

In the Superior Court of Pennsylvania

Nos. 2695, 2697 & 2699 EDA 2013

RUICK L. ROLLAND and HOLLY ROLLAND, h/w,
Appellants/Cross-Appellees,

v.

STEVEN SENN, SENN LANDSCAPING, INC., BRUCE IRRGANG,
UNITED CONSTRUCTION SERVICES, INC., MODERN
EQUIPMENT SALES & RENTAL CO., and MODERN GROUP, LTD.

BRIEF FOR APPELLANTS

On Appeal from the New Trial Orders of the Court of Common Pleas of
Philadelphia County, Pennsylvania, Civil Trial Division, dated
August 6, 2013 at December Term, 2009, No. 3110

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**Exhibits Attached to Brief for Appellants in Accordance
with the Pa. Rules of Appellate Procedure**

Trial Court’s Pa. R. App. P. 1925(a) opinion dated
January 31, 2014..... Exhibit A

Orders for New Trial Exhibits B-E

Plaintiffs’ Pa. R. App. P. 1925(b) Statement of Errors
Complained of on Appeal Exhibit F

I. INTRODUCTION

A. The Parties

This case concerns a man who was run over by a ten-thousand-pound track loader operated by a ten-year-old boy. The defendants include the landscaper who knowingly placed his child at the controls of the machinery, the leasing company that rented the five-ton earthmover knowing that a child was operating it, and the property-owner who hired the landscaper and leased the machinery knowing that it was being used by a child. After a three-week trial, a unanimous jury found in favor of the plaintiffs, appellants herein. Although the trial court explicitly found that all of the parties bore responsibility for the incident, it granted a new trial, primarily because it disagreed with the jury's unanimous finding that the plaintiff was not contributorily negligent.

Ruick Rolland is a carpenter whose left leg was amputated after he was run over by the track loader. Contrary to the trial court's characterization of Rolland as a "supervisor," multiple non-party disinterested witnesses confirmed that he was merely one of several co-

equal independent contractors on the project who reported directly to the owner of the property. R.1866a, 1868a, 1869a, 2143a-2144a.

Steven Senn, the owner of Senn Landscaping, Inc, is the father who allowed his child to operate the earthmover at the worksite. Unmentioned in the trial court's opinion, the child testified that he had operated the track loader in an unsafe manner. R.3275a-3276a. Understandably, the Senn defendants agreed that summary judgment against them would be appropriate so long as the Court permitted apportionment of liability among all parties. R.511a.

Modern Equipment Sales & Rental Co. owned and leased the machinery. Modern knew that an incompetent child was engaged in the dangerous use of its machine. R.2330a-2331a. Modern further admitted that it could have and should have intervened once it learned that a child was using the machine. R.2299a-2301a. Accordingly, the trial court also entered summary judgment as to liability against Modern, expressly leaving open the issue of apportionment of liability among the parties.

The third group of defendants includes Bruce Irrgang, the owner of the estate on which the construction project was undertaken. Under

the auspices of his privately-owned construction company, United Construction Services, Inc. (UCS), Irrgang rented the track loader from Modern and provided it to Senn. Unlike Modern, Irrgang disputed that he knew that the boy was operating the track loader. Accordingly, the jury decided all aspects of plaintiffs' claims against Irrgang and UCS.

B. The Accident

Days after Modern delivered the track loader, the consequences of entrusting such a dangerous instrumentality to a child were gruesomely realized. As Rolland stood beside the stationary track loader, the child-operator unexpectedly began moving the machine, turning it towards the plaintiff, and dragging one of Rolland's legs under its tracks, mangling and crushing the extremity so badly that it could not be salvaged. R.2339a-2340a. Rolland ultimately required amputation above the knee.

C. The Verdict

After hearing all of the evidence, the jury found that Senn and his company were liable for 47 percent of the harm Rolland suffered, that Irrgang and UCS were liable for 32 percent, and the Modern defendants

were liable for 21 percent. The jury awarded \$18 million to Rolland and \$2 million in loss of consortium damages to his wife.

Although plaintiffs sought punitive damages against all the defendants, the trial judge allowed the jury to consider only whether to award punitive damages against Stephen Senn individually. The jury found that Senn was reckless, and, after a separate set of closing arguments, the jury returned a punitive award against Senn in the amount of \$16,000.

Following the briefing and oral argument of the parties' post-trial motions, the trial court granted a new trial. Although the trial court considered the jury's finding of no contributory negligence "shocking," the evidence presented at trial more than adequately supports the jury's unanimous finding. That evidence included an explicit concession by the defendants' sole liability expert that plaintiff's conduct was not at all unreasonable. R.2384a. And while the trial court found that Irrgang and UCS were somehow prejudiced by the entry of summary judgment as to Modern and Senn, the supposed prejudice is a baseless invention of the trial judge.

Finally, the trial court granted a new trial based on its exclusion from evidence of statements attributed to Rolland found in the files of Senn Landscaping's worker's compensation insurer, produced in the midst of trial. The trial court initially excluded the evidence, because its probative value was outweighed by the likelihood of unfair prejudice associated with its introduction but later concluded, in the context of granting a new trial, that the existence of the worker's compensation file should have resulted in a mistrial once counsel for the Senn defendants brought the file's existence to the trial court's and the parties' attention. Yet beyond representing an unquestionably appropriate exercise of the trial court's discretion, that court's initial ruling was proper. The "statements" in question were unverified, unreliable notes created by a previously unidentified claims investigator, referencing statements purportedly given by the plaintiff while he was, according to the notes themselves, medicated with morphine and other narcotics and emotionally distraught.

Moreover, although the trial court makes reference to Rolland's participation in some sort of "scheme to defraud the worker's compensation carrier," it was undisputed that Rolland *never* made a

claim for worker's compensation benefits, *never* received worker's compensation benefits, *never* sought worker's compensation benefits, and *never* initiated a single communication with any worker's compensation carrier.

Perplexingly, the trial court used this evidentiary ruling as a basis for granting a new trial as to *all* of the defendants, including those defendants who had themselves requested the exclusion of the evidence. Even more incredibly, the trial court used the withheld documents to justify granting a new trial in favor of the defendants who had withheld the evidence in the first place.

II. STATEMENT OF JURISDICTION

On August 30, 2013, plaintiffs filed their timely notice of appeal from the trial court's orders docketed August 6, 2013 granting defendants' motions for a new trial.

This Court possesses appellate jurisdiction pursuant to Pennsylvania Rule of Appellate Procedure 311(a)(6), which provides that an interlocutory appeal as of right may be taken from a trial court's order awarding a new trial.

III. STATEMENT OF THE SCOPE AND STANDARDS OF REVIEW

Plaintiffs/appellants appeal from the trial court's grant of defendants' motions for a new trial. As this Court is well-aware, a party seeking a new trial must satisfy a very stringent standard, which the defendants/appellees are unable to satisfy here:

A new trial will be granted on the grounds that the verdict is against the weight of the evidence where the verdict is so contrary to the evidence it shocks one's sense of justice. [A party] is not entitled to a new trial where the evidence is conflicting and the finder of fact could have decided either way.

Betz v. Erie Ins. Exchange, 957 A.2d 1244, 1252 (Pa. Super. 2008) (internal quotations omitted).

In *Rettger v. UPMC Shadyside*, 991 A.2d 915 (Pa. Super. 2010), this Court specifically examined the standards of review applicable to a trial court's grant of a new trial:

"A new trial is not warranted merely because some irregularity occurred during the trial or another trial judge would have ruled differently; the moving party must demonstrate to the trial court that he or she has suffered prejudice from the mistake." *Harman ex rel. Harman v. Borah*, 562 Pa. 455, 756 A.2d 1116, 1122 (2000). Once the trial court passes on the moving party's claim, the scope and standard of appellate review coalesce in relation to the reasons the trial court stated for the action it took. *See id.* Where the court is presented with a finite set of reasons

supporting or opposing its disposition and the court limits its ruling by reference to those same reasons, our scope of review is similarly limited. *See id.* at 1123. Thus, “[w]here the trial court articulates a single mistake (or a finite set of mistakes), the appellate court’s review is limited in scope to the stated reason, and the appellate court must review that reason under the appropriate standard.” *Id.* (quoting *Morrison v. Com., Dept. of Pub. Welfare*, 538 Pa. 122, 646 A.2d 565, 571 (1994)).

Our standard of review prescribes the degree of scrutiny we apply to the trial court’s decision and the manner in which we evaluate its conclusions. *See id.* at 1122 (citing *Morrison*, 646 A.2d at 570). If the trial court’s challenged ruling was one of law, we review its grant or denial of a new trial on that point to discern if the court committed legal error. *See id.* at 1123. Similarly, if the challenged ruling involved a discretionary act, we review the disposition of the new trial motion relative to that act for abuse of discretion. *See id.* “Discretion must be exercised on the foundation of reason.” *Id.*

Rettger, 991 A.2d at 923-24.

IV. TEXT OF THE ORDERS IN QUESTION

Plaintiffs/appellants have appealed from the following four Orders, which the trial court docketed on August 6, 2013:

AND NOW, to wit, this 5th day of August, 2013, upon due review of the Post-Trial Motions of Defendants, Bruce Irrgang and United Construction Services, Inc., and the Plaintiffs’ Response(s) thereto, it is hereby ORDERED and DECREED that said Defendants are GRANTED a NEW TRIAL on all issues.

AND NOW, to wit, this 5th day of August, 2013, upon due review of the Post-Trial Motions of Defendants, Modern Equipment Sales and Rental Co. and Modern Group Ltd., and the Plaintiffs' Response(s) thereto, it is hereby ORDERED and DECREED that said Defendants are GRANTED a NEW TRIAL on all issues.

AND NOW, this 5th day of August, 2013, upon consideration of the Motion for Post-Trial Relief of Defendants, Stephen Senn and Senn Landscaping, Inc., requesting a new trial, and any responses thereto, it is hereby ORDERED that the Motion is Granted and Defendants, Stephen Senn and Senn Landscaping, Inc., are granted a new trial on all issues.

AND NOW, this 5th day of August, 2013, upon consideration of Plaintiffs' Motion for Post-Trial Relief, including their motion to remove nonsuit and/or vacate the order refusing to submit the issue of the defendants' recklessness to the jury and motion for a new trial limited to the issue of whether defendants, Irrgang, United Construction Services, Modern Equipment Sales and Rental Company, and Modern Group Ltd. Acted with reckless indifference, and this response in opposition thereto, it is hereby ORDERED that said motion is DENIED.

See Exhibits B through E, hereto.

V. STATEMENT OF THE QUESTIONS PRESENTED

1. Did the trial court err as a matter of law, or otherwise abuse its discretion, when it ruled that a new trial was necessary based on the trial judge's conclusion, stemming from his failure to consider the evidence in a light most favorable to plaintiffs, that the jury's finding that plaintiff was not liable to any extent whatsoever for his own injuries "shocked the conscience" of the trial judge?

2. Did the trial judge err as a matter of law, or otherwise abuse his discretion, in concluding that a predecessor judge's entry of summary judgment in favor of plaintiffs as to liability against the Modern and Senn defendants somehow prejudiced defendants UCS and Irrgang's right to a fair trial on the subject of their own liability, such that it was proper to order a new trial at which the jury would be required to adjudicate the liability of all defendants, where: (i) UCS and Irrgang were afforded a fair opportunity to fully litigate every aspect of their own liability, causation, damages, and contributory negligence; and (ii) the Senn defendants have conceded their responsibility for Rolland's injuries?

3. Did the trial court err as a matter of law, or otherwise abuse its discretion, when it concluded that it should have granted a mistrial at the request of the Modern defendants after the trial court improperly ordered, *sua sponte* in the midst of trial, the production of a worker's compensation file that none of the parties was then seeking, when the trial court's contemporaneous decision to exclude the worker's compensation file represented a proper exercise of that court's discretion?

4. Whether, if this Court were to affirm the trial court's grant of a new trial, this Court should remand to the trial court for a ruling in the first instance on plaintiffs' motion for post-trial relief seeking punitive damages against the Modern defendants, UCS, and Irrgang?

VI. STATEMENT OF THE CASE

A. Relevant Factual History

1. Rolland was merely one of several contractors

Plaintiff Ruick Rolland was one of several contractors directly retained by defendant Bruce Irrgang in connection with various home improvement projects Irrgang commissioned, including an outdoor landscaping construction project. R.1866a, 2315a-2316a, 2320a. Rolland

was a handyman with carpentry skills who had worked directly for Irrgang for many years on various projects at Irrgang's many properties. R.2312a.

Although the trial court's opinion suggests that "significant evidence was presented to establish that Rolland was supervising the jobsite," every non-party witness who testified independently confirmed Rolland's assertion that he was merely one of several co-equal independent contractors on the project, each of whom reported directly to Irrgang, the owner of the property. R.2318a-2319a, 2325a, 2335a-2336a. Two other contractors who were working on the site (not parties to this action) testified, without contradiction, that Rolland was merely one of several co-equal independent contractors who had no supervisory authority. R.1866a, 1868a, 1869a, 2143a-2144a. Rolland and the other contractors testified that defendant Irrgang micromanaged all of the activities and had ultimate authority over all the workers. R.1865a, 2315a.

Irrgang directly retained Stephen Senn and Senn Landscaping, Inc. to dredge a pond on his property as part of the landscaping construction project. R.1867a-1868a. Because Senn lacked the necessary

earth-moving equipment, Irrgang ordered from defendant Modern Equipment Sales and Rental Co. a track loader and excavator. R.2328a. Irrgang did so under the auspices of United Construction Services, a privately-held company he personally controlled that maintained an account with Modern. R.2246a, 2329a.

Rolland's ministerial role in this transaction consisted of placing a telephone call (at the direction of Irrgang) to Modern and signing the paperwork (which he believed was merely a delivery receipt) when the machinery was delivered. R.2328a, 2330a. Rolland was not, at that time, employed by UCS. R.2315a.

2. It was undisputed that Modern knew a child was operating its track loader

Modern's employee, Kevin Cann, delivered the machinery. As Cann was unloading the equipment, Senn's ten-year-old son, Stevie, hopped into the track loader and drove it away. R.2330a-2331a, 3394a. Cann did not admonish anyone with respect to the child's operation of the track loader, even though his employer expected him to do so under such circumstances. Instead, he merely asked, "What is he doing?" and declared in jest, "I didn't see anything." R.1900a, 2330a-2331a, 3394a.

Cann *twice* reported the child's operation of the track loader to Modern's rental manager, Paul Mutter, who did nothing beyond *twice* asking Cann if the customer had signed the paperwork (which included provisions requiring UCS to indemnify Modern, and to limit use of the equipment to "competent operators"). R.1904a, 1906a, 1916a. "It's their responsibility," Mutter told Cann. R.1905a. In fact, when Cann returned to the Irrgang job site approximately a week before the tragedy, he saw the child operating the track loader again, in dangerous proximity to a lake. R.1901a. Although Modern expected Cann to "confront the customer" under such circumstances, it was undisputed that he failed to do so. R.1900a, 2250a.

3. A ten-year-old is not competent to operate a dangerous five-ton track loader

The subject track loader weighs more than 10,000 pounds and is extremely dangerous, especially in the hands of a ten-year-old boy. The danger is a function of the track loader's considerable mass, its tight turning radius and sensitive joy-stick controls, the limited visibility afforded to its operator, and its use in areas without defined travel lanes. R.1939a-1940a, 2012a.

It was undisputed that a ten-year-old child is not competent to operate a ten-thousand-pound bulldozer. R.1918, 2250a (“You can agree that Modern does not think a ten-year-old is competent to operate this machine”). A ten-year-old child lacks the judgment, maturity, and knowledge necessary to master the technical demands of safely operating such a machine. R.2009a-2010a, 2019a, 2247a-2248a. At trial, each of the parties agreed that operation of the track loader by a child posed a significant danger to people around the machine and, not insignificantly, to the child himself. R.1913a-1915a, 2012a, 3600a.

4. Modern admitted that it should have acted to stop the child’s use

Under the terms of the rental agreement, UCS was contractually obligated to ensure that only competent operators used the rented equipment. R.2246a, 2636a. The contract also conferred upon Modern the right to repossess its equipment if misused by the customer or if any of the terms of the rental agreement were violated. R.2636a. Modern has, in other cases, exercised this right when it was concerned that misuse might damage its machine. R.1917a-1918a.

At trial, witnesses for Modern conceded that the operation of the track loader by the child constituted “misuse” of the machinery.

R.1914a. Modern also knew that this particular type of misuse posed a risk of significant injury. R.1915a. Mutter, the rental manager, testified that he knew that use of a track loader by a child was dangerous. R.1915a, 1921a.

Mutter's cavalier response to Cann's report was not in accordance with industry-wide standards or, for that matter, with Modern's own practices. R.1919a, 2013a-2014a. Modern's designated representative conceded that, under these circumstances, Mutter should have contacted UCS and explained that use of the track loader by a child violated the rental agreement and that any such continued use would result in repossession of the track loader by Modern. R.2299a-2300a. Modern admitted that "Mr. Mutter didn't do what he was supposed to do." R.2301a.

The evidence conclusively established that Modern knew the child was operating its machine, knew that such use was dangerous, but nonetheless failed to properly intervene.

5. Irrgang knew that the child was operating the track loader

Irrgang denied knowing that a child was operating the machine he had rented. However, he testified that he subjectively believed that

such use would be “absurd” and would pose dangers to the child, to the machine, and to those around the machine. R.3600a.

Rolland and a non-party witness testified that Rolland told Irrgang the child was operating the machine. R.2153a, 2334a. Additionally, Rolland and the child operator testified that Irrgang was present while the boy operated the machine. R.2334a, 3220a-3221a. Although the trial court, in its opinion, questioned how summary judgment could have been entered as to Modern but not as to Irrgang, the extent of Irrgang’s subjective knowledge constituted a disputed issue of material fact. As reflected by its unanimous verdict, the jury concluded that Irrgang knew of the child’s operation and that he failed to stop such use until after Rolland had been injured.

6. The child runs over Rolland

Approximately ten days after Irrgang/UCS rented the track loader, ten-year-old Stevie Senn, directed and “supervised” by his father (but outside of his father’s presence), drove the track loader out of the area surrounding the pond and, for the first time, into an area populated by other workers. R.1870a, 3246a. Rolland arrived at the site after this activity was already underway. R.1870a.

Concerned that the track loader was going to run over and damage one of Irrgang's garden hoses, Rolland asked one of Senn's employees to move the hose away from the path of the loader. R.2338a. Consistent with Rolland's lack of supervisory authority at the site, the employee refused. R.1847a.

In order to move the hose himself, Rolland approached the **already stationary** track loader, but only after ensuring that the child-operator was aware of his presence and understood to keep the machine stationary. R.2339a-2340a. Although the trial court, in its opinion, describes Rolland as "directing" the child's operation of the machine "by giving hand signals" (opinion at 26), Rolland testified that he merely extended his hand in an outstretched position to ensure that the child, who was already stopped, was aware of his presence. R.2339. Expecting the child to "do nothing" while he lifted the hose over and around the track loader, Rolland was standing alongside the track loader when Stevie Senn, without warning, began moving the machine. R.2339a-2340a. Stevie testified that he believed he heard Rolland say "go ahead," even though Rolland testified that he had, in fact, said no such thing. R.2339a, 3267a.

7. Rolland's conduct was reasonable

Although the trial court claimed to be “shocked” by the jury’s refusal to find Rolland’s conduct unreasonable, there was ample evidence to support that finding. Two expert witnesses on construction workplace safety testified, without contradiction, that Rolland acted reasonably and was not responsible for the injuries he sustained as the result of the child’s admitted unsafe operation of the track loader. R.1960a, 1962a, 2021a. Moreover, the expert retained by Modern conceded that Rolland’s account, if credited by the jury, would represent **reasonable** conduct on his part. R.2384a.

8. It was undisputed that the child operated the track loader in an unsafe manner

Irrespective of whether Rolland had said anything, the child should not have operated the machine while a person was near it. Although the trial court posits “it is possible that [the child] simply misheard the instructions given by Rolland,” the impropriety of the child’s conduct was not disputed. Plaintiff’s expert testified, consistent with Modern’s own safety manual, that such machinery should *never* be operated if anyone is standing nearby, even if the operator is told to “go ahead.” R.1942a, 1964a, 2637a. Stevie Senn likewise admitted in his

testimony that he operated the machine in an unsafe manner. R.3275a-3276a. Even the expert who testified on Modern's behalf admitted that the child was at fault and should not have engaged the machine while someone was nearby, irrespective of what he might have thought he heard Rolland say. R.2383a. Thus, there was no question that the child had operated the machine in an unreasonably unsafe manner.

9. Senn's actions following the accident underscored his appreciation of the wrongfulness of his conduct

The track loader crushed and mangled Rolland's left leg. R.2339a. Once summoned to the scene, Senn concocted a scheme to conceal from the police his son's operation of the machine. Evidencing his conscious appreciation of the wrongfulness of his conduct, Senn falsely told police and emergency personnel responding to the scene that an 18-year-old co-worker, Matt Fischer, had been operating the track loader at the time of the injury. R.1874a, 2339a, 3423a.

10. Senn, not Rolland, reported the incident to Senn's worker's compensation carrier

Rolland was taken from the scene in an ambulance, and doctors worked furiously to save his life and leg. After multiple surgeries over a period of days, it was clear that the damaged leg, even if somehow

salvaged, would likely be useless. At the recommendation of his doctors, Rolland agreed to have his leg amputated. Due to the severity of the injuries, it was amputated above the knee. R.3502-3503a.

While Rolland was in the hospital, Senn reported the accident to his company's insurance carrier. The same carrier provided Senn with liability coverage and worker's compensation coverage. In an apparent effort to limit his liability exposure, Senn falsely informed his insurance company that Rolland was his subordinate, working as an employee of Senn Landscaping. R.3665a. Consequently, the carrier repeatedly tried to reach Rolland by telephone in the hospital during the days before the amputation. It was undisputed that Rolland was, at that time, under the influence of morphine and other potent narcotics and was confused and distraught as he confronted the likely loss of his leg. R.2051a, 2053a.

