



punitive damages and sanctions under Federal Rule of Civil Procedure 11.

After a non-jury trial, and based on the following Findings of Fact and Conclusions of Law, the Court finds in favor of the plaintiff and against defendant on both the breach of fiduciary duty claim and the conversion claim. In addition, the Court finds in favor of the plaintiff and against defendant on defendant's counterclaims for slander, defamation, and intentional interference with a business or contractual relationship. The Court will enter judgment in favor of the plaintiff and will award compensatory damages, punitive damages, and pre-judgment and post-judgment interest. Defendant's claim for compensation for work performed on partnership files after Louis Gagliardi's death will be denied. However, defendant will be compensated for the costs incurred in winding up the partnership case files and in producing the 1996 and 1997 accountings. The Court's findings of fact are set forth in Section II, infra. The Court's conclusions of law are included in its discussion of the legal issues in Section III, infra.

## **II. FINDINGS OF FACT**

### **A. BACKGROUND**

1. Louis J. Gagliardi, and defendant, Byron Bennett, were duly licensed to practice law in the state of Pennsylvania in 1993.

2. Mr. Gagliardi and defendant formed a law partnership on April 1, 1993 to be known as "Gagliardi and Bennett." This law partnership was formed from Mr. Gagliardi's existing sole proprietor law office where Mr. Bennett worked as an associate. The partnership agreement was oral; under the agreement, Mr. Gagliardi received 60% of partnership profits and defendant

received 40%. Mr. Gagliardi received a greater percentage of the partnership's profits because he owned the building where the law partnership conducted business and defendant was not required to pay rent.

3. Mr. Gagliardi wrote a check - number 4309 - on May 7, 1993, to defendant, in the amount of \$5,000 as a loan to the partnership. The partnership has not repaid the \$5,000 loan.

4. Mr. Gagliardi and the defendant opened a partnership checking account with CoreStates First Pennsylvania Bank, account number 031000011 2004 5660. The initial loan check in the amount of \$5,000 was deposited into the partnership account when the account was opened.

5. Mr. Gagliardi passed away on September 26, 1993.

6. The decedent maintained residences in both Plymouth Meeting, Pennsylvania, and Deerfield Beach, Florida. Mr. Gagliardi's estate was probated in Broward County, Florida. Since 1986, Mr. Gagliardi had been registered to vote in Florida. For the years 1991-1993, the decedent listed Florida as his home address on his federal income tax returns. Since 1986, Mr. Gagliardi spent more than half of his time in Florida. Mr. Gagliardi was licensed to practice law in Pennsylvania and was the Auditor of Corporate Sureties for the Court of Common Pleas of Philadelphia County, Pennsylvania in 1993 and for at least four consecutive years prior to 1993.

7. On October 28, 1993, defendant opened an account with Mellon, PSFS, designated "Byron Bennett, ITF Estate of Louis J. Gagliardi." This account was numbered 35-713-5444 and, as late as January 25, 1996, there was a balance of \$10,565.08 in the account. Defendant admits that he eventually spent all of the money in the ITF account for various items including childcare for his minor daughter and legal fees for counsel who initially represented defendant in

this matter.

8. After Mr. Gagliardi passed away, defendant continued to practice law at the law partnership location at 625 Walnut Lane, Philadelphia, Pennsylvania. In late January 1994, defendant relocated his law practice to its current location at 6813 Ridge Avenue, Philadelphia, Pennsylvania.

9. During December 1993, Mrs. Gagliardi made photocopies of case files located at the partnership's law office. In addition, Mrs. Gagliardi arranged to freeze the partnership's bank account and had all of the mail which was sent to the law partnership's location redirected to her home in Plymouth Meeting, Pennsylvania. Mrs. Gagliardi did not remove the Rolodex or the telephone logs from the partnership's law office. Further, she did not make false or malicious statements to partnership clients.

10. On March 15, 1994, six months after Mr. Gagliardi passed away, defendant withdrew the entire balance of \$2,454.21 which remained in the partnership's CoreStates' checking account. On March 16, 1994, defendant opened a checking account with Roxborough-Manayunk Federal Savings Bank under the name "Byron Bennett, Esq." Defendant proceeded to write numerous checks against this checking account.

11. During the period September 26, 1993, to July 11, 1997, defendant received partnership revenue from 128 cases in the amount of \$77,345.71. The Estate has never received any part of this revenue.

12. In addition to the revenue referenced in paragraph 11 above, defendant received a fee of \$2,428.12 for settling case # 231, Best v. K-Mart. The client, Diane Best, called the law partnership prior to Mr. Gagliardi's death. Defendant did not execute a written contingent fee

agreement until after Mr. Gagliardi's death, although, the contingent fee agreement listed counsel as "Gagliardi and Bennett." Defendant now concedes that the Best case should be treated as a partnership file.

