NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

EASTERN ATLANTIC INSURANCE COMPANY, Appellant v. SWISS REINSURANCE AMERICA CORPORATION, (SUCCESSOR IN INTEREST TO UNDERWRITERS REINSURANCE COMPANY), Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 179 MDA 2013

Appeal from the Order entered December 28, 2012
in the Court of Common Pleas of Dauphin County,
Civil Division at No(s): 2004 CV 5514

BEFORE: GANTMAN, ALLEN, and MUNDY, JJ.

MEMORANDUM BY ALLEN, J.: **FILED NOVEMBER 01, 2013**

Eastern Atlantic Insurance Company ("Appellant") appeals from the trial court's grant of summary judgment in favor of Swiss Reinsurance America Corporation, as successor in interest to Underwriters Reinsurance Company ("Swiss Re"), and the trial court's denial of Appellant's motion for partial summary judgment. We affirm.

The trial court detailed the factual background as follows:

> In 1996, [Appellant], asked Preferred Reinsurance Intermediaries, Incorporated (hereinafter "Preferred Re"), for assistance in developing a commercial automobile insurance program in the Commonwealth of Pennsylvania. Because [Appellant] did not possess an A.M. Best Rating, nor was it a licensed insurer outside of Pennsylvania, Preferred Re endeavored to identify a "fronting company" which could satisfy the role of an insurance company with the necessary A.M. Best

Rating and which was also licensed in states outside Pennsylvania.

Preferred Re approached United National Group (hereinafter "United National") to act as the fronting company on [Appellant's] behalf. United National advised Preferred Re that it would underwrite motor vehicle insurance on behalf of [Appellant] subject to the following conditions:

> 1. United National ceded all risks to an accredited reinsurer;
>
> 2. United National assumed no risk whatsoever with respect to [Appellant's] proposed insurance program; and
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> 3. Underwriters Reinsurance Company (hereinafter "Underwriters Re") would stand between United National and [Appellant] in the capacity of a reinsurer due to [Appellant's] lack of an A.M. Best Rating and licensure in multiple states.

As a result, the parties agreed that Underwriters Re would reinsure United National pursuant to a 100% Quota Share Reinsurance Agreement under which Underwriters Re assumed 100% of the liabilities under the commercial trucking program. In turn, Underwriters Re would cede 30% of its liability to [Appellant]. To enable Underwriters Re to take credit for the reinsurance provided to it by [Appellant] and to secure payments due Underwriters Re from [Appellant], the parties agreed that [Appellant] would secure its obligations to Underwriters Re with irrevocable letters of credit.

The Quota Share Reinsurance Contract executed in June of 1996 further prescribed that United National would retain 30% of gross written premiums and a 3% adjustable tax allowance and thereafter pay the remaining 67-70% of "net ceded premiums" to the reinsurer, Underwriters Re, via distribution by Preferred Re. Preferred Re thereafter withheld 1% of net ceded premiums that it received from United National in payment of its brokerage fee prior to distribution of the remaining net ceded premiums to Underwriters Re and [Appellant].

Through the efforts of the reinsurance intermediary, Preferred Re, [Appellant] and Underwriters Re executed the 1996 and 1997 Retrocessional Agreements and 1996 and 1997 Commission Agreements. Under these agreements,

Underwriters Re agreed to pay [Appellant] the following prescribed percentages of "net ceded premiums" that it received from United National via Preferred Re:

1. 30% of net ceded premiums as prescribed in the parties' 1996 and 1997 Retrocessional Agreements; and

2. 35% provisional commission as prescribed in the parties' 1996 and 1997 Commission Agreements.

The parties mutually agreed that Underwriters Re would retrocede 30% of Underwriter Re's 100% Quota Share liability and in consideration thereof a 30% share of net ceded premiums to [Appellant] via the 1996 and 1997 Retrocessional Agreements. The 1997 Retrocessional Agreement also required [Appellant] to maintain irrevocable letters of credit, with said letters of credit to remain in force and be renewed until all liability had run off or been commuted.