When initially contacted by Senn's carrier, Mrs. Rolland, according to notes maintained by the carrier, accurately explained that her husband was not an employee of Senn Landscaping. R.3671. According to the insurance company's records, the carrier thereafter repeatedly attempted, without success, to obtain a statement from Mr.

Rolland while he was hospitalized. The insurance carrier's records (which figure prominently in the trial court's decision to grant a new trial) describe a telephone call placed to Rolland less than three days after he was discharged from the hospital in which Rolland, according to the notes themselves, declined to provide a recorded interview because he had recently been given morphine and other narcotics. R.3675a.

The trial court claimed that "Mr. Rolland went to great lengths [during his direct examination] to explain that he was heavily sedated and incoherent in the days following the accident" and dismissed his testimony in this respect as "rehearsed, planned, and choreographed." Yet the insurance company notes at issue expressly reference that Rolland reported, *at the time*, that he "recently had been given 30 milligrams of morphine." Moreover, the records of the home healthcare workers *confirm* that Rolland was, at that time, regularly receiving Ativan, Percocet, Gabapentin, and Morphine Sulfate. R.2638a. Finally, Mrs. Rolland testified that her husband was heavily medicated, confused, and understandably distraught. R.2051a, 2053a. Thus, the

record demonstrates that Mr. Rolland's supposedly "*choreographed*" testimony was, in fact, simply *accurate* testimony.

According to typed notes contained in the carrier's files concerning this purported telephone conversation, Rolland reportedly described himself inconsistently as Senn's subordinate **and** supervisor, before breaking down in tears. R.3676a-3677a.

Though the trial court intimates that Rolland might have been somehow scheming to defraud the worker's compensation carrier, Mr. and Mrs. Rolland did not initiate any interaction with the carrier. The carrier initiated *all* of the contacts. Rolland never applied for or obtained worker's compensation benefits from Senn Landscaping or any other party relating to this incident.

B. Relevant Procedural History

1. Summary judgment was entered as to Modern and Senn

Because there was (i) no question that Modern and Senn *knowingly* permitted a child to operate a dangerous machine under their control, (ii) no question that the child was incompetent, and (iii) no question that the child operated the machine in an unsafe manner, plaintiffs moved for summary judgment on their negligent entrustment

claims against these defendants. In their response to the motion, the Senn defendants conceded that summary judgment would be appropriate so long as the jury was permitted to apportion liability. R.511a-512a. After receiving full briefing, Judge Gary Di Vito of the Court of Common Pleas of Philadelphia County issued an Order stating in pertinent part:

There being no question that defendants Modern Equipment Sales and Rental Company, Modern Group, Senn Landscaping Inc., and Stephen Senn, negligently entrusted a track loader to a ten year old child, and that said entrustment was the proximate cause of Mr. Rolland's injuries, judgment is hereby entered in favor of Plaintiffs. As to these defendants, and as to Plaintiffs' claims of negligent entrustment, the only issue to be decided at trial will be the amount of damages to which Plaintiffs are entitled.

R.1576a. The trial court subsequently clarified its Order, making clear that the relative responsibility of each of the parties, including the plaintiff, would be adjudicated at any trial. R.1653a.

Plaintiffs did not move for summary judgment against Irrgang (the property owner) or UCS (the company Irrgang controlled, which leased the track loader) because Irrgang, unlike Modern and Senn, disputed that he knew, prior to Rolland's injury, that a 10-year-old was operating the track loader on his property.

2. The jury found that Irrgang knew that a child was operating the track loader

At trial, the question of Irrgang and UCS's liability was the subject of considerable argument, though Irrgang did not call a single witness. Plaintiffs contended Irrgang knowingly allowed the 10-year-old child to operate the 10,000-pound track loader that he had provided to Senn. Rolland testified that he spoke to Irrgang specifically about the child's operation. R.2334a. Multiple witnesses confirmed Rolland's account and testified that Irrgang saw the child operating the track loader and permitted the boy's continued operation of the machine, notwithstanding his recognition that such operation was "absurd" and dangerous. R.2153, 3220a-3221a.

Irrgang never took the stand at trial, relying instead upon the introduction, by Modern, of excerpts from his videotaped deposition testimony in which he denied any knowledge of the child's operation, and in which he characterized Rolland as a job-site supervisor.

3. Senn invoked his Fifth Amendment right against self-incrimination

Senn invoked the Fifth Amendment and refused to take the stand. R.1992a. Although the trial court, in its opinion, suggests that Senn

refused to testify because of the information contained in the worker's compensation file, his counsel made clear that he was not going to testify, irrespective of that ruling, because to do so might expose him to criminal liability for the false information he provided to the police following the accident. R.1928a.

4. The defense centered upon Rolland's conduct

Because summary judgment as to liability was entered against Stephen Senn, Senn Landscaping, and the Modern defendants, the defense focused on the disputed contention that Rolland was a "supervisor" on the site, with authority to restrict the child's operation, who unreasonably placed himself in dangerous proximity to the track loader, such that he was more than 50% responsible for his injuries (which would have foreclosed any recovery under Pennsylvania's comparative negligence principles).

The trial judge gave the defendants a full and fair opportunity to convince the jury that Rolland bore responsibility for his injuries. They emphasized that he, like the other contractors working on the site, knew that the child was operating the machine. The defendants also emphasized that Rolland admitted that he briefly operated the track

loader and therefore may have known of the equipment's tight turning radius and sensitive joystick control. The defendants also relied on the deposition testimony of Senn and Irrgang, who characterized Rolland as a "supervisor" with authority over and control of the track loader.

The trial court permitted the defendants to prove or argue that Rolland was responsible, to a significant extent, for his own injuries. In fact, the trial court afforded the defense considerable latitude, allowing the defense liability expert to offer opinions that the witness candidly acknowledged were not expressed anywhere in his reports. R.2366a, 2374a. Nonetheless, the jury unanimously found that Rolland was not contributorily negligent.

5. The grant of a new trial

The trial judge held that a new trial was required because the jury's finding that Rolland was not liable to any extent shocked the trial court's conscience. Judge Younge also relied on two other grounds in granting a new trial in favor of all defendants. In his Rule 1925(a) opinion, Judge Younge claimed that Judge Di Vito's earlier grants of summary judgment against the Modern and Senn defendants somehow improperly deprived *Irrgang and UCS* of their ability to obtain a fair

trial. In so ruling, Judge Younge did not purport to have reconsidered the summary judgment record to assess the propriety of Judge Di Vito's summary judgment rulings. In fact, Judge Younge seemingly expresses agreement with the grants of summary judgment, writing that "[a]ll of the parties bore responsibility for this accident." Opinion at 36.

According to the trial court, "the first and foremost reason" for a new trial was the trial court's erroneous exclusion from evidence of the file maintained by the insurance carrier that provided general liability *and* worker's compensation coverage to Senn Landscaping.

6. The trial court, not the parties, sought production of the worker's compensation file that now figures so prominently

Early in discovery, counsel for plaintiffs learned that Stephen Senn had given a recorded statement to his insurance company concerning the incident. However, that recorded statement had never been produced in discovery. During trial, counsel for plaintiffs renewed his request for the statement. R.1924a-1925a. In response, Senn's counsel claimed to have found it in a **previously undisclosed** worker's compensation file that had been maintained by the same company that provided Senn's liability coverage. R.1924a-1925a.

Although counsel for plaintiffs made clear he was seeking *only* Senn's statement, the trial court, *sua sponte*, ordered production of the *entire* worker's compensation file for *in camera* review. R.1925a-1926a. Although the trial court asserts that it was "ambushed with an evidentiary issue that had a drastic impact on this case" (opinion at 28), it was an "ambush" of that court's own making. Judge Younge made the redacted contents of the worker's compensation file available to counsel for all parties but ultimately excluded the evidence as more unfairly prejudicial than probative under Pa. R. Evid. 403. R.1985a.

The recorded statement given by Senn, which had been sought by plaintiffs, included numerous declarations that contradicted Senn's characterization of Rolland as a project supervisor. In his **recorded** statement, Senn (in the presence of an attorney) characterized himself as Rolland's *superior* and claimed that he had intended to pay Rolland for his work on the landscaping project as a W-2 employee of Senn Landscaping. R3764a, 3767a. These declarations were indisputably false, as Rolland, like Senn, had been hired for the project directly by Irrgang.

The worker's compensation file also contains an insurance adjuster's notes of a conversation with defendant Irrgang, in which Irrgang also falsely stated that Rolland had been working on the project as an employee of Senn Landscaping. R.3673a. The declarations of Senn and Irrgang found in the file unquestionably *undermined* their claims that Mr. Rolland was a project supervisor.

The insurance file also included the typewritten account of the **unrecorded** conversation that the carrier purportedly had with Mr. Rolland while he was medicated, in which he allegedly described himself as both Senn's subordinate **and** supervisor. R.3675a-3676a.

7. Judge Younge initially held that the contradictory and unreliable accounts in the worker's compensation file were inadmissible

The trial court decided that the worker's compensation file, if admitted, would have to be admitted in its entirety. R.1984a-1985a. Plaintiffs, Senn, and Irrgang/UCS objected to its introduction. Plaintiffs, in particular, noted that the unverified and unrecorded notes concerning statements attributed to Rolland had not been timely produced, could not be cross-examined, and were, according to the notes themselves, of dubious reliability, rendering them unfairly prejudicial

and excludable under Pennsylvania Rule of Evidence 403. R.1986a. Only Modern claimed an interest in admitting the records (even though it had made no effort to obtain them in pre-trial discovery). R.1987a. Although Modern sought to exploit this new-found evidence to confront Rolland with his supposedly false statement, it could not have done so without calling as a witness the adjuster (who had not been identified as a witness by any of the parties).

Judge Younge agreed that the worker's compensation file was inadmissible. Notwithstanding the trial court's express holding, counsel for Modern, during cross-examination of the plaintiff, asked Rolland whether he had told anyone over the phone that he had been working as an employee of Senn Landscaping when the accident occurred. R.2395a. Rolland denied making any such representations and, in fact, had already testified on direct examination that he was heavily medicated, traumatized, and unable to concentrate or think clearly at the time. R.2343a.

8. The trial court now contends that its exclusion of the worker's compensation file was erroneous

In his Rule 1925(a) opinion, Judge Younge contends that, notwithstanding his initial decision to exclude the evidence, the statements attributed to Rolland should have been admitted because they may have suggested his participation in a scheme to defraud the worker's compensation carrier, even though Rolland had not initiated any of the communications and had never sought or requested worker's compensation benefits. Judge Younge also asserted that the notes of Rolland's unverified statements, given while he was medicated days after having his leg amputated, were now arguably material because they might have tended to support the otherwise unsubstantiated claim that Rolland was the "project supervisor," even though every non-party witness confirmed Rolland's testimony that he was simply one of several independent contractors on the job, and even though the recorded statement given by Senn described Rolland as a **subordinate**, not as a supervisor.

In his opinion, Judge Younge concludes that he should have admitted the worker's compensation file and that he should have,

accordingly, granted Modern's request for a mistrial. Judge Younge, however, does not contend in his opinion that his initial evidentiary ruling represented an improper exercise of discretion. For the reasons explained below, plaintiffs respectfully submit that Judge Younge's original ruling, excluding the contents of the worker's compensation file from evidence, was correct and an appropriate exercise of discretion.

Following Judge Younge's entry of orders granting a new trial to all defendants, plaintiffs filed their timely notice of appeal to this Court.

VII. SUMMARY OF THE ARGUMENT

A. Ample Evidence Of Record Supports The Jury's Finding Of No Contributory Negligence

None of the grounds on which the trial court relied in granting a new trial in favor of the defendants can withstand appellate scrutiny.

Initially, more than adequate support exists in the trial court record to uphold the jury's finding that Rolland was not contributorily negligent. The jury simply rejected defendants' repeated calls to find Rolland liable for the loss of his leg. Moreover, the jury's specific allocation of liability among the three groups of defendants was neither irrational nor conscience-shocking.

Judge Younge was “shocked” by the verdict because he impermissibly ignored the evidence of record that amply supported the jury’s verdict. Multiple experts, *including the expert called by Modern*, testified that Rolland acted reasonably when he approached the already stationary track loader, intending to move the hose. R.1943a, 1962a, 2384a.

Though he was required to view this evidence in the light most favorable to plaintiffs, the trial judge granted a new trial simply because he disagreed with the result reached by the jury, improperly positioning himself as the proverbial “thirteenth juror.”

Fundamental to Judge Younge’s characterization of the verdict as “shocking” was his belief that Rolland’s control over the instrumentality was somehow greater than Modern’s. Judge Younge arrived at his view by accepting as true the disputed claim that Rolland was some sort of “supervisor” who controlled the operation of the track loader.

Judge Younge’s view of this disputed evidence, in disagreement with the jury’s unanimous view to the contrary, ignores significant differences between Rolland and the defendants. Unlike the defendants, Rolland did not own the track loader or the premises. He was not

subject to the terms of the rental contract, had no financial authority over Senn, and had no right to control the disposition of the loader. The trial court, however, elevated Rolland to a position of supervision and, ultimately, control, improperly adopting a construction of the evidence in the light **least favorable** to plaintiffs.

B. The Trial Judge Improperly Revisited The Order Granting Summary Judgment

Judge Younge, in his capacity as trial judge, also impermissibly questioned the propriety of the order granting summary judgment as to the Senn and Modern defendants. He concluded, without any logical or legal basis, that the order, which did not even mention Irrgang or UCS, somehow improperly prejudiced those defendants.

C. The Trial Court's Proper Evidentiary Ruling Was Not Grounds For A Mistrial

Judge Younge properly exercised his discretion when he excluded from evidence the disputed, unverified, and undisclosed statements attributed to Rolland in the worker's compensation file. Accordingly, his denial of Modern's request for a mistrial was proper.

The significance the trial court gave after the fact to these excluded documents is at odds with Modern's failure to even request

them prior to trial. Moreover, while the trial court characterized the file as “devastating,” the trial court ignored those portions of the file that were detrimental to Modern’s position, including a *recorded* statement by Senn in which he describes Rolland as a subordinate, not as a supervisor. The trial court also overlooked the inherent unreliability of the unverified statements attributed to Rolland. There is likewise no support for the trial court’s contention that the excluded files were possibly probative of a “scheme” by Rolland to obtain worker’s compensation benefits, particularly given that Rolland never sought worker’s compensation benefits.

Finally, the trial court used its evidentiary ruling as a basis for granting a new trial as to Irrgang/UCS and Senn, although these defendants had agreed with the initial evidentiary ruling. Even more inexplicably, it awarded a new trial to the Senn defendants, who had improperly withheld the documents in the first place.

VII. ARGUMENT

A. Ample Evidence Of Record Supports The Jury's Finding Of No Contributory Negligence

1. The claims of contributory negligence

The defendants' claims of contributory negligence centered around two aspects of Rolland's conduct: (1) his decision to place himself in close proximity to the stationary loader; and (2) his alleged failure to exercise his supervisory authority as the "project manager."

Though they called no fact witnesses to the stand, and collectively offered the testimony of only one expert witness on liability, the defendants vigorously argued that Rolland, more than any of the other parties, shouldered the greatest degree of responsibility for his injuries. Comparative negligence principles would have reduced, or even eliminated, Rolland's right of recovery if this defense had been successful.

The apportionment of liability is quintessentially a jury question. *See Powell v. Drumheller*, 653 A.2d 619, 623 (Pa. 1995) ("The question of concurrent causation is normally one for a jury."). The trial judge afforded the defendants free rein to argue that Rolland was liable for his own injuries. The jury was properly assigned the task of assigning

percentages of liability to the defendants adjudicated negligent, and was also instructed to determine whether, and to what extent, the plaintiff bore responsibility for his own injuries. *Id.*

After three weeks of trial, the jury unanimously rejected the defendants' argument and found that the plaintiff had not acted negligently.

2. The trial judge viewed the evidence in the light least favorable to the verdict winner

In his Rule 1925(a) opinion, Judge Younge held that the refusal of the jury to find Rolland liable shocked his conscience, as did its assignment of 21 percent of responsibility to the defendant that had knowingly permitted a ten-year-old child to operate its ten-thousand-pound earthmover. By holding that the jury's refusal to find Rolland contributorily negligent "shocked" its conscience, the trial court improperly substituted its judgment for that of the jury.

In *Helpin v. Trustees of Univ. of Pa.*, 969 A.2d 601 (Pa. Super. 2009), *aff'd*, 10 A.3d 267 (Pa. 2010), this Court made clear that mere disagreement with the result does not warrant the award of a new trial:

[a] new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. A trial judge

must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror.

Id. at 615-16 (internal quotations omitted).

Similarly, in *Betz v. Erie Ins. Exchange, supra*, this Court recognized:

A new trial will be granted on the grounds that the verdict is against the weight of the evidence where the verdict is so contrary to the evidence it shocks one's sense of justice. [A party] is not entitled to a new trial where the evidence is conflicting and the finder of fact could have decided either way.

957 A.2d at 1252.

Though the trial court's Rule 1925(a) opinion pays lip service to this standard, the trial judge has simply substituted his view of the evidence for that of the jury.

3. Ample evidence supported the reasonableness of Mr. Rolland's act of approaching the track loader

As to the contention that Rolland acted unreasonably when he approached the stationary track loader, multiple experts testified that the plaintiff acted reasonably. Daniel Rothermel, who offered expert testimony in construction landscaping, testified that Rolland's actions,

approaching a stationary track loader, were commonplace and reasonable. R.1943a. Under cross-examination by counsel for Modern, Rothermel testified:

Q. So the bottom line is, I take it, no matter what Mr. Rolland did in this case, it's your opinion that he's absolutely, positively 100 percent not responsible for any lack of judgment; correct?

A. With the facts as they are, yes, 100 percent.

R.1962a. Rothermel reiterated his opinion, without objection, on redirect examination. R.1962a-1963a.

Andrew M. Agoos, an expert with regard to industry practices of renting and leasing construction and earth-moving equipment, testified without objection that Rolland did not have sufficient familiarity with the track loader to know what sort of danger he was putting himself in by standing near the machine and attempting to flip a garden hose over it. R.2023a. Rolland, for his part, testified that he approached the *stationary* loader only after assuring himself that the operator was aware of his presence. He testified that he expected the operator to “do nothing” as he flipped the garden hose over the machine, and that he did not subjectively view his actions as unreasonably dangerous. R.2339a.

Most telling, however, were the conclusions of the sole expert called by defendant Modern, Jerry L. Purswell, Ph.D., who was recognized by the trial court as an expert in the fields of safety engineering, ergonomics, and biomechanics. Purswell acknowledged, on cross examination, that Rolland's account, if credited, did not implicate any negligence on his part. Purswell testified as follows:

[Q.] You understand that if Mr. Rolland was doing what he swore under oath to this jury that he was doing, you wouldn't have a problem with that; right?

A. If the loader is stopped and he does not expect it to move forward and he is trying to run the hose over it, then I wouldn't have a problem with that. If he expects it to move, I would have a big problem with it.

R.2384a.

In fact, Rolland's conduct, even as envisioned by the trial court, would not give rise to contributory negligence as a matter of law. Central to the trial court's decision is the notion that Rolland should have anticipated that the child might move the track loader. Yet it is "a fundamental principle of law that one is not bound to anticipate another's negligence." *Mulheirn v. Brown*, 185 A. 304, 305 (Pa. 1936); *see also Fleischman v. Reading*, 130 A.2d 429, 431 (Pa. 1937) ("One is not bound to anticipate the negligence of another").

Based on the foregoing evidence presented to the jury, it cannot be said that the result reached by the jury was “inherently improbable or at variance with admitted or proven facts.” *Rittenhouse v. Hanks*, 777 A.2d 1113, 1119 (Pa. Super. 2001). Though he was required to view this evidence in the light most favorable to Rolland, the trial judge granted a new trial simply because he disagreed with the result reached by the jury, improperly positioning himself as the proverbial “thirteenth juror.”

4. The trial court improperly considered the evidence in the light least favorable to Rolland in order to accord him “supervisory” status

Integral to Judge Younge’s characterization of the verdict as “shocking” is his finding that Rolland’s connection to the track loader was somehow qualitatively superior to Modern’s. Opinion at 14-15 (“Mr. Rolland’s involvement in this construction project was much more significant than that of the Modern Defendants”). If Modern can be faulted for failing to prevent the child’s operation of the track loader, the trial court reasoned, so too should Rolland, for he, according to the trial court, had an equal, if not superior, ability to control the use of the machine. Yet before the trial court could be “shocked,” it first had to

find that Rolland possessed authority and control over the track loader and its child-operator. On this point the evidence was in dispute.

Rolland testified that he was merely one of several co-equal contractors on the job site and that he had no authority to intercede in matters between Mr. Irrgang and his contractors. R.2318a-2319a. Consistent with this testimony, two independent, non-party witnesses, Kenneth Gerringer and Donald Dayton, testified that Rolland exercised no supervisory authority on the job site. R.1866a, 1868a, 1869a, 2143a-2144a. In fact, *nobody* took the witness stand to substantiate the defendants' characterization of Rolland as some sort of supervisor or "safety manager." The only "proof" on this point came from the videotaped deposition testimony of defendants Irrgang and Senn, neither of whom took the stand at trial. Yet Irrgang could identify no documents to substantiate the supervisory role he had imagined for Rolland and, in fact, could not recall even discussing with Rolland such a role:

Q. My question is a little different. I'm not interested in what's understood. I'm interested in what you told Mr. Rolland. Did you ever tell him that you expected him to be the enforcer of safety at your personal residence?

A. I don't know if we ever had that conversation.

R.3611a.

