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Reports of Cases Decided in the Several Courts of Erie County for the Year 2012

XCV

ERIE, PA

JUDGES
of the
Courts of Erie County
during the period covered
by this volume of reports

COURTS OF COMMON PLEAS

HONORABLE ERNEST J. DISANTIS, JR. ---------- President Judge
HONORABLE SHAD CONNELLY ---------- Judge
HONORABLE STEPHANIE DOMITROVICH ---------- Judge
HONORABLE WILLIAM R. CUNNINGHAM ---------- Judge
HONORABLE MICHAEL E. DUNLAVEY ---------- Judge
HONORABLE ELIZABETH K. KELLY ---------- Judge
HONORABLE JOHN J. TRUCILLA ---------- Judge
HONORABLE JOHN GARHART ---------- Judge
HONORABLE DANIEL J. BRABENDER, JR., ---------- Judge

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GREATER ERIE INDUSTRIAL DEVELOPMENT CORPORATION, Plaintiff

v.

PRESQUE ISLE DOWNS, INC., Defendant

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admission of file and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

In considering a motion for summary judgment, all facts and reasonable inferences therefrom must be taken in a light most favorable to the party opposing summary judgment.

REAL ESTATE / DEEDS / CONTRACTS / AGREEMENTS OF SALE

Unless covenants and conditions contained within a purchase agreement are also contained within the corresponding deed, such covenants and conditions are merged into the deed or otherwise waived.

REAL ESTATE / DEEDS / CONTRACTS / AGREEMENTS OF SALE

An agreement of sale is not merged into a deed as to matters not to be consummated by the deed or which are collateral to it.

REAL ESTATE / DEEDS / CONTRACTS / AGREEMENTS OF SALE

A covenant is collateral, and therefore one which survives the deed, if it bears no relation to title, possession, quantity or emblements of the transferred property.

REAL ESTATE / DEEDS / CONTRACTS / AGREEMENTS OF SALE

If an agreement of sale contains collateral covenants or agreements, delivery of the deed is only considered part performance; the contract remains binding as to those covenants in the agreement which confer valuable rights on a purchaser and form a part of the consideration on which he or she contracted to pay the purchase money and accepted the deed.

CIVIL PROCEDURE / COMMENCEMENT OF ACTION
CONTRACTS / BREACH

The statute of limitations for a breach of a written contract is four years.

CIVIL PROCEDURE / COMMENCEMENT OF ACTION
CONTRACTS / BREACH

The statute of limitations is an affirmative defense which must be asserted in the initial pleadings or it is waived.

CIVIL PROCEDURE / COMMENCEMENT OF ACTION
CONTRACTS / BREACH

The discovery rule provides that the statute of limitations in a contract claim only begins to run when a party's right to institute an action arises;

i.e., when a party knew or should have known of a breach.

CIVIL PROCEDURE / COMMENCEMENT OF ACTION
CONTRACTS / BREACH

A "time is of the essence" clause in a contract does not impact the statute of limitations and hence does not affect the time frame when an injured party may bring a claim against a breaching party.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 14436-2009

Appearances: W. Patrick Delaney, Esq., Attorney for Plaintiff
Michael E. Flaherty, Esq., Attorney for Defendant

OPINION

Garhart, Jr., Dec. 14, 2011

I. Fact and Procedural Background

This opinion is filed in response to the parties' cross motions for summary judgment and responses thereto after oral argument has been held.

The facts of the dispute are as follows. On July 20, 2005, Plaintiff Greater Erie Industrial Development Corporation (GEIDC) entered into an Agreement for Sale of Real Estate (the Agreement) with defendant Presque Isle Downs, Inc. (PIDI) for the purchase of real property at the former International Paper Company site located at 1540 East Lake Road in Erie, Pennsylvania.

Under the Agreement, Defendant PIDI agreed to sell Plaintiff GEIDC some real property, together with the improvements thereon. Also under the Agreement, PIDI agreed to acquire and deliver to GEIDC, at an unspecified future date, a quantity of clean fill dirt sufficient to cap the Dunn Brickyard parcels to meet an Act 2 Standard in accordance with a cleanup plan to be approved by the Pennsylvania Department of Environmental Protection (See the Agreement, paragraph 15).

The purchase price of four million dollars was allocated at paragraph 3 of the Agreement to assign a specific value to different parts of the sale. Paragraph 3(c) allocates six hundred thousand dollars of the four million dollar purchase price specifically to clean fill dirt.

On October 10, 2005, the parties executed an addendum to the Agreement, which in part added a clause that states "Buyer shall accept the Property in 'as is' condition, and 'with all faults,' including but not limited to the environmental condition."