13. The parties have stipulated that total partnership revenue produced from files retained by defendant is \$79,773.83 and that defendant has not distributed any part of this revenue to plaintiff.

14. Phyllis DeSanto was a full-time secretary for the decedent when he operated his sole proprietor law office. Upon formation of the law partnership, Ms. DeSanto continued to work full-time as a secretary for the partnership. After Mr. Gagliardi passed away, Ms. DeSanto continued to work full-time as a paid secretary for Mr. Bennett's sole proprietor law office. Ms. DeSanto was injured in an automobile accident in 1992 while working for Mr. Gagliardi as his secretary. Mr. Gagliardi and the defendant provided legal services for Ms. DeSanto prior to Mr. Gagliardi's death. Ms. DeSanto was never asked to sign a contingent fee agreement and neither defendant nor decedent was ever compensated for the legal work performed on behalf of Ms. DeSanto.

15. Ms. DeSanto's case was settled for \$18,000 in December 1994, while she was still working full-time as a paid secretary for the defendant. After Ms. DeSanto's case settled, she continued to work for defendant, but without pay, and on a part-time basis.

16. Defendant commingled all of the revenue generated from partnership case files with his own personal funds. In addition, defendant spent all but approximately \$2,000 of the partnership's revenue for personal and other non-partnership purposes.

17. Mr. Gagliardi received \$7,380 in partnership profits for the second and third quarters

of 1993. This is calculated by adding a \$2,400 check received by Mr. Gagliardi for profits prior to his death, \$1,087.15 for personal expenses of Mr. Gagliardi paid by defendant, and a \$3,892.85 cashier's check sent by defendant to Mrs. Gagliardi. Both parties agree that defendant received \$4,920 in partnership profits for this same time period.

18. Mr. Gagliardi advanced \$3,536.25 in costs prior to the formation of the law partnership on cases which yielded revenue after he passed away. Defendant has never reimbursed the Estate for these costs.

19. The partnership case files retained by the Estate, and referred to other lawyers, generated \$12,372.85 in revenue for the Estate. There were \$194.50 in costs advanced by Mr. Gagliardi in these cases. The Estate did not pay defendant any part of this revenue.

20. The defendant expended 563.5 hours in completing work in winding up the partnership cases. In winding up partnership cases, defendant incurred \$2,938.51 in costs. In addition, defendant paid \$750 to a Certified Public Accountant, Marvin Hutt, for preparation of the partnership's 1993 tax return. The defendant also spent 73.5 hours, and paid \$618.87 in costs, in, producing the 1996 and 1997 accountings.

21. Defendant produced two accountings of partnership revenue - one in 1996 in preparation for proceedings in state court and one in 1997. Prior to the filing of a lawsuit by plaintiff against defendant in state court, defendant made no attempt to produce an accounting for the benefit of the Estate despite repeated demands for an accounting.

### III. CONCLUSIONS OF LAW

#### A. SUBJECT MATTER JURISDICTION

Although there is conflicting evidence, the Court concludes that decedent was, at the time of his death on September 26, 1993, a domiciliary of the state of Florida.<sup>1</sup> The Court finds that decedent intended to remain indefinitely in Florida. The most persuasive evidence presented to establish Mr. Gagliardi's domicile was his Florida voter registration card and the Florida address on his federal income tax returns. See Bank One Tex., N.A. v. Montle, 964 F.2d 48, 50 (1st Cir. 1992) (“the place a person is registered to vote is a “weighty” factor in determining domicile.”)<sup>2</sup>

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<sup>1</sup> 28 U.S.C. § 1332 confers diversity jurisdiction in the district courts when a citizen of one state sues a citizen of a state different from plaintiff's. See 28 U.S.C. § 1332(a)(1) (West Supp. 1998). “In order to be a citizen of a state within the meaning of the diversity statute, a natural person must both be a citizen of the United States and be domiciled within the state.” Newman-Green, Inc. v. Alfonso-Larrain, 490 U.S. 826, 828 (1989); see also Brown v. Keene, 33 U.S. 112, 115 (1834). In addition, for the purposes of determining whether diversity of citizenship existed, the citizenship of Mrs. Gagliardi, the representative of the Estate, is not relevant. See 28 U.S.C. § 1332(c)(2) (“the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, . . .”). The Court must, thus, look to decedent's domicile to determine his state of citizenship. A person is a domiciliary of the state where he maintains a residence with the intention to remain indefinitely. See e.g., Krasnov v. Dinan, 465 F.2d 1298, 1300 (1972); Mas v. Perry, 489 F.2d 1396 (5th Cir. 1974); Sun Printing & Publishing Association v. Edwards, 194 U.S. 377, 24 S.Ct. 696 (1904). To determine decedent's domicile, therefore, “[t]he fact of residency must be coupled with a finding of intent to remain indefinitely.” Krasnov, 465 F.2d at 1300.