Senn admitted that **he** was responsible for supervising his own son. R.3419a-3420a. He admitted he never told Rolland he expected Rolland to supervise his employees or his child. R.3420a. Ironically underscoring his lack of supervisory control over Senn's employees, Rolland was forced to move the hose himself because Senn's employee declined to move the hose at the plaintiff's request.

In order to create the supposedly "shocking" parity between Rolland and Modern, the trial court ignored the evidence favorable to the verdict-winner and improperly considered the relevant facts in the light least favorable to Rolland. Plaintiff's act of approaching the stationary track loader with his arm outstretched became, according to the trial court, evidence of "interfering" with the track loader and "directing its operation." Opinion at 28. Plaintiff's signature on the delivery invoice became, according to the trial court, evidence of his personal assumption of responsibility under the terms of the rental agreement. Opinion at 25 ("Since Mr. Rolland signed for the track loader, there was at least a circumstantial case as to whether he, himself, had entrusted the equipment to the child"). The significance

accorded by the trial court to Rolland's ministerial act of signing the paperwork is confounding, as it is hornbook law that a person who executes a contract on behalf of a disclosed principal does not become personally liable on the instrument. *See Geyer v. Huntingdon County Agricultural Ass'n*, 66 A.2d 249, 250-251 (Pa. 1949); *B&L Asphalt Indus. v. Fusco*, 753 A.2d 264, 270 (Pa. Super. 2000). Incredibly, the only tangible evidence of Rolland's supposed supervisory status referenced in the trial court's opinion was the disputed statement attributed to plaintiff while he was under the influence of narcotics, which the trial court didn't even allow into evidence. Opinion at 6.

The trial court's improperly skewed interpretation of the record pervades its opinion. For instance, it was undisputed that Irrgang provided Senn with the track loader so as to spare Senn the financial burden of securing the machinery himself. Irrgang directed Rolland to call Modern and place an order using the account maintained by UCS, Irrgang's corporate alter-ego. In its opinion, the trial court distorted Rolland's ministerial acts, transforming plaintiff into an agent of UCS who rented the track loader and personally "loaned" the machine to Senn: "Mr. Rolland, acting on behalf of United Construction Services,

rented a track loader from the Modern defendants, and then in turn loaned the track loader to the Senn Defendants.” Opinion at 3. Astonishingly, the trial court drew from the evidence inferences *unfavorable* to the plaintiff, such as concluding that the mere absence of any actual UCS employees on the Irrgang premises somehow inexplicably suggested that Rolland “acted as project manager for the work supervised on behalf of Defendant United Construction Services.” Opinion at 4.

The trial court cavalierly abandoned *any* pretense of considering the record in the light most favorable to Mr. Rolland and simply disregarded the testimony of Rolland, Gerringer, and Dayton before concluding that “significant evidence was presented to establish that Mr. Rolland was supervising the job site.” Opinion at p. 24.

The evidence and arguments credited by Judge Younge were properly put before the jury. The finders of fact *expressly rejected* defendants’ repeated calls to hold Rolland responsible for his injuries.

5. The trial court ignored fundamental differences between plaintiff and defendants

Judge Younge’s professed “shock” stems from his refusal to acknowledge that Rolland, as one of several independent contractors,

did not stand on an equal footing with the defendants and did not possess the right to control the child's operation of the track loader. The trial court repeatedly chastised Rolland for his purported failure to prevent the child from using the track loader ("Mr. Rolland's testimony alone established that he ... did nothing to intervene") (opinion at 21), ignoring the absence of any proof that he had authority to so act and sidestepping the fact that Rolland, in fact, told Irrgang that his loader was being operated by "the kid."

The trial court's professed consternation ignores the fundamental differences between Rolland and the defendants. Unlike Modern (which owned the track loader, and which had the right to repossess the machinery if it was used by incompetent operators), Rolland had no ownership interest in the machine and certainly lacked Modern's superior knowledge and expertise with respect to the dangerous properties of the machinery it leased for profit. R.2026a. Unlike Irrgang, Rolland neither hired nor paid Senn. Unlike Irrgang, Rolland did not own the property on which these activities were undertaken. Rolland was not a party to the rental agreement and, unlike UCS, assumed no contractual duty to limit use of the machine to competent

operators. Unlike Senn (who placed his son in the loader), Rolland did not control Senn Landscaping's employees. The purported parity on which the trial court's outrage was based is simply non-existent, particularly when the record is considered in the light most favorable to the plaintiffs.

6. There was ample basis for the jury's allocation of liability

Ample evidence also supports the jury's finding that the Modern defendants were 21 percent liable for Rolland's injuries. Judge Younge overlooked that the jury had, in fact, allocated the lion's share of responsibility to the other defendants (47 percent to the Senn defendants and 32 percent to Irrgang and UCS). The jury's reasonable apportionment recognized that Senn, having placed his child at the controls, was most responsible and that Irrgang, as the property owner who hired Senn and provided him with the loader, was also significantly culpable.

The evidence more than adequately supports the jury's specific finding concerning Modern's proportionate share (21%) of liability. Modern was in the business of selling and leasing this equipment and was possessed of superior knowledge regarding the dangers of these

machines (R.2026a) yet it *knowingly* permitted a child to operate its track loader, *knowing* such use was dangerous. Modern categorically recognized that 10-year-old children were not competent operators. 2250a. Modern conceded that its employees failed to do what they should have done and admitted that they should have contacted Irrgang/UCS, admonished the customer concerning the prohibition against operation by incompetent users, and repossessed the machine if necessary. R.1919a, 2299a-2301a. Any of these steps would have prevented Rolland's injuries. The jury's finding that the Modern defendants were 21 percent liable for Rolland's injuries is amply supported by the evidence of record.

B. Judge Younger Erred Procedurally And Substantively In Holding That The Earlier Entry Of Summary Judgment Against The Senn And Modern Defendants Unfairly Prejudiced Irrgang And UCS

1. The order granting summary judgment was unquestionably proper

Though not directly implicated in this appeal, Judge Di Vito's order granting summary judgment against Modern and Senn was unquestionably appropriate. The order reflected the rather unremarkable judicial recognition that knowingly permitting a ten-

year-old child to operate a five-ton bulldozer will constitute negligent entrustment of a dangerous instrumentality when the child operates the track loader in an unsafe manner.

The tort of negligent entrustment arises when an actor “permit[s] a third person to use a thing or engage in an activity which is under the control of the actor, if the actor knows or has reason to know that such person ... is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.” Restatement (Second) of Torts §308.¹ Thus, negligent entrustment arises where a dangerous instrumentality, such as a gun, is left accessible to children. *Mendola v. Sambol*, 71 A.2d 827 (Pa. Super. 1950). Not surprisingly, the rule articulated in §308 “has its most frequent application where the third person is a member of a class [such as young children or feeble-minded adults] which is notoriously likely to misuse the thing which the actor permits him to use.” Restatement (Second) Torts §308, comment (b).

Here, Modern *knew* its track loader was being operated by a child, *knew* that such operation constituted dangerous misuse, and *admitted*

¹ Section 308 has, for decades, been the law in Pennsylvania. *Kuhns v. Brugger*, 135 A.2d 395, 403 (Pa. 1957).

that its employees had failed to respond and intervene properly. This undisputed evidence included the following: (i) Modern's employee, at the time of delivery, knew a child would be operating the track loader, and later saw the child actually using the machine; (ii) Modern's deliveryman *twice* reported the child's operation to Modern's Rental Manager; (iii) Modern conceded a ten-year-old is not competent to operate such machinery, and that such operation constitutes misuse of the instrumentality that was dangerous to the child, to the equipment, and to others; (iv) Modern's employees failed to properly admonish Irrgang/UCS that use by a child violated the rental agreement that would result in repossession of the machine; and (v) the child operated the machine in an indisputably improper manner — a fact that was confirmed by **Modern's** expert witness who testified the child “was at fault.” R.2383a. The evidence on which Judge Di Vito relied was introduced at trial and confirms the propriety of his grant of summary judgment.

In his opinion, Judge Younge suggests the entry of summary judgment was “problematic” because Modern “did not directly entrust the track loader to the ten-year-old boy,” but had entrusted it to “either

Mr. Rolland or United Construction Services.” Opinion at 24-25. In this respect, the trial court has unquestionably misapprehended the gravamen of the tort. The Pennsylvania Supreme Court has explicitly rejected as “unrealistic” the distinction incorrectly articulated by the trial court. *Kuhns v. Brugger, supra*, 135 A.2d at 405. There is no requirement of a **direct** conveyance from the entrusting party; it is enough if the actor “**permit[s]** a highly dangerous instrumentality to be in a place where the incautious hands of a child might come in contact with it....” 135 A.2d at 404 (emphasis added); *see also* Restatement (Second) Torts §308, comment (b). In fact, the Supreme Court has held that an automobile dealership that simply failed to properly secure one of its cars after a set of keys was stolen was subject to liability under §308 when the car was stolen by a teenager and involved in an accident. *Anderson v. Bushing Pontiac Company, Inc.*, 171 A.2d 771 (Pa. 1961).

Tellingly, the **sole authority** to which Judge Younge cited in support of his contention that summary judgment was “problematic,” *Burkholder v. Genway Corporation*, 637 A.2d 650 (Pa. Super. 1994), has **nothing** at all to do with negligent entrustment. *Burkholder* concerned the scope of 75 Pa.C.S.A. §1574, a *statutory* provision not even remotely

implicated in this case, which imposes **vicarious liability** on a person who permits his automobile to be driven by an unlicensed operator. By contrast, the doctrine of negligent entrustment has nothing to do with vicarious liability. “Section 308 imposes liability on a defendant because of her own acts in relation to an instrumentality or activity under her control; an ‘entrustor’s’ liability is not dependent on, derivative of, or imputed from the ‘trustee’s’ actual liability for damages.” *Christiansen v. Silfies*, 667 A.2d 396, 400 (Pa. Super. 1995); *see also Kuhns v. Brugger, supra*, 135 A.2d at 404; *Ferry v. Fisher*, 709 A.2d 399, 403 (Pa. Super. 1998) (“The entrustor’s liability is not dependent on, derivative of, or imputed from the trustee’s actual liability”). The trial court’s single citation to an entirely irrelevant decision underscores the incorrect legal paradigm through which Judge Younge improperly considered the factual record.

Beyond its misapplication of *Burkholder* and its invention of a “constructive entrustment” concept, the trial court’s opinion includes a series of novel legal propositions in support of its critique of the grants of summary judgment. Judge Younge incorrectly contends that the child’s operation of the machine might have represented a “superseding

cause” of Rolland’s injuries. But a “superseding cause” arises only when the intervening event at issue is so extraordinary as to be unforeseeable. *Miller v. Checker Yellow Cab Co.* 348 A.2d 128, 130 (Pa. 1975). Surely it cannot be said that misuse of a bulldozer by a ten-year-old was so extraordinary as to have been unforeseeable. *Anderson v. Bushing Pontiac, supra*, 171 A.2d at 774.

The trial court’s opinion is also irreconcilably inconsistent. For instance, it asserts that “this court ... felt that the Rollands had failed to prove the tort of negligent entrustment against the Modern Defendants” (opinion at 24), only to declare 14 pages later that “these facts created a prima facie case of negligent entrustment [as to Modern] sufficient to overcome a motion for judgment notwithstanding the verdict” (opinion at 38). With similar inconsistency, the trial court, ignoring Modern’s concession regarding the incompetence of children to operate this machine, erroneously posits that summary judgment may have been improvident because “there was no solid evidence present [sic] at trial that the ten year old was in fact an incompetent operator. . . .” Opinion at 27. Yet, six pages earlier, Judge Younge declared that, “This Court would never suggest that a ten-year-old child was in fact

competent to operate heavy equipment on a construction site.” Opinion at 21.²

The trial court similarly contended that the age of the child may have been immaterial because an adult might have made the same mistake as the child. Opinion at 26-27. But liability for negligent entrustment arises where the entrusted party acts negligently; it is not dependent upon a particular type of negligence that is unique to the entrusted party. *Christiansen v. Silfies*, 667 A.2d at 400.

The trial court goes so far as to invent for Modern excuses that are contrary to the position taken by this defendant. The trial court suggested that Modern might not have been able to retrieve the track loader without violating its contractual obligation to provide the machinery (opinion at 24), even though Modern admitted that it, in fact, was possessed of the right to repossess, *and would have done so here*. R2300a.

² This child was statutorily prohibited from operating the machinery. 43 P.S. §44 (minors under sixteen years of age are prohibited from work involving the operation of “motor vehicles of any description”).

2. Judge Younge committed reversible procedural error by reconsidering, at the post-trial motion stage, Judge Di Vito's entry of summary judgment against the Senn and Modern defendants

Implicit in his opinion, Judge Younge's grant of a new trial presupposes that the retrial will not be governed by the same "problematic" order granting summary judgment. Any other interpretation renders the grant of a new trial meaningless. But the Rules of Civil Procedure do not allow a trial court to revisit, in the context of post-trial motions, the propriety of an earlier order disposing of a motion for summary judgment. In *Bostick v. Schall's Brakes and Repairs, Inc.*, 725 A.2d 1232 (Pa. Super. 1999), this Court recognized:

The note to Pa.R.C.P. 227.1(c) states that a motion for post-trial relief may be filed following a trial by jury.... Logically, **post-trial** motions may not be filed to orders disposing of **pre-trial** motions (i.e., orders disposing of preliminary objections, motions for summary judgment, motions relating to discovery) or motions relating to proceedings not constituting a trial.

Id. at 1236 (emphasis in original); *see also Vietri ex rel. Vietri v. Delaware Valley High School*, 63 A.3d 1281, 1288 (Pa. Super. 2013) (an adverse ruling on summary judgment cannot be challenged by means of post-trial motions).

Judge Younge’s apparent reconsideration of Judge Di Vito’s earlier grant of summary judgment against the Senn and Modern defendants was also procedurally erroneous under the coordinate jurisdiction prong of the law of the case doctrine. The Supreme Court of Pennsylvania “has long recognized that judges of coordinate jurisdiction sitting in the same case should not overrule each others’ decisions.” *Commonwealth v. Starr*, 664 A.2d 1326, 1331 (Pa. 1995). The “coordinate jurisdiction rule” is a “rule of sound jurisprudence based on a policy of fostering the finality of pre-trial applications in an effort to maintain judicial economy and efficiency.” *Id.* (citing *Okkerse v. Howe*, 556 A.2d 827, 831 (Pa. 1989)); *Golden v. Dion & Rosenau*, 600 A.2d 568, 570 (Pa. Super. 1991) (a matter decided by a trial judge should remain undisturbed, unless the order is appealable, and an appeal therefrom is successful).

Compounding his error, Judge Younge did not even purport to reexamine the record as it existed at the summary judgment stage to determine whether the entry of summary judgment was proper. He apparently based his assessment of the purported impropriety of summary judgment without any pretense of examining the record

available to Judge Di Vito. Nevertheless, by denying j.n.o.v. in favor of Modern, Judge Younge recognized there was sufficient evidence to find Modern negligent.

When he initially ruled from the bench on the parties' post-trial motions, Judge Younge focused heavily upon the "erroneous" ruling rendered by Judge Di Vito. Plaintiffs urge this Court to compare the reasons recited from the bench, *immediately* following oral argument, with the reasons recited in the opinion written five months later. In its 1925(a) opinion, the trial court went to great lengths to explain that its decision was *not* based upon any error in Judge Di Vito's decision, presumably in belated recognition of the impropriety of revisiting a motion for summary judgment in the setting of post-trial motions.

3. The jury's finding of liability against Irrgang and UCS necessarily establishes that the jury found that those defendants were independently negligent

Perhaps now aware of his inability to reconsider Judge Di Vito's grants of summary judgment against the Senn and Modern defendants, Judge Younge asserts in his Rule 1925(a) opinion that the earlier entries of summary judgment against those defendants somehow prejudiced Irrgang and UCS by "suggesting that they had negligently

entrusted the track loader” Opinion at 15. Conspicuously, Judge Younge does not explain why Irrgang and UCS can be heard to complain about any supposed prejudice *after* trial when they did not move for severance *prior* to trial.

According to Judge Younge’s Rule 1925(a) opinion, the trial as to Irrgang and UCS was a meaningless exercise because their liability somehow flowed automatically from that of Senn and Modern. But plaintiffs never contended that UCS, as the lessee, or Irrgang, as the property owner, was automatically liable for negligently entrusting the track loader simply because the Modern and Senn defendants had already been held liable. Rather, plaintiffs’ claims against Irrgang and UCS were predicated upon the *disputed* contention that Irrgang was aware of the child’s operation. Irrgang did not dispute his appreciation of the “absurd” dangers associated with the use by a child of industrial earth moving machinery. He simply denied that he was aware, prior to Rolland’s injury, that a child was using, on his property, the track loader his company had leased.

The trial court repeatedly characterizes as “illogical” that the “Modern Defendants were held liable for negligent entrustment while

the company that leased the equipment from the Modern Defendants ... was permitted to present a defense.” Opinion at 22. But there was nothing illogical about this approach. Unlike Modern, Irrgang/UCS denied knowing that a child was operating the machinery they had provided to Senn. Because liability under §308 attaches only if the actor “knows or has reason to know” of the improper use, the entry of summary judgment was limited to those parties who admitted they were aware of the misuse. Irrgang, as property owner and as principal of UCS, denied knowing that Senn had allowed his son to operate the track loader. There was thus nothing “illogical” about the entry of summary judgment as to some, but not all, of the defendants. The trial court expressly noted that Irrgang “could have intervened and prevented this accident” if he “saw the boy operating the track loader that was leased by his company.” Opinion at 41.

The evidence establishing Irrgang’s knowledge included: (i) Rolland’s testimony that he told Irrgang that Senn’s “kid” was operating his track loader, (ii) the testimony of a non-party witness who overheard that conversation, and (iii) the child’s testimony that Irrgang was present as he maneuvered the machine. Irrgang’s right to control

the use of the track loader was never in dispute. In fact, when Senn sought to return his child back behind the controls of the track loader following Rolland's injury, Irrgang belatedly prohibited such conduct. R.1875a. Irrgang did not take the stand to rebut any of this testimony.

Grasping at straws to justify a new trial as to all defendants, Judge Younge took aim at the orders granting summary judgment so as to extend to Irrgang/UCS the extraordinary relief of a new trial even though: (i) they were never subject to the summary judgment orders; (ii) they fully litigated every issue; and (iii) their claims of undefined "prejudice" could not be reconciled with their failure to seek severance. Even more confounding, Judge Younge used the grant of summary judgment as a basis to grant a new trial to Senn, even though **Senn admitted that he was negligent.** R.511a. Because this ground for a new trial is procedurally and substantively erroneous, this Court should reverse the grant of a new trial and reinstate the jury's verdict.

C. The Trial Court’s Original Decision To Exclude Senn Landscaping’s Worker’s Compensation File Was Correct

1. Judge Younge awarded a new trial to Modern on account of his exclusion of evidence that Modern had never sought in the first place

The “first and foremost” ground on which Judge Younge justified his grant of a new trial is the most inexplicable. Judge Younge claims that he should have granted the Modern defendants’ request for a mistrial arising out of the belated production by the Senn defendants of a worker’s compensation file that no defendant had previously sought.

The file’s existence was known and/or should have been known to all parties, including the Modern defendants (who made no effort to secure it), the Senn defendants (who controlled it), and the Irrgang/UCS defendants (who had been interviewed by the worker’s compensation carrier in 2009). Days into trial, the trial court, *sua sponte*, ordered production of the **entire** file, even though **none** of the parties had sought it. Plaintiffs had simply renewed, at trial, an ongoing request for production of a recorded statement that **Senn** had given. Notwithstanding their conspicuous failure to seek discovery of this file

(or to even request its production at trial), the Modern defendants sought to improperly exploit the trial court's *sua sponte* order for its production, claiming that exclusion of evidence they had never sought in discovery somehow justified a mistrial.

According to the file, Senn, not Rolland, initiated the worker's compensation claim. Senn unquestionably had an interest in being considered Rolland's employer, so that his company could avail itself of the employer immunity provided in the Worker's Compensation Act. While the trial court repeatedly suggests that Rolland was a participant in a scheme to fraudulently obtain worker's compensation benefits, it is undisputed that Rolland never made a claim for such benefits, never initiated a claim for such benefits, and never needed such benefits (as he was already insured). R.3032a. In fact, the only communication initiated on Rolland's behalf was one in which his representatives made clear that he was making *no claim* for such benefits. R.3665a.

2. The excluded worker's compensation file constituted a mixed bag

Included in the worker's compensation file are transcriptions of telephone interviews conducted by the carrier with Irrgang and Senn, as well as unverified notations concerning statements attributed to

Rolland. In his recorded statement, Senn offered an account that cannot be reconciled with his claim that Rolland was supposedly Irrgang's on-site supervisor. In that transcribed statement, Senn referred to Rolland as his subordinate, not his supervisor.

Q. OK, and who directed Ruick as to what to do, or does, you know, how does that work?

A. I . . . I told him . . . I pointed and told him where to go and what to help me with.

R.3764a.

In the statement he provided to the worker's compensation carrier, Irrgang debunked many of the claims on which Modern's "supervisor" defense was based. According to the contested records, Irrgang told the carrier that Rolland "was working for Steve Senn on this project." R.3673a. Thus, while the trial court suggests that the file would have "affected the outcome of trial" (opinion at 29), the file in fact included significant evidence that would have undermined Modern's defense, not bolstered it.

3. The statements purportedly given by Rolland are inherently unreliable

According to the worker's compensation file, an insurance company investigator reportedly attempted to reach Rolland while he

was hospitalized undergoing the surgeries that would culminate in the amputation of his leg. Unlike the recorded, verifiable interview of Senn, this evidence consisted entirely of the “work product notes” of the insurance claims investigator purporting to document interactions with Rolland.