The parties' 1996 and 1997 Commission Agreements define Underwriters Re's payment obligations to [Appellant] of the 35% provisional commission, subject to upward or downward adjustment. Over the course of several years (1996-2004), Preferred Re prepared monthly accounting reports in accordance with the agreements between the parties. The deposition testimony of Suzann Maxine Bartley, along with her testimony at the Evidentiary Hearing, provided that when her deposition was taken in May of 2004, she (Ms. Bartley) was a reinsurance accounting manager who had been with Preferred Re for nineteen (19) years. Ms. Bartley's duties included the processing of all reinsurance treaties, the accounting with respect to reinsurance treaties, and the handling of all issues connected to reinsurance treaties. Presently, Ms. Bartley is the Chief Financial Officer at Preferred Re. The Court was also presented with the deposition testimony of Karen Nelson Basso, similarly taken in May of 2004, along with her testimony at the Evidentiary Hearing. Through that testimony, the Court learned that Ms. Basso is the Senior Vice-President of Preferred Re and has been with the company for twenty-six (26) years.

Ms. Bartley was closely involved from the commencement of the parties' agreements, including having responsibility for the preparation of the monthly reinsurance statements provided to the parties to delineate the calculations made in accordance with the parties' agreements. Through the testimony of Ms. Bartley and Ms. Basso, the Court learned that these monthly

> reinsurance statements would account for all of the different segments that would have divided up and accounted for the premium, the losses, the loss adjustment expense, and the various expense factors in the parties' agreements. Beginning with the first month of reporting under the parties' original agreement, the monthly reinsurance statements prepared by Preferred Re were sent to [Appellant] and Underwriters Re. These monthly reinsurance statements likewise took into account slight changes to the parties' agreements over time. The distribution, according to Ms. Bartley, occurred as follows: Preferred Re received premium funds from United National (less 6 certain deductions), and then allocated and distributed such funds to Underwriters Re and [Appellant], in conformity with the parties' agreements. These monthly reinsurance statements were issued to the parties and were accompanied by monthly payment checks. [Appellant] never returned a payment check to Preferred Re. Moreover, [Appellant] only made two (2) inquiries regarding these monthly reinsurance statements over the entire duration of Preferred Re issuing said statements, to which Preferred Re responded with a full explanation both times.

Trial Court Opinion, 12/28/12, at 1-5 (footnotes omitted).

The trial court then summarized the procedural history preceding this appeal as follows:

> [Appellant] commenced this action by way of Complaint on December 21, 2004. On January 18, 2005, [Swiss Re], filed Preliminary Objections to [Appellant's] Complaint. On February 7, 2005, [Appellant] filed Preliminary Objections to [Swiss Re's] Preliminary Objections and on February 28, 2005, [Swiss Re] filed Amended Preliminary Objections to [Appellant's] Complaint. [Appellant] then filed its First Amended Complaint on March 21, 2005. [Appellant's] First Amended Complaint alleges causes of action for breach of contract, replevin, unjust enrichment, and tortious conversion.
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> [Swiss Re] filed Preliminary Objections to [Appellant's] First Amended Complaint on April 11, 2005. [Appellant] filed Preliminary Objections to [Swiss Re's] Preliminary Objections to [Appellant's] First Amended Complaint on May 2, 2005. The Preliminary Objections were addressed in this Court's Opinion filed on June 30, 2006. In the Court's Opinion, we sustained