<sup>2</sup> 13B Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Fed. Prac. & Proc. § 3612 (1984) states that:

Factors frequently taken into account [in determining a person's domicile] include: current residence; voting registration and voting practices; location of personal and real property; location of brokerage and bank accounts; membership in unions, fraternal organizations, churches, clubs, and other associations; place of employment or business; driver's license and automobile registration; payment of taxes; as well as several others.

In addition, for seven years before his death he spent more than one half his time in Florida and his estate was probated in Broward County, Florida. The defendant is a domiciliary of the state of Pennsylvania. Thus, since decedent and defendant are citizens of different states and the amount in controversy exceeds \$50,000, the Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1332.<sup>3</sup>

## **B. DISCUSSION**

### **1. JUDICIAL ESTOPPEL**

Defendant initially claimed that he acquired the assets of the law partnership, after Mr. Gagliardi passed away, as a joint tenant with the right of survivorship. Defendant abandoned this position on June 27, 1996, and, thereafter, argued that he is entitled to reasonable compensation for his services in winding up the partnership affairs. Plaintiff argues that the Court should find that defendant is judicially estopped from changing his legal position because his new argument is inconsistent with his original theory of the case.

Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, is a “judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that she has previously asserted in the same or in a previous proceeding.”

Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 358 (3d Cir. 1996)

(citations and internal quotations omitted); see also Scarano v. Central R. Co. of New Jersey, 203 F.2d 510, 513 (3d Cir. 1953). In the Third Circuit’s latest pronouncement on judicial estoppel,

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<sup>3</sup> The complaint in this case was filed on August 5, 1996, prior to the amendment taking effect in January 1997 which changed the amount in controversy requirement from \$50,000 to \$75,000. See Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 206(a)(1), 110 Stat. 3850. Thus, the amount in controversy requirement applicable to this case is \$50,000.

the court stated that:

Asserting inconsistent positions does not trigger the application of judicial estoppel unless intentional self-contradiction is used as a means of obtaining unfair advantage. Thus, the doctrine of judicial estoppel does not apply when the prior position was taken because of a good faith mistake rather than as part of a scheme to mislead the court. An inconsistent argument sufficient to invoke judicial estoppel must be attributable to intentional wrongdoing.

In re Chambers Development Co., Inc., 1998 WL 258387, \*14 (3d Cir. 1998). Thus, “[t]he basic principle [of the doctrine of judicial estoppel] is that absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.” 18 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Fed. Prac. & Proc. § 4477 (1981 & Supp. 1998).

The Court finds that defendant did not change his legal theory to “gain an unfair advantage” in this case. Rather, defendant changed his position from one which had no merit to a legally tenable position after conducting research on the law of partnerships. He, thus, has a “good explanation” for changing his legal theory of the case. In addition, the “inconsistent position doctrine must not be allowed to interfere with the modern pleading rules that expressly permit pursuit of inconsistent positions within a single action.” Id. In this case, defendant simply chose to pursue an alternative legal theory at trial. Moreover, plaintiff initially asserted that a partnership did not exist between Mr. Gagliardi and defendant and has since changed her legal theory to claim that defendant breached his fiduciary duty to plaintiff under the UPA. Thus, both parties have asserted inconsistent legal theories in this case. Accordingly, the Court will not utilize the doctrine of judicial estoppel to resolve any issues in this case.

## 2. DEFENDANT’S FIDUCIARY DUTY AND CONVERSION

The parties have stipulated that a law partnership existed between defendant and Mr. Gagliardi at the time of Mr. Gagliardi’s death in September 1993. Under the UPA, as codified in Pennsylvania at 15 Pa.C.S.A. § 8301, et seq. (West Supp. 1998), a partnership is dissolved upon the death of one of the partners. See 15 Pa.C.S.A. §§ 8351, 8353(4) (West Supp. 1998).<sup>4</sup> However, “[o]n dissolution, the partnership is not terminated but continues until the winding up of partnership affairs is completed.” 15 Pa.C.S.A. § 8352 (West Supp. 1998). Thus, Mr. Gagliardi’s death did not terminate the partnership; rather, his death merely dissolved the partnership. After the dissolution of the partnership, defendant was responsible for winding up the partnership affairs. The Court concludes that defendant attempted to wind up the partnership affairs by settling all existing partnership case files.