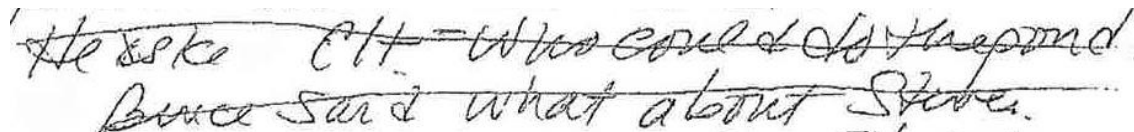
The notes reference a purported conversation with Mrs. Rolland in which she specifically informed the carrier that her husband was *not* one of Senn’s employees. R.3671a. The notes also purport to describe two conversations with Mr. Rolland in which he expressed unwillingness to discuss such matters while he was distraught and under the influence of narcotic pain medications. The entry concerning the interaction with Rolland on August 27, 2009 (mere days following the amputation of his leg) *explicitly* notes that Rolland told the investigator that he “recently had been given 30 milligrams of morphine, and refused to give a recorded statement.” R.3675a. The records of the healthcare workers treating Rolland confirm that he was, at that time, receiving multiple narcotic medications. R.2638a. Mrs. Rolland confirmed that her husband was understandably distraught, confused, and medicated. R.2051a, 2053a.

The note in the worker's compensation file references statements purportedly made by Mr. Rolland that are, in varying respects, consistent and inconsistent with the contentions asserted by plaintiffs in this litigation. For instance, according to the notes, Rolland described himself as a "self-employed" carpenter privately hired by Irrgang. On the other hand, the notes purport to recite a list of supervisory tasks that Rolland supposedly performed on the job, such as "making sure [Senn's employees] were getting the job done." R.3676a. According to the notes, the purported interview was terminated when Rolland became too emotionally distraught to talk. R.3677a.

While the notes, *on their face*, reflect the inherent unreliability of their heavily medicated subject, compelling evidence also exists suggesting the interviewer did not accurately document whatever it was that Rolland supposedly told her.

Significantly, the worker's compensation carrier also produced handwritten notations on which the typewritten entries are based. Disparities between the handwritten notes and their typewritten counterparts undermine the already dubious reliability of the carrier's

documentation. For instance, the handwritten notes state that Irrgang, not Rolland, initially suggested Senn for the job:



~~He asks CIt - Who could do the pond
Bruce said what about Steve.~~

“He [Irrgang] asked claimant [Rolland] — who could do the pond? Bruce [Irrgang] said, what about Steve?”

R.3726a.

The typewritten transcription of these notes, on the other hand, recites that *Rolland* suggested Senn:

The cIt told Bruce that he needed to have his pond repaired. Bruce agreed and asked CIt who could do the pond. CIt told Bruce that Steve Senn could do the pond. There was no work going on for cIt at Bruce's home at the

“... Bruce ... asked claimant who could do the pond. Claimant told Bruce that Steve Senn could do the pond. ...”

R.3676a.

Similarly, the typewritten notes reciting the nine supervisory duties purportedly assumed by Rolland correspond to handwritten entries that purport to describe duties that were undertaken “since [the] job started,” presumably by “both Steve [Senn] and claimant.”

R.3726a. But the handwritten entries do not clearly define whether

Rolland purportedly described these as jointly undertaken duties or as duties that were divided between Senn and Rolland.

Thus, the worker's compensation file is: *(i)* an untimely produced record that had never been sought by the defendants during years of discovery or at trial, *(ii)* purportedly prepared by an individual who had never been identified as a potential witness, *(iii)* of a second-hand hearsay account, *(iv)* of an unrecorded statement that was never adopted by the plaintiff, *(v)* prepared by an insurance carrier with an interest in the outcome, *(vi)* with no assurances that the statements purportedly attributed to the plaintiff were accurately memorialized, *(vii)* under circumstances in which the statements, if made as described in the document, would have simply been the inherently unreliable accounts of a traumatized individual under the mind-altering influence of multiple narcotics and analgesics, *(viii)* purportedly given after Mrs. Rolland had already told the carrier that her husband was not employed by Senn.

4. The trial court's initial decision to exclude the evidence was an appropriate exercise of discretion

Judge Younge, in a proper exercise of his discretion, excluded this evidence under Pa. R. Evid. 403 because the untimely produced statements attributed to Rolland would have opened a Pandora's box of collateral issues, including: (i) the existence and amount of Senn's liability insurance, (ii) the extent to which an individual under the influence of Morphine, Dilaudid, and Percocet, in a setting of trauma, may be an unreliable historian (an issue that would have implicated expert medical testimony), and (iii) the extent to which the labyrinthine provisions of the Worker's Compensation Act would have worked to Rolland's detriment.

Following this proper exercise of his discretion, Judge Younge denied defendant Modern's motion for a mistrial. He has now revisited both of these rulings. It is difficult, if not impossible, to explain the trial court's dramatic reversal, as the *only* intervening event appears to have been a verdict with which Judge Younge disagrees in numerous respects.

The original decision to exclude the file was clearly proper and an unquestionably proper exercise of the Court's discretion. *Lewis v. Pruitt*, 487 A.2d 16 (Pa. Super. 1985) (questions concerning the admission or exclusion of evidence are within the sound discretion of the trial court and may be reversed on appeal only when a clear abuse of discretion is apparent). Relevant evidence can be excluded if its potential for unfair prejudice outweighs its probative value or where any probative value is outweighed by the danger of "confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Pa. R. Evid. 403.

In his opinion, Judge Younge concludes that his initial decision excluding the untimely produced worker's compensation file "deprived the defendant of a fair trial." Opinion at 27. With all due deference, the suggestion that the Modern defendants were "denied a fair trial" by the trial court's proper exclusion of evidence that Modern had never sought vastly overstates the significance of the evidence in question. First of all, the excluded evidence was at best a mixed bag, as it included declarations by Senn and Irrgang that undermined Rolland's supervisory status imagined by the defendants.

Moreover, Rolland's status as a mere contractor was confirmed by every non-party witness who testified on the subject. In other words, according to the trial court, the inherently suspect contents of the insurance company's file would have somehow undermined Rolland's credibility with respect to a factual issue that was independently verified by every disinterested non-party witness who testified.

Similarly overblown is the trial court's contention that "this was extremely persuasive evidence" that "would have affected the outcome of trial." Opinion at 28-29. The suggestion that a disputed, unverified statement (purportedly given in connection with a conversation Rolland did not initiate, when he was traumatized and medicated, hours after his discharge from the hospital) would have somehow altered the outcome of the trial grossly exaggerates the significance of the evidence.

5. The denial of a mistrial cannot be reversible error where the underlying evidentiary ruling represented a permissible exercise of the court's discretion

There can be no serious question that the decision to exclude the untimely produced, hearsay statements of dubious reliability represented a proper exercise of discretion.

Conspicuously, in his Rule 1925(a) opinion Judge Younge does not once contend that his initial evidentiary decision to exclude the worker's compensation file from evidence represented an improper exercise of his discretion. He merely contends that, on reflection, he would have exercised his discretion differently. Yet absent the conclusion that his initial discretionary ruling was improper, Judge Younge's decision to deny a mistrial cannot be overturned. Judge Younge's initial ruling to exclude this evidence did not represent an abuse of discretion; accordingly, there was no improper evidentiary ruling in place that would have justified the extraordinary relief of a new trial. *See Wilson v. Donegal Mut. Ins. Co.*, 598 A.2d 1310, 1312 (Pa. Super. 1991) (to justify granting a new trial based on the exclusion of evidence, the trial court's ruling "must be shown not only to have been erroneous but harmful to the party complaining").

Although Judge Younge characterizes his decision to deny a mistrial as "prejudicial error," he does not contend that his decision to exclude the evidence in question represented an abuse of discretion. Ultimately, Judge Younge is punishing the plaintiffs for the Senn defendants' improper withholding of evidence, and rewarding the Senn

defendants with a new trial. Inexplicably, Judge Younge is rewarding Irrgang/UCS with a new trial even though they too objected to the introduction of the file. Accordingly, this third and final ground on which Judge Younge relied in granting a new trial cannot survive appellate scrutiny.

D. Plaintiffs Seek A New Trial As To Punitive Damages Only In The Event That The Grant Of A New Trial Is Affirmed

There was ample evidence demonstrating that the defendants recklessly disregarded significant risks of serious physical injury of which they were all subjectively aware. Accordingly, Judge Young improperly withdrew from the jury the issue of punitive damages as to Modern and Irrgang/UCS. Only in the event that this Court were to affirm the award of a new trial, plaintiffs respectfully urge that this Court remand the issue of punitive damages as to all defendants as well.

IX. CONCLUSION

The trial court has improperly substituted its judgment for that of the jury with respect to the issue of contributory negligence, even though the issue was fully litigated by all parties and properly submitted to the jury. The trial court considered the evidence in the light least favorable to the plaintiffs, found “prejudice” where none exists, and has second-guessed its own rulings, apparently for no reason other than its dissatisfaction with the jury’s disposition of the case. For all of the foregoing reasons, the trial court erred as a matter of law and abused its discretion in granting defendants’ motions for a new trial. Accordingly, this Court should reverse the trial court’s grant of a new trial and remand for entry of judgment on the jury’s verdict.

Respectfully submitted,



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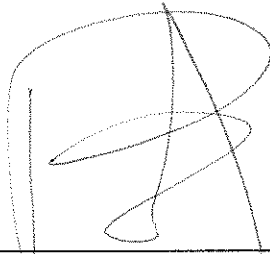
Dated: April 23, 2014

**CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS**

This brief complies with the type-volume limitations of Pa. R. App. P. 2135(a)(1) because this brief contains 13,848 words excluding the parts of the brief exempted by Pa. R. App. P. 2135(b).

This brief complies with the typeface and the type style requirements of Pa. R. App. P. 124(a)(4) and 2135(c) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook font.

Dated: April 23, 2014

A handwritten signature in black ink, appearing to read "Paul A. Lauricella", written over a horizontal line.

Paul A. Lauricella

**Exhibits Attached to Brief for Appellants in Accordance
with the Pa. Rules of Appellate Procedure**

Trial Court's Pa. R. App. P. 1925(a) opinion dated
January 31, 2014..... Exhibit A

Orders for New Trial Exhibits B-E

Plaintiffs' Pa. R. App. P. 1925(b) Statement of Errors
Complained of on Appeal Exhibit F

EXHIBIT "A"

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

RUICK L. ROLLAND AND HOLLY ROLLAND, h/w :

DECEMBER TERM, 2009

vs.

No.: 3110

STEPHEN SENN, SENN LANDSCAPING, INC., :
BRUCE IRRGANG, UNITED CONSTRUCTION :
SERVICES, INC., MODERN EQUIPMENT :
SALES AND RENTAL CO. and :
MODERN GROUP, LTD. :

PRESENTED FOR
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PRO PROTHY

OPINION

YOUNGE, J.

January 31, 2014

Procedural Posture:

The above-captioned Plaintiffs filed this appeal from a series of orders signed and entered by this Court on August 6, 2013. These orders denied their motion for post-trial relief and granted all motions for post-trial relief filed by the Defendants to the extent that these motions request a new trial on all issues.

The Defendants, Bruce Irrgang and United Construction Services, Inc., appeal from these orders to the extent that the award of a new trial conflicted with their request for a judgment notwithstanding the verdict that would have made the award of a new trial unnecessary. Modern Equipment Sales and Rental Co., and Modern Group, LTD. (the Modern Defendants) filed a similar appeal from the orders awarding a new trial on all issues.

Jury selection in this matter began on Friday, March 8, 2013 and opening statements began on Monday, March 11, 2013. The Jury returned a verdict in favor of the Rollands on March 28, 2013. Specifically, the Jury found that one hundred percent (100%) of the Rollands'

Rolland Etal Vs Senn Etal-OPFLD



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harm could be attributed to the Defendants' combined negligence. It apportioned liability between the Defendants as follows: Stephen Senn twenty three point five percent (23.5%); Senn Landscaping, Inc. twenty three point five percent (23.5%); Bruce Irrgang sixteen percent (16%); United Construction Services, Inc. sixteen percent (16%); Modern Equipment Sales & Rental Co. ten point five percent (10.5%); and Modern Group, LTD ten point five percent (10.5%). It awarded eighteen million dollars to Mr. Rolland and two million dollars to Ms. Rolland for loss of consortium. The jury found that Stephen Senn acted recklessly and awarded an additional sixteen thousand in punitive damages. The jury found no comparative negligence on the part of Mr. Rolland.

Critical was the fact that the Jury was never asked to assess negligence against the Modern Defendants, Senn Landscaping Inc., and Stephen Senn because prior to trial the Motion Court granted the Rollands' motion for partial summary judgment. A fair reading of the Motion Court's order revealed that it found, as a matter of law, that the Defendants had negligently entrusted the track loader to Stephen Senn's ten-year-old son and that this conduct caused Mr. Rolland's injuries. In response to a motion to reconsider filed by the Modern Defendants, the Motion Court modified this ruling to specifically "state that summary judgment is not granted on Plaintiffs' claims for punitive damages against Defendants and that the issue of the apportionment of the negligence of all parties will still be decided by the jury." Interestingly, the Motion Court's order left open questions of liability against Defendants Bruce Irrgang and United Construction Services. As previously discussed, following trial, the Jury found Bruce Irrgang and United Construction Services negligent and apportioned damages.

All parties filed motions for post-trial relief; this Court requested briefs and scheduled argument. After transcripts were complete, this Court held argument on August 5, 2013, and the

following day, on August 6, 2013, entered an order awarding a new trial on all issues. All parties with the exception of Stephen Senn and Senn Landscaping, Inc. filed an appeal from the award of a new trial.

Facts: Summary of the Accident

In December of 2009, the Rollands brought this action for compensation for personal injuries that occurred on a construction site in August of 2009. To summarize the case in the most concise form, Mr. Rolland suffered an above-the-knee amputation of his left leg after being struck by a track loader that was being operated by the ten-year-old son of Stephen Senn.

This accident occurred on a 15-acre property owned by Defendant, Bruce Irrgang, during construction of a replica of the Hogan Bridge, the original of which can be found at the Augusta National Golf Club near Atlanta, Georgia. At the time of trial, Mr. Irrgang was a wealthy businessman who owned several construction companies, including United Construction Services, and several large homes that could be characterized as estates. He decided to create a replica of the Hogan Bridge on one of his personal estates in Wayne, Pennsylvania. To carry out this task, he contracted with several parties including Mr. Rolland and, Mr. Rolland's longtime acquaintance, Stephen Senn of Senn Landscaping. Mr. Rolland was hired to complete electrical work while the Senn Defendants were hired to dredge a pond that was under this replica Hogan Bridge.

To carry out the dredging, Mr. Rolland, acting on behalf of United Construction Services, rented a track loader from the Modern Defendants and then in turn loaned the track loader to the Senn Defendants. Stephen Senn of Senn Landscaping in turn allowed his ten-year-old son to operate this track loader on the Irrgang construction site. When the Modern Defendants first delivered a track loader to the Irrgang property on August 4, 2009, Mr. Rolland signed for the

track loader on behalf of United Construction Services. (*Tr. Transcr.* 28 – 29 (3/21/13).) This track loader experienced mechanical difficulty and the Modern Defendants swapped that track loader out for a different loader on August 5, 2009. Interestingly enough, all of the workers who were involved in this construction project described themselves as independent contractors. From the evidence presented at trial, United Construction Services appeared to have no clearly identifiable employees on the construction site, and its owner, Bruce Irrgang, was only briefly onsite. These facts alone created a major contention throughout trial as to the issue of whether the Plaintiff, Ruick Rolland, acted as project manager for the work supervised on behalf of Defendant, United Construction Services.

Weather conditions on August 4 and 5 of 2009 brought dredging operations to a halt. Dredging resumed some nine or ten days later on August 14, 2009 after Mr. Rolland contacted the Senn Defendants and told them to return to the site because he felt conditions were suitable for operations to resume. The accident ultimately occurred on August 14, 2009 when Mr. Rolland intervened in the child's operation of the track loader by giving hand signals and directing his operation of the machine. When Mr. Rolland testified under oath at trial, he described the accident as follows:

I had my hand out. I said, "Stop". And he went [] I said "stop" the second time; and he, again, acknowledged. Then I reached down on the ground and picked up the hose. I was not in front of the machine at any time. And I started to bring the hose up. And I was flipping it over the cab. And about halfway across, the machine turned. I felt my leg get pulled under the track. I felt my bones crushing. And I was screaming.

(*Tr. Transcr.* 63 – 64 (3/22/13).)

The Rollands proceeded against the Modern Defendants based on a theory of negligent entrustment. The chief evidence in support of this theory was the fact that Kevin Cann, the truck driver who delivered the track loader to the Irrgang property on August 4 and 5, 2009, saw the

ten-year-old boy operating the track loader. (*Tr. Transc.* 7 (3/13/13); 40 (3/12/13).) Mr. Cann, the Modern Defendants employee and agent, reported seeing the child's operation of the track loader to a manager with the Modern Defendants, Paul Mutter. Mr. Mutter, when he testified at trial, admitted that he should have consulted Modern's General Counsel, Thomas Callahan, when he heard that a child was operating the Modern Defendants' track loader. (*Tr. Transcr.* 7-71 (3-13-13).) When Mr. Callahan testified at trial, he conceded that if he had known that a ten-year-old child was operating the track loader he would have contacted Mr. Rolland to inform him that he would attempt to repossess the track loader if this behavior was permitted to persist. (*Tr. Transcr.* 57 (3/21/13).)

The Plaintiffs espoused a similar theory of negligent entrustment against Bruce Irrgang and Untied Construction Service. Under this theory, Plaintiffs pointed out that United Construction Services leased the track loader from the Modern Defendants and permitted the Senn Defendants to use the track loader. They also highlighted the fact that the accident occurred on a property that belonged Mr. Irrgang. According to Mr. Rolland's version of events, he and Mr. Irrgang stood together on the construction site and discussed the fact that Stephen Senn's ten-year-old son was operating the track loader while they both watched the boy dredge the pond. (*Tr. Transcr.* 41-43 (3-21-13).) The Senn Defendants admitted liability from the start (*Tr. Transcr.* 53 – 59 (3-12-13)), but argued that their conduct was not reckless.

An understanding of Mr. Rolland's background and the relationship between the parties is critical to any assessment of the varying degrees of liability between the parties to this lawsuit. Mr. Rolland went to a vocational high school and was skilled in carpentry, building maintenance, auto body and machine work. Specifically, he was familiar with construction site protocol and the track loader involved in this accident. Mr. Rolland began working for Mr. Irrgang in the

early 1990s and continued working for him for over twenty years up and until the time of this accident. According to Mr. Rolland, in 1999 or 2000 he began to work full time for Mr. Irrgang and that this work consisted mostly of renovating or improving the various private estates that Mr. Irrgang owned. (*Id.* 116 – 117.) When describing this relationship during an interview after the accident to a workers' compensation claims representative, Elizabeth Kutz, Mr. Rolland allegedly said:

He [Plaintiff] sometimes is hired as a supervisor of other employees due to his knowledge of the property or house where the work/job was being done...[That he] does work for [Mr. Irrgang] at his house, and for the companies [Mr. Irrgang] owns, which are United Construction, United Installation, and Spackle Drywall.

(*Westfield Workers' Compensation File Produced During Trial*).

Mr. Rolland testified that prior to the accident he had known Mr. Senn for approximately 25 years, and that for a brief period of time his wife's sister had been married to Mr. Senn's brother. (*Tr. Transcr.* 25 (3/22/13).) The uncontested fact established at trial was that Mr. Rolland was well aware that Mr. Senn's ten-year-old son was operating a track loader on the construction site. Mr. Rolland admitted that he saw the ten-year-old boy operate the track loader on Mr. Irrgang's property on August 4 and 5 of 2009. He also admitted that he felt comfortable enough with the situation that he was willing to approach the track loader and direct the child's operation of the machine on August 14, 2009. (*Tr. Transcr.* 62 – 63 (3/21/13).)

Facts: Workers' Compensation File Produced During Trial

Critical to this Court's decision to award a new trial was the workers' compensation file related to this matter that was produced during trial. Prior to trial, Bruce Irrgang and United Construction Services filed a motion to preclude what they characterized as irrelevant post-accident statements. (*Defendants Bruce Irrgang's and United Construction Services, Inc.'s Motion in Limine to Preclude Alleged Post-Accident Statements/Conduct by Defendants not*

Relevant to any Proper Issue in the Case (5/15/12).) Co-Defendants either joined the motion or filed similar motions of their own. This Motion sought to preclude the fact that Stephen Senn and another employee of Senn Landscaping initially tried to hinder the police investigation by covering up the fact that Mr. Senn's ten-year-old son was operating the track loader when it struck Mr. Rolland.¹ The motion also sought to preclude allegations that Mr. Senn attempted to convince Mr. Rolland to fraudulently file a claim with the workers' compensation carrier for Senn Landscaping.

This Court denied in part and granted in part the motion in limine to preclude post-accident statements. This Court denied this motion to the extent that Defendants sought to preclude evidence that the Senn Defendants attempted to mislead investigators following the accident because this evidence was relevant to possible consideration of punitive damages. In particular, the evidence illustrated that Mr. Senn knew that he should not have let his ten-year-old son operate the track loader. However, this Court granted the motion to the extent that it addressed some scheme to defraud the workers' compensation carrier for Senn Landscaping. This alleged scheme was irrelevant to any disputed matter at trial. It was not conclusive evidence of a *crimi falsi* conviction and because the Senn Defendants had admitted liability, it was irrelevant to the establishment of negligence, causation, damages or the liability of the remaining Defendants. This scheme could also have been construed as an attempt on the part of Mr. Senn to pay the medical bills of his long-time acquaintance and onetime, albeit distant, family member, Mr. Rolland. This Court was attempting to streamline the case and prevent mini-trials on matters that were really irrelevant collateral issues. The Rollands' Counselors were unhappy with this ruling.

