In the Superior Court of Pennsylvania

No. 1456 EDA 2010

LEROY RICE

v.

2701 RED LION ROAD ASSOCIATES LIMITED PARTNERSHIP; 2701 RED LION ROAD, INC.; RAYMOND GOLDBERG T/A R.G. REAL ESTATE MANAGEMENT; INTERLAKE MATERIAL HANDLING, INC.; THE INTERLAKE CORPORATION; THE INTERLAKE COMPANIES, INC.; INTERLAKE STEEL CORPORATION; WAREHOUSE TECHNOLOGY, INC.; INTERLAKE INC.; STOKES EQUIPMENT CO., INC.; WALTER A. SCHMIDT, INC.; W.A. SCHMIDT, INC.; WALTER A. SCHMIDT D/B/A WALTER A. SCHMIDT COMPANY; ACME METALS, INC.; ACME STEEL COMPANY; ACME STEEL CORPORATION; and STOKES EQUIPMENT COMPANY

Appeal of: Interlake Material Handling, Inc., The Interlake Companies, Inc., The Interlake Corporation a/k/a XIK Corporation and Interlake Steel Corporation a/k/a XIK Steel Corporation (collectively, "Interlake")

BRIEF FOR PLAINTIFF/APPELLEE LEROY RICE

On Appeal from the Judgment of the Court of Common Pleas of Philadelphia County, April Term 2003, No. 2328

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I. INTRODUCTION

The Interlake defendants–appellants (collectively "Interlake") raise just two issues in their 68–page Brief. Neither issue has any merit.

In the first issue raised on appeal, Interlake contends that the scope of the retrial that occurred on remand from this Court's memorandum decision of June 26, 2009 was too narrow because it was limited to plaintiff Leroy Rice's damages and Interlake's cross–claims against its co–defendants. According to Interlake, this Court had ordered a complete new trial. Contrary to Interlake's contention, however, the trial court accurately understood the limited scope of the retrial that this Court ordered in its June 26, 2009 memorandum decision.

Of course, that memorandum decision is now itself the law of this case, and it is far too late for Interlake to seek to alter or modify the scope of the retrial that this Court ordered in its earlier decision. Interlake's remedy, if it did not agree with the scope of the retrial that this Court ordered in 2009, was to request reargument and/or to file a petition for allowance of appeal in the Supreme Court of Pennsylvania. Interlake, however, did neither of those things.

Interlake's second and only other issue on appeal challenges the trial court's entry of a nonsuit on Interlake's cross–claims against various co–defendants at the retrial. Again, contrary to Interlake's contentions, the trial court was absolutely correct in holding that Interlake failed to introduce sufficient evidence to enable a jury to find that the co–defendants either were negligent or that their negligence was a cause–in–fact of some or all of Mr. Rice's injuries. Interlake's contention that

Mr. Rice should be judicially estopped from obtaining a nonsuit on the cross–claims because he successfully overcame those co–defendants' motions for summary judgment at an earlier stage of this litigation is frivolous. Accordingly, Interlake's second issue on appeal is equally devoid of merit, and the judgment should be affirmed.

II. COUNTER–STATEMENT CONCERNING PA. R. APP. P. 1925(b)

Interlake, in its Rule 1925(b) statement of matters complained of on appeal, sought to raise 12 issues. *See* Ex. D to Br. for Appellants. Interlake's Brief for Appellants, however, raises only two of those 12 issues. As a result, Interlake has waived the remaining 10 issues, which Interlake mentioned in its Rule 1925(b) statement but failed to brief or argue in its Brief for Appellants. *See Harris* v. *Toys "R" Us–Penn, Inc.*, 880 A.2d 1270, 1279 (Pa. Super. Ct. 2005) ("We have repeatedly held that failure to develop an argument with citation to, and analysis of, relevant authority waives that issue on review.").

Among the issues that Interlake has waived by failing to raise or brief them in Interlake's Brief for Appellants are any challenge to the size or supposed excessiveness of the jury's damages verdict on retrial and any challenge to the trial court's discretionary decision refusing to grant Interlake's request to reopen discovery, in advance of the retrial, following remand from this Court's decision on Interlake's earlier appeal.

III. COUNTER–STATEMENT OF THE QUESTIONS INVOLVED

1. Did the trial court correctly understand, based on the express language of this Court's June 26, 2009 memorandum decision on Interlake's earlier appeal, that this Court's grant of a new trial was limited to the issues of damages and Interlake's cross–claims against the co–defendants?

2. Did the trial court correctly rule both: (a) that Interlake's failure to introduce sufficient evidence on retrial in support of Interlake's cross–claims against the co–defendants necessitated the entry of nonsuits on those cross–claims; and (b) that plaintiff's earlier successful opposition of those co–defendants' summary judgment motions did not estop plaintiff from seeking the entry of nonsuits on Interlake's cross–claims?

IV. COUNTER–STATEMENT OF THE CASE

This case involves the partial paralysis of Leroy Rice, which occurred on September 18, 2001, when defective racking, manufactured and sold by Interlake, collapsed onto Mr. Rice, crushing his spine and rendering him a permanently disabled paraplegic. Mr. Rice initiated the underlying action against various other defendants on negligence–based theories, and against Interlake on a product liability theory. Before the earlier trial of this matter, which occurred in September, 2006, Mr. Rice settled his negligence–based claims, leaving only his product liability claim against Interlake. The case proceeded to trial, and the jury returned a $10.6 million verdict against Interlake. R.97a.

Interlake thereafter appealed to this Court. This Court decided Interlake's earlier appeal by means of a non–precedential memorandum decision issued June 26, 2009. A copy of this Court's earlier memorandum decision is attached as Exhibit B to Interlake's Brief for Appellants. Throughout that opinion, this Court noted that Interlake was precluded at trial from calling four witnesses, who would have supported Interlake's cross–claims against the negligence–based defendants, and two damages witnesses. As a result, this Court ruled, "Interlake is entitled to a new trial ***on damages and to allocate responsibility among the defendants***, with the previously precluded evidence now admissible." Opinion at 10 (emphasis added). During the original trial, Interlake unsuccessfully defended the product liability claim, and this Court did not award Interlake a new trial on liability. Interlake did

not seek reconsideration or any further appellate review of this Court's June 26, 2009 non–precedential opinion.

Because this Court's June 26, 2009 memorandum decision controls the outcome of the first issue that Interlake is raising on appeal, plaintiff's analysis of the language and meaning of that memorandum decision is set forth below under argument heading "A" of this Brief for Appellee. *See infra*, pages 12–18.