> several of [Swiss Re's] Preliminary Objections to [Appellant's] First Amended Complaint and consequently dismissed Counts 2, 3, 5, 6, and 7. The remaining Counts of [Appellant's] First Amended Complaint are Count 1 (breach of contract for the alleged non-payment of a 35% provisional commission) and Count 4 (breach of contract for the alleged unauthorized draw against the letters of credit).
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> On July 24, 2006, [Swiss Re] filed its Answer and New Matter to [Appellant's] First Amended Complaint. [Appellant] filed its Reply to [Swiss Re's] New Matter on August 16, 2006. On April 20, 2009, [Appellant] filed its Motion for Partial Summary Judgment and [Swiss Re] filed its Motion for Summary Judgment. The Court heard Oral Argument on January 22, 2010. Further testimony was heard during several days of Evidentiary Hearing on September 28, 2011, September 29, 2011, September 30, 2011, January 4, 2012, January 5, 2012 and January 6, 2012. Both parties filed Post-Hearing Briefs on April 23, 2012 and Reply Briefs on May 11, 2012.

Id. at 6-7. On December 28, 2012, the trial court issued its memorandum opinion and order with respect to the parties' motions for summary judgment. Appellant filed a timely appeal. Appellant frames seven issues for our review:

> I. WHETHER THE COURT ERRED IN FAILING TO ENFORCE THE CLEAR AND UNEQUIVOCAL TERMS OF THE PARTIES' 1996 AND 1997 COMMISSION AGREEMENTS THEREBY DEPRIVING APPELLANT OF ITS PRESCRIBED 35% PROVISIONAL COMMISSION BY INAPPROPRIATELY ACCOUNTING FOR THE SAME AS AN UNAUTHORIZED CREDIT AGAINST INDEPENDENT PAYMENTS TO UNITED NATIONAL INSURANCE COMPANY.
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> II. WHETHER THE COURT ERRED IN OVERRULING APPELLANT'S CONTINUING OBJECTION TO APPELLEE'S ADMISSION OF PAROLE EVIDENCE TO DEFINE AND GIVE DIFFERENT MEANING TO THE OTHERWISE CLEAR AND UNEQUIVOCAL TERMS OF THE PARTIES' 1996 AND 1997 COMMISSION AGREEMENTS.
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> III. WHETHER THE COURT ERRED IN CONCLUDING THAT ACCOUNTING FOR [APPELLANT'S] PRESCRIBED 35% PROVISIONAL COMMISSION AS AN OTHERWISE

UNAUTHORIZED CREDIT AGAINST INDEPENDENT PAYMENTS TO UNITED NATIONAL INSURANCE COMPANY COMPLIED WITH REINSURANCE INDUSTRY STANDARDS IN RELIANCE UPON THE INCOMPETENT AND DISPUTED TESTIMONY OF FACT WITNESS, KAREN BASSO.

IV. WHETHER THE COURT ERRED IN FAILING TO RESTRICT THE INCOMPETENT AND DISPUTED TESTIMONY OF FACT WITNESS, KAREN BASSO TO ITS PROPER SCOPE BY EXPRESSLY ADMITTING THE WITNESS'S TESTIMONY FOR THE LIMITED PURPOSE OF "HISTORICAL BACKGROUND FROM THIS WITNESS'S PERSPECTIVE" WITHIN THE MEANING OF RULE 105 OF THE PENNSYLVANIA RULES OF EVIDENCE AND SUBSEQUENTLY ACCEPTING THE SAME AS PURPORTED EVIDENCE OF REINSURANCE INDUSTRY STANDARDS AS A BASIS TO PROACTIVELY REFORM THE PARTIES' 1996 AND 1997 COMMISSION AGREEMENTS.

V. WHETHER THE COURT ERRED IN PROACTIVELY REFORMING THE PARTIES' 1996 AND 1997 COMMISSION AGREEMENTS IN RELIANCE UPON SUNBEAM CORP. V. LIBERTY MUT. INS. CO. IN DEFAULT OF ANY TERMS OF ART THEREIN HAVING "SPECIAL MEANING" IN THE REINSURANCE INDUSTRY TO ACCOUNT FOR APPELLANT'S PRESCRIBED 35% PROVISIONAL COMMISSION AS AN OTHERWISE UNAUTHORIZED "CREDIT" AGAINST SUMS INDEPENDENTLY PAID TO UNITED NATIONAL INSURANCE COMPANY.