After opening statements, on Wednesday, March 13, 2013, Counsel for the Rollands sought to revisit the issue of preclusion of the alleged workers' compensation fraud committed by Mr. Senn. Specifically they sought to obtain and introduce statements contained in a workers' compensation file that were allegedly made by Mr. Senn indicating he was supervising Mr. Rolland and that Mr. Rolland was working as an employee of the Senn Defendants at the time of this accident. Counsel for the Rollands sought to impeach Mr. Senn's contradictory deposition testimony wherein he stated that Mr. Rolland was his supervisor on the jobsite. They argued that the statements allegedly made by Mr. Senn were directly relevant to one of the primary defenses in the case—that Mr. Rolland was the onsite supervisor of everyone on the project. They felt Mr. Senn's contradictory testimony would affirmatively rebut the contention that Mr. Rolland was the onsite job supervisor and ultimately responsible for his own injury.

(Tr. Transcr. 7 (3/13/13).)

This Court denied this request and reaffirmed its earlier ruling. (*Id.*) The following day, on Thursday, March 14, 2013, Counsel for the Senn Defendants advised this Court that on Tuesday, March 12, 2013, Counsel for the Rollands approached her and requested that she check her file for any recorded statements related to the accident that her clients might have given. She went on to explain that on Wednesday, March 13, 2013, Counsel for the Rollands again approached her about the issue and informed her that he had been in contact with a workers' compensation adjuster from Westfield Insurance Company back in March of 2010, and that he was told that Mr. Senn had made a statement pertaining to this accident. That evening she contacted the Westfield adjuster and for the first time obtained a copy of a statement that Defendant, Stephen Senn, made in connection with a workers' compensation claim. Upon

receiving a copy of this statement, she forwarded it on to Counsel for the Rollands. (*Tr. Transcr.* 5 - 6 (3/14/13).)

Armed with this statement, Counsel for the Rollands approached this Court and again sought to reopen the issue of workers' compensation fraud. Specifically, they sought to impeach Mr. Senn's anticipated testimony at trial with the inconsistent nature of his alleged statements found in the workers' compensation file juxtaposed to his deposition testimony. All Defendants, including the Modern Defendants, objected to this statement being used at trial. Counsel for the Modern Defendants argued that Mr. Senn's recorded statement was extremely prejudicial in that it directly contradicted the theory of the case that the Modern Defendants espoused during opening statement. Counsel argued that the Modern Defendants would have approached the case in a different fashion if they had been aware of the statement prior to trial. (*Tr. Transcr.* 12 (3/14/13).)

At this point, this Court agreed to reconsider the issue but also ruled that the entire workers' compensation file should be produced and made available to all Counsel. By the end of the day on Thursday, March 14, 2013, attorneys working with Counsel for the Senn Defendants had obtained a copy of the workers' compensation file and were redacting sections for attorney client privilege and work product. (*Tr. Transcr.* 91 (3/14/13).) By Friday, March 15, 2013 the contents of the workers' compensation file were produced and reviewed, at which point, it became clear that the issue was much bigger than initially described on motion in limine. It was now evident that all of the parties to this litigation, with the exception of the Modern Defendants, were potentially implicated in an alleged scheme to obtain workers' compensation insurance for Mr. Rolland. (*Tr. Transcr.* 11 (3/15/13).) In fact Mr. Rolland, himself, allegedly had made a statement to workers' compensation adjuster, Elizabeth Kutz. In this statement, the he allegedly

admitted that he was working as a supervisor for Senn Landscaping, Inc. at the time of this accident.

The contents of this workers' compensation file had vast implications for this litigation that was already more than a week underway. All parties essentially reversed their prior positions on key elements of the content of the workers' compensation file. The Rollands now wanted the entire file excluded, including the alleged statements of Stephen Senn, while all of the Defendants wanted any potential fraudulent conduct on the part of Mr. Rolland placed before the Jury. This Court considered granting a mistrial because of these implications; however, entering a mistrial would have been a drastic measure considering both judicial economy and the economic and emotion investment of the parties. In an attempt to forge ahead, this Court reaffirmed its earlier ruling and precluded the entire issue. It attempted to avoid placing the parties on trial for any collateral agreements that they might have made in the wake of this accident. (*Tr. Transcr. 9 – 25 (3/15/13); 98 (3/20/13).*)

Facts: Testimony of Ruick Rolland in the Wake of the Workers' Compensation File

Proceeding with trial thereafter became extremely precarious for all of the parties, with the exception of the Modern Defendants, once their alleged scheme to defraud the workers' compensation carrier for the Senn Defendants was exposed. Frustrating was the fact that this Court repeatedly told Counsel for the Rollands to quit attempting to revisit an issue that this Court already disposed of on motion in limine.² This Court had previously ruled that Mr. Senn's offer to submit a claim to the Senn Defendants' workers' compensation carrier would not be admissible at trial. When this Court issued this ruling, it was not aware that a claim had in fact been submitted and statements given in support of the same. None of this would have become apparent if Counsel for the Rollands had not insisted on revisiting the issue for their own benefit.

This new evidence gave the trial an unplanned twist particularly for the Modern Defendants who claimed to have known nothing of the alleged scheme.³

Upon advice of Counsel, Stephen Senn invoked his Fifth Amendment right against self incrimination and refused to testify at trial. (*Tr. Transcr.* 43 (3/15/13).) Since Counsel for the Plaintiffs did not call Bruce Irrgang in their case-in-chief, he chose not to testify in his own defense. (*Tr. Transcr.* 14 – 15 (3-26-13).) Mr. Rolland, on the other hand, needed to take the stand and testify because he had the burden of proof—his testimony was required to establish his case.

Despite the fact that this Court precluded the issue of workers' compensation fraud, Mr. Rolland still had a very hard time with this issue on cross-examination when, for example, the following exchange occurred:

[Defense Counsel] Q. Mr. Rolland, ten days after this accident, did you tell anybody that you were hired to supervise the job? [Mr. Rolland] A. No, I did not ... [Defense Counsel] Q. Did you tell anybody, Mr. Rolland, that you were supervising Mr. Senn's employees making sure they were getting the job done and getting it done properly? [Mr. Rolland] A. No, I never said that. [Defense Counsel] Q. Did you say to anybody over the phone that you were supervising Mr. Senn and the physical work that his employees were doing? [Mr. Rolland] A. I have no recollection of saying that over the phone to anybody. [Defense Counsel] Q. Mr. Rolland, on this particular job that we're here for on Wayne Avenue, you considered yourself the primary contractor; didn't you? [Mr. Rolland] A. No, I did not. [Defense Counsel] Q. Did you ever say at any point before today that you were the primary contractor at 655 North Wayne Avenue? [Mr. Rolland] A. I never said that.

(*Tr. Transcr.* 8 - 14 (3/22/13).)

Following this Court's ruling on the workers' compensation file and the decision of Mr. Senn to invoke the Fifth Amendment, the Plaintiff appeared to have anticipated the problem that he would face on cross-examination. During direct-examination, Mr. Rolland went to great lengths to explain that he was heavily sedated and incoherent in the days following the accident.

(*Tr. Transcr.* 68 – 80 (3/21/13).) His repetitious testimony regarding his mental state following the accident sounded rehearsed, planned and choreographed.

Standard of Review for the Award of a New Trial

The purpose of post-trial motion practice governed by Pennsylvania Rule of Civil Procedure 227.1 is to give the trial court an opportunity to review and reconsider its earlier rulings and correct its own errors before an appeal is taken. *Lahr v. City of York*, 972 A.2d 41 (Pa. Cmwlth. 2009). Post-trial motions should be granted only when the moving party suffered prejudice as a result of the trial court's clear error. *Id.* 54. When discussing the standard of review applied by appellate courts reviewing a trial court's grant of a new trial, the Pennsylvania Supreme Court has stated:

Trial Courts have broad discretion to grant or deny a new trial... Although all new trial orders are subject to appellate review, it is well-established law that, absent a clear abuse of discretions by the trial court, appellate courts must not interfere with the trial court's authority to granted or deny a new trial... [W]hen analyzing a decision by a trial court to grant or deny a new trial, the proper standard of review, ultimately, is whether the trial court abused its discretion. Each review of a challenge to a new trial order must begin with an analysis of the underlying conduct or omission by the trial court that formed the basis for the motion. There is a two-step process that a trial court must follow when responding to a request for new trial. First, the trial court must decide whether one or more mistakes occurred at trial. These mistakes might involve factual, legal, or discretionary matters. Second, if the trial court concludes that a mistake (or mistakes) occurred, it must determine whether the mistake was a sufficient basis for granting a new trial. The harmless error doctrine underlies every decision to grant or deny a new trial...

To review the two-step process of the trial court for granting or denying a new trial, the appellate court must also undertake a dual-pronged analysis. A review of a denial of a new trial requires the same analysis as a review of a grant. First, the appellate court must examine the decision of the trial court that a mistake occurred.

At this first stage, the appellate court must apply the correct scope of review, based on the rational given by the trial court. There are two possible scopes of review to apply when appellate courts are determining the propriety of an order granting or denying a new trial. There is a narrow scope of review: “[w]here the

trial court articulates a single mistake (or a finite set of mistakes), the appellate court's review is limited in scope to the stated reason, and the appellate court must review that reason under the appropriate standard." [Conversely,] [i]f the trial court leaves open the possibility that reasons additional to those specifically mentioned might warrant a new trial, or orders a new trial 'in the interests of justice,' the appellate court applies a broad scope of review, examining the entire record for any reason sufficient to justify a new trial. Even under a narrow scope of review, the appellate court might still need to examine the entire record to determine if there is support for any of the reasons provided by the trial court.

The appropriate standard of review also controls this initial layer of analysis. If the mistake involved a discretionary act, the appellate court will review for an abuse of discretion. If the mistake concerned an error of law, the court will scrutinize for legal error. If there were no mistakes at trial, the appellate court must reverse a decision by the trial court to grant a new trial because the trial court cannot order a new trial where no error of law or abuse of discretion occurred.

If the appellate court agrees with the determination of the trial court that a mistake occurred, it proceeds to the second level of analysis. The appellate court must then determine whether the trial court abused its discretion in ruling on the request for a new trial. [Discretion must be exercised on the foundation of reason.] An abuse of discretion exists when the trial court has rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will. A finding by an appellate court that it would have reached a different result than the trial court does not constitute a finding of an abuse of discretion. [Where the record adequately supports the trial court's reasons and factual basis, the court did not abuse its discretion.]

When determining whether the trial court abused its discretion, the appellate court must confine itself to the scope of review, as set forth in our preceding discussion. If the trial court has provided specific reasons for its ruling on a request for a new trial, and it is clear that the decision of the trial court is based exclusively on those reasons, applying a narrow scope of review, the appellate court may reverse the trial court's decision only if it finds no basis on the record to support any of those reasons. [As a practical matter, a trial court's reference to a finite set of reasons is generally treated as conclusive proof that it would not have ordered a new trial on any other basis.] Alternatively, where the trial court leaves open the possibility that there were reasons to grant or deny a new trial other than those it expressly offered, or the trial court justifies its decision on the "interests of justice," an appellate court must apply a broad scope of review and affirm if it can glean any valid reason from the record.

Harman ex rel. Harman v. Borah, 756 A.2d 1116, 1121-23 (Pa. 2000).

Discussion: Explanation for the Award of a New Trial

The first and foremost reason that this Court awarded a new trial was based on the fact that it should have granted the motion for mistrial filed by the Modern Defendants following the production of the workers' compensation file. The second reason that this Court awarded a new trial was because the Jury Verdict assessing no liability against Mr. Rolland was against the weight of the evidence to the extent that it shocked the conscience.

For reasons that will be more fully explained below, this Court committed prejudicial error when it denied the Modern Defendants' motion for a mistrial following production of the workers' compensation file midway through trial. The workers' compensation file had a drastic impact on the flow and tempo of trial because suddenly prospective, planned witnesses did not testify. Based on the late production, the Modern Defendants were also prevented from fully cross-examining Mr. Rolland with the contents of the workers' compensation file, the contents of which contained an alleged admission by Mr. Rolland that he was actually working as a supervisor for Mr. Senn at the time of this accident. This admission would have bolstered the defense presented by the Modern Defendants. The workers' compensation file was particularly significant for the Modern Defendants because they were the only party that was not involved in the alleged scheme to defraud the workers' compensation carrier for the Senn Defendants, and they may truly have been surprised by this evidence.

The Jury's finding of no comparative negligence on the part of Mr. Rolland shocked the conscience of this Court and was against the weight of the evidence. Along these same lines, the Jury's finding of over twenty percent (20%) responsibility on the part of the Modern Defendants shocked the conscience of this Court and was against the weight of the evidence. Mr. Rolland's involvement in this construction project was much more significant than that of the Modern

Defendants. Mr. Rolland had known and worked with Bruce Irrgang and Stephen Senn for many years. Mr. Rolland saw the ten-year-old operate the track loader every single day that he was on the construction site—a track loader for which he ordered and signed. Furthermore, after the second day of dredging, weather conditions brought work on the project to a halt for several days. The Senn Defendants returned to the site to commence dredging after Mr. Rolland contacted them and directed them to return. The Jury Verdict finding no liability on the part of Mr. Rolland was shocking.

The rulings made by this Court on post-trial review were never meant to overturn or overrule the Motion Court's award of summary judgment in favor of the Plaintiffs. However, this Court felt that the pretrial award of summary judgment on the issue of negligent entrustment in favor of the Rollands permeated this trial and may have contributed to this shocking Verdict. As will be more fully explained below, it had the affect of shifting the burden of proof to the Modern Defendants to prove that Mr. Rolland was actually responsible for his own injury when it was the Rollands who should have been required to carry the burden of proof on all issues. The Motion Court's ruling further prejudiced Bruce Irrgang and United Construction Services by suggesting that they had negligently entrusted the track loader to Stephen Senn's ten-year-old son when issues of factual dispute remained as to their liability. The Motion Court's pretrial grant of partial summary judgment on the issue of negligent entrustment presented the case in a skewed fashion. In reality either everyone on the Irrgang construction project should have been held liable for allowing the ten-year-old boy to operate the track loader or the issue of negligent entrustment should have been submitted to the jury.

The Defendants in this action had a constitutional right to present their defense before an unbiased Jury. The pretrial grant of partial summary judgment combined with this Court's

failure to grant a mistrial in the face of the alleged admissions contained in the workers' compensation file hampered the ability of the Defendants to present a defense and the Jury returned a Verdict that was against the weight of the evidence.

The Appeal Filed By Ruick and Holly Rolland

In their 1925(b) Concise Statement of Matters Complained of on Appeal, the Rollands primarily argued that this Court erred in awarding a new trial on all issues because such an award was not justified. They raised the following issues:

1. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motions for a New Trial by finding that the Summary Judgment Order entered by [the Motion Court] was erroneous, and/or by finding that it failed to acknowledge the existence of outstanding issues of material fact, for the following reasons: a. The Propriety of [the Motion Court's] Order was not properly before this Court because an adverse ruling on Summary Judgment cannot be challenged by Post-Trial Motions pursuant to Pennsylvania's Rules of Civil Procedure; b. The Law of the Case Doctrine and/or Coordinate Jurisdiction Rule preclude a Trial Judge from revisiting an earlier Order such as an Order granting Summary Judgment in the context of Post-Trial Motions; c. There were no disputed issues of material fact that were overlooked by [the Motion Court]; d. The Court did not identify any disputed issues of material fact that were purportedly improperly overlooked by [the Motion Court]; e. There were no issues of material fact pertaining to whether there was a superseding cause of the damages suffered by the [P]laintiffs; f. The acts or events referenced by the Court did not constitute a superseding causing and/or superseding causes of the damages suffered by the Plaintiffs; g. [the Motion Court's] Order did not impermissibly shift the burden of proof; h. [the Motion Court's] Order was properly decided on the basis of the facts and arguments that were before [the Motion Court] when [it] issued that Order; i. Neither the Modern Defendants, nor the Senn Defendants, raised in their responses to Plaintiffs' Motion for Summary Judgment any disputed issues of material fact by affidavits, documentary evidence, or deposition testimony; j. The undisputed evidence presented to [the Motion Court] established the requisite elements of the tort of negligent entrustment as a matter of law, and [D]efendants have not identified any fact that warranted a contrary result.

2. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' motions for a New Trial by finding that the [V]erdict was against the weight of the evidence, when, in fact, it was amply supported by the evidence adduced at trial.

3. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motions for a New Trial by finding that [P]laintiffs did not offer sufficient evidence to prove the elements of the cause of action of negligent entrustment, when, in fact, each of the prerequisite elements of the tort was established.

4. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motion for a New Trial by finding that the [V]erdict did not address the issue of superseding cause because: (i) there were no superseding causes that would extinguish the liability of any of the [D]efendants; (ii) the [D]efendants did not identify any act that would constitute a superseding cause; (iii) the actions of the child operator could not have been a superseding cause because they were foreseeable and/or not so unusual or unexpected as to break the chain causation, and were the gravamen of the tort of negligent entrustment; (iv) the actions of [P]laintiff did not constitute a superseding cause; (v) there was no evidence that [P]laintiff called the [D]efendant back to the site; (vi) the act of calling the [D]efendants to return to the worksite nine days after the equipment had been delivered to the site could not be considered a superseding cause, as it was foreseeable and/or not so unusual or unexpected as to break the chain of causation; and (vii) the [D]efendants waived any claim that the actions of the child or [P]laintiff constituted a superseding cause.

5. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motions for a New Trial when it found that the operator's age was immaterial because: (i) it was undisputed that the child operated the instrumentality in an unsafe manner; (ii) none of the [D]efendants challenged the materiality of the child's age; and (iii) there was no dispute or disagreement, by any party to this litigation, that a [ten-year-old] child lacks the judgment and maturity necessary to operate a track loader.

6. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motion for a New Trial by finding that it should have granted the Modern Defendants' Motion for a Mistrial or that Modern could not prove that [P]laintiff's responsibility was 51 percent [51%] or greater without confronting him with unspecified comments allegedly made by the [P]laintiff.

7. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motions for a New Trial because it was "shocked" by the [J]ury's finding that Plaintiff was not responsible for his injuries, because there was more than adequate evidence in the record, including trial testimony from the [D]efense liability expert, supporting the [J]ury's finding that Mr. Rolland acted reasonably under the circumstances.

8. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motions for a New Trial when it found that [the Motion Court] Order had somehow improperly contributed to the [J]ury's finding that [P]laintiff was

not negligent because: (i) the propriety of [the Motion Court's] Order was not properly before the Trial Court; (ii) [the Motion Court's] Order expressly provided that the liability of the other parties, including the [P]laintiff, would be decided by the [J]ury; and (iii) the parties were properly provided with the opportunity to fully litigate and argue the issues of [P]laintiff's contributory responsibility, if any.

9. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motion for a New Trial when it found that the entry of Summary Judgment as to the Modern Defendants and as to the Senn Defendants somehow shifted the burden of proof to Irrgang and United Construction because: (i) the Order granting Summary Judgment did not implicate Irrgang or United Construction Service in any way; (ii) the [J]ury was properly instructed as to the burden of proof; and (iii) the [J]ury's findings as to Irrgang and United Construction Services were supported by the evidence and the law.

10. The Trial Court erred, or otherwise abused its discretion, in granting the Motion by Irrgang and Untied Construction Services for a New Trial when it found that Defendant Irrgang's case should have been severed because Irrgang never moved for severance, and the Court never raised the issue of severance until after the Trial was concluded.

11. The Trial Court erred, or otherwise abused its discretion, in granting the Motions by Irrgang and United Construction Services for a New Trial because: (i) the evidence established that Irrgang owned the premises, retained Senn, exercised control and/or the right of control over the track loader, and permitted the child to operate the machine knowing and/or having reason to know that the child was not competent to operate it; (ii) the evidence established that United Construction Services leased the track loader, exercised control and/or the right of control over the track loader, and permitted the child to operate the machine knowing and/or having reason to know that the child was not competent to operate it; and (iii) United Construction Services did not articulate any basis for a new trial other than an unsubstantiated claim that it was somehow inexplicably prejudiced by the entry of Summary Judgment as to the Modern Defendants and the Senn Defendants.

12. The Trial Court erred, or otherwise abused its discretion, in granting the Senn Defendants' Motion for a New Trial when it found that the entry of Summary Judgment somehow resulted in a "shocking" finding of forty percent liability as against the Senn [D]efendants because: (i) the Senn Defendants explicitly admitted liability; (ii) the Senn Defendants expressly consented to the entry of Summary Judgment so long as they were permitted to argue [P]laintiff's responsibility at trial; (iii) the issue of [P]laintiff's responsibility was, in fact, fully litigated and submitted to the [J]ury; and (iv) the [J]ury's finding with respect to [P]laintiff's responsibility was supported by the evidence.

13. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motion for a New Trial because it failed to view the record in the light most favorable to the [P]laintiffs.

14. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motions for a New Trial because [P]laintiffs established each of the requisite elements of the tort of negligent entrustment, as set forth in Restatement (Second) of Torts §308, and as adopted by the Courts of this Commonwealth, as to each of the defendants.

15. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motions for a New Trial on the basis of the exclusion of evidence of matters contained within the Workers' Compensation records because: (i) the evidence was unreliable and/or properly excluded and/or excludable under Pennsylvania Rule of Evidence 403 and/or properly excluded as hearsay; (ii) the Senn Defendants should not be entitled to a new trial on account of the Court's exclusion from evidence of documentation that was in the possession of and/or control of them, their counsel, and/or their insurers, but which was not timely produced; (iii) the evidence had not been sought or disclosed by any of the parties during the discovery process, but was, instead, *sua sponte* ordered produced by the Court after Trial was well underway; and (iv) the exclusion of the evidence at issue, even if deemed somehow improper, was nonetheless harmless error.