In due course, this Court remanded this case to the Philadelphia County Court of Common Pleas for a retrial on the issues of damages and to allow Interlake to try to prove its cross–claims. This matter was then assigned to the Honorable Joseph A. Dych for all pretrial and trial matters.

Judge Dych held a conference in this matter on September 17, 2009. At the conference, counsel for the parties discussed the scope of the retrial that this Court had ordered in its June 26, 2009 ruling. On September 21, 2009, Interlake filed a formal motion to "Establish the Scope of the Re–Trial, Discovery and the Evidence to be Presented at Trial."

On September 30, 2009, the trial court sent to counsel for the parties a letter describing the scope of the retrial that this Court had ordered in this Court's June 26, 2009 ruling. In that letter, a copy of which is attached as Exhibit C to Interlake's Brief for Appellants, Judge Dych wrote:

> Concerning the scope of the new trial ordered on remand by the Superior Court in its June 26, 2009 opinion, I have considered the positions of counsel advanced at our conference on September 17, 2009 and in subsequent written submissions. I have concluded that the new trial will be limited to (a) defendant Interlake's cross–claims sounding in negligence and (b) damages, and that, accordingly, defendant

> Interlake is permitted to introduce on liability the testimony of previously excluded witnesses Brian Tumulty, Chris Curtis, Steven Davis, and Raymond Goldberg, and on damages, in addition to damages evidence admitted in the original trial, defendant may introduce the previously excluded testimony of experts Kathleen Murphy, R.N. and Gary Barach.

Judge Dych's letter concluded by stating that jury selection on retrial was scheduled to begin on Friday, December 4, 2009, with the start of trial scheduled for Monday, December 7, 2009.

Using Judge Dych's letter to counsel, Interlake initiated a three–pronged interlocutory appellate assault. To lay the groundwork for Interlake's flurry of activity unsuccessfully seeking immediate interlocutory appellate review from this Court that would soon follow, on October 22, 2009 counsel for Interlake filed a praecipe with the trial court's Prothonotary's Office asking for an adverse order to be entered on Interlake's motion to "Establish the Scope of the Re–Trial, Discovery and the Evidence to be Presented at Trial." R.1367a.

Next, on October 28, 2009, Interlake asked the trial court, on an emergency basis, to certify the "adverse order" that was supposedly obtained by praecipe on the motion to "Establish the Scope of the Re–Trial" for immediate interlocutory appeal by permission pursuant to 42 Pa. Cons. Stat. Ann. §702(b) as involving "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter." R.108a.

Thereafter, Interlake filed in this Court a Petition for Review, which this Court docketed at No. 135 EDM 2009, arguing that Judge Dych was not correctly

interpreting this Court's June 26, 2009 non–precedential opinion and was unfairly restricting the scope of pre–retrial discovery and trial evidence. This Court thereafter rejected that request for interlocutory review. R.117a.

Around that same time, Interlake also filed what it claimed was a collateral order appeal, which this Court docketed at No. 3354 EDA 2009, again arguing that Judge Dych was not correctly interpreting this Court's June 26, 2009 non–precedential opinion and was unfairly restricting the scope of pre–retrial discovery and trial evidence. R.109a. This Court thereafter quashed that appeal. R.118a.

Lastly, Interlake filed a second Petition for Review arguing, once again, that Judge Dych was not correctly interpreting this Court's June 26, 2009 non–precedential opinion and was unfairly restricting the scope of pre–retrial discovery and trial evidence. This Court docketed Interlake's second Petition for Review at No. 4 EDM 2010. Soon thereafter, this Court likewise denied that Petition for Review by means of an order that strongly discouraged Interlake from pursuing any further requests for immediate interlocutory appellate review. R.119a.

If nothing else, Interlake's three meritless and consequently unsuccessful requests for interlocutory appellate review filed in this Court achieved a postponement of two and a half months of the start of the retrial of this case. Instead of beginning on December 4, 2009, as originally scheduled, jury selection in the retrial of this matter did not begin until February 19, 2010. R.3049a, 3093a. The actual retrial itself lasted only two days, beginning on February 22, 2010 and concluding on February 23, 2010. On the evening of February 23rd, the jury

returned a verdict in favor of Leroy Rice and against the Interlake defendants in the amount of $12.4 million. R.3632a.

As noted above, Interlake in its current appeal does not challenge the jury's damages verdict as excessive or as unsupported by the evidence. The verdict that Mr. Rice obtained against Interlake at the original trial was $10.6 million, and Interlake likewise did not challenge that verdict as excessive in its original appeal to this Court. In addition, although Interlake's three meritless interlocutory requests for review that preceded the retrial asked, among other things, for this Court to direct the trial court to reopen discovery before conducting the retrial, the Brief for Appellants that Interlake has now filed in support of its current appeal does not argue that the trial court erred or otherwise abused its discretion in refusing to reopen discovery before conducting the retrial.

Rather, Interlake's current appeal raises only two issues: (1) did the trial court properly understand and adhere to the scope of the retrial ordered in this Court's June 26, 2009 memorandum decision; and (2) did the trial court err or otherwise abuse its discretion in entering nonsuits on Interlake's cross–claims against the co–defendants based on the absence of evidence necessary to hold those co–defendants liable to plaintiff?

V. SUMMARY OF THE ARGUMENT

This appeal represents the fourth time that Interlake has asked this Court to hold that the memorandum decision this Court issued on June 26, 2009 entitled Interlake to a complete new trial rather than a new trial limited to the issues of damages and Interlake's cross–claims against the co–defendants. This Court did not perceive any merit in Interlake's arguments the first three times that they were presented to this Court, and Interlake offers no reasons as to why it should fare better in this latest attempt to change this Court's June 26, 2009 memorandum decision from what it actually says into what Interlake wishes it said.

Because so much of Interlake's unnecessarily lengthy Brief for Appellants focuses on irrelevant issues, it is important to emphasize what this appeal is and is not about. Neither the trial court nor any of the parties has ever suggested that a trial court has the ability or discretion to disregard or disobey this Court's instructions on remand. Interlake's Brief for Appellants improperly insinuates that Judge Dych, on remand from this Court's earlier ruling, did not seek or intend to implement this Court's earlier mandate. As Judge Dych's Rule 1925(a) post–trial opinion makes clear, nothing could be farther from the truth. Not only did Judge Dych properly seek to understand and implement this Court's instructions on remand, but Judge Dych in fact did so correctly.