On October 11, 2005, the parties closed on the purchase of the property, at which time Plaintiff GEIDC delivered the four million dollar purchase price in exchange for Defendant PIDI's delivery of a deed. By closing, Defendant had not yet fulfilled its covenant to acquire and deliver the clean fill dirt as detailed in the Agreement, and the details of the clean fill

dirt obligation were not included in the language of the deed.

This brings us to the dispute at hand. By January 6, 2009, Defendant PIDI still had not delivered the clean fill dirt to GEIDC, so GEIDC's chief operating officer contacted PIDI to inquire about the obligation. Defendant denied they had any remaining obligation to GEIDC, and as a result, GEIDC filed this lawsuit on October 1, 2009 seeking $600,000, the amount GEIDC paid to defendant PIDI as consideration for the obligation to obtain and deliver the clean fill dirt. Specific performance is not requested as GEIDC has already had to find and purchase a substitute source of clean fill dirt at an additional expense.

II. Standard of Review

Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Donegal Mut. Ins. Co. v. Fackler,* 835 A.2d 712, 716 (Pa. Super. 2003). In considering a motion for summary judgment, all facts and reasonable inferences therefrom must be taken in a light most favorable to the party opposing summary judgment. *Summers v. Certainteed Corp.*, 997 A.2d 1152, 1159 (Pa. 2010). Because the facts as laid out above, in their material aspects, are not in dispute, the court finds this case is ripe for decision as a matter of law.

III. Discussion

For the sake of clarity, the Court will present the parties' arguments in the format of Defendant's arguments and Plaintiff's responses thereto (even though the Court recognizes that there are cross motions for summary judgment). This works because Plaintiff's arguments in its Motion for Summary Judgment are included again in its Brief in Opposition to Defendant's Motion for Summary Judgment and are more fully developed there.

A. Merger by Deed

Defendant PIDI's primary argument is based on the well established Pennsylvania doctrine of merger by deed. PIDI argues that unless covenants and conditions contained within a purchase agreement are also contained within the corresponding deed, such covenants and conditions are merged into the deed or otherwise waived. *Bricker v. Kline,* 86 Pa. Super. 594 (1926). In other words, Defendant does not dispute that it covenanted in the Agreement to provide a quantity of clean fill dirt to Plaintiff GEIDC, but because the same covenant was not included in the language of the deed, the obligation did not survive closing. Finally, with respect to Defendant's merger argument PIDI states that the language included in the October 10, 2005 addendum to the Agreement, that GEIDC has "inspected and investigated the Property and shall accept the same AS IS and WITH ALL FAULTS and without any warranties or

representations, either express or implied," demonstrates the intent of the parties that the clean fill dirt covenant was not to survive closing.

While Defendant accurately states the general merger by deed rule, Plaintiff responds that PIDI's obligation to provide clean fill dirt survived closing because it was a collateral matter to the agreement to transfer the property. Pennsylvania law provides that an exception to the merger by deed rule is that an agreement of sale is not merged into the deed as to matters not to be consummated by the deed, or which are collateral to it. See, e.g., *Rappaport v. Savitz*, 220 A.2d 401 (Pa. 1966). A covenant is "collateral, and therefore one which survives the deed, if it bears no relation to title, possession, quantity or emblements of the transferred property." *Carsek Corp. v. Stephen Schifter, Inc.*, 246 A.2d 365, 370 (Pa. 1968). As an example of a collateral covenant, Plaintiff cites to the case of *Dick v. McWilliams*, 139 A. 745, 746, in which the Pennsylvania Supreme Court determined that a covenant to finish a building was of a different nature than the agreement to sell it, and accordingly, the covenant was not merged with the deed.

Plaintiff further argues that the doctrine of merger has no application where the intent of the parties makes plain that certain covenants are not to be merged with the deed. *Dick*, 139 A. at 746. Specifically, if the agreement contains collateral covenants or agreements, delivery of the deed is only considered part performance; the contract remains binding as to those covenants in the agreement which confer valuable rights on a purchaser and form a part of the consideration on which he or she contracted to pay the purchase money and accepted the deed. *Raab v. Beatty*, 96 Pa. Super. 574, 576 (1929). Plaintiff also cites to several other illustrative cases to demonstrate how the collateral matter exception has been applied in Pennsylvania jurisprudence. See *Shawnee Lake Ass'n v. Uhler*, 198 A. 910 (Pa. 1938); *Perrige v. Horning*, 654 A.2d 1183 (Pa. Super. 1995); *Valvano v. Galardi*, 526 A.2d 1216 (Pa. Super. 1987); *Kline v. Johnson*, 70 Pa.D&C.2d 386 (Northumberland Cty. 1975).