16. To the extent that the Trial Court based the grant of a new trial on its exclusion from evidence of statements contained in Plaintiff's medical records, the Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motions for a New Trial on the basis of the exclusion of such evidence because: (i) the evidence was unreliable and/or properly excluded and/or excludable under Pennsylvania Rule of Evidence 403; (ii) the evidence was properly excluded as hearsay; (iii) the defendants never established that the statements contained in the medical records reflected statements that were made by Mr. Rolland; and (iv) the exclusion of the evidence at issue, even if deemed somehow improper, was nonetheless harmless error.

17. Above, [P]laintiffs have sought to preserve their ability to challenge on appeal this Court's grant of a new trial in favor of [D]efendants on each and every one of the grounds argued in Defendants' Post-Trial Motions. If this Court granted a new trial in favor of the [D]efendants on any other basis, then this Court, in so doing erred, and abused its discretion.

18. The Trial Court erred, or otherwise abused its discretion, in denying Plaintiffs' Motions for a New Trial because the evidence established that Irrgang, United Construction Services, and the Modern Defendants: (i) knew and/or had reason to know that a child was operating a dangerous instrumentality over which they exercised control and/or a right of control; (ii) knew and/or had reason to know that the instrumentality posed an unreasonable risk of serious physical

injury if used by a child; and (iii) failed to take any action to prevent use of the instrumentality.

Discussion of Issues Averred in the 1925(b) Statement Filed by Ruick and Holly Rolland

1. This Court Did Not Award a New Trial Based Solely on Any Error Found in the Motion Court's Order that Granted Partial Summary Judgment in Favor of the Rollands.

As will be more fully discussed below this Court did not award a new trial based solely on any error that occurred when the Motion Court granted partial summary judgment in favor of the Rollands on issues of negligence entrustment. When discussing this issue, this Court merely meant to suggest that the award of partial summary judgment was extremely problematic when viewed in conjunction with the verdict. The Motion Court's grant of partial summary judgment was one of multiple problematic aspects of this case. Contrary to the Rollands' position, this Court had the authority to review the propriety of the Motion Court's order in conjunction with the Verdict, and the coordinate jurisdiction rule was not an impediment.⁴ However, this Court never meant to reverse the order awarding summary judgment.

The Motion Court's Order was problematic for several reasons.⁵ First, it removed from the case the determination of whether the Defendants negligently entrusted the track loader to Stephen Senn's ten-year-old son. The Rollands bore the burden of proof on the issue of negligent entrustment and the question of whether a defendant's conduct is negligent is usually left to the jury when conflicting evidence exists in the record. *Johnson v. Walker*, 376 Pa. Super. 302, 307 (1988) (the question of negligence is usually decided by the jury). *Davidson v. Schuylkill Traction Co.*, 4 Pa. Super. 86, 89 (1897) (negligence is always a question for the jury whenever there is conflicting testimony).⁶ The issue of negligent entrustment in the case *sub judice* was (and is) extremely difficult to assess because all of the parties who were involved in this action seemed comfortable with the fact that Mr. Senn's ten-year-old son was operating the

track loader. Mr. Rolland's testimony alone established that he witnessed the child operating the track loader for several days prior to the accident and did nothing to intervene.

Secondly, it awarded summary judgment when significant issues of material fact remained to be decided. For example, the fact that Mr. Rolland signed for the track loader constituted, at the very least, a circumstantial case as to whether he was in possession of the track loader. There was also an issue as to whether Mr. Rolland's decision to direct the operation of the track loader on August 14, 2009, as well as the child's operation of the track loader and his failure to follow Mr. Rolland's instructions constituted an independent superseding cause. This accident would not have occurred if Mr. Rolland had not approached the track loader and begun to give the ten-year-old child directions. The Motion Court's order was problematic in that it shaped the case in a manner that predetermined that the ten-year-old child was actually at fault for the accident. This Court would never suggest that a ten-year-old child was in fact competent to operate heavy equipment on a construction site. However, Mr. Senn's ten-year-old son had been operating the track loader on the Irrgang property for several days without incident. The lapse in time between when the Modern Defendants' driver, Kevin Cann, delivered the track loader and saw the child operating it and the date of the accident was also a significant hurdle for the Plaintiffs in casually connecting the Modern Defendants' negligent behavior to this accident. Finally, in his testimony, Mr. Senn's son suggested that the accident occurred because he misheard Mr. Rolland. He testified that he thought Mr. Rolland told him to go and he began to move the track loader forward. Based on his version of events, his ability to manually operate the track loader was not really at issue. It was possible that he simply misheard the directions given by Mr. Rolland. If he had been an adult, he still might have misheard the directions and this accident might still have occurred.

Thirdly, the order impermissibly shifted the burden of proof to the Modern Defendants to prove they had not negligently entrusted the track loader to Stephen Senn's ten-year-old son. This was particularly significant for Defendants, Bruce Irrgang and United Construction Service, because the order found that the Modern Defendants had negligently entrusted the track loader. An extremely inconsistent and prejudicial result was created by the Rollands' approach to motioning for summary judgment against the Modern Defendants while at the same time allowing the jury to determine the negligence of Bruce Irrgang and United Construction Services. This was inconsistent in that the Modern Defendants leased the track loader directly to United Construction Services and Mr. Rolland signed for the track loader. The posture of this case was illogical in that the Modern Defendants were held liable for negligent entrustment while the company that leased the equipment from the Modern Defendants, United Construction Services, was permitted to present a defense. If the Modern Defendants were deemed to have negligently entrusted the track loader then logically, United Construction Services should also have been found liable for negligent entrustment. The posture of the case essentially suggested that Bruce Irrgang and United Construction Services should be found liable for negligent entrustment when even the Rollands, themselves, felt that their liability should be assessed by the Jury. The Rollands' position was inconsistent in this regards and will require a new trial.

2. The Verdict Simply was Against the Sheer Weight of the Evidence.

A new trial may be awarded based on the a jury's verdict being against the weight of the evidence only when the verdict is so contrary to the undisputed evidence as to shock one's sense of justice. *Davis v. Mullen*, 565 Pa. 386, 390, 773 A.2d 764, 766 (2001). The verdict must be so shocking as "to make the award of a new trial imperative, so that right may be given another opportunity to prevail." *Vattimo v. Eaborn Truck Service*, 777 A.2d 1163, 1165 (Pa. Super.

2001). The evidence supporting the verdict must be “so inherently improbable or at variance with admitted or proven facts or with ordinary experience as to render the verdict shocking to the court's sense of justice.” *Rittenhouse v. Hanks*, 777 A.2d 1113, 1119 (Pa. Super. 2001). A litigant “is not entitled to a new trial where the evidence is conflicting and the finder of fact could have decided either way.” *Fanning v. Davne*, 795 A.2d 388, 393 (Pa. Super. 2002). Nor should a new trial be granted simply because the trial judge, on the same facts, would have arrived at a different conclusion. *Davis*, 565 Pa. 386 (2001). Rather, it is axiomatic that questions of credibility are to be decided by the jury, which “is entitled to believe all, part, or none of the evidence presented.” *Pioneer Commercial Funding Corp. v. American Financial Mortgage Corp.*, 797 A.2d 269, 279 (Pa. Super. 2002). A weight of the evidence challenge concedes that there was sufficient evidence to sustain the verdict, but asserts that the verdict was against the weight of the evidence. *Fanning v. Davne*, 795 A.2d 388, 393 (Pa. Super. 2002).

This Court granted a new trial because the Jury Verdict was against the weight of the evidence. The finding of no liability on the part of Mr. Rolland was extremely suspect given the posture of this case as presented to the Jury. At trial, Mr. Rolland alleged that he was an independent contractor who was working on a property owned by Mr. Irrgang. This allegation directly contradicted statements in the workers' compensation file; however, this was his contention at trial. If Mr. Rolland was in fact an independent contractor, then he was responsible for his own voluntary decision to approach the track loader and give directions to the ten-year-old child.

The Jury's decision to find no comparative negligence on the part of Mr. Rolland defies logic. Mr. Rolland signed for the track loader and was heavily involved in this construction project. He was acquainted with Stephen Senn and had worked for Bruce Irrgang for many

years. Significant evidence was presented to establish that Mr. Rolland was supervising the jobsite, and he had ample opportunity to observe the ten-year-old child operating the track loader. Under the facts of this case, the Jury's finding of no comparative negligence on the part of Mr. Rolland juxtaposed to its finding in excess of twenty percent (20%) against the Modern Defendants defies logic. The Modern Defendants' truck driver, Kevin Cann, was only briefly exposed to the child operator ten days prior to the accident while Mr. Rolland was onsite every single day. There was also a serious question as to whether the Modern Defendants could have prevented the ten-year-old from operating the track loader. The leasing agreement entered into between the Modern Defendants and United Construction Services allowed for repossession in the event of misuse; however, the Modern Defendants also agreed to provide a track loader for the construction project on the property owned by Mr. Irrgang. If the Modern Defendants had in fact repossessed the track loader, they might have been found in breach of their agreement to provide construction equipment.

3. The Issue of Whether the Rollands were Able to Establish Each and Every Element of the Tort of Negligent Entrustment Is Completely Unrelated to this Court's Decision to Grant A New Trial.

This Court granted the Defendants a new trial because the Verdict was against the weight of the evidence. The workers' compensation filed midway through trial contributed to this shocking Verdict and the Modern Defendants' motion for mistrial should have been granted. In conjunction with the prejudice caused by this Court's failure to enter mistrial, the order entered by the Motion Court was problematic. However, the ability of the Plaintiffs to establish a *prima facie* case of negligent entrustment was really irrelevant to the award of a new trial.

When discussing the motion for post-trial relief filed by the Modern Defendants, this Court highlighted the fact that it felt that the Rollands had failed to prove the tort of negligent

entrustment against the Modern Defendants. *See Burkholder v. Genway Corporation*, 432 Pa. Super. 36 (1994) (standing for the proposition that an automobile leasing company that leases automobiles to a corporate entity has no duty to ascertain which corporate employee will operate its automobiles and whether those employees have a valid driver's license).⁷ Critical in this regard was the fact that the Modern Defendants did not directly entrust the track loader to the ten-year-old boy. Mr. Rolland ordered and signed for the track loader on behalf of United Construction Services. Therefore, there was an issue as to whether the track loader was entrusted to either Mr. Rolland or United Construction Services. Since Mr. Rolland signed for the track loader there was at least a circumstantial case as to whether he, himself, had entrusted the equipment to the child. At most, it could be said that the Modern Defendants constructively entrusted the track loader to the child, and constructive entrustment should have automatically been a question that was submitted to a finder of fact.⁸ Although Kevin Cann saw the ten-year-old boy operating the track loader some nine or ten days prior to the accident, it was really a jury question as to whether it could be said that the Modern Defendants constructively entrusted the track loader to the child on the day of the accident—some nine or ten days later.

The Rollands might attempt to argue on appeal that this Court was not in a position to assess their ability to prove negligent entrustment because the Motion Court's pretrial ruling removed the issue of the Modern Defendants' liability from the case prior to trial. Any argument along these lines would be faulty because the Motion Court's ruling did not remove the issue of liability on the part of Bruce Irrgang or United Construction Services. In theory, the Rollands were in a position where they should have presented all of their evidence and their entire case in order to establish liability against the remaining Defendants. Therefore, this Court had an opportunity to review the Rollands' entire case, and it is of the opinion that the Plaintiffs'

evidence on the tort of negligent entrustment had clear issues of material fact that were never submitted to the Jury.

4. The Award of a New Trial was Not Based Solely on the Failure of the Verdict to Address Superseding Cause.

This Court did not award a new trial based on the failure of the Verdict to address superseding cause. However, superseding cause was intertwined with this Court's decision to award a new trial based on the inconsistent nature of the Verdict that failed to assess comparative negligence on the part of Mr. Rolland. Mr. Rolland's decision to direct the track loader should have been fully considered by the Jury. The child had been operating the track loader for several days prior to this accident and everything was okay up and until the point at which Mr. Rolland decided to interfere with his operation of the track loader. Furthermore, evidence of the child's improper operation of the track loader was never presented to the Jury because the Plaintiff made a tactical decision to withdrawal the case against Stephen Senn's ten-year-old son.

5. This Court Did Not Award a New Trial Based on the Fact that the Age of the Operator of the Track Loader was Immaterial.

This Court did not award a new trial by finding that operator age was immaterial in this case. This Court would never hold as a matter of law that a ten-year-old child is competent to operate a track loader. This Court when passing on motions for post-trial relief, simply commented on the fact that Counsel for the Rollands focused an extraordinary amount of their case on the fact that a ten-year-old child had operated the track loader. The reality was that the ten-year-old child had been operating the track loader without incident for a number of days prior to the accident. Mr. Rolland, himself, felt confident enough in the child's ability that he was willing to walk within a few feet of the track loader and direct the child's operation.

Focusing on the age of Stephen Senn's son, Counsel made dramatic, inflammatory argument and

requested punitive damages. The comments that were made by this Court during the hearing on motions for post-trial relief were really directed to Counsel's approach to the case and demand for punitive damages. Counsel characterized the Defendants' conduct as outrageous or reckless when the reality was that there was no solid evidence present at trial that the ten-year-old child was in fact an incompetent operator or that he was the legal cause of the accident. As previously mentioned, Mr. Senn's son testified that Mr. Rolland told him to go ahead and he proceeded to move the track loader in a forward direction. If a Jury were to accept his version of events, it might have come to the conclusion that the accident happened because the child misheard the directions given by Mr. Rolland and not that the child was in fact an incompetent operator.

6. This Court Should Have Granted a Mistrial in Favor of the Modern Defendants When the Workers' Compensation File was Produced Midway Through Trial.

This Court committed a prejudicial error when it denied the Modern Defendants' motion for a mistrial after the contents of the workers' compensation file were produced midway through trial. The Modern Defendants should have been given the opportunity to confront Mr. Rolland with his alleged admissions. The trial court has the power to order a mistrial in the interest of manifest necessity when the ends of public justice would otherwise be defeated. The decision to declare a mistrial is left to the sound discretion of the trial judge, but the power ought to be used with the greatest caution because it is a drastic measure. A mistrial is required based on a discovery violation when it is of such a nature as to deprive the defendant of a fair trial. Commonwealth v. Ligons, 565 Pa. 417, 773 A.2d 1231 (2001); Commonwealth v. Counterman, 553 Pa. 370, 719 A.2d 284 (1998).

The workers' compensation file contained numerous alleged admissions made by all parties to this litigation with the exception of the Modern Defendants. All indications were that the Modern Defendants knew nothing of the contents of the workers' compensation file prior to

production. The Modern Defendants should have been given an opportunity to review this file and prepare a defense. Five days into trial, after the Modern Defendants had given their opening statement, Counsel for the Rollands requested copies of statements from a workers' compensation filed. The record indicates that Counsel for the Rollands had been aware of these statements since March of 2010. Yet, Counsel chose to wait until several days into trial, after the Modern Defendants had given their opening statement, to divulge this information to opposing Counsel. In the wake of the file, Mr. Senn took the Fifth Amendment and Mr. Irrgang refused to testify.

The Modern Defendants should have been permitted to confront Mr. Rolland with the statement that he allegedly made to Elizabeth Kutz. Under Pennsylvania Rule of Evidence 803 (25)(A) a party's admission contrary to the position maintained by that party at trial is always admissible as an exception to the hearsay rule. Mr. Rolland's alleged admission that he was supervising construction on Mr. Irrgang's property at the time of the accident fits within an exception to the hearsay rule because it directly contradicted Mr. Rolland's trial testimony. *See Finnerty v. Darby*, 391 Pa. 300 (1958) (statements made to police by a hospitalized, severely injured driver following an accident were admissible at trial to contradict the driver's testimony).

Midway through trial, this Court was ambushed with an evidentiary issue that had a drastic impact on this case. The alleged admissions that Mr. Rolland was supervising the worksite became extremely significant when coupled with the fact that Mr. Rolland contacted the Modern Defendants and ordered construction equipment, including the track loader at issue in this accident. Upon delivery, he signed for the track loader, and he was directing its operation at the time of the accident. This was extremely persuasive evidence that was directly relevant to contested matters at trial—specifically, Mr. Rolland's supervisory role on the construction site.

This would have affected the outcome of trial, and this Court's decision to preclude the evidence and proceed with trial prejudiced the Modern Defendants.

7. This Court Did Not Abuse Its Discretion When It Found the Jury Verdict Shocking Because the Jury Failed to Assess Comparative Negligence against Mr. Rolland.

The Pennsylvania Supreme Court has written:

A new trial is warranted on weight of the evidence grounds only 'in truly extraordinary circumstances i.e., when the jury's verdict is 'so contrary to the evidence that it shocks one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.' *Armbruster v. Horowitz*, 572 Pa. 1, 813 A.2d 698, 703 (2002)... This Court has also noted that one of the reasons that the power and duty to upset a verdict on weight grounds is so narrowly circumscribed is because of the obvious tension between the broad, settled, exclusive role of the fact-finder in assessing credibility and the limited power of trial judges, in narrowly circumscribed circumstances, to overturn those assessments when the judicial conscience is not merely disappointed, or uncomfortable, but shocked. *Id.* at 704.

Criswell v. King, 575 Pa. 34, 834 A.2d 505 (2003).

In the case *sub judice*, the record was replete with instances of Mr. Rolland's culpability in this instance and the Jury should have assessed comparative negligence against him. As discussed throughout this Opinion, Mr. Rolland ordered and signed for the track loader. He was onsite almost every single day which meant that he had an opportunity to reflect on the implications of permitting Stephen Senn's ten-year-old son to continue to operate the track loader because he had repeatedly seen the child operate the equipment. On the day of the accident, Mr. Rolland approached the track loader while it was being operated by the ten-year-old child and began to direct the child's operation of the piece of heavy equipment. On these facts, the Jury's assessment of zero liability against Mr. Rolland is almost unfathomable. This irrational finding was further compounded by the Verdict assessing twenty percent (20%) responsibility against the Modern Defendants when they had merely tangential involvement in this construction project.

8. This Court Awarded a New Trial because the Jury's Finding that Mr. Rolland Was Not Negligent Was Against the Weight of the Evidence.

Issues raised in eighth paragraph of the Rollands' 1925(b) Statement were previously addressed in the first paragraph of the discussion section of this Opinion when this Court addressed the first issues raised by the Rollands in their 1925(b) Statement. As previously stated and reiterated throughout this Opinion, this Court did not award a new trial based on the Motion Court's pretrial order that granted partial summary judgment on the issue of negligent entrustment. It simply found the order problematic when viewed in conjunction with the Verdict finding no liability or comparative negligence against Mr. Rolland. In reality, the award of partial summary judgment basically shifted the burden of proof to Defendants to prove they had not negligently entrusted the track loader to Stephen Senn's ten-year-old son.

To briefly recap prior discussion, the order finding that the Modern Defendants had negligently entrusted the track loader was particularly significant for Bruce Irrgang and United Construction Services because it skewed the case in an extremely inconsistent and prejudicial fashion. The Plaintiffs decided to motion for summary judgment against the Modern Defendants and ultimately prevailed in that motion while at the same time they decided to allow the Jury to decide whether Bruce Irrgang and United Construction Services negligently entrusted the track loader to Stephen Senn's ten-year-old son. This was inconsistent in that the Modern Defendants leased the track loader directly to United Construction Services, and Mr. Rolland signed for the track loader himself. The posture of this case was illogical in that the Modern Defendants were held liable for negligent entrustment while the company that leased the equipment from the Modern Defendants, United Construction Services, was permitted to present a defense. The posture of the case basically assumed liability on the part of United Construction Services when even the Rollands felt there were factual issues for the Jury to determine. The position of the

Rollands in their presentation of the case was inconsistent in this regards and will require a new trial.

9. The Trial Court Did Not Abuse its Discretion in Granting a New Trial to Bruce Irrgang and United Construction Services.

The issue of partial summary judgment and its affect of shifting the burden of proof as it pertained to Bruce Irrgang and United Construction Services was specifically addressed in paragraph eight above; therefore, there is no need to reiterate that discussion herein. However, it should be mentioned that the Verdict in the case *sub judice* was joint and several and that the Jury apportioned negligence between multiple defendants, a new trial as to one Defendant would require a new trial as to all Defendants. On retrial, the jury will need to hear all of the evidence and again apportion fault.

10. Defendants Did Not Receive A New Trial Based on Principals of Severance Related to Bruce Irrgang and United Construction Services.

On August 5, 2013, this Court held argument on motions for post-trial relief. During argument this Court suggested that severance of Bruce Irrgang and United Construction might have been appropriate given the posture of this case. The pretrial ruling made by the Motion Court that granted partial summary judgment against the Modern Defendants placed Bruce Irrgang and United Construction Services at somewhat of a disadvantage in defending this case. The Modern Defendants were found to have negligently entrusted the track loader to Stephen Senn's ten-year-old son when in fact they were not in possession of the track loader. The track loader had been leased to United Construction Services. As previously mentioned, the posture of the case implied or suggested that United Construction Services had negligently entrusted the track loader when no specific finding of liability had been made.

Despite the fact that this Court suggested that severance might have remedied the inherent conflict in the posture of this case, it did not award a new trial based on any issue related to severance as it related to Bruce Irrgang and United Construction Services. As discussed throughout this Opinion, the award of a new trial was based on preclusion of the contents of the workers' compensation file and the Modern Defendants' motion for a mistrial. The Court also awarded a new trial based on what it believed was an inconsistent Verdict that was against the sheer weight of the evidence to such an extent that it shocked the conscience.

11. This Court Did Not Commit Reversible Error When It Granted Motions for Post-Trial Relief Filed by Bruce Irrgang and United Construction Services Despite the Fact that the Rollands Were Able to Present Favorable Evidence in Support of Their Case.