However, the UPA also states that “[p]artners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability.” 15 Pa.C.S.A. § 8333. In addition, the UPA makes a partner accountable as a fiduciary to account to the representatives of a deceased partner.<sup>5</sup> See 15 Pa.C.S.A. § 8334; see also Bracht v. Connell, 170 A. 297, 299 (Pa. 1933) (“A

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<sup>4</sup> 15 Pa.C.S.A. § 8351 provides that “[t]he dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on, as distinguished from the winding up, of the business.” In addition, 15 Pa.C.S.A. § 8353(4) provides that “[d]issolution is caused: . . . (4) By the death of any partner.”

<sup>5</sup> 15 Pa.C.S.A. § 8334 provides that:

- (a) General Rule- Every partner must account to the partnership for any benefit and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by

surviving partner is in a fiduciary capacity as regards the estate of his deceased partner.”). Thus, defendant had a fiduciary duty, as a trustee, to account to the Gagliardi Estate - and plaintiff as the representative of the Estate - for all income received from partnership case files. In addition, defendant had a fiduciary duty to distribute to the Estate decedent’s share of the profits from settled cases.

Defendant conceded in his Supplemental Findings of Fact and Conclusions of Law submitted post-trial that he breached his fiduciary duty to the Estate by commingling and converting partnership revenues for his own personal and professional uses. In addition, defendant testified that he spent all but approximately \$2,000 of the partnership funds on things unrelated to the partnership.

The Court concludes that defendant breached his fiduciary duty to the Estate by not accounting to the Estate for partnership income until three years after Mr. Gagliardi passed away despite repeated demands for an accounting. Moreover, defendant breached his fiduciary duty to the Estate by providing inaccurate accountings to the Estate in violation of 15 Pa.C.S.A. § 8333. Accordingly, the Court will award plaintiff damages for defendant’s breach of his fiduciary duty. Since the damages for breach of fiduciary duty are identical to those for the conversion claim, the Court need not analyze plaintiff’s conversion claim. The Court nonetheless concludes that defendant did convert to his own personal and professional uses funds which properly should

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him of its property.

(b) Personal representative- Subsection (a) applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner.

have been distributed to the Estate.

### **3. PARTNERSHIP PROFITS RECEIVED BY DEFENDANT**

The parties have stipulated that defendant received \$79,773.83 in revenue from the law partnership files which defendant retained after Mr. Gagliardi passed away. Further, the parties have stipulated that defendant has not disbursed any of this revenue to plaintiff. The Court concludes that since decedent was to receive 60% of the partnership's profits under the partnership agreement, plaintiff is entitled to receive 60% of the profits generated from the files owned by the law partnership at the death of Mr. Gagliardi. However, because the total partnership revenue generated after Mr. Gagliardi's death (\$79,773.83) is subject to several claims which will affect the total, the Court will consider these claims before determining what plaintiff is owed.

### **4. THE INITIAL LOAN**

The parties have stipulated that Mr. Gagliardi initially loaned \$5,000 to the partnership and that the loan was not repaid. The UPA's Rules for Distribution of partnership monies provide that liabilities owing to partners shall be paid prior to profits owed to partners.<sup>6</sup> See 15

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<sup>6</sup> 15 Pa.C.S.A. § 8362 provides that:

In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary: . . .

(2) The liabilities of the partnership shall rank, in order of payment, as follows:

- (i) Those owing to creditors other than partners.
- (ii) Those owing to partners other than for capital or profits.
- (iii) Those owing to partners in respect of capital.
- (iv) Those owing to partners in respect of profits.

Pa.C.S.A. § 8362(2)(ii). Thus, the partnership should have repaid the \$5,000 loan prior to the distribution of any profits to defendant. The parties agree that the loan should have been paid by March 31, 1995. Accordingly, the Court will award plaintiff \$5,000 in repayment of the loan.

#### **5. COSTS INCURRED BY MR. GAGLIARDI PRIOR TO HIS DEATH**

The parties have stipulated that Mr. Gagliardi incurred \$3,536.25 in costs on cases prior to the formation of the law partnership which yielded recovery after Mr. Gagliardi passed away. Further, both parties agree that these costs should have been paid to the Estate by March 31, 1995. Thus, the Court will award plaintiff \$3,536.25 in reimbursement of costs advanced by Mr. Gagliardi.

#### **6. DISTRIBUTION OF PARTNERSHIP PROFITS FOR THE SECOND AND THIRD QUARTERS OF TAX YEAR 1993**

The Court has concluded that Mr. Gagliardi received \$7,380 in partnership profits for the second and third quarters of 1993.<sup>7</sup> Both parties agree that defendant received \$4,920 in partnership profits covering this same time period. \$4,920 is 40% of \$12,300. Thus, Mr. Gagliardi was entitled to receive 60% of \$12,300 or \$7,380. Since Mr. Gagliardi received \$7,380 for the second and third quarters of 1993, the Court concludes that plaintiff is not entitled to receive any distribution of partnership profits for this period.

