp. 5-7. Plaintiffs did present testimony, although much of it was without verified receipt, concerning the expenses paid by Plaintiffs for architect fees, incorporation fees, attorney's fees, copying fees and stated the various times they traveled to places to pursue completion of things necessary in order to open the restaurant in reliance upon the representations of Defendants.

Plaintiffs did present a receipt for was an architect's fee of $6,630. *See*, for example, N.T. 5/18/01, p. 146. Plaintiffs also produced a cancelled check for those fees in the amount of $5,880. The amount requested for travel expenses, as stated by Plaintiffs, was $2,500, estimated by itemizing the various trips taken. *See*, for example, N.T. 5/18/01, p. 145. In addition, Plaintiffs provided testimony that they incurred attorney's fees to organize the corporation and to advise them during negotiations for which they paid $2,500. *See*, N.T. 5/18/01, p. 146. There was additional testimony concerning payment of photocopy and blueprint fees in various amounts paid by Plaintiffs, including $237 paid to Defendants. *See*, for example, N.T. 5/18/01, p. 159. Clearly, there was sufficient evidence introduced into the record by the jury that would allow the jury to determine that Plaintiffs had incurred out-of-pocket expenses and the jury in evaluating those expenses, was satisfied that Plaintiffs had proof of such out-of-pocket expenses amounted to $7,850 by a preponderance of the evidence. There was no indication whatsoever that the jury was awarding such damages out of sympathy as they obviously did not award all of Plaintiffs' claimed out-of-pocket expenses. Clearly, the matter of sufficiency of evidence concerning the jury's verdict is one which is clear that the evidence was sufficient based upon the jury's determination of what evidence they would accept and what evidence they would not.

4. Issues Relating to Allegations of Fraud and Misfeasance

Both parties have cited in their Concise Statements of Matters Complained of on Appeal that the Court committed an error relating to Plaintiffs' claims based upon fraud and misfeasance. Plaintiffs, in paragraph 8 of their Concise Statement, assert the Court was in error because it did not permit Plaintiffs to amend the Complaint regarding "fraud, misrepresentation, liability of Keith Eck, lost profits, punitive damages, and the like, especially not limited to extent that the Court may find or an appellate court may find that civil fraud should not have been instructed in this matter or that misfeasance cannot be supported independently or is ancillary to a contract action." In paragraphs 17 through 19 of their Concise Statement Defendants also question the Court's ruling and charge related to the allegations of civil fraud and misfeasance asserting that the Court was in error because it changed Count II of Plaintiffs' Complaint from detrimental reliance to civil fraud, *sua sponte*, without Plaintiffs having requested the change and further that it was error for the Court to charge on civil fraud and misfeasance. Defendants also argued it was error to treat misfeasance as a independent cause of action.

These allegations of error concern Count II of Plaintiffs' Amended Complaint and its relationship to Count V. (There is no Count IV.) Count II is titled: "Detrimental Reliance (Stated in Alternative to Count I)." In paragraph 36 of that Count Plaintiffs incorporate all prior pleadings of the Complaint. Then, through paragraph 41, Plaintiffs plead that Defendants deliberately made, or permitted to be made, representations to Plaintiffs which they knew or should have known were false and misleading as to Defendants' intent to enter a lease agreement with Plaintiffs and specifically sets forth four misrepresentations. In summary

those representations assert that Defendants encouraged Plaintiffs to enter into the lease negotiations and to expend money in anticipation of leasing the Hardee's building for a Kenny Rogers' restaurant and that the same would be made available to them and that no one else was being considered for leasing of that building. Count II further asserts that: Plaintiffs were induced and justifiably relied upon these misrepresentations; they expended money to consummate the Lease Agreement; and, Defendants' false representations that the Hardee's building would be made available for them to lease as a restaurant was the direct and proximate cause of Plaintiffs sustaining damages.

