

**COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA**

**WAYNE HOWE, DANIEL FERRARA,
MICHAEL SCHIMANSKI,**

: No. 999 CV 2022

Plaintiffs,

vs.

**ERTLE ENTERPRISES, INC. d/b/a
ERTLE SUBARU,**

Defendant.

OPINION

Plaintiffs claim in this case that they were wrongfully terminated from their employment with Defendant Ertle Enterprises, Inc. d/b/a Ertle Subaru (Ertle Subaru). Plaintiffs allege the following facts in their complaint. The Plaintiffs were employed as sales consultants at Ertle Subaru in 2020. In this role, Plaintiffs met with customers in the car dealership showroom and accompanied them on test drives to sell motor vehicles.

On March 6, 2020, Governor Wolf proclaimed a disaster pursuant to 35 Pa.C.S. § 7301(c) as a result of the presence of the Covid-19 coronavirus in the Commonwealth ("COVID-19 Disaster Declaration Order"). On March 19, 2020, pursuant to his authority under the COVID-19 Disaster Declaration Order, Governor Wolf issued an order prohibiting businesses which were not life-sustaining from operating ("Business Closure Order"). Automobile dealers were not permitted to continue operations under the Business Closure Order as the car sales business was deemed "non-life-sustaining."

Ertle Subaru closed its automotive sales business accordingly. On April 20, 2020, online vehicle sales were authorized to commence statewide. However, in-person sales were still prohibited during the "Red Phase" of the Governor's reopening plan and were not permissible until Monroe County was moved into the "Yellow Phase" of the plan.

Ertle Subaru directed Plaintiffs to report to work in person while Monroe County was still in the "Red Phase" under Governor Wolf's order. Plaintiffs did return to work on May 11, 2020. However, on May 15, 2020, at the conclusion of the workday, Plaintiffs expressed their concern about defying the Governor's Business Closure Order and informed Ertle Subaru they would not return to work until Monroe County had entered the "Yellow Phase". Plaintiffs learned Ertle Subaru placed them back on the schedule on May 26, 2020. On May 25, 2020, Plaintiffs again informed Ertle Subaru that they did not feel comfortable returning to work due to Monroe County still being in the "Red Phase". On May 27, 2020, Ertle Subaru terminated Plaintiffs' employment without an explanation.

Ertle Subaru filed preliminary objections on March 17, 2022, arguing that Plaintiffs were not entitled to rely upon Governor Wolf's executive order as the basis for their wrongful termination claim. Plaintiffs responded to Defendant's preliminary objections on April 25, 2022.

DISCUSSION

I. **Standard of review**

Preliminary objections should be sustained only when it "appear[s] with certainty that the law will not permit recovery, and, where any doubt exists as to whether the preliminary objections should be sustained, the doubt must be resolved in favor of

overruling the preliminary objections.” *McCord v. Pennsylvanians for Union Reform*, 100 A.3d 755, 758 (Pa. Cmwlth. 2014) (quoting *Pa. State Lodge, FOP v. Dep’t of Conservation*, 909 A.2d 413, 416 (Pa. Cmwlth. 2006)). In determining whether the factual averments of a complaint are sufficient to state a cause of action, all doubts must be resolved in favor of the sufficiency of the complaint. *Slaybaugh v. Newman*, 749 A.2d 517, 519 (Pa. 1984).

II. Is Governor Wolf’s Business Closure Order a clear pronouncement of public policy for the purposes of a wrongful termination claim?

In Pennsylvania, as a general rule, there is no common law cause of action against an employer for termination of an at-will relationship. *Clay v. Advanced Computer Applications, Inc.*, 559 A.2d 917, 918 (Pa. 1989). Exceptions to this rule have been recognized in only the most limited of circumstances, where discharges of at-will employees would threaten clear mandates of public policy. *Id.* The Legislature is generally the body to declare the public policy of the state. *Mamlin v. Genoe*, 17 A.2d 407, 409 (Pa. 1941). The right of a court to declare what is or is not in accord with public policy exists “only when a given policy is so obviously for or against public health, safety, morals, or welfare that there is a virtual unanimity of opinion in regard to it.” *Id.* To determine the public policy of the Commonwealth, courts “examine the precedent within Pennsylvania, looking to our own Constitution, court decisions, and statutes promulgated by our legislature.” *Weaver v. Harper*, 975 A.2d 555, 563 (Pa. 2009).