As explained below, Judge Dych correctly understood the limited scope of the retrial that this Court's June 26, 2009 memorandum opinion authorized, and Judge Dych properly discharged his duty as a trial court judge in limiting the scope of the

retrial to exactly what this Court had ordered in its June 26, 2009 memorandum decision. This Court's June 26, 2009 memorandum decision bound Judge Dych in the same way that, under the law of the case doctrine, it now binds this Court. All that now matters is what that decision actually said and whether Judge Dych correctly understood it. Because Judge Dych properly followed this Court's instructions contained in the June 26, 2009 memorandum decision, Interlake's challenge to the scope of the retrial must be rejected.

Judge Dych likewise did not err or abuse his discretion in entering nonsuits on Interlake's cross–claims against the co–defendants, as there was simply insufficient evidence presented to enable those claims to reach the jury. Interlake's procedural argument that Mr. Rice's victory on summary judgment should somehow estop him from obtaining those nonsuits simply misses the mark.

For all of these reasons, the judgment appealed from should be affirmed.

VI. ARGUMENT

A. Judge Dych Properly Understood And Implemented The Limited Scope Of The Retrial That This Court Ordered In Its June 26, 2009 Memorandum Decision

On June 26, 2009, this Court issued a 15–page non–precedential memorandum decision resolving Interlake's appeal from the judgment following the original trial of this case. All judges on the three–judge panel joined in the result. A copy of that memorandum decision is attached to Interlake's Brief for Appellants as Exhibit B.

As that opinion explains:

> Leroy Rice was severely injured when a forklift he was operating hit storage racks and heavy cases of frozen food fell on him. Rice sued Interlake, the manufacturer of the racks, on a strict liability theory. He also sued numerous other defendants on negligence theories, including the warehouse, the designer of the racks and servicing companies. One week before trial, Rice settled with all the negligence defendants, leaving Interlake.

Op. at 2. At the original trial, the jury found in favor of Mr. Rice on his strict liability claim against Interlake and awarded damages totaling $10.6 million.

On appeal from that judgment, Interlake asserted that the trial court had erred by not allowing Interlake to pursue its cross–claim defense, by means of which Interlake asserted that the other defendants, which plaintiff had sued for negligence, were liable for some or all of the damages that Mr. Rice suffered. This Court agreed, holding that a retrial was necessary, limited to the amount of plaintiff's damages, and allowing Interlake to offer evidence in support of its cross–claims. This Court's opinion, however, did not order that Interlake receive a new trial on Mr. Rice's strict liability claim against Interlake. Moreover, this Court affirmed the trial court's denial of judgment notwithstanding the verdict on Mr. Rice's strict liability claim against Interlake, holding that the plaintiff's evidence "is sufficient to support a finding against Interlake" on plaintiff's strict liability claim. Op. at 15.

Interlake's central contention in its current appeal is that this Court's June 26, 2009 non–precedential ruling somehow silently held that Interlake was entitled to a complete new trial, including on the issue of Interlake's liability to Mr. Rice on

his strict liability claim, even though every indication from the actual language of this Court's opinion is to the contrary. Interlake's position is based on a tortured misinterpretation of this Court's earlier opinion, rather than the actual language of that opinion.

The first issue that this Court discussed in its non–precedential opinion issued June 26, 2009 was whether the trial court properly excluded evidence that Interlake had argued was relevant either to establish Interlake's cross–claims against the settling co–defendants or to the amount of plaintiff's damages. In that section of the opinion, this Court explained that "Interlake answered the complaint, *in relevant part*, by filing cross claims against those co–defendants charged with negligence." Op. at 6 (emphasis added). The opinion further explained that Mr. Rice was "on notice that Interlake was going to attempt to shift responsibility from itself to other defendants." Op. at 9. This Court further observed that the evidence that Interlake had wanted to introduce would not have prejudiced Mr. Rice because "Rice had actual notice of the substance of the cross–claims and the evidence that Interlake meant to use to prove *those* claims." Op. at 10 (emphasis added). Then, in a footnote, this Court proceeded to observe that Interlake's "defense" consisted of "pointing fingers at" Interlake's co–defendants. Op. at 10 n.4. It was in this context that this Court's earlier opinion granted a limited retrial on the issue of damages and to allow Interlake to pursue its cross–claims against the co–defendants.

In concluding its discussion of this issue, this Court's earlier non–precedential opinion states:

> As such, ***Interlake is entitled to a new trial on damages and to allocate responsibility among the defendants***, with the previously excluded evidence now admissible.

Op. at 10 (emphasis added). Nowhere else throughout the balance of this Court's memorandum decision issued June 26, 2009 does the memorandum decision state or suggest that this Court ordered a retrial beyond the limited scope specified in the above quotation.

The second issue discussed in this Court's non–precedential opinion was Rule 238 delay damages, and that discussion was not pertinent to the issue of the scope of the retrial on remand. Op. at 10–12.

The third issue discussed in this Court's non–precedential opinion involved the trial court's decision to preclude Interlake's expert from testifying about one specific issue — "the general condition of the warehouse" — which was a subject matter that was argued to be relevant to Interlake's negligence cross–claims against the settling defendants. Op. at 12. Interlake's expert had testified at length at the original trial and was not restricted in any way during the original trial from defending the product itself. However, Interlake sought to argue at the original trial that the warehouse racking, in general, was in poor condition and, therefore, the settling defendants were somehow partially responsible under a negligence theory for the injuries plaintiff suffered. Op. at 13. This Court's opinion recognized that the trial court had excluded that portion of the expert's testimony because that evidence was relevant only to negligence and because plaintiff was not pursuing negligence claims against Interlake. Op. at 13. Yet, now that the co–defendants potentially

liable for negligence might be on the verdict slip at the retrial, this Court ruled that the expert's testimony would be admissible to allow Interlake to attempt to prove its negligence cross–claims against the settling defendants. Op. at 13.

Thus, this Court's discussion of the third issue on appeal does not demonstrate that this Court silently granted Interlake a new trial on the issue of Interlake's own strict liability to plaintiff. Moreover, notwithstanding this Court's June 26, 2009 opinion permitting Interlake's expert to testify at the retrial regarding general warehouse racking conditions, Interlake did not call that expert to testify at the retrial, nor did Interlake even introduce the live testimony of any witness at the retrial.

The fourth issue that this Court discussed, in one short paragraph, was the trial court's need to put the co–defendants on the verdict slip at the retrial. As this Court explained in its opinion, the co–defendants should be on the verdict slip at the retrial "[b]ecause Interlake will now be allowed to present the evidence regarding its cross–claim * * * ." Op. at 14.