VI. WHETHER THE COURT ERRED IN PROACTIVELY REFORMING THE CLEAR AND UNEQUIVOCAL TERMS OF THE PARTIES' 1996 AND 1997 COMMISSION AGREEMENTS IN DEFAULT OF ANY ALLEGATIONS OF ACCIDENT, FRAUD OR MISTAKE.

VII. WHETHER THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN APPELLEE'S FAVOR BY RESOLVING DISPUTED ISSUES OF MATERIAL FACT CONCERNING EXTRANEOUS MATTERS TO THE PARTIES' OTHERWISE CLEAR AND UNEQUIVOCAL AGREEMENTS.

Appellant's Brief at 4-5.

All of Appellant's issues are interrelated, such that we address them together.

Appellant exhorts us to apply the standard of review applicable to a trial court's grant of summary relief. Appellant's Brief at 3. However, the record reflects that the trial court's order granting judgment in Swiss Re's favor followed a six day evidentiary hearing replete with sworn testimony, exhibits, arguments from counsel, and requests for "post-trial" relief by Appellant, such that we deem the trial court's order to be a verdict following a non-jury trial. ***See Molineaux v. Reed,*** 532 A.2d 792, 793-794 (Pa. 1987) ("A hearing to take the testimony of witnesses, where any party is free to call witnesses, takes the matter beyond the realm of summary judgment because the factfinder has now been given the opportunity to weigh evidence and determine credibility, if necessary."); ***see also Keller v. Scranton City Treasurer,*** 29 A.3d 436, 442 (Pa. Cmwlth. 2011) ("Before we can review the trial court's Order, however, we must know the impetus for the Order, as that will tell us what our standard and scope of review are on appeal."); *and see generally,* Appellant's Motion for Post-Trial Relief and Reconsideration, 1/7/13. Indeed, the trial court explained that it reached its determination "after receiving considerable testimony through Oral Argument and several days of Evidentiary Hearing, and upon reviewing all of the agreements between the parties…" Trial Court Opinion, 12/28/12, at 8. Significantly, Appellant *moved* for such an evidentiary hearing. *See generally,* Appellant's Motion for Evidentiary Hearing, 5/17/11. Accordingly, rather than apply the standard of review for a trial court's grant of summary relief, we recognize:

> Our appellate role in cases arising from non-jury trial verdicts is to determine whether the findings of the trial court are supported by competent evidence and whether the trial court committed error in any application of the law. The findings of fact of the trial judge must be given the same weight and effect on appeal as the verdict of a jury. We consider the evidence in a light most favorable to the verdict winner. We will reverse the trial court only if its findings of fact are not supported by competent evidence in the record or if its findings are premised on an error of law. However, [where] the issue…concerns a question of law, our scope of review is plenary.
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> The trial court's conclusions of law on appeal originating from a non-jury trial are not binding on an appellate court because it is the appellate court's duty to determine if the trial court correctly applied the law to the facts of the case.

Wyatt, Inc. v. Citizens Bank of Pennsylvania, 976 A.2d 557, 564 (Pa. Super. 2009) *citing* ***Wilson v. Transp. Ins. Co.***, 889 A.2d 563, 568 (Pa. Super. 2005) (citations omitted).

In challenging the trial court's conclusion that Swiss Re made the 35% provisional commission payment, Appellant argues:

> The [trial court] committed reversible error in resolving disputed issues of material fact via its inappropriate acceptance of parol evidence to conclude that disputed reinsurance industry standards and conduct of the Parties permit reformation of the Parties' Retrocessional Agreements to account for Appellant's prescribed 35% Provisional Commission as an otherwise unauthorized "credit" against independent payments to United National Insurance Company.