#### **7. PARTNERSHIP PROFITS RECEIVED BY THE ESTATE**

The parties also do not dispute that Mrs. Gagliardi received \$12,372.85 in revenue from two cases which the Estate retained and which were settled by R. Torpey, Esq. After subtracting \$194.50 for costs incurred by the Estate in winding up these two cases, file numbers 175 and

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<sup>7</sup> See Findings of Fact, paragraph 17, supra.

238, the parties agree that \$12,178.35 is available for distribution. Accordingly, the Court will award defendant \$4,871.34 as his 40% share of these partnership revenues.

### **8. THE DESANTO CASE**

Plaintiff claims that the Estate is entitled to a portion of the proceeds which Ms. DeSanto received in settlement of her case. Plaintiff argues that Ms. DeSanto, the partnership's legal secretary, and defendant established a *quid pro quo* agreement to defeat plaintiff's claim to the settlement proceeds - an agreement whereby defendant would provide legal services to Ms. DeSanto without charge and, in return, Ms. DeSanto would work, after receiving the settlement proceeds, without pay, as a volunteer secretary for defendant.

The Court rejects plaintiff's claim that Ms. DeSanto and defendant established a *quid pro quo* agreement to defeat plaintiff's claim to settlement proceeds. Since defendant received no compensation for the legal services he rendered to Ms. DeSanto, plaintiff is not entitled to any compensation from the defendant as a result of the settlement of the DeSanto case.

### **9. DEFENDANT'S CLAIM FOR COMPENSATION FOR WINDING UP THE PARTNERSHIP'S AFFAIRS**

Defendant claims that he is entitled to reasonable compensation for his services in winding up the partnership's affairs. Originally, defendant claimed he was entitled to be paid \$125 per hour for every hour he spent working on a partnership file after Mr. Gagliardi passed away. In addition, defendant claimed he was entitled to 40% of the profits, if any, which remained after he was paid his \$125 per hour fee. However, defendant abandoned this untenable legal position at trial. Instead, defendant claimed at trial that he was entitled to be reasonably compensated for the services he provided which would ordinarily have been performed by Mr.

Gagliardi. Defendant estimated that, after the formation of the partnership, Mr. Gagliardi performed approximately 30 to 40 percent of the work on the partnership's files. Thus, defendant asserts that he is entitled to be reasonably compensated for the 30 to 40 percent of the work which Mr. Gagliardi would have performed had he not passed away.

The UPA provides that, “[n]o partner is entitled to remuneration for acting in the partnership business except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.” 15 Pa.C.S.A. § 8331(6) (West Supp. 1998). Thus, ordinarily, a surviving partner, such as defendant, would be entitled to reasonable compensation for his services in winding up the partnership affairs.

However, the Pennsylvania Supreme Court held, in Lee v. Dahlin, 159 A.2d 679 (Pa. 1960), that a trustee who breaches his fiduciary duty to the estate of a former partner forfeits his rights to compensation. In Lee, the Pennsylvania Supreme Court stated that:

There is no question that ordinarily A.V. Dahlin would have been entitled to some compensation [for his services in winding up the partnership affairs]; however, . . . since the death of one partner leaves the survivor in a position of absolute control with only the duty to account, it is apparent that the survivor must proceed with utmost caution and use the highest degree of care in the liquidation of the partnership. This was not done. There is ample evidence on the record that A.V. Dahlin, after the death of George Dahlin, took a truck belonging to the partnership for which he failed to account; used partnership funds for personal expense and failed to account to George Dahlin's estate even after a lapse of approximately five years. A trustee who breaches his fiduciary duty with a resultant loss to the estate forfeits his rights to compensation.

Lee v. Dahlin, 159 A.2d at 681.

The Court finds Lee v. Dahlin very persuasive. In this case, defendant commingled partnership funds with his own personal funds and has admitted that he spent nearly all of the

revenue obtained from the partnership files for personal or other non-partnership purposes. In addition, defendant breached his fiduciary duty to account to Mr. Gagliardi's estate for several years. In fact, defendant only produced the first of the two accountings in 1996 in preparation for proceedings in state court, not for the benefit of the Estate or to fulfill his fiduciary obligation. As a result of his breach of his fiduciary duty, the Court concludes that defendant should receive no compensation for his services in winding up the partnership's affairs and will deny defendant's claim for compensation for his services in winding up the partnership's affairs.

The Court will, however, award defendant the costs he incurred in winding up the partnership cases and in producing the accountings. These costs total \$4,307.38, calculated by adding \$2,938.51 (for winding up partnership case files), \$750 (paid to Marvin Huttman, C.P.A., for preparation of the partnership's 1993 tax return), and \$618.87 (paid for the production of the 1996 and 1997 accountings).