A. The Emergency Management Code.

The legislature determines the public policy of the state of Pennsylvania. *Mamlin*, 17 A.2d at 409. The Governor has a role in enforcing that public policy through his

powers to execute the law. The Governor derives broad authority from our Commonwealth's Constitution, as it vests him with "supreme executive power" and directs him to "take care that the laws be faithfully executed." Pa. Const. art IV, § 2. The Governor's powers, however, are limited to those specifically granted to him by the Legislature through statutes, or the power conferred upon him by the Constitution.

Even though the COVID-19 pandemic was a type of emergency not confronted by Pennsylvanians for over one hundred years, the Governor's authority to issue emergency executive orders to address it was expressly delegated by the Legislature.

The Emergency Management Code, 35 Pa.C.S. § 7301, provides as follows:

(a) Responsibility to meet disasters.--The Governor is responsible for meeting the dangers to this Commonwealth and people presented by disasters.

(b) Executive orders, proclamations and regulations.--Under this part, the Governor may issue, amend and rescind executive orders, proclamations and regulations which shall have the force and effect of law.

(c) Declaration of disaster emergency.--A disaster emergency shall be declared by executive order or proclamation of the Governor upon finding that a disaster has occurred or that the occurrence or the threat of a disaster is imminent. The state of disaster emergency shall continue until the Governor finds that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist and terminates the state of disaster emergency by executive order or proclamation, but no state of disaster emergency may continue for longer than 90 days unless renewed by the Governor. The General Assembly by concurrent resolution may terminate a state of disaster emergency at any time. Thereupon, the Governor shall issue an executive order or proclamation ending the state of disaster emergency. All executive orders or proclamations issued under this subsection shall indicate the nature of the disaster, the area or areas threatened and the conditions which have brought the disaster about or which make possible termination of the state of disaster emergency. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and, unless the circumstances attendant upon the disaster prevent or impede, shall be promptly filed with the Pennsylvania Emergency Management Agency and the Legislative Reference Bureau for publication under Part II of Title 45 (relating to publication and effectiveness of Commonwealth documents).¹

(d) Activation of disaster response.--An executive order or proclamation of a state of disaster emergency shall activate the disaster response and recovery aspects of the Commonwealth and local disaster emergency plans applicable to the political subdivision or area in question and shall be authority for the deployment and use of any forces to which the plan or plans apply and for use or distribution of any supplies, equipment and materials and facilities assembled, stockpiled or arranged to be made available pursuant to this part or any other provision of law relating to disaster emergencies.

(e) Commander in chief of military forces.--During the continuance of any state of disaster emergency, the Governor is commander in chief of the Pennsylvania military forces. To the greatest extent practicable, the Governor shall delegate or assign command authority by prior arrangement embodied in appropriate executive orders or regulations, but this does not restrict the authority of the Governor to do so by orders issued at the time of the disaster emergency.

(f) Additional powers.--In addition to any other powers conferred upon the Governor by law, the Governor may:

- (1) Suspend the provisions of any regulatory statute prescribing the procedures for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency, if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency.
- (2) Utilize all available resources of the Commonwealth Government and each political subdivision of this Commonwealth as reasonably necessary to cope with the disaster emergency.
- (3) Transfer the direction, personnel or functions of Commonwealth agencies or units thereof for the purpose of performing or facilitating emergency services.
- (4) Subject to any applicable requirements for compensation under section 7313(10) (relating to powers and duties), commandeer or utilize any private, public or quasi-public property if necessary to cope with the disaster emergency.
- (5) Direct and compel the evacuation of all or part of the population from any stricken or threatened area within this Commonwealth if this action is necessary for the preservation of life or other disaster mitigation, response or recovery.
- (6) Prescribe routes, modes of transportation and destinations in connection with evacuation.
- (7) Control ingress and egress to and from a disaster area, the movement of persons within the area and the occupancy of premises therein.
- (8) Suspend or limit the sale, dispensing or transportation of alcoholic beverages, firearms, explosives and combustibles.
- (9) Confer the power of arrest on the law enforcement personnel serving as part of the emergency forces of a party state during operations in this Commonwealth pursuant to a declaration of a disaster emergency under subsection (c). Law enforcement personnel shall be under the operational control of the Commissioner of Pennsylvania State Police and shall comply with the terms and conditions of the Emergency Management Assistance Compact under Chapter 76

(relating to Emergency Management Assistance Compact). Arrest powers granted under this paragraph shall expire when the declaration of a disaster emergency is terminated by executive order, proclamation or operation of law, if the arrest powers have not previously been terminated.