Many aspects of the testimony related to whether or not Defendants made false and misleading statements to Plaintiffs about Defendants' intent and willingness to lease the Hardee's building to Plaintiffs for use as a Kenny Rogers' restaurant. In essence, Plaintiffs testified that Defendant Eck made a false statement on one or more occasions when he said that the building would be leased to them and specifically on the date they signed the Lease Agreement on July 9th when Defendant Eck stated that he would be taking steps to have Defendant Centura execute the Agreement which Defendants had just signed, but at a later date. There had been a continuing request on the part of Defendant Eck to Plaintiffs that he wanted them to sign the Lease in January or February. *See*, for example, N.T. 5/18/01, pp. 151-157. The truth of the matter, however, as Plaintiffs asserted at trial, was that all Defendant Eck wanted, was to get Plaintiffs' signature on a lease so he could use it to negotiate the sale of the building to another party. Plaintiff Jahanshahi testified to that effect at several points in his testimony. *See*, for example, N.T. 5/18/01, pp. 160-161 and 171-173. Specifically, Plaintiff's testimony was to the effect that Defendant Eck admitted to Plaintiffs in the July 22nd

conversation that the deal for selling the building was a deal Defendant Eck "wanted all along" and that Defendant Eck further said, "I needed this deal, this is the deal I was looking for and I needed you guys to sign that lease . . ." ***Id***., at 172. This testimony, if believed and accepted by the jury, and which the Court must accept as being true because of the jury's verdict in favor of Plaintiffs, was sufficient to allow the jury to find that Defendants had made fraudulent misrepresentations of material facts to Plaintiffs knowing that the representations were untrue. Further, the testimony clearly established the misrepresentations were of material importance to Plaintiffs in their choosing to continue negotiations over a long period of time and to make plans to lease and actually enter into a lease agreement for the Hardee's building in order to use it for their Kenny Rogers' restaurant franchise. The jury also on this testimony could easily conclude that Defendants intended Plaintiffs to rely upon these representations and that Plaintiffs did in fact so rely and this reliance caused them to suffer harm. Accordingly, these actions on the part of Defendants constitute the necessary elements to make out a case of civil fraud. These allegations of civil fraud are also clearly set forth under Count II of Plaintiffs' Amended Complaint.

Count II of the Amended Complaint is not entitled civil fraud but titles as to a count are not part of the pleadings. Although entitled, "Detrimental Reliance," detrimental reliance is not a separate cause of action but relates to supplying the element of consideration in a contract or that a party relied upon a misrepresentation to their detriment in a tort action. The Count II pleadings specifically assert there were false and misleading, fraudulent, statements made by Defendants intending to induce Plaintiffs to enter into a lease agreement and to expend monies for that purpose and that Plaintiffs were in fact induced and did rely

upon those misrepresentations which resulted directly and proximately in causing Plaintiffs to sustain injuries, losses and damages. *See* Amended Complaint, paragraphs 37 through 40.

Defendants also argued vigorously that Plaintiffs claim in Count II is only a contract claim of "promissory estoppel" and not a tort action for fraud. Just as detrimental reliance is not a separate cause of action, neither is promissory estoppel. Promissory estoppel is not a separate cause of action but rather is involved in determining whether or not a valid contract was formed or in existence which could be breached. At some point throughout the litigation it appears that defense counsel, perhaps through some statement made at some point by Plaintiffs initial counsel, deemed Count II to be a contract action based upon the doctrine of promissory estoppel. Promissory estoppel, however, only goes to the contract action under Count I and Count III as being sufficient to supply the element of consideration necessary for the formation of the contract. Defendants' New Matter had set up lack of consideration as a defense. Defendants asserted at trial there was no consideration for the contract to reimburse expenses in Count 3. In fact, as part of their defense and in moving for a non-suit Defendants argued against the application of the doctrine of promissory estoppel to overcome the lack of consideration in forming either contract, especially that there was no consideration for the oral lease about reimbursement of expenses. *See,* N.T. 5/17/01 at pp. 184-185, for example.

At the conclusion of Plaintiffs' case Defendants moved for a non-suit as to all aspects of Plaintiffs' claims and in reference to Count II asserted the Count related to a contract or quasi-contract type of action. *See*, N.T. 5/20/01 at pp. 294. Plaintiffs' counsel asserted that detrimental reliance could be quasi-contractual or quasi-tort and that in the case before the Court that Defendant Eck was a tortfeasor and that the claim was one in tort. *See, **Id.***, at 295.

