

Control No. 16040748  
Control No. 16011524  
Control No. 16013561

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

DARRIN ULMER  
Plaintiff  
vs.  
L.F. DRISCOLL COMPANY,  
LLOCSIRD, INC. d/b/a L F DRISCOLL COMPANY,  
J.J. DON, INC. d/b/a L F DRISCOLL COMPANY,  
DUGGAN & MARCON, INC.,  
DAN LEPORE & SONS,  
ROMAN MOSAIC AND TILE COMPANY,  
LIBERTY/COMMERZ 1701 JFK BOULEVARD, L.P.,  
LIBERTY PROPERTY TRUST, and  
LIBERTY PROPERTY PHILADELPHIA  
CORPORATION  
Defendants  
vs.  
PHILADELPHIA D & M, INC.  
Additional Defendant

OCTOBER TERM, 2009  
NO. 3603

DOCKETED

APR 19 2016

N. ERICKSON  
DAY FORWARD

Ulmer Vs L.F. Driscoll -ORDER



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ORDER

And Now, this <sup>19</sup> day of April, 2016, after considering the Motion for Reconsideration filed by Plaintiff Darrin Ulmer, the Responses filed by the Driscoll Defendants, after oral argument held April 12, 2016, and for the reasons set forth in Court Exhibit "A", attached hereto, it is hereby **ORDERED** that the Motion for Reconsideration is **GRANTED**, and the Driscoll Defendants' Motion for Summary Judgment filed January 13, 2016 (Control No. 16011524) is **DENIED**. The Driscoll Defendants' Motion at Control No. 16013561 is **DENIED**.

BY THE COURT:

*Frederica A. Massiah-Jackson*  
FREDERICA A. MASSIAH-JACKSON, J.

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**Court Exhibit "A"**

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On March 15, 2016, after consideration of the memoranda submitted by the parties, this Court granted the Motion for Summary Judgment filed by the Driscoll Defendants. Plaintiff-Ulmer filed a Motion for Reconsideration. The parties submitted memoranda, and oral argument was held on April 12, 2016. The Order dated March 15, 2016, was vacated on April 13, 2016.

The issue presented is whether this Court is bound by an Order dated July 23, 2012, filed by Honorable Paul P. Panepinto, wherein a Motion for Summary Judgment filed by the Driscoll Defendants was DENIED. After further review and consideration, this Court concludes that the coordinate jurisdiction rule does apply and Judge Panepinto's Order is the law of the case.

On October 25, 2007, Mr. Ulmer was injured at a construction work site. His Complaint was filed in October, 2009, naming numerous contractors and other entities. The Driscoll Defendants filed a Motion for Summary Judgment claiming statutory employer immunity per the Workers Compensation Act. After Judge Panepinto denied the Defendants' Motion, trial commenced in January, 2013. Subsequently, Honorable Gary DiVito granted Defendants' Motion for Non-Suit at the close of Plaintiff-Ulmer's case. An Appeal was filed.

The Honorable Superior Court considered the issues raised -- none of which included challenges to Judge Panepinto's Order -- and held on August 17, 2015:

“ . . . we reverse and remand for a new trial.”

The new trial is scheduled to commence on June 10, 2016.

In Commonwealth v. Starr, 664 A.2d 1326 (Pa. 1995), the Supreme Court provided an exhaustive overview of the coordinate jurisdiction rule and its attendant meanings and limitations. In that case, when a second Trial Court reversed the first Trial Court's order, the Supreme Court determined there was an abuse of discretion by undermining policies behind the law of the case doctrine.

In Riccio v. American Republic Insurance Co., 705 A.2d 422 (Pa. 1997), the Supreme Court relied on the Starr case, *supra*, and Goldey v. Trustees of the University of Pennsylvania, 675 A.2d 264 (Pa. 1996), to comment that the Court must look where the rulings occurred in the context of the procedural posture of the litigation . . . “a later motion should not be entertained or granted when a motion of the same kind has previously been denied, unless intervening changes in the facts or the law clearly warrant a new look at the question.” 675 A.2d at 267.

In the case at bar, the Driscoll Defendants contend that there have been intervening changes in the facts and the law since July, 2012. They claim these “exceptional circumstances” exist because: (a) Patton v. Worthington Associates, Inc., 89 A.3d 643 (Pa. 2014), was decided by the Superior Court in 2012 and was not reversed until 2014; (b) the

intervening partial trial presented new facts; and, (c) the interests of judicial economy and efficiency demand a new result. This Court is unable to agree. First, the Defendants can point to nothing in the motion papers or Judge Panepinto's Order, issued without opinion, which implicitly or explicitly suggests that counsel or the Court believed that Patton was applicable or considered. Defendants are unable to point to anything in the record to support their suggestion that Judge Panepinto, an experienced trial judge, was "confused" by the Patton decision. Next, this Court is not able to assess facts and witnesses from a truncated trial which obviously incorporated certain deficits requiring a remand and a clean slate. Query whether a cross-appeal should have been filed by the Driscoll Defendants to clarify the record in the event of a remand. Finally, the interests of judicial economy and efficiency will not support an abrogation of the coordinate jurisdiction rule because the prior ruling is not clearly erroneous and nothing indicates a manifest injustice will occur if the parties go forward with a second trial.

Here, as in Commonwealth v. Harmon, 366 A.2d 895 (Pa. 1976), the "singular question" presented is whether a new trial entitles the parties to re-litigate a previously determined pre-trial motion. The Pennsylvania Supreme Court has consistently held that there is no constitutional right to re-litigate a pre-trial motion when a new trial is ordered. Notwithstanding 4th Amendment rights, the Supreme Court explained the remedy in

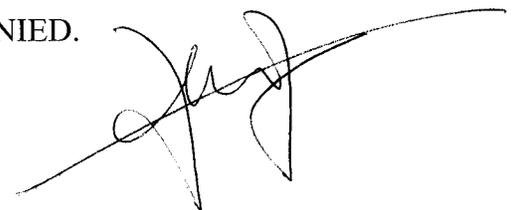
Commonwealth v. Lagana, 509 A.2d 863 (Pa. 1986):

“The solution for this dilemma is to have the ruling of the first suppression hearing incorporated into the record of the second hearing, and to allow review of the first decision on appeal as if it had been entered anew.”

The Driscoll matter does not rise to a constitutional challenge. Judge Panepinto’s Order will be incorporated with the record of the second trial to allow review, if appropriate.

This Court, on March 15, 2016, focused its attention on the word “new” in the phrase “new trial”. However, as Justice Nix commented in Harmon, supra, the scope of the subject is the “trial”, and “the critical word . . . is trial.” 366 A.2d at 897. Summary judgment motions are filed and ruled on prior to the commencement of trial. Rule 1035.2 of the Pennsylvania Rules of Civil Procedure. Pre-trial proceedings are by definition distinguishable from the actual trial. Dispositive motions are distinguishable from evidentiary rulings made during the course of the first trial.

Accordingly, after review and reconsideration of the procedural context of this litigation and acknowledging that the same motion of the same kind was previously denied, the Driscoll Defendants’ Motion for Summary Judgment is DENIED.

A handwritten signature in black ink, appearing to be a stylized name, possibly "J. Nix", written over a horizontal line.