The fifth issue this Court addressed, in one short paragraph, was whether Interlake would be entitled to certain jury instructions at the retrial. What this Court ruled was that "[t]o the extent that *the now–allowed evidence* touches on these points, jury instructions will be required." Op. at 14 (emphasis added). In other words, to the extent that evidence pertaining to Interlake's cross–claims against the settling defendants, or evidence pertaining to the plaintiff's damages, make certain jury instructions pertinent, the trial court would need to deliver such

jury instructions. What jury instructions would be required on the subjects of Interlake's cross–claims against the co–defendants and plaintiff's damages was a matter that this Court left to the trial court's discretion based on the evidence actually introduced during the retrial. This Court concluded its memorandum opinion by explaining that "Interlake's claims regarding * * * jury instructions are moot considering the disposition of this matter." Op. at 15.

This Court's mootness holding on the jury instructions issue in this Court's June 26, 2009 memorandum decision further confirms that this Court did not grant Interlake a complete retrial in that decision. This Court has defined "moot" as follows: "An issue before a court is moot if in ruling upon the issue the court cannot enter an order that has any legal force or effect." *Deutsche Bank Nat. Co.* v. *Butler*, 868 A.2d 574, 577 (Pa. Super. Ct. 2005) (internal quotations omitted); *see also Commonwealth* v. *Nava*, 966 A.2d 630, 633 (Pa. Super. Ct. 2009) (same).

When this Court wrote at the conclusion of its June 26, 2009 memorandum decision that "Interlake's claims regarding * * * jury instructions are moot considering the disposition of this matter," "the disposition of this matter" to which this Court's earlier opinion referred was, of course, "a new trial on damages and to allocate responsibility among the defendants." If this Court in its earlier opinion had indeed ruled that Interlake was entitled to a complete retrial, as Interlake is now contending, this Court could not and would not have characterized Interlake's challenge to the jury instructions as moot, because that challenge would not have been moot under those circumstances. This is because the jury instructions at issue

pertained largely to plaintiff's product liability claim against Interlake, and thus — if that product liability claim were to be retried — the question of whether the jury instructions sought by Interlake on plaintiff's product liability claim should be delivered to the jury at the retrial would not have been "moot."

A hypothetical helps illustrate this point. Assume a case in which the plaintiff has asserted only a claim for breach of contract against the defendant. Assume further that, after the jury ruled in the plaintiff's favor, the defendant takes an appeal arguing two points: first, that the trial court erroneously excluded one of defendant's witnesses; and, second, that the trial court should have delivered the jury instructions that defendant had proposed instead of the jury instructions actually delivered.

In this hypothetical case, if the appellate court agrees with the defendant that a new trial is necessary because defendant's witness should have been allowed to testify, that conclusion does not make defendant's challenge to the jury instructions moot. Rather, this Court would necessarily proceed to address the jury instructions issue to ensure that the jury instructions that are used at the retrial are proper.

As in the foregoing hypothetical, if this Court in deciding Interlake's earlier appeal had in fact ruled that Interlake was entitled to a complete new trial on all issues, Interlake's challenge to the jury instructions that the trial court had used at the first trial on the product liability claim would not have been "moot" in any respect. Rather, the reason why Interlake's jury instruction challenge insofar as it

related to plaintiff's product liability claim was described as "moot" at the conclusion of this Court's memorandum decision — meaning that this Court could not "enter an order that has any legal force or effect" — was because this Court in deciding Interlake's earlier appeal *did not* order a retrial of plaintiff's product liability claim against Interlake.

Sixth, this Court's non–precedential ruling held that the trial court will have discretion concerning whether to compel the settling co–defendants to attend the retrial. Op. at 14.

And, lastly, this Court affirmed the trial court's denial of Interlake's motion for j.n.o.v. on Mr. Rice's strict liability claim against Interlake. Op. at 14–15. Interlake has thus already had one fair trial and appeal regarding Interlake's liability on plaintiff's strict liability claim. Due process requires nothing more than that. Although this Court's earlier affirmance of the trial court's rejection of Interlake's motion for j.n.o.v. was not, in and of itself, dispositive of what scope of a retrial this Court ordered in its earlier opinion, that affirmance is fully consistent with the limited scope of retrial that this Court explicitly provided for elsewhere in its opinion.

The final two sentences of this Court's non–precedential opinion issued June 26, 2009 state: "Judgment reversed and matter remanded for a new trial in accordance with this decision. Jurisdiction relinquished." Op. 15. This Court's use of the words "a new trial *in accordance with this decision*" demonstrates beyond question that this Court did not grant Interlake a comprehensive new trial on each

and every issue, including the issue of Interlake's liability on Mr. Rice's strict liability claim against Interlake. Rather, the retrial was limited to the questions of damages and the settling co–defendants' liability (if any) for those damages on Interlake's cross–claims. If this Court had intended to require a complete retrial of all issues, the memorandum decision would have simply concluded by stating "Judgment reversed and matter remanded for a new trial. Jurisdiction relinquished." Nowhere in this Court's earlier opinion do the words "retrial on Interlake's liability," "retrial on liability and damages," or any other words to that effect appear.

On July 8, 2010, Judge Dych issued his Rule 1925(a) opinion in this case. A copy of that opinion is attached as Exhibit E to Interlake's Brief for Appellants. Judge Dych's explanation of his understanding of the scope of remand in the aftermath of this Court's June 26, 2009 memorandum decision deserves to be quoted at length as it represents the epitome of reasonableness and sound legal judgment:

> In short, the Superior Court said that: (a) the trial court erred in precluding Interlake's proof of the co–defendants' negligence, that the negligence evidence should be admitted in the second trial, and that the co–defendants should appear on the verdict sheet; (b) Interlake's complaints on jury instructions were moot; and (c) Interlake was to be permitted to adduce evidence that Rice caused delay that reduces his entitlement to delay damages. Those were the instructions to the trial court on remand and those are the instructions I followed.
>
> No matter how I parse the Superior Court's language, I cannot escape the conclusion that it faulted the trial judge's rulings only because they thwarted Interlake's legitimate efforts to point the finger of blame at its co–defendants, not because there was any error in the jury verdict on product liability. Regarding the excluded witnesses, the

