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Howard J. Bashman

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Howard Bashman

To preserve issues for appeal following either a jury or nonjury trial in Pennsylvania state court, it is necessary to file a timely post-trial motion. On March 18, the Superior Court of Pennsylvania issued a ruling that some may view as delivering a harsh and costly appellate waiver lesson for Genuardi's Family Market (now owned by Safeway) and its trial counsel.

The dispute giving rise to litigation in that case arose between the developer of a shopping center and Genuardi's. Following a nonjury trial and the trial court's ruling on the parties' timely filed post-trial motions, the Court of Common Pleas of Chester County, Pa., issued a judgment in favor of the developer in the amount of nearly \$317,000.

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According to court documents, both parties then appealed to the Superior Court of Pennsylvania from the trial court's ruling. The Superior Court ruled that the trial court had properly found Genuardi's liable but agreed with the developer-plaintiff that the trial court had failed to calculate damages in accordance with the lease agreement between the parties.

On remand, the trial court received a new round of briefing from the parties and heard oral argument, but the trial court received no new evidence. Thereafter, the trial court issued an opinion holding that the developer was entitled to recover in excess of \$10.5 million from Genuardi's. According to court documents, counsel for Genuardi's thereafter filed a motion for reconsideration, which the trial court denied. Simultaneously with denying Genuardi's motion for reconsideration, the trial court issued a verdict entering judgment in favor of the developer and against Genuardi's in the amount of nearly \$18.5 million, an amount that included more than \$6 million in interest and more than \$1.6 million in attorney fees, costs and expenses.

Instead of filing any timely post-trial motion in the trial court to challenge that verdict, Genuardi's appealed directly to the Superior Court. In its ruling issued last month in *Newman Development Group of Pottstown LLC v. Genuardi's Family Market Inc.*, the Superior Court ruled that Genuardi's had waived and thus forfeited any right to obtain appellate review as the result of its failure to file post-trial motions in the trial court following the trial court's entry of a verdict on remand.

From the perspective of Genuardi's, it probably appeared that filing a motion for a new trial following the proceedings on remand was unnecessary because the proceedings on remand themselves did not constitute a "trial." The trial court, on remand, had not received any new evidence. Rather, the parties on remand only provided additional written and oral arguments regarding damages.

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But regardless of how it may have seemed to Genuardi's and its counsel at the time, the Pennsylvania Superior Court's ruling last month in *Newman Development Group* makes clear that when a trial court, in a non-jury proceeding that occurs on remand from an earlier Superior Court appeal, issues a new verdict based on the Superior Court's earlier ruling and the arguments of opposing counsel, timely post-trial motions must be filed to preserve issues for appeal. And, according to the Superior Court's ruling in *Newman Development Group*, this result was dictated by that court's earlier, but seldom cited, ruling in *Cerniga v. Mon Valley Speed Boat Club Inc.* (2004).

Perhaps the nonjury nature of the trial proceedings was largely to blame for Genuardi's failure to file post-trial motions following the trial court's new verdict on remand. If the issue of damages had been submitted to and decided by a jury on remand, there would be little doubt that a new round of post-trial motions would have been necessary to preserve any issues for a second appeal.

Given the amount of money at stake, barring a settlement it appears likely that Genuardi's will pursue all remaining options for further appellate review. Already, according to the Superior Court's online docket entries, Genuardi's, with the assistance of additional appellate counsel, has filed an application seeking panel or en banc reargument in the Superior Court. The Superior Court's deadline for acting on that application is May 31. If the Superior Court denies further review, then Genuardi's is likely to ask for review from the state Supreme Court. So we have likely not heard the last of this case.

Although Genuardi's has learned an expensive lesson regarding the need for post-trial motions in a nonjury case that was remanded for additional proceedings following an earlier appeal, the Superior Court's decision in the *Newman Development Group* provides an important lesson for all. If a Pennsylvania state appellate court remands a case originally resolved by means of a nonjury trial for additional proceedings that produce a new verdict, post-trial motions must be filed challenging that new verdict in order to preserve issues for appellate review even if the proceedings on remand did not resemble an actual "trial."

It is impossible to tell from the Superior Court's ruling in *Newman Development Group* whether Genuardi's challenge to the trial court's \$18 million-plus verdict had any likelihood of prevailing in the absence of waiver, but it is painful as a proponent of high-quality appellate advocacy to see such a challenge rejected on procedural grounds for failing to file a post-trial motion. Regardless of whether this is a mistake that counsel for Genuardi's should have known to avoid, it is now certainly a mistake that all lawyers practicing in Pennsylvania must avoid. An \$18 million lesson is something that not more than one litigant should be forced to endure. •

Howard J. Bashman *operates his own appellate litigation boutique in Willow Grove, Pa., and can be reached by telephone at 215-830-1458 and via e-mail at hjb@hjbashman.com. You can access his appellate Web log at <http://howappealing.law.com>.*

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