35 P.S. §7301.

The Pennsylvania Supreme Court recently addressed the purposes of the Emergency Management Code:

(t)he General Assembly imbedded in the Code its purposes, which include to “[r]educ[e] vulnerability of people and communities of this Commonwealth to damage, injury and loss of life and property resulting from disasters;” to “[p]repare for prompt and efficient rescue, care and treatment of persons victimized or threatened by disaster;” to “[c]larify and strengthen the roles of the Governor, Commonwealth agencies and local government in prevention of, preparation for, response to and recovery from disasters;” to “[a]uthorize and provide for cooperation in disaster prevention, preparedness, response and recovery” and to “[s]upplement, without in any way limiting, authority conferred by previous statutes of this Commonwealth” 35 Pa.C.S. §§7103(1),(2),(4),(5),(9).

Friends of Danny DeVito v. Wolf, 227 A.3d 872, 885 (Pa. 2020).

The public policy expressed in the Emergency Management Code, i.e., reducing the loss of life resulting from disasters, was cited as the purpose of Governor Wolf’s Business Closure Order. The Business Closure Order was framed as follows:

**ORDER OF THE GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA
REGARDING THE CLOSURE OF ALL BUSINESSES THAT ARE NOT LIFE
SUSTAINING**

WHEREAS, the World Health Organization and the Centers for Disease Control and Prevention (“CDC”) have declared a novel coronavirus (“COVID-19”) a “public health emergency of international concern,” and the U.S. Department of Health and Human Services (“HHS”) Secretary has declared that COVID-19 creates a public health emergency; and

WHEREAS, as of March 6, 2020, I proclaimed the existence of a disaster emergency throughout the Commonwealth pursuant to 35 Pa. C.S. § 7301(c); and

WHEREAS, I am charged with the responsibility to address dangers facing the Commonwealth of Pennsylvania that result from disasters. 35 Pa. C.S. § 7301(a); and

WHEREAS, in addition to general powers, during a disaster emergency I am authorized specifically to control ingress and egress to and from a disaster area and the movement of persons within it and the occupancy of premises therein; and suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, and combustibles. 35 Pa. C.S. § 7301(f); and

WHEREAS, in executing the extraordinary powers outlined above, I am further authorized during a disaster emergency to issue, amend and rescind executive orders, proclamations and regulations and those directives shall have the force and effect of law. 35 Pa. C.S. § 7301(b); and

WHEREAS, in addition to my authority, my Secretary of Health has the authority to determine and employ the most efficient and practical means for the prevention and suppression of disease. 71 P.S. § 532(a), 71 P.S. 1403(a); and

WHEREAS, these means include isolation, quarantine, and any other control measure needed. 35 P.S. § 521.5.

NOW THEREFORE, pursuant to the authority vested in me and my Administration by the laws of the Commonwealth of Pennsylvania, I do hereby ORDER and PROCLAIM as follows: . . .

Governor Wolf, "*Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closure of All Businesses that are not Life Sustaining*," (Mar. 19, 2020).

Pennsylvania's appellate courts have long recognized that the effort to eliminate contagious disease, such as COVID-19, is an important public policy:

"The United States' struggle against communicable disease is as old as the nation itself, and Pennsylvania is no stranger to that effort. . . Typhus (a highly lethal bacterial infection spread by body lice), and typhoid (a food-borne illness that produced similar feverish symptoms), afflicted Philadelphia as well, with major outbreaks of one or the other in 1836, 1876, 1888-89, 1899 and 1906. And the influenza pandemic of 1889-1890 – "with the exception of 1918-19, the most severe influenza pandemic in the last three centuries" – killed more than one million people worldwide, including many Americans.