> court was specific: the trial judge had imprudently accepted Rice's claim of prejudice at the number of witnesses Interlake proposed to introduce; in consequence, the judge improperly "precluded Interlake from presenting evidence that would have allowed the jury to consider the claims against the settling defendants." Thus, "Interlake should have been permitted to adduce evidence against the settling defendants and use the evidence the settling defendants had prepared to use against Rice's claim." Slip op. at 2–3. Regarding the six previously excluded witnesses — Tumulty, Curtis, Davis, Goldberg, Murphy and Barach — Rice could not claim surprise because Rice had actual notice of the substance of their testimony, had participated in their depositions and, as to the experts, had received expert reports. *Id.* at 7–8. So, Rice was on notice of Interlake's cross–claims and the fact that Interlake "was going to attempt to shift responsibility from itself to other defendants." *Id.* at 9–10. Since Rice would suffer neither surprise nor prejudice from the "previously precluded evidence," Interlake was now "entitled to a new trial on damages and to allocate responsibility." *Id.* at 10. On the separate issue of the trial judge's decision to preclude as "immaterial" some of Interlake's expert evidence, the court declared that the evidence of "disrepair of the entire racking system" was specifically relevant to the "negligence aspect of the claim." *Id.* at 13 n.6. In the only reference to the product case, the court said that the trial judge properly had given the issue to the jury.
>
> I reject Interlake's argument that even though the Superior Court said that the trial judge did not err in giving the product liability case to the jury (denying the judgment n.o.v. motion), it somehow also found that the verdict was compromised by errors in the negligence case and should be set aside. I am at a loss to find any such connection in the opinion and nothing in Interlake's extensive briefing or oral argument persuades me that the court's express rulings include, by inference, innuendo, indirection, or implication, the *additional unstated instruction* that product liability, as decided by the jury, was to be retried. Interlake has pointed to no authority that mandates reading such an intention into the Superior Court opinion that is otherwise silent on the subject. Guided by [Pa. R. App. P.] 2591, I tried the case as it was presented to me.

Ex. E to Br. for Appellants at 6–8.

Moreover, given that Judge Dych was not the judge who presided over Mr. Rice's original trial against Interlake, there is not even any basis to suggest that

this Court's ruling on Interlake's original appeal could have caused any affront to Judge Dych, as the errors that this Court identified in its earlier memorandum decision were errors that a different trial judge had committed.

Because there was not and is not any dispute over whether Judge Dych had the obligation to strictly adhere to the scope of the retrial that this Court ordered in its June 26, 2009 memorandum opinion, Interlake has unnecessarily inflicted on this Court that portion of its lengthy appellate brief arguing that a lower court on remand must adhere to an earlier ruling of this Court on direct review. Interlake's "due process" argument is equally without merit, because Interlake has already received one fair trial on plaintiff's strict liability claim, and this Court's June 26, 2009 memorandum opinion held, in affirming the trial court's rejection of Interlake's motion for j.n.o.v., that more than adequate evidence supported the jury's verdict.

There was never a question that Interlake fully and completely defended the product liability allegations in the first trial. Interlake presented expert testimony and its company engineer as a witness. Interlake also cross–examined all of plaintiff's witnesses at the original trial and presented closing arguments. After a five–day trial on the product liability claim, the jury found the product was defective, a finding that this Court later upheld in affirming the trial court's denial of Interlake's post–trial motion seeking the entry of j.n.o.v.

It was also entirely unnecessary for Interlake to devote some 10 pages of its Brief for Appellants to arguing that the three–judge panel that issued this Court's

June 26, 2009 memorandum decision had no alternative but to grant Interlake a complete retrial of all claims and issues. To begin with, regardless of whether at some earlier stage in the judicial history of this Commonwealth partial retrials were disfavored, at present partial retrials — including retrials limited simply to damages without a retrial also as to liability and retrials solely to allocate responsibility among co–defendants — are routinely granted by Pennsylvania appellate courts. *See Kornfield* v. *Atlantic Financial Federal*, 856 A.2d 170, 178 (Pa. Super. Ct. 2004) (remanding for a retrial as to damages only); *Cheng* v. *SEPTA*, 981 A.2d 371, 383 (Pa. Commw. Ct. 2009) (remanding for a retrial as to damages only); *Thompson* v. *City of Philadelphia*, 507 Pa. 592, 602, 493 A.2d 669, 674 (1985) (remanding for "a new trial, limited to the issue of the apportionment of negligence"); *Ball* v. *Johns–Manville Corp.*, 625 A.2d 650, 662 (Pa. Super. Ct. 1993) (remanding case for new trial limited to issue of whether certain defendants, who settled pre–trial, contributed to plaintiff's injuries); *see also* Pa. R. Civ. P. 227.1(a) (specifying that a trial court may "order a new trial as to all or any of the issues").

It is simply not correct that this Court's June 26, 2009 memorandum decision ordering that a partial retrial occur necessitated retrying the entire case. Indeed, in his Rule 1925(a) opinion, Judge Dych cited three decisions that the Supreme Court of Pennsylvania issued within the past 25 years authorizing limited retrials:

> *See e.g., Quinby v. Plumsteadville*, 907 A.2d 1061, 1077–78 (Pa. 2006) (holding that Superior Court erred in granting j.n.o.v on a wrongful death claim and remanding for new trial on that claim and on damages); *McNeil v. Owens–Corning*, 680 A.2d 1145, 1149 (Pa. 1996) (holding that the Superior Court erred to the extent that it allowed a new trial on a lung cancer claim and affirming the grant of a new trial

> limited to non–cancer injury claims); *Thompson v. City of Philadelphia*, 493 A.2d 669, 672–74 (Pa. 1985) (holding that Superior Court erred in reversing trial court's order granting new trial and remanding for a new trial limited to apportionment of damages).

Ex. E to Br. for Appellants at 5.

Contrary to Interlake's argument on appeal, had the trial court actually granted a complete retrial, *that* would have violated both this Court's memorandum decision issued June 26, 2009 and the law of the case doctrine.

In essence, what Interlake appears to be arguing is that the earlier three–judge panel of this Court that issued the June 26, 2009 memorandum decision should have ordered a complete retrial of the entire case regardless of whether that three–judge panel in fact actually did so. What Interlake's argument impermissibly overlooks, however, is that this subsequent three–judge panel is bound by the earlier three–judge panel's ruling regardless of whether that ruling did nor did not reach the correct outcome. As this Court recognized in *SmithKline Beecham Corp.* v. *Stop Huntingdon Animal Cruelty USA*, 959 A.2d 352, 357 (Pa. Super. Ct. 2008), "[a]mong the related but distinct rules which make up the law of the case doctrine are that * * * upon a second appeal, an appellate court may not alter the resolution of a legal question previously decided by the same appellate court."