In paragraph eleven of their 1925(b) Statement, the Rollands cited to a laundry list of evidence that helped to establish their case against Bruce Irrgang and United Construction Services. For example, the Rollands cited to the fact that these Defendants owned the property where the accident occurred and that they leased the track loader that was involved in the accident. The evidence cited by the Rollands was relevant to the extent that they were able to establish a *prima facie* case of negligent entrustment against Bruce Irrgang and United Construction Services. However, this evidence did not warrant an automatic judgment in favor of the Rollands on the issue of negligent entrustment and what amounted to basically an assessment of damages against Bruce Irrgang and United Construction Services. As previously discussed, an extremely inconsistent and prejudicial result was created by the Rollands' decision to gain the award of partial summary judgment against the Modern Defendants while at the same time deciding to allow the Jury to determine the negligence of Bruce Irrgang and United Construction Services.

Despite all of the favorable evidence listed by the Plaintiffs, the award of a new trial was required when this Court decide to grant the Modern Defendants a new trial. This Court determined that it erred when it denied the Modern Defendant motion for a mistrial based on the contents of the workers' compensation file produced midway through trial. In light of the fact that the Verdict in the case *sub judice* was joint and several and that the Jury apportioned negligence between multiple defendants, a new trial as to one Defendant would require a new trial as to all Defendants. On retrial, the jury will need to hear all of the evidence and again apportion fault.

12. This Court Did Not Abuse Its Discretion When It Found the Jury Verdict Shocking Because the Jury Failed to Assess Comparative Negligence against Mr. Rolland.

This Court awarded a new trial because the Verdict assessing no comparative negligence against Mr. Rolland was against the sheer weight of the evidence to such an extent that it shocked the conscience of this Court. When discussing its decision to award a new trial, this Court highlighted the fact that the finding of forty percent (40%) liability against the Senn Defendants was shocking juxtaposed to the finding of zero liability on the part of Mr. Rolland. The evidence establishing Mr. Rolland's comparative negligence has been thoroughly discussed throughout this opinion to such an extent that it does not need to be reiterated again. This Court specifically addressed issues related to Mr. Rolland's comparative fault in the first and second numbered paragraphs of the discussion section of this Opinion. It should suffice to say that no error occurred in this regard.

13. This Court Reviewed the Record in a Light Most Favorable to the Rollands and Still Came to the Conclusion that a New Trial Was Warranted.

In the thirteenth paragraph of their 1925(b) Statement, the Rollands alleged that this Court erred when it failed to review the record in a light most favorable to the Verdict winner.

The Rollands' contention is categorically unfounded. This Court reviewed the record and felt that the Defendants were entitled to a new trial. It authored this Opinion in support of its rulings.

14. The Inability of the Rollands' to Prove Negligent Entrustment was NOT a Central Issue in this Court's Decision to Award a New Trial.

This Court simply did not award a new trial based on the Rollands' failure or success in proving negligent entrustment. The Rollands' ability to prove a *prima facie* case of negligent entrustment was really irrelevant to this Court's decision to award a new trial. It was, and remains, the opinion of this Court that the Rollands' case against the Modern Defendants was extremely problematic in light of the facts and evidence implicating Mr. Rolland that a juror could construe as creating an independent superseding cause thereby breaking the causal chain. The ability to establish a *prima facie* case of negligent entrustment is distinguishable from the right to judgment as matter of law (being entitled to summary judgment). That being said this Court awarded a new trial based on the implications of the late production of the workers' compensation file and the inconsistent and shocking Verdict that failed to find comparative negligence. It was the opinion of this Court that the award of partial summary judgment on the issue of negligent entrustment contributed to this inconsistent Verdict.

15. A New Trial is Required Based on the Prejudicial Error that Occurred When this Court Precluded Reference to the Workers' Compensation File and Denied the Modern Defendants' Motion for Mistrial.

This Court previously addressed the issue of whether the Modern Defendants should have been permitted to conduct discovery related to the workers' compensation file when it discussed the sixth paragraph of the Rollands' 1925(b) Statement. During that discussion, this Court also addressed the fact that the Modern Defendants should have been permitted to cross-examine Mr. Rolland with statements made to workers' compensation adjuster, Elizabeth Kutz.

16. This Court Did Not Award a New Trial Based on Exclusion of Evidence Contained in Mr. Rolland's Medical Records.

This Court simply did not award a new trial based on the exclusion of any statements found in Mr. Rolland's medical records. It relied solely on the alleged admissions made by Mr. Rolland that were contained in the workers' compensation filed produced midway through trial. These alleged admissions were made to workers' compensation adjuster, Elizabeth Kutz. In this statement, Mr. Rolland allegedly admitted that he was working for the Senn Defendants and supervising the construction project on Mr. Irrgang's property at the time of the accident. This Court also awarded a new trial because it found the Verdict that assessed no comparative negligence against Mr. Rolland shocking and against the weight of the evidence.

17. This Court has Clearly Explained the Grounds for the Award of a New Trial and the Rollands Should be Limited on Appeal to Pursue only Errors Defined in Their 1925(b) Statement.

In paragraph seventeen of their 1925(b) Statement, the Rollands requested the right to amend their 1925(b) Statement after they have an opportunity to review the 1925(b) Opinion authored by this Court. Whether amendment will be necessary is an issue that can be addressed at a later date. At this point in time, it should suffice to say that this Opinion was authored in response to the Rollands' 1925(b) Statement of Matters Complained of on Appeal. This Court hopes that it has thoroughly addressed the issues presented by the Rollands.

18. Based on the Award of a New Trial, the Motion for Post-Trial Relief Filed on Behalf of the Rollands is Irrelevant at this Time and Juncture.

This Court awarded a new trial on all issues; therefore, the Rollands' motion for post-trial relief is really a moot issue for all intents and purposes. In their motion for post-trial relief, the Rollands argued that this Court erred when it limited the Jury's ability to award punitive damages against only the Defendant, Stephen Senn. The Rollands argued that the Jury should

also have been permitted to assess punitive damages against Bruce Irrgang, United Construction Services, and the Modern Defendants. They argued that these Defendants engaged in outrageous misconduct with an evil motive or reckless indifference to a known risk of harm.

This Court disagreed with the Rollands' characterization of the evidence and declined to present the question of punitive damages as to all Defendants. With the exception of Mr. Irrgang, himself, all of the parties to this litigation admitted that they had seen Stephen Senn's ten-year-old son operate the track loader. Obviously, the child should not have been operating the track loader; however, he had successfully operated the track loader on Mr. Irrgang's property on several occasions prior to the accident. Either all of the parties, including Mr. Rolland, were negligent as a matter of law for permitting this situation to exist or the issue of negligent entrustment should have been submitted to the Jury. This same principal holds true with regards to punitive damages. With the omission of Stephen Senn from the discussion, either a *prima facie* case for the assessment of punitive conduct was established against all of the parties to this litigation or the issue of punitive conduct needed to be completely removed from the case. All of the parties, including Mr. Rolland, bore responsibility for this accident.

The Appeal Filed by the Modern Defendants

Interestingly enough, the Modern Defendants filed an appeal from the orders entered by this Court that awarded the Modern Defendants a new trial on all issues. This Court requested a 1925(b) Concise Statement of Matters Complained of on Appeal. In this 1925(b) Statement, the Modern Defendants averred numerous issues and argued that this Court erred as follows:

1. Judgment Notwithstanding the Verdict: Whether the Court should have granted Modern's post-trial motion for judgment notwithstanding the verdict because Modern did not owe a duty to [P]laintiff under the facts and circumstances of this case. While [P]laintiff posited a negligent entrustment theory of liability, modern demonstrated under well-settled precedent in its post-trial motion that no such duty exists as to it...

2. Discovery: Whether, in granting Modern a new trial, the Court should have also granted Modern additional discovery in preparation of the new trial...
3. Summary Judgment: When a new trial proceeds, whether the April 11, 2012 Order of [the Motion Court] granting Plaintiffs' Motion for Partial Summary Judgment and/or the May 24, 2012 Order of [the Motion Court] amending the prior April 11, 2012 Order will, and did previously at trial, improperly govern the trial because genuine issues of material fact exist as to the alleged negligence of Modern, Senn Landscaping, Inc. and Stephen Senn.
4. Summary Judgment: When a new trial proceeds, whether the April 11, 2012 Order of [the Motion Court] and the May 24, 2012 Order of [the Motion Court] granting Plaintiffs' Motion for Partial Summary Judgment will, and did previously at trial, improperly govern the trial because it failed to acknowledge the existence of a superseding cause for the damages sustained by Plaintiff, including but not limited to the action of the Plaintiff and/or [the ten-year-old boy]
5. Summary Judgment: When a new trial proceeds, whether the April 11, 2012 Order of [the Motion Court] and the May 24, 2012 Order of [the Motion Court] granting Plaintiffs' Motion for partial Summary Judgment will, and did previously at trial, improperly govern the trial because it impermissibly shifted the burden of proof as [to the Plaintiffs' claims], which should properly rest with Plaintiff, instead to Modern depriving Modern from meaningfully defending itself at trial by requiring Modern to prove that Plaintiff was 51% responsible for the incident to absolve Modern.
6. Summary Judgment: When a new trial proceeds, whether the April 11, 2012 Order of [the Motion Court] and the May 24, 2012 Order of [the Motion Court] granting Plaintiffs' Motion for Partial Summary Judgment will, and did previously at trial, deprive the Jury of its ability to meaningfully apportion negligence, if any, among all parties, including Plaintiff, Ruick Rolland...
7. Summary Judgment: When a new trial proceeds, whether the April 11, 2012 Order of [the Motion Court] and the May 24, 2012 Order of [the Motion Court] granting Plaintiffs' Motion for Partial Summary Judgment will, and did previously at trial, improperly influence the [J]ury's determination of negligent entrustment against Modern by virtue of improper assumption by the Jury of the negligence of the underlying operator of the equipment, [the ten-year-old son of Stephen Senn], a necessary prerequisite for any determination on negligent entrustment.
8. Summary Judgment: When a new trial proceeds, whether the April 11, 2012 Order of [the Motion Court] and the May 24, 2012 Order of [the Motion Court] granting Plaintiffs' Motion for Partial Summary Judgment will, and did

previously at trial, improperly effect the [J]ury's determination of the liability of all parties by virtue of the verdict sheet configuration. The prior Orders on summary judgment resulted in the verdict sheet being provide to the [J]ury already designating Modern as negligent, which prevented the [J]ury from being able to fully apportion the negligence of all parties which would include the ability to find Modern [zero percent (0%)] liable.

Discussion of Issues Averred in the Modern Defendants' 1925(b) Statement

1. The Rollands Will Probably Be Able to Establish a *Prima Facia* Case of Negligent Entrustment that Will Be Sufficient to Place the Issue of Negligent Entrustment Before the Jury on Retrial.

The Modern Defendants made a flawed argument when they argued that they owed no duty to the Rollands and that judgment notwithstanding the verdict should have been entered in their favor. A motion for judgment notwithstanding the verdict proceeds on the theory that there should have been a judgment as a matter of law in favor of the moving party because there was not sufficient evidence to submit the case to a jury. *Moure v. Raeuchle*, 604 A.2d 1003, 1007 (Pa. 1992). To briefly summarize in the most concise fashion, the Modern Defendants' motion for judgment notwithstanding the verdict was based on the concept that they leased the track loader to United Construction Services and that the Senn Defendants took possession of the track loader and entrusted it to Stephen Senn's ten-year-old son. They basically argued that they were not responsible for the track loader once it left their possession. The problem with their argument is the fact that the ten-year-old was seen operating the track loader by their agent and truck driver, Kevin Cann, when he delivered the track loader. The track loader belonged to the Modern Defendants, and under the terms of the lease entered into with United Construction Services, the Modern Defendants retained the right to repossess the track loader if it was being misused. The Modern Defendants had specific knowledge that their track loader was being used by a ten-year-old. These facts created a *prima facie* case of negligent entrustment sufficient to overcome a motion for judgment notwithstanding the verdict.

Due to the pretrial order awarding partial summary judgment on the issue of negligent entrustment, the issue of whether the Rollands presented sufficient evidence to establish a *prima facie* case against the Modern Defendants was not an issue that was before this Court until post-trial review. The issue of negligent entrustment as it pertained to the Modern Defendants had been removed from the case for all intents and purposes. After reviewing the facts, this Court is of the opinion that a new jury hearing the entire case could foreseeably come to a different conclusion as to the culpability of all of the parties, including the Rollands, on the tort of negligent entrustment.

2. In the Event that the Case *Sub Judice* is Remanded for a New Trial, Additional Discovery Can be Conducted at that Time.

This Court did not enter an order establishing a discovery track because issues related to discovery are usually handled by team leaders or calendar judges in Philadelphia County. If the appellate court system affirms the decision to award a new trial made by this Court, jurisdiction of this matter should be returned to the team leader or calendar judge who will probably set a trial date and permit any discovery deemed necessary. The question of whether the issues presented will require additional discovery would most practically be dealt with after the appellate court system decides whether in fact the decision to award a new trial will become a reality.

3.- 8. The Propriety or Impropriety of the Decision of the Motion Court to Award Partial Summary Judgment on the Issue of Negligent Entrustment Was Not Decided by this Court.

This Court did not explicitly overrule the Motion Court's order awarding partial summary judgment on the issue of negligent entrustment. It awarded a new trial based on rulings that it made during trial related to alleged admissions in the workers' compensation file. This Court also awarded a new trial because it felt that the Jury's Verdict finding no comparative negligence

on the part of Mr. Rolland was against the weight of the evidence to such an extent that it shock the conscience. The order awarding partial summary judgment entered by the Motion Court played a significant role in creating this inconsistent and shocking verdict; however, this Court never specifically intended to review that Motion Court order.

The Appeal filed by Bruce Irrgang and United Construction Services, Inc.

Interestingly enough, Bruce Irrgang and United Construction Services filed an appeal from the orders entered by this Court that awarded them a new trial on all issues. This Court requested a 1925(b) Concise Statement of Matters Complained of on Appeal. In this 1925(b) Statement, the Defendants raised numerous issues and argued that this Court erred as follows:

1. The trial court erred in not granting judgment notwithstanding the verdict to [D]efendants, Irrgang and UCS where [P]laintiffs failed to present evidence capable of establishing that these [D]efendants were negligent, or that their negligence was a substantial cause of the [P]laintiff's accident and injury for the following among other reasons as more completely explained in [D]efendants' post-trial brief...
2. Defendants, Irrgang and UCS, were also entitled to judgment notwithstanding the verdict because the evidence established that [P]laintiff was reckless in moving directly in front of, or (as he testified) alongside and within two feet of a running track loader operated by a ten-year-old, and after placing himself in that position, turning his attention from this running machine to perform the trivial task of moving a garden hose from the machine's path; the Court should have concluded that this conduct was, as a matter of law, reckless and precluded him from recovering.
3. Alternatively, the Court should have entered judgment in favor of the [D]efendants since the evidence established [P]laintiff's comparative negligence in the circumstances of this accident exceeded any possible negligence on the part of [D]efendants as a matter of law and/or was the sole cause of [P]laintiffs' harm.
4. Alternatively, the [C]ourt erred in failing to find that judgment notwithstanding the [V]erdict would have been awarded [D]efendants, Irrgang and UCS, since the Senn [D]efendants were 100 percent liable for [P]laintiffs' harm.

Discussion of Issues Averred in the 1925(b) Statement Filed by Bruce Irrgang and United Construction Services

1. - 4. The Defendants, Bruce Irrgang and United Construction Services Were Not Entitled to Judgment in Their Favor so This Court Declined to Grant Their Request for Judgment Notwithstanding the Verdict.

The Plaintiffs presented a *prima facie* case of negligent entrustment against Bruce Irrgang and United Construction Services; therefore, these Defendants were not entitled to judgment notwithstanding the verdict. A motion for judgment notwithstanding the verdict proceeds on the theory that there should have been a judgment as a matter of law in favor the moving party because there was not sufficient evidence to submit the case to a jury. *Moure v. Raeuchle*, 604 A.2d 1003, 1007 (Pa. 1992).

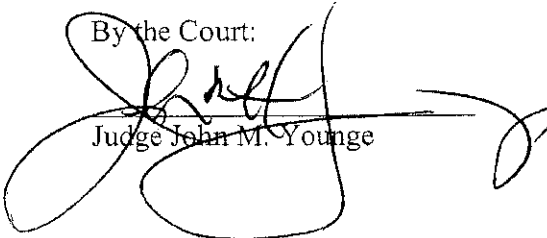
An examination of the record illustrates ample evidence to submit the question of Moving Defendants' liability to the jury. The uncontested facts were that Bruce Irrgang owned the property where the accident took place and either he, or United Construction Services, employed all of the parties involved in this litigation. Based on Plaintiffs' version of the events, Bruce Irrgang regularly monitored and controlled the progress of the construction project. Arguable, Mr. Irrgang acted as a general contractor. Mr. Rolland testified that Mr. Irrgang was physically present on the construction site and that he witnessed the ten-year-old operate the track loader on at least one occasion prior to the accident. The fact that United Construction Services leased the track loader was significant in this analysis because it was technically in possession of the track loader when the accident occurred. If in fact, Mr. Irrgang saw the boy operating the track loader that was leased by his company, United Construction Services, he could have intervened and prevented this accident.

The Moving Defendants were not entitled to a judgment in their favor as a matter of law. However, they should have been permitted to present a defense that was free from the

presumption that they in fact negligently entrusted the track loader—a presumption created by the order granting partial summary judgment by the Motion Court. One of the major frustrations in dealing with the case *sub judice* was the fact that Counsel for all of the parties seemed to confuse the difference between the ability to establish a *prima facie* case and the right to a judgment as a matter of law. The parties were entitled to a jury trial in which the Rollands carried the burden of proof, and the Defendants were entitled to present a defense.

Conclusion:

For these reasons, this Court awarded the Defendants a new trial on all issues.

By the Court:

Judge John M. Younge

¹ Matt Fischer, Senn landscaping employee and family member, initially told police that he was operating the track loader at the time of this accident.

² Counsel should not be surprised by the award of a new trial on all issues because this Court was quite candid with Counsel and repeatedly placed them on notice of its belief that there were significant legal issues that might lead to reversal in the appellate courts. During *in camera* discussions, reference to which can be found throughout the record, this Court explained to Counsel that it was grappling with both the Motion Court's pretrial award of summary judgment in favor of the Rollands and the allegedly scheme to commit workers' compensation fraud that came to light during trial.

When the workers' compensation file first came to light, this Court warned Counsel that they were headed down a road that might lead to reversal. It stated, "[Let] me say this, folks. I've tried to suggest to you all before, this case isn't as complicated as you all are making it and you are making it real complicated. And you really don't want to try this case again. Well, I'm gonna tell you right now, if I do what you're asking me to do, you're going to try this case again... I've been doing this a lot longer than you, Counsel, and I'm telling you you're gonna try this case again. If I let you do that you're gonna try this case again. That's a reversal with a big fat R right on it." (*Tr. Transcr.* 18 – 19 (3-13-13).) After production of the workers' compensation file, this Court urged Counsel to enter into a stipulation and told counsel, "[I]n the absence of such stipulation, the Modern Defendants would clearly have a legitimate issue for appeal that would remain open. So I believe this is something, that a stipulation should be entered into for their behalf. But in absence of that, a clear, clear issue for appeal would remain that might lead to the reversal of this case." (*Tr. Transcr.* 13 – 14 (3-15-13).)

With specific reference to the Motion Court's pretrial rulings, this Court stated, "Now, let me say this, also: I have urged all the parties to resolve this case. I have made it very clear, in light of pretrial rulings, there's a better

than average chance this case is going to be retried again in about three years anyway because of pretrial rulings. And so, therefore, I've urged all the parties to swallow your pride and come up with a way to resolve this case with honor." (*Tr. Transcr.* 98 (3-22-13).) It went on to state, "There [are] a lot of reasons for everybody to resolve this. A lot of reasons. I've said it to you privately. But if not, let's just keep on going." (*Tr. Transcr.* 22 (3-27-13).)

³The Pennsylvania Rules of Civil Procedure, 4001 *et seq.*, covering depositions and discovery were specifically created to prevent trial by ambush.

⁴A well established principal in this Commonwealth is that "The primary purpose of the rules is "to ensure fundamental fairness in the justice system by preventing a party aggrieved by one judge's interlocutory order to attack that decision by seeking and securing relief from a different judge of the same court" *Id.* at 575, 664 A.2d at 1332. However, this principle is inapplicable to a judge ruling on post-trial motions. *See Commonwealth v. Oakes*, 481 Pa. 343, 392 A.2d 1324 (1878). The purpose of post-trial motions is to promote judicial economy by offering the trial court the initial opportunity to correct error before burdening the appellate courts. *In re Smith*, 393 Pa. Super. 39, 49, 573 A.2d 1077, 1081 (1990). Moreover, litigants must raise all allegations of error on post-trial motion or they will be deemed waived on appeal. *Bryant v. Girard Bank*, 358 Pa. Super. 335, 344, 517 A.2d 968, 973 (1986). Necessarily then, the judge assigned to hear such motions must be able to decide them, even where (as is commonplace in large urban judicial districts) the challenged rulings have been made by several different judges of the same court. *Taylor v. City of Philadelphia*, 692 A.2d 308, 312 (Pa. Commw. Ct. 1997); *See also Chestnut v. The Hill Sch.*, 718 A.2d 336 (Pa., Super. Ct. 1998); *Borough of Jefferson v. Bracco*, 160 Pa. Commw. 681, 687, 635 A.2d 754, 757 (1993) (subsequent judge on post-trial motion under Pa. R.C.P. 227 "is bound only by the law and the limits of discretion").