Defendants also asserted that the Misfeasance in Count V could not attach to a breach of contract claim and there being no tort alleged in the Amended Complaint the misfeasance claim could not proceed to adjudication. *See,* ***Id.,*** at 298-299. Count V of Plaintiffs' Amended Complaint asserts Defendants committed misfeasance by committing the misrepresentations as well as the failure to reimburse the out-of-pocket expenses as promised (the actions asserted in Count II) and were responsible therefore for causing harm to Plaintiffs. At that point Plaintiffs' counsel moved to amend the Complaint to assert negligent misrepresentation and fraud as the basis for the claims. *See* ***Id.***, at 300. The Court in denying Defendants' non-suit motion as to Count II stated its reasons at pp. 305-309. Relying upon the allegations of paragraph 38 of the Amended Complaint, and the other paragraphs under Count II, the Court concluded that the allegations of the Complaint stated the actions and statements by Defendant Eck were false and misleading and were intended by Defendants to induce Plaintiffs to enter the lease agreement and in reliance thereon to expend money. The Court found that this alleged an action in civil fraud even though the title of the count called it detrimental reliance.

It is clear therefore that no actual amendment of the Complaint was effected. To the extent there was an amendment of the Complaint it was certainly not done *sua sponte* by the Court but based upon the motion of Plaintiffs' counsel that the tort of misrepresentation and civil fraud was being alleged by the wording of Count II. The Court believes that contention to be correct. The assertions of misfeasance clearly can attach to a tort action. Therefore, the Court does not believe any error was committed by submitting the case to the jury under the theories of civil fraud and misfeasance. Even if an amendment was made and

was needed, the amendment was proper because it conformed the Complaint to the testimony offered in support of the Complaint allegations.

It is interesting to note, however, even if there would have been some error in the submission of the fraud and misfeasance issues to the jury for determination the only damages recoverable thereunder would have been the losses incurred by Plaintiffs for the actual pecuniary losses suffered which would include the expenses paid by Plaintiffs as a consequence of relying on Defendants' acts and loss of profits. The jury's verdict under the breach of contract actions of Count I was sufficient to sustain and also award damages to Plaintiffs for those items. Therefore, even if the Court did err in regards to civil fraud and misfeasance claims the error was harmless to both parties since the Defendants' breach of contract found to exist by the jury support the amount of damages awarded by jury. Only if the jury had determined that Plaintiffs were entitled to punitive damages would any error regarding the civil fraud and misfeasance have had an impact upon the outcome of the case as to the amount of the jury's verdict.

5. Court Refusal to Permit Defendant Eck to Testify as an Expert in Commercial Real Estate.

Defendants' Concise Statement of Issues Raised on Appeal in paragraph 13 asserts the Court erred in failing to allow Defendant Eck to testify as an expert in commercial real estate transactions in Lycoming County despite the testimony that he had been involved in real estate transaction in the area for approximately 25 years. This matter was raised at trial when Defendant Eck was asked a question by his counsel on direct examination as to whether or not in the development industry it is common for tenants to negotiate with multiple landlords at the same time and the Court sustained an objection to the question. *See*, N.T.

51801, p. 77. In an attempt to qualify Defendant Eck so he could properly state his opinion as an answer to that question defense counsel established that Defendant Eck was familiar with the development industry in Lycoming County from 1976 (approximately 25 years) and obtained an affirmative answer without objection as to his opinion that it was common for a developer in that industry to continue to market a property while negotiating with respect to tenants. ***Id***., at 76-77. This, in fact, was the relevant question in this case. There was no testimony to the effect that Plaintiffs were negotiating on other sites. Although the objection to the question was not based on relevancy, the sought-after opinion had little relevance, if any, and the exclusion caused no error.