Of course, Interlake was not entirely without any remedy after this Court issued its June 26, 2009 memorandum decision granting a retrial limited to damages and Interlake's cross–claims against the co–defendants. Interlake could have sought reargument in this Court, and/or petitioned for allowance of appeal from the Supreme Court of Pennsylvania, arguing that a complete retrial as to all

issues should have been granted. But Interlake failed to do so, opting instead to take its chances that it might be able to convince a Court of Common Pleas judge that the Superior Court had in fact silently granted a complete new trial. When that effort failed, Interlake filed three "emergency" requests for interlocutory appellate review in this Court, each of which this Court resoundingly rejected.

Interlake's track record before this Court in this very case is far from commendable. In the first appeal, Interlake claimed that it wanted to pursue its cross–claims against the co–defendants, but on remand after attaining that ability Interlake outright dismissed its claims against two of the five co–defendants and failed to introduce sufficient evidence to overcome a nonsuit against the remainder. In addition, although Interlake argued in its earlier appeal to this Court that it was prejudiced at the original trial by its inability to call six witnesses — four pertaining to its cross–claims, and two pertaining to damages — even after this Court allowed a retrial at which Interlake could call those six witnesses, Interlake failed to call even a single one of those witnesses. Lastly, in the three emergency appeals that Interlake filed in this Court between December 2009 and February 2010, Interlake asked this Court to order Judge Dych to reopen discovery before conducting the retrial of this case. Now that Interlake is actually appealing from a final judgment, the issue of reopening discovery has fallen by the wayside and is no longer being pursued by Interlake.

It literally adds insult to injury for Interlake, the company whose defective racking has permanently rendered plaintiff a quadriplegic, to now be seeking to

subject plaintiff to a third trial to recover for his injuries when the first two trials have provided Interlake with a full and fair opportunity to assert its defenses. The actual litigation history of this case demonstrate beyond question that Interlake's assertions of error and prejudice allegedly resulting therefrom are disingenuous. Mr. Rice has been a paraplegic for ten years due to Interlake's defective product. Interlake has done everything within its power to stall the resolution of this matter, even going so far as arguing to obtain relief from this Court that Interlake itself had no intention of actually pursuing.

Because Judge Dych correctly understood and implemented the mandate of this Court's memorandum decision issued June 26, 2009, and because Interlake is incapable of establishing that this Court's earlier memorandum decision held that Interlake was entitled to a complete new trial, this Court should reject the first of the two grounds for a new trial that Interlake has raised in its Brief for Appellants.

B. Judge Dych Correctly Entered Nonsuits On Interlake's Negligence Cross–Claims Against The Co–Defendants And Correctly Held That Plaintiff Was Not Estopped From Seeking The Entry Of Those Nonsuits Merely Because Plaintiff Had Successfully Opposed Those Defendants' Summary Judgment Motions

In its earlier appeal to this Court, Interlake attained the ability to proceed to trial on its negligence cross–claims against five of Interlake's co–defendants. On remand, however, Interlake decided to voluntarily dismiss its cross–claims against two of those co–defendants before the retrial of this case even began. R.3082a. As a result, Interlake at the time of retrial was asserting negligence cross–claims against

only three defendants, referred to generically by Interlake as Schmidt, Red Lion, and Stokes. R.3082a. In actuality, however, these "three" entities in fact constitute approximately nine separate corporate entities.

In any negligence action, to state a *prima facie* cause of action, the party with the burden (here, Interlake on its cross–claims) must demonstrate the elements of negligence: "a duty owed * * * , a breach of that duty * * * , that the breach was the proximate cause of the harm suffered, and the damages suffered were a direct result of harm." *See Quinby* v. *Plumsteadville Family Practice, Inc.*, 589 Pa. 183, 199, 907 A.2d 1061, 1070 (2006) (quoting *Hightower–Warren* v. *Silk*, 548 Pa. 459, 463, 698 A.2d 52, 54 (1997)). Here, Interlake failed to prove a *prima facie* case. More specifically, Interlake failed to prove that a duty was owed by either Schmidt, Red Lion, or Stokes, that there was a breach of that duty, and/or causation as a result of any breach. *See James Corp.* v. *North Allegheny School Dist.*, 938 A.2d 474, 498 (Pa. Commw. Ct. 2007) (recognizing that a defendant pursuing a cross–claim against a co–defendant bears the burden of proof).

With regard to co–defendant Schmidt, Interlake presented no live testimony and called no experts. Interlake was attempting to prove that Schmidt, as a racking installer in the year 1979, failed to follow proper industrial racking installing methodology from the 1970s. Interlake attempted to do this without an expert. Expert testimony is required when the subject is "so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman." McCormick, Evidence 33 (3d ed. 1984); *West Phila. Therapy Ctr.* v. *Erie*

Ins. Group, 751 A.2d 1166, 1168 (Pa. Super. Ct. 2000). "It has been uniformly held that expert testimony is necessary to establish negligent practice in any profession." *Powell* v. *Risser*, 375 Pa. 60, 65, 99 A.2d 454, 456 (1953). In *Storm* v. *Golden*, 538 A.2d 61, 64 (Pa. Super. Ct. 1988), this Court held that expert testimony is necessary whenever the subject matter of the inquiry involves special skills and training not common to the lay person. *See also Young* v. *DOT*, 560 Pa. 373, 377–79, 744 A.2d 1276, 1278–79 (2000) (expert required to testify as to issue of placing warning signs on road near construction sites).

In this matter, Interlake sought to hold an alleged industrial racking design facility liable for negligence for not following 1979 standards for industrial racking installation. Interlake needed, but did not have, an expert. Interlake attempted to rely on the testimony of Jeff Ketchman, Ph.D., read into evidence, with regard to Schmidt. Dr. Ketchman was Mr. Rice's product liability expert, whom counsel for plaintiff called live during the first trial to testify on the subject of product defects. Dr. Ketchman, however, was not (and consequently never was qualified by the trial court as) an expert with regard to racking installation, as Judge Dych recognized in his Rule 1925(a) opinion:

> I determined that Dr. Ketchman was not qualified to offer testimony concerning negligence in industrial racking installation, a determination that is supported by the fact that the witness himself denied having the requisite expertise. N.T., 02/23/10 at 115. Second, and in any event, Interlake elicited no testimony from Ketchman about standard of care for installing racking systems in 1979 and Ketchman gave no testimony to a reasonable degree of any professional certainty that Schmidt's purported negligence caused Rice's injuries.

Ex. E to Br. for Appellants at 11.