It is against *this* backdrop that the General Assembly adopted the Department of Health Act in April 1905, unmistakably signaling its belief that the swift prevention and control of communicable disease was of paramount importance to public health and safety throughout the Commonwealth."

Corman v. Acting Secretary of Pennsylvania Department of Health, 266 A.3d 452, 473 (Pa. 2021); see also *Troxel v. A.I. Dupont Institute*, 675 A.2d 314, 322 (Pa. Super. 1996) (physicians' duty encompasses a duty to correctly inform the patient about the contagious nature of a disease in order to prevent its spread); *DiMarco v. Lynch Homes-Chester County, Inc.*, 583 A.2d 422, 425 n.3 (Pa. 1990) ("The

physician who fails to properly inform his or her patient about the communicability of the disease that the patient has contracted or to which the patient has been exposed should be at least as culpable as the hacker who unleashes a virus that spreads from computer to computer destroying computer programs and files as it travels. Computer hackers are subject to criminal sanctions and civil sanctions. We can at least assess civil sanctions where a physician's action or inaction causes the spread of death and disease."); *Case v. Com., Dept. of Agriculture, Bureau of Animal Industry*, 535 A.2d 284, 288 (Pa. Cmwlth. 1987) (Department of Agriculture allowed to establish a special quarantine to kill any animal for the purpose of preventing the spread of a dangerous transmissible disease).

The purpose of Governor Wolf's Business Closure Order was to protect the public and reduce the chances of contracting and spreading COVID-19. At the time the Governor issued the Business Closure Order, he did so under the authority granted to him by the Legislature in 35 Pa.C.S. § 7301(b). Although Governor Wolf's executive order was short-lived, it expressed an established public policy of the Commonwealth at the time it was issued to suppress a contagious disease.

The Pennsylvania Supreme Court recognized the legitimacy of the Governor's executive order under the Emergency Management Services Code (the "Emergency Code"), 35 Pa.C.S. § 7101-79a31, in *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 880 (Pa. 2020). There our Supreme Court found that "(t)he Governor derives broad authority from our Constitution, as it vests him with "supreme executive power" and directs him to "take care that the laws be faithfully executed." Pa. Const. art IV, § 2." *Id.* at 885. "As the Commonwealth's chief executive officer, the Governor has primary responsibility for protecting the public safety and welfare of the people of Pennsylvania in times of actual or imminent disasters where public safety and welfare are threatened. 35 Pa.C.S. § 7301(a)." *Id.* at 885. He is further empowered to "issue, amend and rescind executive orders, proclamations and regulations which shall have the force and effect of

law. 35 Pa.C.S. § 7301(b).” *Id.* The Governor may, by proclamation or executive order, declare a state of disaster emergency, 35 Pa.C.S. § 3701(b), “upon finding that a disaster has occurred or that the occurrence or the threat of a disaster is imminent. 35 Pa.C.S. § 7301(c).” *Id.* This state of disaster emergency shall continue until the Governor finds that the threat or danger has passed or that emergency conditions no longer exist, but may not continue for longer than ninety days unless renewed by the Governor. *Id.* As a counterbalance to the exercise of the broad powers granted to the Governor, the Emergency Code provides that the General Assembly by concurrent resolution may terminate a state of disaster emergency at any time. *Id.*

The Supreme Court determined in *Friends of Danny DeVito* that the Governor’s action was taken under his constitutional and statutory authority. The Court also noted that non-essential businesses were forced to shutter their physical operations “under threat of criminal prosecution.” *Id.* at 880.

Defendants have cited a federal district court decision addressing a claim by an employee that he was terminated because he reported his employer’s alleged violation of Covid-19 mitigation requirements to the Pennsylvania Department of Health. The court found that such a termination would not be a violation of public policy. *Warner v. United Natural Foods, Inc.* 513 F. Supp. 3d 477 (M.D.Pa. 2021). The *Warner* case can be distinguished from this one because it did not involve an employee who was directed to report to work in violation of Governor Wolf’s emergency order. The *Warner* decision did hold that the Pennsylvania Supreme Court would not find a violation of Governor Wolf’s disaster order to be a violation of public policy that an employee could rely upon to

support a wrongful termination claim. The court cited cases where an employee was fired for whistleblowing, when the employee had no legal duty to report the acts at issue. See *Donahue v. Fed. Exp. Corp.*, 753 A.2d 238, 244 (Pa. Super. 2000). The case did not cite the Pennsylvania Supreme Court's decision in *Friends of Danny DeVito, supra*. The *Warner* court recognized that the Governor had the power to issue the executive order under the Pennsylvania Constitution and the Emergency Management Code, 35 Pa.C.S. § 7301, and also recognized that the Governor was attempting to save lives by containing the spread of a new disease.