Regardless, the Court properly sustained the objection to the next question as to the common practice of tenants to negotiate with multiple landlords. This issue then generally became a subject for additional testimony argument, and the Court's ruling was entered immediately thereafter. *See* ***Id.***, at 77-89. In trying to qualify Defendant Eck as such an expert defense counsel introduced testimony to the effect that Defendant Eck was also a tenant and familiar with tenants and development projects in Lycoming County and from that experience it was not unusual for tenants to negotiate with multiple landlords as a common practice in the area. ***Id***., at 79. Defense counsel further established that Defendant Eck was primarily concerned with development of commercial property in Lycoming County, particularly shopping centers, both as landlord and tenant and named very specific shopping centers, all of which he was involved with in developing as a landlord, only acting as tenant in places where he was also acting as landlord. ***Id***., at 81-82. In cross-examination, as to his qualifications in this regard, Defendant Eck made it clear he did not represent to be familiar with Lycoming

County but said he was familiar with the Williamsport area. ***Id.***, at 83. Defendant Eck reaffirmed he was landlord in all of the shopping center developments he was familiar with as a tenant. ***Ibid.*** His testimony under cross-examination established that he was only familiar with the way his company operated and its practices and could only express familiarity with personal negotiations with other developers of projects in which he was also involved. *See*, N.T. 83-85. The Court, after argument, concluded that Defendant Eck had not established he had such expertise as to be able to testify as to the general practice of tenants in commercial settings in Lycoming County, but did permit Defendant Eck to give testimony concerning the practices of tenants in situations in which he was familiar. ***Id.***, at 86-88.

The Court cannot see how any error was committed in this regard. The Court considered the testimony given by Defendant Eck as to his qualifications and determined that he could not provide any information from which he would have been able to ascertain the general practice of tenants in Lycoming County. He specifically limited himself to being familiar in the Williamsport area, not all of Lycoming County. He also indicated he was only familiar with tenants where he was acting as a tenant himself or he was directly involved in negotiations with his tenants. He was allowed to give that testimony to the jury for their consideration. Furthermore, there was no real relevance as to the general practice of tenants in Lycoming County but rather the issue at trial was whether or not it was a common business practice for landlords of shopping centers in negotiating with prospective tenants to also continue to negotiate with other tenants. Defendant Eck was permitted to provide testimony in that relevant regard.

6. Improper Charge as to Punitive Damages

Plaintiffs requested a charge on punitive damages through their requested points 11 and 12, based upon the standard civil jury instruction 14.00, which provides that the jury could award punitive damages if they find the conduct of defendant was outrageous. *See*, Pa. Standard Civil Jury Instruction 14.00, as Revised June 1984. Under the standard charge conduct may be deemed outrageous if it arises out of a bad motive or reckless indifference. *See also,* ***Smith v. Brown***, 423 A.2d 743 (Pa. Super. 1980) and ***Chambers v. Montgomery***, 192 A.2d 335 (Pa. 1963). The Court overruled Defendants' objection to those points for charge. Defendants' objections asserted the punitive damages claim should be dismissed and did not address Plaintiffs' proposed language. *See*, N.T. 5/21/01, pp. 379, 380. The punitive damage claim was based upon the allegations of misfeasance. *See*, N.T. 5/21/01, p. 384. The Court's charge as to punitive damages is set forth in the Notes of Testimony of May 22, 2001 at pp. 423-426. At the conclusion of the Court's charge Plaintiffs' counsel objected on the basis that the Court had used terms of malicious and wanton in describing the standard to be applied to determine if the wrongful conduct of Defendants supported awarding punitive damages. Plaintiffs' requested the punitive damage standard be limited to saying that Defendants' conduct had to arise out of a bad motive or reckless indifference. The Instruction requested by Plaintiffs provides outrageous conduct is established when a person acts with a bad motive or with reckless indifference to the interest of others. Despite the provisions of that Standard Civil Jury Instruction this Court believes that the Instruction given to the jury was appropriate because it gave the charge language requested by Plaintiffs but also stated as follows, *inter alia,*

> Punitive damages cannot be awarded if the conduct is merely a breach or merely negligent or error or a mistake or mistake (sic) conduct In order to be entitled to subject a person to punitive damages (this) conduct must be that which would outrage you or be deemed to you to be egregious under all circumstances that are presented.[2]
>
> Another way of stating this is that the jury may award punitive damages only if an actor's conduct was malicious, wanton, willful, oppressive or exhibited reckless indifference to the rights of others.

This language in the Court's charge was based upon what this Court believes to be a correct statement of the current status of the law of awarding punitive damages in Pennsylvania and was primarily based upon the language of the Pennsylvania Superior Court in ***Johnson v. Hyundai***, 698 A.2d 631 at 639 (Pa. Super. 1997). *See also*, ***SVH Coal, Inc., v. Continental Grain Co.,*** 587 A.2d 702 (Pa. 1991) and ***Robeson v. EMC Ins. Companies***, Lexis 3050 (Pa. Super. 2001).