The Court is convinced by the case law Plaintiff cites. The covenant to deliver clean fill dirt was collateral to the obligation to transfer the property. The obligation to deliver dirt conferred a valuable right on Plaintiff, and it is clear from the parties' allocation of the purchase price that a large portion of the price was payment for that dirt specifically. Therefore, it could not have been the parties' intention that GEIDC pay six hundred thousand dollars for nothing in return. The Court will not assume the parties intended such an absurd result, and therefore, the doctrine of merger by deed does not apply in this case. Rather, the collateral matter exception prevails. Finally, the Court finds the AS IS and WITH ALL FAULTS language in the addendum refers to the property to be conveyed (the International Paper property), not any obligation to deliver new dirt not already included on the property as of the date of

closing. Therefore, such language does not prevent the application of the collateral matter exception to the merger by deed doctrine.

B. Statute of Limitations

The statute of limitations for a breach of a written contract is four years. 42 Pa.C.S.A. §5525(a)(1). Defendant argues the statute of limitations clock started running on the date Plaintiff entered into the purported collateral agreement on July 20, 2005. Plaintiff filed this lawsuit more than four years later, on October 1, 2009, and as such, Plaintiff's claims are time barred.

In response, Plaintiff asserts two arguments. First, statute of limitations is an affirmative defense that must be asserted in the initial pleadings, or is waived. Defendant did not assert statute of limitations as a defense in his answer to Plaintiff's Complaint or in its Preliminary Objections, and it cannot raise the defense now for the first time at the summary judgment stage. See Pa.R.Civ.P. 1030(a) and 1032(a) (2010). Second, Plaintiff argues that even if Defendant has not waived its statute of limitations defense, the clock on a breach of contract action does not start to run until the injured party learns of the breach, and therefore the claim was timely filed.

The Court agrees that the defense of statute of limitations has been waived after Defendant failed to raise it in either preliminary objections or its answer. However, even were it not waived, Plaintiff is also correct in its argument that the statute of limitations in a contract claim only begins to run when a party's right to institute an action arises. *Crouse v. Cyclops*, 745 A.2d 606, 611. This is called the discovery rule. When a party knew or should have known of a breach, the clock begins to run. In the instant case, Plaintiff GEIDC could not have discovered that Defendant PIDI intended not intend to deliver the clean fill dirt until the date of closing, at the earliest. This suit was filed less than four years after the date of closing, and therefore the statute of limitations is not a defense.

C. Time Is Of the Essence

Defendant argues that even if Plaintiff GEIDC is correct that PIDI's obligation to deliver clean fill dirt is collateral to the transfer of property, it would still be subject to the "time is of the essence" clause at paragraph 21 of the Agreement. Thus, the purported collateral agreement expired under the terms of this provision.

Plaintiff responds, and the Court agrees, that a "time is of the essence" clause has nothing to do with the time frame when an injured party may bring a claim against a breaching party. Rather, such a clause ensures that the dates set for performance in a contract are strictly adhered to, and non compliance of such dates constitutes a breach. *Mesina v. Silberstein*, 528 A.2d 959 (Pa. Super. 1987). Here, there is no date set for the performance

of PIDI's obligation to deliver clean fill dirt. Second, a time is of the essence clause is included to protect obligees under a contract, not to permit an obligor to escape a contractual duty to perform. Defendant's argument under this provision has no merit.

D. Full Performance

Defendant next argues that because the Agreement states at Paragraph 18 that "the formal tender by Seller of an executed deed shall constitute performance hereunder" means that Defendant has no obligation to Plaintiff beyond the delivery of the deed.

Plaintiff responds that formal tender of the deed, while satisfying any covenants relating to the transfer of the property, did not terminate PIDI's collateral obligations. Because the Court has already determined that PIDI's obligation to deliver dirt was collateral to the transfer of the property, Defendant's full performance argument holds no water.

E. Due Diligence Clause and Buyer Contingency Waiver Clause

Defendant argues that Plaintiff is foreclosed from bringing a breach of contract cause of action because of its own failure to use due diligence in the inspection of the property before closing. Specifically, Defendant asserts that in paragraph 4(1)(a) of the Agreement, the language states the Agreement is contingent upon Buyer "satisfying itself as to the condition of the Property and its suitability for Development by Buyer, including, but not limited to, all matters and contingencies related to (i) soils, (ii) subsurface conditions, (iii) the environmental condition of the property..." Further, in paragraph 4(ii), the Agreement provides that "notwithstanding any provision in Section 4(i) to the contrary, if Buyer does not timely terminate this Agreement on or before the expiration of the Due Diligence Period, Buyer shall be deemed to have waived the Buyer contingencies set forth in Section 4(i)."

Plaintiff responds, and again, the Court agrees, that the buyer contingencies provision in the Agreement relates to the buyer's duty to investigate the condition of the property as it stood during the due diligence period, not with respect to the seller's future collateral obligation to deliver additional dirt not yet existing. Defendant's defense here is meritless.