Interlake claims that Dr. Ketchman's testimony concerning the design of Interlake's product was equivalent to expert testimony against Schmidt's racking installation. Such is not true. As Judge Dych recognized, Dr. Ketchman did not testify, within a reasonable degree of professional certainty, that the racking installer failed to comply with 1979 industry standards and such failure was the proximate cause of Mr. Rice's harm. In fact, Dr. Ketchman affirmatively admitted in his testimony that he was not an expert in racking installation. R.3462a.

Furthermore, there has been no testimony in this case as to which Schmidt entity was actually responsible for installing the racking. There were three Schmidt defendants: Walter A. Schmidt, Inc.; W.A. Schmidt, Inc.; and Walter A. Schmidt d/b/a Walter A. Schmidt Co. Interlake failed to introduce any competent evidence to establish which of these three defendants, if any, installed the racking. Even the testimony of Mr. Willis, a former Stokes employee, that was read into evidence confirmed that he was not sure of the company's name. R.3484a.

Even assuming that Interlake could identify the correct Schmidt entity and that Dr. Ketchman qualified as an expert on the subject of racking installation in 1979 during the trial of this case, Interlake nevertheless failed to introduce any competent evidence that the racking was to be, or could be, tied to the wall that the racking abutted against. Nor was there any competent evidence that the deflector plate, if bolted to the floor, would have prevented this incident. The only engineering testimony regarding the deflector plate is that it is not intended to be an anchoring mechanism for the racking to the floor. As a result, the trial court

correctly concluded that Interlake completely failed to provide any competent evidence that the racking was installed improperly by 1979 standards for racking installation:

> [N]ot only did Interlake fail to establish the requisite standard of care and causation, it did not even establish that Ketchman or Willis, a former employee of Stokes and the only other witness testifying about installation, knew with certainty how the system was installed or even that it was Schmidt that had installed it. Any jury finding based on this evidence would have been purely speculative.

Ex. E to Br. for Appellants at 11.

Not surprisingly, because Dr. Ketchman was plaintiff's expert witness on the issue of product defect, the entire gist of Dr. Ketchman's testimony was that Interlake's product was defective. Dr. Ketchman testified that he believed the racking was defective because it only had one hole in the base. R.3395a–96a. Dr. Ketchman also testified that he believed the racking was defective because of the placement of the holes in the footplate. R.3396a–97a. Dr. Ketchman further testified that the size of the hole provided by Interlake was inadequate. R.3397a–98a. Dr. Ketchman believed that the hole should be increased in size from 1/2 inch to 5/8 inch. R.3398a–400a. Dr. Ketchman testified about the "deflector" being sold by Interlake as an "accessory," not as an "anchor." R.3400a–02a. Dr. Ketchman specifically testified that the deflector "does not supplement the anchoring capacity." *Id.* Dr. Ketchman also testified that "the root cause of this failure and the dumping of the product was the failure of the anchoring and the defective design" of the product. R.3407a–09a.

It is of course the trial court's responsibility to determine if a party has met its *prima facie* case:

> A trial court's entry of compulsory non–suit is proper where [a party] has not introduced sufficient evidence to establish the necessary elements to maintain a cause of action, and it is the duty of the trial court to make such a determination prior to submission of the case to a jury.

Gigus v. *Giles & Ransome, Inc.*, 868 A.2d 459, 461 (Pa. Super. Ct. 2005). As this Court has recognized, *see Hoffman* v. *Mogil*, 665 A.2d 478, 480–81 (Pa. Super. Ct. 1995), a nonsuit is proper when the plaintiff fails to offer expert testimony on causation between the alleged negligence at issue and the incident at issue. Since Interlake was the third–party plaintiff, it was Interlake's burden to prove its cross–claims. *See James Corp.*, 938 A.2d at 498.

Similarly, the trial court also correctly ruled that Interlake failed to introduce sufficient evidence against the Red Lion defendants to enable that cross–claim to reach the jury. As the trial court's opinion cogently explains:

> Interlake claims that Red Lion was liable for Rice's injuries because it was the owner–in–possession when the accident occurred in 2001 or, if out–of–possession, was liable because it failed to make repairs of which it had notice. Finding that Interlake failed to adduce sufficient evidence to present the question of Red Lion's liability to the jury, I nonsuited the claim.
>
> My reasons for nonsuiting the case against Schmidt/Stokes apply equally to Red Lion, namely, that Interlake failed to establish the element of causation necessary to support a *prima facie* case of negligence. Therefore, even if Interlake could show that Red Lion owed a duty to Rice (and I think it could not), I do not need to reach the questions whether Interlake established which "Red Lion" entity owned the property in 2001 or whether that entity was liable as a landlord–in–possession or as a landlord–out–of–possession whose liability is triggered by some exception to the general rule that

> landlords are not liable for injuries to third parties on their leased property. *Henze v. Texaco Inc.*, 508 A.2d 1200, 1202 (Pa. Super. 1986). There simply is no competent evidence on the record that would support a jury verdict that some failure to repair or correct the racking system or any other condition in the warehouse proximately caused Rice's injuries. Nonsuit was proper.

Ex. E to Br. for Appellants at 11–12.

As the trial court correctly ruled, not only is there no evidence whatsoever with regard to the three entities that Interlake is generically referring to as "Red Lion," there is no evidence whatsoever that any of these entities were "in possession" in that they had any intent to control the property. In order for a land owner to be considered "in possession" of his property, he must occupy the property "with the intent to control it." *Rudy* v. *A–Best Products Co.*, 870 A.2d 330, 333 (Pa. Super. Ct. 2005) (citing Restatement (Second) of Torts §328E). Moreover, the "retained control" provision found in Restatement (Second) of Torts §360 applies to common areas of multi–unit properties, like parking lots or fire escapes, rather than to shelves of racking contained in a frozen food warehouse. *See Leary* v. *Lawrence Sales Corp.*, 442 Pa. 389, 275 A.2d 32 (1971). In addition, the trial court also correctly ruled that Interlake failed to present sufficient evidence that "Red Lion" is excepted from the general rule that a landlord out of possession is not liable for personal injuries that result on the premises. Here, the lease agreement clearly vests responsibility with the tenant. R.1526a–27a.

Further still, although Judge Dych did not reach the issue because it was unnecessary for him to do so, Interlake has failed to establish which "Red Lion" entity would be responsible for Interlake's claimed negligence. The complaint

identifies 2701 Red Lion Road Associates Limited Partnership, 2701 Red Lion Road, Inc., and Raymond Goldberg, t/a R.G. Real Estate Management. Interlake at the retrial of this case failed to establish which if any of these entities owned the property on September 18, 2001. No person testified on this issue. Despite Interlake's claim to this Court in Interlake's original appeal that Interlake needed to call Mr. Goldberg as a witness at the time of trial, it did not call him.