⁵ Several years ago, this Court presided over an assessment of damages trial in an action that was brought primarily on a theory of Wrongful Use of a Civil Proceeding, 42 Pa. Cons. Stat. Ann. § 8354, otherwise known as a Dragonetti Action. That case had a similar posture to this action in that the motion court had granted a motion for summary judgment on the issue of liability. Although this matter pertained to a different cause of action than the case *sub judice*, the logic employed by the court in review of a summary judgment motion previously granted on behalf of a plaintiff prior to a trial on damages is quite instructive. The Superior Court ultimately remanded the case for a new trial because it felt that the pretrial award of summary judgment was erroneous when issues of material fact existed for a jury to determine. In *Morris v. DiPaolo*, 930 A.2d 500, 505 (Pa. Super. 2007), the Court wrote:

To sustain a claim for wrongful use of civil proceedings, a plaintiff must prove that the defendant initiated or continued civil proceedings against the plaintiff: (a) without probable cause or in a grossly negligent manner; (b) for an improper purpose; and (c) that those proceedings were terminated in favor of the plaintiff. *Banner v. Miller*, 701 A.2d 232, 238 (Pa. Super. 1997). The burden of establishing each of these elements lies squarely with plaintiff... Therefore, in order to

justify the grant of summary judgment in his favor, a plaintiff must establish that there is no dispute of material fact with respect to each element. A careful review of the record before the trial court at summary judgment reveals that [the plaintiff] had not met this very high burden...

Again, as we noted above, as long as an attorney believes that there is a slight chance that his client's claim will be successful, it is not the attorney's duty to pre-judge the case. [The defendant - attorney's] statement that the case against [the plaintiff] was "attenuated", while sufficient to allow for an inference of improper motive, is not sufficient to support a finding of improper motive as a matter of law.

In light of the foregoing discussion, we conclude that [the plaintiff] had not met the extremely high burden necessary to sustain a grant of summary judgment on the issue of liability. [The defendant - attorney] had not conceded that he acted with an improper purpose, and therefore it was [the plaintiff - attorney's] burden to establish this element by a preponderance of the evidence. With a record as inconclusive as this one regarding [the defendant - attorney's] intent, the subjective state of mind under which [defendant - attorney] was acting remained an issue of fact to be determined by the jury.

We recognize that the evidence of record in the case *sub judice* established a *prima facie* case against [the defendant – attorney]; however, it did not foreclose all issues of material fact. Accordingly, it was error for the trial court to enter summary judgment in favor of [the plaintiff – attorney] on the issue of liability. As this renders the remainder of the appeal moot, we need not address any of [the defendant – attorney’s] other issues on appeal.

⁶It was Plaintiffs’ burden to prove negligent entrustment and serious issues remained as to who was actually in possession of the track loader that was supplied to the ten-year-old child. For example, Mr. Rolland’s act of signing for the track loader created, at the very least, a circumstantial case as to whether he was in possession of the track loader at the time it was entrusted to the child operator. The Defendants were entitled to have this issue present to the Jury. The Restatement of Torts § 388 entitled Chattel Known to be Dangerous for Intended Use reads in relevant part:

One who supplies directly or through a third person a chattel for another to use, is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows, or from facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is supplied; (b) and has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so.

The Restatement of Torts § 389 entitled Chattel Known to be Incapable of Safe Use reads in relevant part:

One who supplies directly or through a third person a chattel for another’s use knowing that the chattel is unlikely to be made reasonably safe before being put to a use which the supplier should expect it to be put, is subject to liability for bodily harm caused by such use to those whom the supplier should expect to use the chattel or to be in the vicinity of its probable use and who are ignorant of the dangerous character of the chattel or whose knowledge thereof does not make them contributorily negligent, although the supplier has informed the other for whose use the chattel is supplied of its dangerous character.

The Restatement of Torts § 390 Chattel for Use by a Person Known to be Incompetent reads in relevant part:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or from facts known to him should know to be likely because of his youth, inexperience or otherwise, to use it in a manner involving unreasonable risk of bodily harm to himself and others whom the supplier should expect to share in, or be in the vicinity of its use, is subject to liability for bodily harm caused thereby to them.

⁷ In *Burkholder*, 637 A.2d 650, 655 (1994), the Superior Court wrote, “We will not countenance a result which imposes a duty on automobile leasing companies to predict which corporate employee will operate the vehicle and whether such employee has a valid driver’s license”. The lapse in time, the competency of the ten-year-old, and the conduct of Mr. Rolland himself were all factors that should have been argued, presented and decided by the Jury.

⁸ When discussing a motion for non-suit on the issue of recklessness, this Court questioned Counsel for the Rollands on their theory of the case as it pertained to the Modern Defendants. Counsel explained that they were proceeding against Modern on a theory of vicarious or constructive entrustment. (*Tr. Transcr.* 73 (3/26/13).)

EXHIBIT "B"

RUICK L. ROLLAND and HOLLY ROLLAND, h/w,

Plaintiffs,

-against-

STEVEN SENN, SENN LANDSCAPING, INC.,
BRUCE IRRGANG, UNITED CONSTRUCTION
SERVICES, INC., MODERN EQUIPMENT SALES
AND RENTAL CO. and MODERN GROUP LTD.,

Defendants.

PHILADELPHIA COUNTY
COURT OF COMMON PLEAS
CIVIL TRIAL DIVISION

DECEMBER TERM, 2009

CIVIL ACTION

NO. 3110

DOCKETED

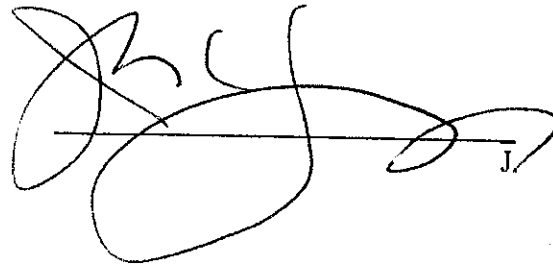
AUG 06 2013

**F. CLARK
DAY FORWARD**

ORDER

AND NOW, to wit, this *5th* day of *August*, 2013, upon due review of the Post-Trial Motions of Defendants, Modern Equipment Sales and Rental Co. and Modern Group Ltd., and the Plaintiffs' Response(s) thereto, it is hereby ORDERED and DECREED that said Defendants are GRANTED a NEW TRIAL on all issues.

BY THE COURT:



Rolland Etal Vs Senn Et-ORDER



09120311000441

Case ID: 091203110

Control No.: 13041232

EXHIBIT "C"

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PA
CIVIL ACTION – LAW

RUICK L. ROLLAND and HOLLY ROLLAND, h/w :
v. :
STEPHEN SENN and SENN LANDSCAPING, INC., and :
BRUCE IRRGANG and UNITED CONSTRUCTION :
SERVICES, INC., and MODERN EQUIPMENT SALES :
AND RENTAL CO., and MODERN GROUP, LTD., and :
ASV, INC. :

DECEMBER TERM, 2009

NO. 3110

DOCKETED

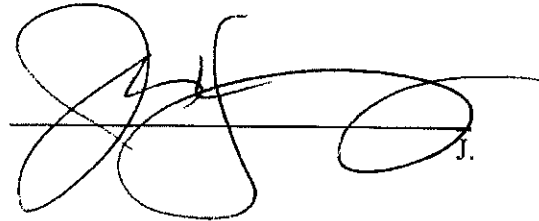
AUG 06 2013

F. CLARK
DAY FORWARD

ORDER

AND NOW, to wit, this *5th* day of *August*, 2013, upon due review of the Post-Trial Motions of Defendants, Bruce Irrgang and United Construction Services, Inc., and the Plaintiffs' Response(s) thereto, it is hereby ORDERED and DECREED that said Defendants are GRANTED a NEW TRIAL on all issues.

BY THE COURT:



Rolland Etal Vs Senn Et-ORDER



09120311000442

Case ID: 091203110

Control No.: 13041205

EXHIBIT "D"

RUICK L. ROLLAND and HOLLY
ROLLAND

Plaintiffs,

v.

STEPHEN SENN; SENN LANDSCAPING,
INC.; BRUCE IRRGANG; UNITED
CONSTRUCTION SERVICES, INC.;
MODERN EQUIPMENT SALES AND
RENTAL CO.; MODERN GROUP, LTD.;
and ASV, INC.

Defendants.

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

DECEMBER TERM, 2009

NO. 03110

DOCKETED

AUG 06 2013

F. CLARK
DAY FORWARD

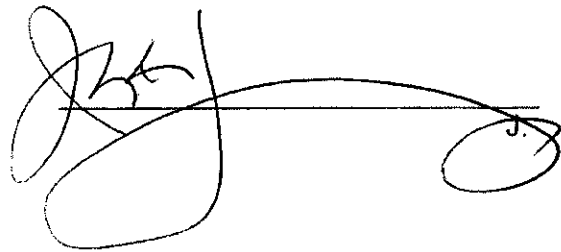
ORDER

AND NOW, this 5th day of August, 2013, upon consideration of the Motion for Post-Trial Relief of Defendants, Stephen Senn and Senn Landscaping, Inc., requesting a new trial, and any response thereto, it is hereby

ORDERED

that the Motion is **GRANTED** and Defendants, Stephen Senn and Senn Landscaping, Inc., are granted a new trial on all issues.

BY THE COURT:



Rolland Etal Vs Senn Et-ORDER



09120311000443

Case ID: 091203110
Control No.: 13041732

EXHIBIT "E"

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY, PENNSYLVANIA

RUICK L. ROLLAND and HOLLY ROLLAND,
h/w

v.

STEPHEN SENN,
SENN LANDSCAPING, INC.,
BRUCE IRRGANG,
UNITED CONSTRUCTION SERVICES, INC.,
MODERN EQUIPMENT SALES AND RENTAL CO.,
MODERN GROUP LTD. and
ASV, INC.

: December Term, 2009

: No. 3110

: **DOCKETED**

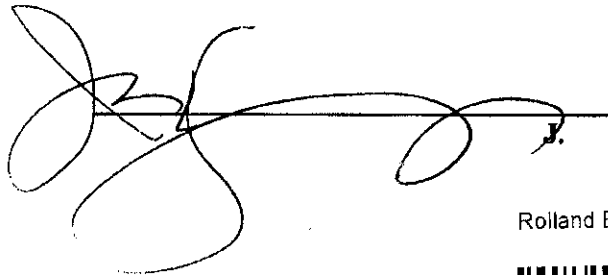
: **AUG 06 2013**

: **F. CLARK
DAY FORWARD**

ORDER

AND NOW, this *5th* day of *Aug*, 2013, upon consideration of plaintiffs' Motion for Post-Trial Relief, including their motion to remove nonsuit and/or vacate the order refusing to submit the issue of the defendants' recklessness to the jury and motion for a new trial limited to the issue of whether defendants, Irrgang, United Construction Services, Modern Equipment Sales and Rental Company, and Modern Group Ltd. acted with reckless indifference, and this response in opposition thereto, it is hereby **ORDERED** that said motion is **DENIED**,

BY THE COURT:



Rolland Etal Vs Senn Et-ORDER



09120311000444

Case ID: 091203110

Control No.: 13042051

EXHIBIT "F"

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RUICK L. ROLLAND and HOLLY ROLLAND, h/w

Plaintiffs,

v.

STEVEN SENN

and

SENN LANDSCAPING, INC.

and

BRUCE IRRGANG

and

UNITED CONSTRUCTION SERVICES, INC.

and

MODERN EQUIPMENT SALES AND RENTAL CO.

and

MODERN GROUP LTD.

Defendants.

PHILADELPHIA COUNTY
COURT OF COMMON PLEAS
CIVIL TRIAL DIVISION

DECEMBER TERM, 2009

NO. 3110

JURY TRIAL DEMANDED

**CONCISE STATEMENT OF ERRORS COMPLAINED OF ON APPEAL
BY APPELLANTS, RUICK AND HOLLY ROLLAND**

Pursuant to this Court's Order of September 10, 2013, Appellants, Ruick and Holly Rolland, respectfully file and serve this Concise Statement of Errors Complained of on Appeal in accordance with Pennsylvania Rule of Appellate Procedure 1925(b).

This Court's Order granting the Defendants' Motions for a New Trial contained no reasoning or explanation beyond the general recitation of reasons offered from the Bench

following oral argument of the Post Trial Motions. In accordance with Pennsylvania Rule of Appellate Procedure 1925(b)(4)(vi), to the extent that the Appellants identify the Trial Court's errors only in general terms herein, the generality of this Statement shall not be grounds for finding waiver. By granting a new trial, however, this Court by implication necessarily has denied the Defendants' Motions for Entry of J.N.O.V., and, therefore, this Court should reject the defendants' contention in support of their cross-appeals that this Court has somehow failed to address or adjudicate Defendants' J.N.O.V. Motions.

Similarly, this Court's Order denying Plaintiffs' Motion for a New Trial contained no reasoning or explanation. In accordance with Pennsylvania Rule of Appellate Procedure 1925(b)(4)(vi), to the extent that the Appellants identify the Trial Court's errors only in general terms herein, the generality of this Statement shall not be grounds for finding waiver.

1. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motions for a New Trial by finding that the Summary Judgment Order entered by Judge DiVito was erroneous, and/or by finding that it failed to acknowledge the existence of outstanding issues of material fact, for the following reasons:

a. The propriety of Judge DiVito's Order was not properly before this Court because an adverse ruling on Summary Judgment cannot be challenged by Post-Trial Motions pursuant to Pennsylvania's Rules of Civil Procedure;

b. The Law of the Case Doctrine and/or Coordinate Jurisdiction Rule preclude a Trial Judge from revisiting an earlier Order such as an Order granting Summary Judgment in the context of Post-Trial Motions;

c. There were no disputed issues of material fact that were overlooked by Judge DiVito;

d. The Court did not identify any disputed issues of material fact that were purportedly improperly overlooked by Judge DiVito;

e. There were no issues of material fact pertaining to whether there was a superseding cause of the damages suffered by the plaintiffs;

f. The acts or events referenced by the Court did not constitute a superseding cause and/or superseding causes of the damages suffered by the plaintiffs;

g. Judge DiVito's Order did not impermissibly shift the burden of proof;

h. Judge DiVito's Order was properly decided on the basis of the facts and arguments that were before Judge DiVito when he issued that Order;

i. Neither the Modern Defendants, nor the Senn Defendants, raised in their responses to Plaintiffs' Motion for Summary Judgment any disputed issues of material fact by affidavits, documentary evidence, or deposition testimony;

j. The undisputed evidence presented to Judge DiVito established the requisite elements of the tort of negligent entrustment as a matter of law, and defendants have not identified any fact that warranted a contrary result.

2. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motions for a New Trial by finding that the verdict was against the weight of the evidence, when, in fact, it was amply supported by the evidence adduced at trial.

3. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motions for a New Trial by finding that plaintiffs did not offer sufficient evidence to prove the elements of the cause of action of negligent entrustment, when, in fact, each of the prerequisite elements of the tort was established.

4. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motions for a New Trial by finding that the verdict did not address the issue of superseding cause because: (i) there were no superseding causes that would extinguish the liability of any of the defendants; (ii) the defendants did not identify any act that would constitute a superseding cause; (iii) the actions of the child operator could not have been a superseding cause because they were foreseeable and/or not so unusual or unexpected as to break the chain of causation, and were the gravamen of the tort of negligent entrustment; (iv) the actions of plaintiff did not constitute a superseding cause; (v) there was no evidence that plaintiff called the defendants back to the site; (vi) the act of calling the defendants to return to the work site nine days after the equipment had been delivered to the site could not be considered a superseding cause, as it was foreseeable and/or not so unusual or unexpected as to break the chain of causation; and (vii) the defendants waived any claim that the actions of the child or plaintiff constituted a superseding cause.

5. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motions for a New Trial when it found that the operator's age was immaterial because: (i) it was undisputed that the child operated the instrumentality in an unsafe manner; (ii) none of the defendants challenged the materiality of the child's age; and (iii) there was no dispute or disagreement, by any party to this litigation, that a 10 year old child lacks the judgment and maturity necessary to operate a track loader.

6. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motions for a New Trial by finding that it should have granted the Modern Defendants' Motion for a Mistrial or that Modern could not prove that plaintiff's responsibility

was 51 percent or greater without confronting him with unspecified comments allegedly made by the plaintiff.

7. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motions for a New Trial because it was "shocked" by the jury's finding that plaintiff was not responsible for his injuries, because there was more than adequate evidence in the record, including trial testimony from the defense liability expert, supporting the jury's finding that Mr. Rolland acted reasonably under the circumstances.

8. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motions for a New Trial when it found that Judge DiVito's Order had somehow improperly contributed to the jury's finding that plaintiff was not negligent because: (i) the propriety of Judge DiVito's Order was not properly before the Trial Court; (ii) Judge DiVito's Order expressly provided that the liability of the other parties, including the plaintiff, would be decided by the jury; and (iii) the parties were properly provided with the opportunity to fully litigate and argue the issue of plaintiff's contributory responsibility, if any.

9. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motions for a New Trial when it found that the entry of Summary Judgment as to the Modern Defendants and as to the Senn Defendants somehow shifted the burden of proof to Irrgang and United Construction because: (i) the Order granting Summary Judgment did not implicate Irrgang or United Construction Service in any way; (ii) the jury was properly instructed as to the burden of proof; and (iii) the jury's findings as to Irrgang and United Construction Services were supported by the evidence and the law.

10. The Trial Court erred, or otherwise abused its discretion, in granting the Motions by Irrgang and United Construction Services for a New Trial when it found that Defendant

Irrgang's case should have been severed because Irrgang never moved for severance, and the Court never raised the issue of severance until after the Trial was concluded.

11. The Trial Court erred, or otherwise abused its discretion, in granting the Motions by Irrgang and United Construction Services for a New Trial because: (i) the evidence established that Irrgang owned the premises, retained Senn, exercised control and/or the right of control over the track loader, and permitted the child to operate the machine knowing and/or having reason to know that the child was not competent to operate it; (ii) the evidence established that United Construction Services leased the track loader, exercised control and/or the right of control over the track loader, and permitted the child to operate the machine knowing and/or having reason to know that the child was not competent to operate it; and (iii) United Construction Services did not articulate any basis for a new trial other than an unsubstantiated claim that it was somehow inexplicably prejudiced by the entry of Summary Judgment as to the Modern Defendants and the Senn Defendants.

12. The Trial Court erred, or otherwise abused its discretion, in granting the Senn Defendants' Motions for a New Trial when it found that the entry of Summary Judgment somehow resulted in a "shocking" finding of forty per cent liability as against the Senn defendants because: (i) the Senn Defendants explicitly admitted liability; (ii) the Senn Defendants expressly consented to the entry of Summary Judgment so long as they were permitted to argue plaintiff's responsibility at trial; (iii) the issue of plaintiff's responsibility was, in fact, fully litigated and submitted to the jury; and (iv) the jury's finding with respect to plaintiff's responsibility was supported by the evidence.

13. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motions for a New Trial because it failed to view the record in the light most favorable to the plaintiffs.

14. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motions for a New Trial because plaintiffs established each of the requisite elements of the tort of negligent entrustment, as set forth in Restatement (Second) of Torts §308, and as adopted by the Courts of this Commonwealth, as to each of the defendants.

15. The Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motions for a New Trial on the basis of the exclusion of evidence of matters contained within the Worker's Compensation records because: (i) the evidence was unreliable and/or properly excluded and/or excludable under Pennsylvania Rule of Evidence 403 and/or properly excluded as hearsay; (ii) the Senn Defendants should not be entitled to a new trial on account of the Court's exclusion from evidence of documentation that was in the possession of and/or control of them, their counsel, and/or their insurers, but which was not timely produced; (iii) the evidence had not been sought or disclosed by any of the parties during the discovery process, but was, instead, *sua sponte* ordered produced by the Court after Trial was well underway; and (iv) the exclusion of the evidence at issue, even if deemed somehow improper, was nonetheless harmless error.

16. To the extent that the Trial Court based the grant of a new trial on its exclusion from evidence of statements contained in plaintiff's medical records, the Trial Court erred, or otherwise abused its discretion, in granting the Defendants' Motions for a New Trial on the basis of the exclusion of such evidence because: (i) the evidence was unreliable and/or properly excluded and/or excludable under Pennsylvania Rule of Evidence 403; (ii) the evidence was

properly excluded as hearsay; (iii) the defendants never established that the statements contained in the medical record reflected statements that were made by Mr. Rolland; and (iv) the exclusion of the evidence at issue, even if deemed somehow improper, was nonetheless harmless error.

17. Above, plaintiffs have sought to preserve their ability to challenge on appeal this Court's grant of a new trial in favor of defendants on each and every one of the grounds argued in Defendants' Post-Trial Motions. If this Court granted a new trial in favor of the defendants on any other basis, then this Court, in so doing erred, and abused its discretion.

18. The Trial Court erred, or otherwise abused its discretion, in denying Plaintiffs' Motions for a New Trial because the evidence established that Irrgang, United Construction Services, and the Modern Defendants: (i) knew and/or had reason to know that a child was operating a dangerous instrumentality over which they exercised control and/or a right of control; (ii) knew and/or had reason to know that the instrumentality posed an unreasonable risk of serious physical injury if used by a child; and (iii) failed to take any action to prevent use of the instrumentality.

Respectfully submitted,

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BY: /s/ Howard J. Bashman
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CERTIFICATION OF SERVICE

I hereby certify that service of a true and correct copy of the within Appellants' Concise Statement of Errors Complaint on Appeal was served on September 27, 2013 by electronic filing, and by first class mail, e-mail, and facsimile as noted herein, on the Court and below listed counsel:

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Dated: September 30, 2013

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true and correct copy of the foregoing document upon the persons and in the manner indicated below which service satisfies the requirements of Pa. R. App. P. 121:

Service by first class mail addressed as follows:

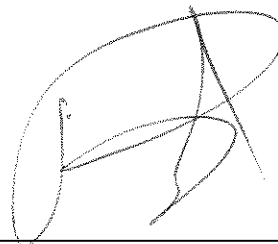
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