#### **10. DEFENDANT'S COUNTERCLAIMS**

The defendant has asserted in counterclaims that plaintiff intentionally interfered with the contractual relationship between defendant and the partnership's clients, and that plaintiff slandered and/or defamed the defendant by alleging false and malicious statements to the partnership's clients about defendant. In an attempt to provide a factual basis for these claims, defendant testified that Mrs. Gagliardi: 1) copied partnership case files without his permission; 2) removed the Rolodex and telephone logs from the partnership's law office without his permission; 3) arranged to freeze the partnership bank account and had mail redirected from the law partnership's office to her home in Plymouth Meeting, Pennsylvania; and 4) made false and malicious statements to some partnership clients.

Defendant concedes in his Supplemental Findings of Fact and Conclusions of Law that he has not presented sufficient evidence to warrant a finding in his favor on any of his counterclaims. Accordingly, the Court will rule in plaintiff's favor on defendant's counterclaims.

## **11. COMPENSATORY DAMAGES**

The Court finds that partnership revenue, after deducting costs and decedent's loan to the partnership, totals \$66,930.20.<sup>8</sup> That figure is the total of partnership profits available for distribution. Since Mr. Gagliardi was a 60% partner, the Court finds that plaintiff is entitled to 60% of these profits or \$40,158.12. From this total the Court must deduct the \$4,871.34 which defendant is entitled to receive as his share of profits from the two partnership case files retained by the Estate as outlined in paragraph 7, supra, thereby reducing plaintiff's share of partnership profits to \$35,286.78. In addition, the Court finds that plaintiff is entitled to receive \$5,000 in payment of the loan to the partnership and \$3,536.25 in reimbursement of costs on settled cases advanced by Louis Gagliardi before formation of the partnership. Thus, the Court finds that plaintiff is entitled to a compensatory damage award in the amount of \$43,823.03.

## **12. PUNITIVE DAMAGES**

Plaintiff has also requested that the Court award punitive damages based on defendant's conduct in breaching his fiduciary duty to the Estate and in converting money owed to the Estate to his own personal and professional uses. The Pennsylvania Supreme Court, in Feld v. Merriam, 485 A.2d 742, 747 (Pa. 1984), adopted § 908 of the Restatement (Second) of Torts

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<sup>8</sup> This figure is calculated by taking the \$79,773.83 in total revenue and deducting decedent's \$5,000 loan and the \$3,536.25 in costs advanced by decedent prior to the formation of the partnership on cases which yielded recovery after he passed away, both of which will be awarded to plaintiff, and the \$4,307.38 defendant is entitled to receive for costs incurred in winding up the partnership.

regarding the imposition of punitive damages. Section 908 states:

(1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.

(2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

Restatement (Second) of Torts § 908 (1979); see also Tunis Brothers Co., Inc. v. Ford Motor Company, 952 F.2d 715, 740 (3d Cir. 1991).

In Smith v. Renault, 564 A.2d 188 (Pa. Super. Ct. 1989), the Superior Court held that in fraud cases “aggravated circumstances” in addition to fraud are required to warrant the imposition of punitive damages. The court in Smith stated that, “[i]f the rule were otherwise, punitive damages could be awarded in all fraud cases. This is not the law. The rule, rather, is that for punitive damages to be awarded there must be acts of malice, vindictiveness and a wholly wanton disregard of the rights of others.” Smith, 564 A.2d at 193.

Thus, while the decision of whether to award punitive damages is within the discretion of the fact-finder, there must be evidence of malicious, wanton, reckless, willful, or oppressive conduct on the part of a defendant. See Chambers v. Montgomery, 192 A.2d 355, 358 (Pa. 1963); see also Tunis Brothers Co., Inc. v. Ford Motor Company, 952 F.2d 715, 740 (3d Cir. 1991). Further, in awarding punitive damages, the Court must consider: (1) the character of the act, (2) the nature and extent of the harm, and (3) the wealth of the defendant. See e.g., Tunis Brothers v. Ford Motor Company, 952 F.2d at 740; Restatement (Second) of Torts § 908.

The Court finds that there is ample evidence in the record to support an award of punitive

damages in this case. Defendant's conduct in keeping all the revenue derived from the wind up of the partnership case files for himself was sufficiently "outrageous" to support an award of punitive damages. The Court fails to comprehend, and defendant has certainly failed to justify, how defendant could have believed that he was entitled to keep all of the revenue derived from the partnership case files. In addition, the character of defendant's acts show a wanton and reckless indifference to the rights of the Estate. Further, there is no doubt that defendant's actions in withholding all of the profits received from the partnership case files caused severe harm to the plaintiff. An award of punitive damages is also necessary to deter defendant, and others similarly situated, from committing the same or similar acts in the future.