At the retrial, Interlake read to the jury the testimony of five witnesses: Mr. Rice, Dr. Ketchman, Mr. Tumulty, Mr. Willis, and Mr. Goldberg. These witnesses do not assist Interlake in establishing who owned the property on September 18, 2001. Four of the five had no historical or other information whatsoever regarding the ownership issue. While Mr. Goldberg, the former owner of Penn Maid Dairy, had some historical information, he testified that he was unfamiliar with the names of the various defendants or the owner of the property. R.3497a–98a. The only name he knew was 2701 Red Lion Road LLC, which was not even a named defendant. R.3501a. When asked if there were entities known as 2701 Red Lion Road, Inc. or 2701 Red Lion Road, LLC, Mr. Goldberg responded "I don't know." R.3502a. Mr. Goldberg testified that the tenant, rather than the landlord, owned everything. R.3498a–99a. He also testified that any and all maintenance was the tenant's responsibility. R.3518a–19a. At no point during the entire testimony of Mr. Goldberg does he ever indicate that 2701 Red Lion Road Associates Limited Partnership, 2701 Red Lion Road, Inc., or Raymond Goldberg was the landlord of the property on September 18, 2001.

Moreover, Interlake did not call a single expert to testify as to what duty "Red Lion" breached, as the landlord for a fully leased–out facility, to maintain its tenant's racking. Is it Interlake's position that such a landlord owes a duty to inspect? If so, is it further Interlake's position that an inspection would have revealed a relevant condition? If so, is it further Interlake's position that such a revelation should have resulted in some conduct that would have changed what actually happened on September 18, 2001, when Mr. Rice sustained his horrendous injuries? Interlake needed expert testimony, as well as factual testimony, on these issues — testimony that Interlake unquestionably failed to present at the retrial of this case.

Finally, with regard to Interlake's negligence cross–claim against co–defendant Stokes, it is unclear under what theory Interlake claims Stokes should have been responsible in this matter. There were originally two Stokes entities at the time of the first trial. At the second trial, Interlake did not identify which of the two Stokes entities it believes installed the racking. Moreover, Dr. Ketchman acknowledged he was not an expert in racking layout. R.3462a. Therefore, Dr. Ketchman could not be, and was not, critical of anything that Stokes did or did not do. Mr. Willis testified that he ordered the Interlake racking for Mr. Goldberg in 1979. R.3483a. Stokes did not, however, install anything itself, but, rather, subcontracted that work to another company. R.3484a. While Interlake argues that Mr. Willis should have checked on the work, Mr. Willis testified he had no obligation to do so. R.3485a.

As the trial court correctly recognized, there was simply no evidence that Stokes did anything wrong. There was no expert testimony to support any claim against Stokes. Expert testimony was required. There was no evidence that the Stokes involved in this litigation was the correct Stokes.

As to Stokes, Interlake's appellate argument consists of only a single paragraph containing no citation whatsoever to the Reproduced Record or the evidence introduced at trial. *See* Brief for Appellants at 67. Interlake has thus waived this argument by failing to adequately offer argument in support of its contention that the trial court erred or abused its discretion by entering a nonsuit as to Interlake's claims against Stokes. *See Irwin Union Nat'l Bank & Trust Co.* v. *Famous*, 4 A.3d 1099, 1103 (Pa. Super. Ct. 2010) ("This Court will not act as counsel and will not develop arguments on behalf of an appellant. When deficiencies in a brief hinder our ability to conduct meaningful appellate review, we may dismiss the appeal entirely or find certain issues to be waived. It is not this Court's responsibility to comb through the record seeking the factual underpinnings of [a] claim.") (citations omitted).

If anything confirms Interlake's inability to introduce sufficient evidence to sustain Interlake's negligence cross–claims against Schmidt, Red Lion, and Stokes, it is Interlake's preposterous argument that Mr. Rice should be estopped from seeking the entry of nonsuit on those cross–claims because, at an earlier stage of the litigation based on a far different record, he successfully opposed those defendants' summary judgment motions.

Interlake argues that if a judge denies a summary judgment motion then, *ipso facto*, a compulsory nonsuit or directed verdict can never be entertained. Judge Moss's denial of these defendants' summary judgment motions, which occurred without an opinion, was based on the summary judgment standard and the record then presented, which was a much different record than Interlake presented at trial. Whether or not a nonsuit was appropriate would rise and fall on Interlake's trial evidence, not an order entered four years earlier in response to a summary judgment motion.

When Judge Moss denied these co–defendants' motions for summary judgment, all that ruling established was that, at that time, a question of fact existed as to these defendants' liability, *based on the record as it then existed*. That ruling had no bearing on the evidence that was or was not introduced at trial by Interlake or even by Mr. Rice. If, at the time of trial, the word "Schmidt" was not even uttered, is it really Interlake's position that Interlake still gets to present its cross–claim against Schmidt to the jury because Judge Moss previously denied a summary judgment motion?

As Judge Dych explained in that portion of his Rule 1925(a) opinion addressing Interlake's estoppel argument:

> I know of no authority that supports this [estoppel] contention and Interlake's extensive briefs do not change my mind. Interlake cites not one case that stands for the proposition that an order denying summary judgment operates at the end of trial to bar nonsuit that is otherwise proper. I do not know the bases for the orders denying the defendants' motions for summary judgment in 2006 and, therefore, can draw no conclusions about the law or facts that they addressed. More important, the considerations of law and fact on a motion for summary

> judgment before trial and a motion to dismiss at the end of trial, after all the evidence is in, is different. * * * The only question I considered — whether the *evidence adduced at trial* was sufficient to go to the jury — most decidedly had not been previously decided.

Ex. E to Br. for Appellants at 13.

In sum, Interlake's desperate and unsupported judicial estoppel argument does not provide any basis for reversing the trial court's entry of nonsuits on Interlake's negligence cross–claims against Schmidt, Red Lion, and Stokes. Rather, the estoppel argument only serves to highlight the utter insufficiency of actual evidence that Interlake introduced against these co–defendants at the retrial of this case. That lack of evidence fully justified Judge Dych's entry of nonsuits.

VII. CONCLUSION

For all of the reasons set forth above, this Court should affirm the judgment of the trial court, because the trial court properly understood the limited scope of the retrial that this Court ordered in its June 26, 2009 memorandum decision, and the trial court did not err or abuse its discretion in entering nonsuits on Interlake's cross–claims against the co–defendants due to evidentiary insufficiency.

Respectfully submitted,

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