Appellant's Brief at 49.

In concluding that Swiss Re was entitled to judgment, the trial court relied on the following evidence:

> During the Evidentiary Hearing, Ms. Basso testified that the 35% Provisional Commission called for in the series of

agreements between the parties was broken down as follows: 20% was used to pay expenses associated with producing the business, 10% was used to pay United National's fronting fee, 3% was applied to premium taxes, boards and assessments incurred in writing the business, and approximately 2% went to insurance company overhead. September 2011 N.T. 354-355. When United National became the fronting company, it retained 30% of the premium. It paid 20% of its 30% (or 20% of the premium) to Integrity Underwriters, an affiliate of [Appellant], for expenses for producing the business, and it retained the balance of 10% as its fronting fee. Because those expenses were now paid by United National under the series of agreements that replaced the Interim Quota Share, [Appellant] was no longer responsible for that obligation. [Appellant's] own expert witness, Mr. Ronald A. Greenfield, confirmed this during an exchange with the Court:

Q: I understand that. However, if Preferred Re never disbursed a nickel to Integrity or to United, and passed that money directly back to [Appellant], who's going to pay Integrity and United in that scenario?

A: [Appellant].

Q: Right, exactly. And it's being paid on their behalf, is it not, by Preferred Re slicing up that $100, such that the net, without the obligation attached to it to pay United National and Integrity, comes back to [Appellant], free of the obligation to pay that money to those two entities, right?

A: That's correct.

January 2011 N.T. 311-312.

Additionally, when Ms. Basso was questioned by counsel for [Appellant] as to the parties' Retrocessional and Commission Agreements, she explained the payment of the 35% Provisional Commission and clarified that the payment of the 30% to United National was the equivalent of a payment to [Appellant][.]

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It was also elucidated during the Evidentiary Hearing that the series of agreements that replaced the Interim Quota Share were interrelated. Ms. Basso testified that, "[y]ou must look at

them all together. There would be no necessity for any one of these agreements without the others." September 2011 N.T. 366. Ms. Basso stated she believed that based on their years of experience in dealing with one another on reinsurance matters, Joseph Anthony DeJesus, who was working on behalf of [Appellant], understood that all of the agreements were inextricably tied together to govern the entire relationship between the parties. September 2011 N.T. 368.

Ms. Basso and Ms. Bartley each testified that the 35% Provisional Commission was accounted for in each of the monthly statements prepared and distributed to the parties. Ms. Bartley, as the person responsible for accounting for the reinsurance transaction, distinctly testified that the monthly reports showed the accounting and payment of the 35% Provisional Ceding Commission[.]

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Additionally, Ms. Basso testified that the monthly reports properly accounted for the 35% Provisional Commission [Appellant] claims it never received:

Q: Okay. Now, how did [Appellant] receive its 35% Provisional Commission? How did it receive this fee?

A: Bear with me one moment. I'll be able to find several sections in the contract that helps us. If you will look at page 5, Article III, Premium and Commission, in URC Exhibit 3, the 100% Quota Share. This states that the company, United National in this case, will pay the reinsurer, Underwriters Re, 70% of all original gross written premium on the business covered hereunder.

There was also, as you see, an adjustable allowance of 3% for premium taxes, boards and bureau assessments.

When we received the accounting statements on a monthly basis from United National Insurance Group, they laid out the gross premium that was written as reported to them by Integrity Underwriters each month. Then they showed the 30% deduction as stipulated here, which as I already stated, covered the 20% agent's commission, which Integrity Underwriters typically would have deducted prior to remitting the premium to United