The only mitigating factor in this case in the Court's consideration of punitive damages is defendant's meager financial status. Defendant's net worth is approximately \$6,000 at this time. This factor, without more, is insufficient to cause the Court not to award punitive damages, but defendant's lack of financial means is considered in determining the amount of the punitive damages award. Accordingly, based on defendant's acts which evince a reckless indifference to plaintiff's rights, the nature and extent of the harm to plaintiff, and defendant's meager financial status, the Court will award plaintiff \$25,000 in punitive damages.

### **13. PLAINTIFF'S REQUEST FOR ATTORNEY'S FEES**

Plaintiff has requested attorney's fees pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927.<sup>9</sup> Because defendant is an attorney who represented himself, the Court has

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<sup>9</sup> 28 U.S.C. § 1927 provides that: "Any attorney or other person . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

decided not to impose attorney's fees or other sanctions under Federal Rule of Civil Procedure 11 in view of the award of punitive damages. With respect to 28 U.S.C. § 1927, the Court finds that both parties in this case behaved inappropriately at various times during the years the litigation has been pending. In addition, both parties took legal positions which might charitably be called untenable. Accordingly, the Court will not award attorney's fees to plaintiff.

#### **14. PRE-JUDGMENT INTEREST**

The plaintiff claims that the Estate should be awarded pre-judgment interest on certain claims. The Court agrees and will award plaintiff pre-judgment interest on the following claims, calculated as follows:

##### **a. The Initial Loan**

The parties have stipulated that the \$5,000 loan from Mr. Gagliardi to the partnership should have been repaid no later than March 31, 1995 and that interest on the loan shall accrue from this date. Thus, plaintiff is entitled to receive pre-judgment interest on decedent's \$5,000 loan to the partnership from April 1, 1995 to the date of this judgment.

##### **b. Costs Incurred By Mr. Gagliardi Prior To His Death**

The parties have stipulated that Mr. Gagliardi advanced \$3,536.25 in costs on cases that yielded recovery after he passed away. In addition, both parties have stipulated that these costs should have been repaid no later than March 31, 1995. Thus, the Court will award plaintiff pre-judgment interest on the costs advanced by the decedent prior to his death on cases which yielded recovery after his death. This interest will be calculated from April 1, 1995 to the date of this judgment.

### **c. Partnership Revenue**

The Court has concluded that plaintiff is entitled to \$35,286.78 in profits derived from partnership case files. The Court will award plaintiff pre-judgment interest on the \$35,286.78 from the dates on which each distribution of partnership profits should have been made to the date of this judgment. The parties will be ordered to calculate the amount of this pre-judgment interest or reach an agreed-upon figure for interest.

### **15. POST-JUDGMENT INTEREST**

Plaintiff argues that the Estate should also be awarded post-judgment interest pursuant to 28 U.S.C. § 1961. The Court agrees and will award plaintiff post-judgment interest pursuant to 28 U.S.C. § 1961 from the date of the judgment to the date the judgment is satisfied.

### **16. FUTURE REVENUE DERIVED FROM PARTNERSHIP CASE FILES**

Any future revenue which is derived from partnership case files by either plaintiff or defendant shall be distributed in a manner not inconsistent with this opinion.

### **C. CONCLUSION**

The Court will enter judgment in favor of plaintiff and against defendant for defendant's breach of fiduciary duty and conversion in the amount of \$43,823.03 in compensatory damages, and in the amount of \$25,000 in punitive damages. Pre-judgment interest will also be awarded to plaintiff on decedent's \$5,000 loan to the law partnership, the costs advanced by Mr. Gagliardi prior to the formation of the law partnership on cases which were settled after he passed away, and on all profits derived from partnership case files after Mr. Gagliardi passed away which should have been distributed to the Estate. In addition, post-judgment interest will accrue from

the date of this judgment to the date the judgment is satisfied.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**ELISA D. GAGLIARDI, individually** : **CIVIL ACTION**  
**and as the personal representative of**  
**the ESTATE OF LOUIS J. GAGLIARDI** :

**vs.** : **NO. 96-5469**

**BYRON BENNETT** :

**ORDER**

**AND NOW**, to wit, this 21st day of August, 1998, following a non-jury trial in this case,  
**IT IS ORDERED THAT** for the reasons set forth in the attached Memorandum,

1. The Court **FINDS IN FAVOR** of plaintiff, Elisa D. Gagliardi, individually, and as the personal representative of the Estate of Louis J. Gagliardi, and against defendant, Byron Bennett, on the claims that defendant breached his fiduciary duty to the Estate of Louis J. Gagliardi and that defendant converted money which belonged to the Estate of Louis J. Gagliardi for his own personal and professional use; and