Part C – Post Trial Issues

1. <u>Plaintiffs' Right to Prejudgment Interest</u>

Plaintiffs' Amended Complaint made a general damages request for $120,717 in damages plus costs and plus interest from the date of contract. Plaintiffs raised the issue of entitlement to prejudgment interest as a matter of law for the first time, based on this Court's ability to reconstruct the record, by their post-trial motion filed May 31, 2001. Plaintiffs assert in this regard that the rate of interest they are entitled to is 6% per annum from the date of breach, July 29, 1997, on the amount of the jury's award of $77,850 or as of May 31st $17,905.50 and requests this Court to assess prejudgment interest. Plaintiffs made no motion

[2] This Court's notes indicate that it actually stated, "a mistake in conduct." Also, that it did use the words "this conduct."

at the time the jury's verdict was received and recorded seeking to amend the verdict to provide for this award of interest. Plaintiffs have cited neither case law nor statutory authority in support of this claim.

The amount of damages in this case was not liquidated. The applicable law is appropriately referred to in ***Fernandez v. Lavin***, 548 A.2d 1191 (Pa. 1988), and ***Metropolitan Edison Co. v. Old Home Manor, Inc.,*** 482 A.2d 1062 (Pa. Super. 1984) and very succinctly stated in ***Land O Lakes, Inc. v. Zelenkofske Axelrod and Co., Ltd.,*** 43 Pa. D&C 4th 192 (C.P. Bucks Co. 1999). As recognized in ***Fernandez,*** *supra,* pre-judgment interest in Pennsylvania follows the provisions of Restatement of Contracts, 2nd §354. Although ***Fernandez*** and ***Metropolitan Edison***, *supra* recognized that the award of interest in a contract action is a matter of right regardless of when it is demanded. The contract obligation must be one that was for a definite sum of money that arose at a definite time in order to entitle the prevailing party in a contract dispute to pre-judgment interest. In this case pre-judgment interest is not appropriate because the amount of money to which Plaintiffs were entitled could not have been ascertained until the trial was completed and further there was uncertainty, and Plaintiffs have introduced no evidence, as to exactly when they would have incurred the lost profits. Even though the contract may have been breached in July of 1997 it is clearly the restaurant would not have been in operation and obtained its first profits until at least a year and four months after that date and given the vagaries of opening of new business and construction issues it may be that the company Plaintiffs were starting would not have earned its first year of profits until a much later date. As clearly pointed out in ***Land O Lakes, Inc.***, *supra* the Restatement of Contract 2nd §354 in comment C indicates a party is not chargeable with interest on a sum pre-

judgment unless that sum is fixed by a contract or the party charged with interest could have determined the amount with reasonable certainty in order to have made a proper tender. There is no definite certainty of sufficiency of an amount of damage in this case to require Defendants to have made such a tender. Furthermore, even though ***Metropolitan Edison Co.,*** *supra*, implies there are severe limitations on the doctrine that a plaintiff waives his right to pre-judgment interest where it is not timely and appropriately asserted, as set forth in ***Tibitz v. Prudential Insurance Company of America***, 169 A. 382 (Pa. 1933), the reasons relied upon by the court in ***Metropolitan,*** to limit the ***Tibitz*** doctrine do not apply to the proceedings in this case. This Court firmly believes it has no right to amend the jury's verdict to include such interest where the jury did not take into consideration such evidence and received no instruction on when the date that such interest should commence arose. Plaintiffs' failure to introduce evidence of and to request a charge on the right to pre-judgment interest constitutes a waiver of this claim.

CONCLUSION

Accordingly, this Court believes the jury's verdict should be sustained and that both the appeal of Plaintiffs and appeal of Defendants should be denied.

BY THE COURT,

William S. Kieser, Judge

cc: Matthew Zeigler, Esquire
David F. Wilk, Esquire
Judges
Suzanne R. Lovecchio, Law Clerk
Gary L. Weber, Esquire (Lycoming Reporter)