> National. **That's the standard in the insurance industry, generally**. (emphasis added).
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> The agent producing the business deducts their commission before they pay premiums.
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> There are other ways of handling it. I believe that is what occurred in this.
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> United National would have kept their 10% fronting fee. So that's the 30% deduction from the premium.
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> United National also, every month, reported to us how much premium was written in states in which they did not have to pay premium tax and how much premium was written in states in which premium tax was incurred. And they took their 3% allowance for the premium tax on that share of premium. So the premium tax was already handled on a gross basis. Again, that was part of 35%, was the provision for premium tax, board and bureau assessments.
>
> So at this point we are either at a 30% deduction or a 33% deduction.
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> Then, what we did in accordance with the Commission Agreement, we had to get up to the 35% Provisional. Clearly, 30 and 33 are clearly not 35. So our accounting department in the monthly accounting statements that we sent to Underwriters Re and [Appellant] would allocate the additional either five points or two points remaining out of the 35 and remit that in addition to the premium that was remitted to [Appellant].
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> That was how we paid for and accounted that 35% Provisional Commission.
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> September 2011 N.T. 358-360.

Trial Court Opinion, 12/28/12, at 8-9, 10-13 (internal footnotes omitted).

After careful scrutiny of the vast record in this case, we affirm the trial court's conclusion that "payment of the 35% [p]rovisional [c]omission was made to [Appellant] by Swiss Re," such that Swiss Re was entitled to judgment as a matter of law. Trial Court Opinion, 12/28/12, at 16. We are

not persuaded by Appellant's challenge to the trial court's admission of Ms. Basso's testimony. ***See Schmidt v. Boardman***, 958 A.2d 498 (Pa. Super. 2008), *affirmed* 11 A.3d 924 (Pa. 2011) (internal citation omitted) ("[T]he admission or exclusion of evidence is within the sound discretion of the trial court. In reviewing a challenge to the admissibility of evidence, we will only reverse a ruling by the trial court upon a showing that it abused its discretion or committed an error of law."). We do not find that the trial court abused its discretion in considering Ms. Basso's testimony, particularly when her trial testimony echoed topics addressed in her deposition which the parties had jointly stipulated could be used for "any and all purposes…, including but not limited to for the purpose of summary judgment or trial." *See* Joint Stipulation, 2/10/09, at 1.

The testimony from Bob Little, Appellant's controller, supports the trial court's determination that Swiss Re paid the 35% provisional commission. Mr. Little testified that the monies Appellant claims Swiss Re owes them equal Appellant's "entire policy surplus," and that Appellant would have been mandated to report such a sizable outstanding obligation to the Pennsylvania Department of Insurance. N.T., 1/4-6/12, at 73-74, 65. However, Appellant never claimed to be owed these monies by Swiss Re in any of their statutorily required financial statements. *Id.* at 65. Further, Mr. Little did not even "recall" any efforts by Appellant during his tenure to recover such outstanding provisional commissions from Swiss Re. *Id.* Indeed, we find compelling, as did the trial court, that Appellant never "object[ed] to or

raise[d] [an] issue with the monthly reinsurance statements issued by Preferred Re," and that Appellant never "return[ed] any of the payment checks that accompanied the monthly reinsurance statements." Trial Court Opinion, 12/28/12, at 13.

In finding that Appellant was "not only…paid its 35% [p]rovisional [c]omission but [that Appellant] was aware of [Swiss Re's] manner of payment as being 'standard in the insurance industry'," the trial court observed:

> It should be specifically noted that the parties in the case *sub judice* are not unsophisticated entities in the insurance and reinsurance industry and they full well understood the actual practices and requirements of their industry, particularly where they were utilizing a reinsurance broker coupled with the absolutely necessary fronting company. If Preferred Re had done anything other than ensure that [Appellant's] fronting company, United National, received the first dollars collected from the premiums in this program to pay their agents who were actually producing this book of business, United National would have been unable to continue in this endeavor for more than a month or two before the demand for payment of services by its agents would have overwhelmed it.
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> The Court finds it disingenuous, at best, that the corporate officers of [Appellant] (with absolutely no adverse reflection on their counsel) have attempted to mischaracterize and manipulate the outcome of the distribution of debits and credits in their favor, as it relates to the 1996 and 1997 Retrocessional and Commission Agreements between the parties. It is obvious from the totality of the testimony that the program to underwrite multistate commercial vehicle insurance by [Appellant], which line of business [Appellant] had almost no experience prior to the current situation, was extremely questionable and likely ultimately doomed from the onset. Furthermore, the conduct of the parties, which exemplified a confirmed practice in the industry when an unusual confluence of factors coalesce in the factual setting such as the case at bar, acts to modify the poorly