2. The Court **FINDS IN FAVOR** of plaintiff, Elisa D. Gagliardi, individually, and as the personal representative of the Estate of Louis J. Gagliardi, and against defendant, Byron Bennett, on the counterclaim asserted by defendant; and

3. The Court **FINDS IN FAVOR** of plaintiff, Elisa D. Gagliardi, individually, and as the personal representative of the Estate of Louis J. Gagliardi, and against defendant, Byron Bennett, in the amount of \$43,823.03 in compensatory damages, plus pre-judgment interest as follows:

(a) Pre-judgment interest is awarded from April 1, 1995 to the date of this Judgment on Louis Gagliardi's \$5,000 loan to the partnership and on the \$3,536.25 in costs advanced by Louis Gagliardi prior to the formation of the law partnership on cases that yielded recovery after he passed away;

(b) Pre-judgment interest is awarded on \$35,286.78 in profits derived from partnership case files which should have been distributed to the Estate of Louis Gagliardi. This interest will be calculated from the date on which each distribution of partnership profits should have been made to the date of this Judgment.

Post-Judgment interest is awarded to plaintiff, Elisa D. Gagliardi, individually, and as the personal representative of the Estate of Louis J. Gagliardi, from the date of this Judgment to the date the Judgment is satisfied.

4. The Court **FINDS IN FAVOR** of plaintiff, Elisa D. Gagliardi, individually, and as the personal representative of the Estate of Louis J. Gagliardi, and against defendant, Byron Bennett, in the amount of \$25,000 in punitive damages. Post-judgment interest is awarded to plaintiff, Elisa D. Gagliardi, individually, and as the personal representative of the Estate of Louis J. Gagliardi, from the date of this Judgment to the date the Judgment is satisfied.

5. The Court **FINDS IN FAVOR** of plaintiff, Elisa D. Gagliardi, individually, and as the personal representative of the Estate of Louis J. Gagliardi, and against defendant, Byron Bennett, on the claim of defendant, Byron Bennett, for compensation for producing the partnership

accountings and for work performed on partnership files after the death of Louis Gagliardi.

6. The Court **FINDS IN FAVOR** of defendant, Byron Bennett, and against plaintiff, Elisa D. Gagliardi, individually, and as the personal representative of the Estate of Louis J. Gagliardi, on plaintiff's request for attorney's fees pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927.

7. The Court **FINDS IN FAVOR** of defendant, Byron Bennett, and against plaintiff, Elisa D. Gagliardi, individually, and as the personal representative of the Estate of Louis J. Gagliardi, on the claim of defendant, Byron Bennett, for reimbursement of costs incurred in winding up partnership affairs and in producing accountings in the total amount of \$4,307.38. Said sum has been deducted from the revenue of the partnership available for distribution in calculating the compensatory damages awarded to plaintiff in paragraph three (3) hereof.

**IT IS FURTHER ORDERED** that Judgment is **ENTERED IN FAVOR** of plaintiff, Elisa D. Gagliardi, individually, and as the personal representative of the Estate of Louis J. Gagliardi, and against defendant, Byron Bennett, as follows:

(a) \$43,823.03 in compensatory damages, plus pre-judgment interest as follows:

(i) Pre-judgment interest is awarded from April 1, 1995 to the date of this Judgment on Louis Gagliardi's \$5,000 loan to the partnership and on the \$3,536.25 in costs advanced by Louis Gagliardi prior to the formation of the law partnership on cases that yielded recovery after he passed away;

(ii) Pre-judgment interest is awarded on \$35,286.78 in profits derived from partnership case files which should have been distributed to the Estate of Louis Gagliardi. This interest will be calculated from the date on which each distribution of partnership profits should

have been made to the date of this Judgment.

Post-Judgment interest is awarded from the date of this Judgment to the date the Judgment is satisfied.

(b) \$25,000.00 in punitive damages.

Post-Judgment interest is awarded from the date of this Judgment to the date the Judgment is satisfied.

**IT IS FURTHER ORDERED** that Judgment is **ENTERED IN FAVOR** of plaintiff, Elisa D. Gagliardi, individually, and as the personal representative of the Estate of Louis J. Gagliardi, and against defendant, Byron Bennett, as follows:

(a) On the counterclaim of defendant, Byron Bennett;

(b) On the claim of defendant, Byron Bennett, for compensation for producing partnership accountings and for work performed on partnership files after the death of Louis J. Gagliardi.

**IT IS FURTHER ORDERED** that Judgment is **ENTERED IN FAVOR** of defendant, Byron Bennett, and against plaintiff, Elisa D. Gagliardi, individually, and as the personal representative of the Estate of Louis J. Gagliardi, on plaintiff's application for attorney's fees pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927.

**BY THE COURT:**

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**JAN E. DUBOIS, J.**