This case is more in line with our Supreme Court's decision in *Shick v. Shirey*, 716 A.2d 1231, 1235 (Pa. 1998) where the court found that a termination of employment because the employee sought worker's compensation benefits would support a wrongful discharge claim. Here the Governor's order stated:

NOW THEREFORE, pursuant to the authority vested in me and my Administration by the laws of the Commonwealth of Pennsylvania, I do hereby ORDER and PROCLAIM as follows:

Section 1: Prohibition on Operation of Businesses that are not Life Sustaining
All prior orders and guidance regarding business closures are hereby superseded.

No person or entity shall operate a place of business in the Commonwealth that is not a life sustaining business regardless of whether the business is open to members of the public...

Enforcement actions will be taken against non-life sustaining businesses that are out of compliance effective March 21, 2020, at 12:01 a.m.

Governor Wolf, "Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closure of All Businesses that are not Life Sustaining," (Mar. 19, 2020).

This order was issued to protect the public from what was at the time a mysterious and contagious disease that caused harrowing illness or death in many patients and

threatened to overwhelm Pennsylvania hospitals. Plaintiffs contend that they were directed to come to work in spite of the executive order, putting themselves at risk and potentially spreading the contagion.

The Governor's order was limited by the Emergency Management Services Code to a period of ninety days, and could be ended at any time by concurrent resolution of the General Assembly. 35 Pa.C.S. Section 7301(c). This was a pandemic not experienced in Pennsylvania for more than one hundred years. It would be a narrow view of public policy to say that an employee could not rely upon the Governor's ability to close a business under the Emergency Management Services Code during a pandemic.

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

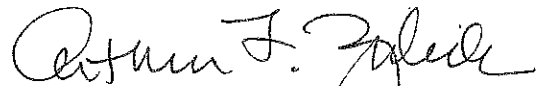
WAYNE HOWE, DANIEL FERRARA, : No. 999 CV 2022
MICHAEL SCHIMANSKI, :
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 Plaintiffs, :
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 vs. :
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 ERTLE ENTERPRISES, INC. d/b/a :
 ERTLE SUBARU, :
 :
 Defendant. :
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ORDER

AND NOW, this 16th day of June, 2022, upon consideration of Defendant Ertle Enterprises, Inc. d/b/a Ertle Subaru's preliminary objection, Plaintiffs Wayne Howe, Daniel Ferrara and Michael Schimanski's response, and the parties' briefs, IT IS ORDERED as follows:

1. Defendant's preliminary objection is **denied**.
2. Defendant shall file an answer to the complaint within twenty days.

BY THE COURT:



ARTHUR L. ZULICK, J.

cc: David M. Koller, Esq.
Susan Smith Lloyd, Esq.

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PROthonotary
2022 JUN 16 P 3:26
MONROE COUNTY, PA

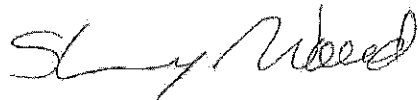
COURT OF COMMON PLEAS OF MONROE COUNTY
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WAYNE HOWE, : No. 000999-CV-2022
 :
Plaintiff/s, :
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SUBURU, :
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NOTICE OF ENTRY OF (ORDER)(JUDGMENT)(VERDICT)(OPINION AND ORDER)

NOTICE IS GIVEN UNDER PENNSYLVANIA RULE OF CIVIL PROCEDURE
236(a)(2) THAT AN OPINION AND ORDER WAS ENTERED IN THIS CASE ON June 16,
2022.

GEORGE J. WARDEN, Prothonotary



By: _____
Shirley Wood

cc: DAVID KOLLER, ESQ
SUSAN S LLOYD, ESQ