> drafted contractual language between the parties. The conduct of the parties, coupled with the extensive period of time in which the division of premium dollars was managed and simultaneously disclosed by their agreed upon intermediary (Preferred Re), clearly indicates to the Court that this was the intention of the parties.

Trial Court Opinion, 12/28/12, at 14-15.

> Our Pennsylvania Supreme Court has explained:
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> It has been long accepted in contract law that an ambiguous written instrument presents a question of fact for resolution by the finder-of-fact, whereas the meaning of an unambiguous written instrument presents a "question of law" for resolution by the court. As the authorities in the field of contracts make clear, however, the latter exercise is also in actuality a factual, not a legal, decision. For a variety of reasons the common law has long thought it best to leave to the court rather than to the jury the essentially factual question of what the contracting parties intended. This fact finding function exercised by the court is denominated a "question of law", therefore, not because analytically it is a question of law but rather to indicate that it is the trial judge, not the jury, to whom the law assigns the responsibility for deciding the matter.

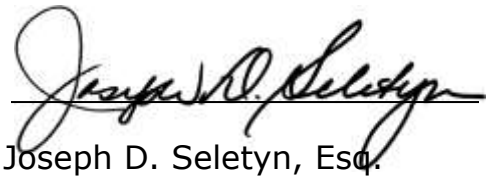
Community College of Beaver County v. Community College of Beaver County, Society of the Faculty (PSEA/NEA), 375 A.2d 1267, 1274 (Pa. 1977) (internal citations omitted). Further, while Pennsylvania generally rejects extrinsic evidence to explain contractual terms, ***see Youndt v. First National Bank of Port Allegheny***, 868 A.2d 539 (Pa. Super. 2005), the trial court accurately recognized that "[t]he parol evidence rule does not apply in its ordinary strictness where the existence of a custom or usage to explain the meaning of words in a writing is concerned." Trial Court Opinion, 12/28/12, at 14 *citing* ***inter alia Sunbeam Corp. v. Liberty***

Mutual Insurance Company, 781 A.2d 1189, 1193 (Pa. 2001). Moreover, "[i]t is beyond argument that parties may always modify a written contract previously entered into…[and a] [subsequent modification] may be established by parol evidence showing either an express agreement or actions necessarily involving the alterations." ***Consolidated Tile & Slate Co. v. Fox,*** 189 A.2d 228, 230 (Pa. 1963); ***see also McBride v. Davis,*** 403 A.2d 125, 129 (Pa. Super. 1979) ("It has always been the law that the parol evidence rule which prohibits the admission of oral evidence to vary or contradict a written contract does not apply to or prohibit a subsequent modification by writings or by words or by conduct or by all three."). We are not persuaded by Appellant's contention that the trial court "proactively reformed" the agreement between the parties, since there is no such reference anywhere in the trial court's well-reasoned and articulate opinion, and given that Appellant did not cite to the record where such specific reference can be found. *See generally*, Trial Court Opinion, 12/28, 12; *see also* Appellant's Brief at 66-69.

Accordingly, based on our careful consideration of the record, including the pleadings, testimony, exhibits, and other evidence adduced during the extensive evidentiary hearing, we find no abuse of discretion or trial court error of law, and therefore we affirm the trial court's determination that Appellant was paid the 35% provisional commission by Swiss Re, such that Swiss Re was entitled to judgment as a matter of law.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/1/2013