F. Limitation of Liability Clause

Defendant next argues that the limitation of liability clause in paragraph 20 of the Agreement limits Plaintiff's remedy for any default to the following: "(a) receive a return of the Deposit as liquidated damages whereby, subject to Buyer's obligations under Section 4(i)(b), neither party shall have any further liability to the other, or (b) proceed with an action for specific performance."

Plaintiff responds that the limitation of liability clause clearly refers to a default in Seller's duty to transfer the property at closing, and not

to PIDI's collateral obligation to deliver dirt. One reason is that specific performance is the appropriate remedy for breach of real property sale contracts, but it is not an appropriate remedy in contracts for personal services such as PIDI's obligation to deliver clean fill dirt. Further, if the limitation of liability clause were to be applied to a post closing breach of PIDI's obligation to deliver dirt, then a return of the $10,000 deposit would not come close to making GEIDC whole after paying $600,000 for the dirt at closing.

The Court agrees that a return of the $10,000 deposit for breach of an obligation worth $600,000 would achieve only a meaningless remedy, and the Court will not assume the parties intended to achieve such an absurd result. The return of the deposit would be an adequate remedy only regarding a breach of the seller's obligation to close, before four million dollars changed hands. Further, because specific performance is used as a remedy only when contractual obligations are unique, such as the transfer of real property, the Court assumes this clause refers only to a breach of PIDI's duty to transfer.

G. "AS IS" and "WITH ALL FAULTS" Language

Defendant's seventh and final argument in defense to Plaintiff's breach of contract claim is that paragraph 3 to the October 10, 2005 addendum states "buyer shall accept the property AS IS and WITH ALL FAULTS, including but not limited to the environmental condition." The same paragraph goes on to state "in addition, Buyer shall perform all measures necessary to attain and thereafter maintain one or a combination of cleanup standards under Act 2, based on commercial non-residential use of the property, for the entire Property being purchased by Buyer, including but not limited to the areas commonly referred to as the South Rail Yard (or South Yard) and the Dunn Brickyard. Buyer shall also perform all measures necessary to obtain an Act 2 release (or releases) of liability for the property from PADEP for Seller..." Defendant argues that such language in the addendum replaces, amends, modifies, and supersedes, in whole, the obligations and responsibilities referenced in the purported collateral agreement.

Plaintiff responds that the "as is" and "with all faults" provision clearly refers to the property to be transferred, without any reference to Defendant's future and collateral obligation to deliver dirt. The condition of the transferred property is not at issue in this case.

The Court agrees with Plaintiff, but would go on to state that, as reasoned above, if the Court were to interpret paragraph 3 of the addendum to annihilate PIDI's collateral obligation to acquire and deliver clean fill dirt, then again, the Court would be assuming the parties intended an absurd result (the payment of $600,000 in exchange for nothing) which the Court refuses to do.

IV. Conclusion

For the reasons discussed above, the Court finds that Defendant PIDI had an obligation to acquire and deliver clean fill dirt to Plaintiff GEIDC at some time after the October 11, 2005 closing. There was a breach of that obligation on or around January 6, 2009 when PIDI made its position clear that it felt it was not obligated to deliver the dirt to GEIDC and would not do so. Plaintiff GEIDC has paid six hundred thousand dollars to PIDI for dirt it never received, and thus has been forced to have clean fill dirt delivered from another source at additional expense. Defendant has asserted no valid defenses to Plaintiff's claim. As specific performance is not an appropriate remedy, Plaintiff is entitled to a return of six hundred thousand dollars from Defendant plus interest. Plaintiff GEIDC's Motion for Summary Judgment is hereby GRANTED and Defendant PIDI's Motion for Summary Judgment is hereby DENIED.

Plaintiff GEIDC shall submit a proposed order to the Court detailing Defendant PIDI's repayment obligation within 10 days of the date of this Opinion.

BY THE COURT:
/s/ **John Garhart, Judge**

MILLCREEK TOWNSHIP WATER AUTHORITY and SUMMITT TOWNSHIP WATER AUTHORITY, Plaintiff,

v.

ERIE CITY WATER AUTHORITY a/k/a ERIE WATER WORKS, Defendant

MUNICIPAL AUTHORITIES / JURISDICTION

Where one municipal water authority contracts with other municipal water authorities to sell for resale water it provides, and those other municipal water authorities include service areas that are not within the service area of the selling authority, disputes concerning the rates charged to the purchasing authorities are governed by 53 Pa.C.S.A.§5607(d)(19), and not §5609(d)(9). In such case, the parties may, by contract, provide for arbitration of disputes, and are not bound by the exclusive jurisdiction of the court of common pleas as provided for in §5609(d)(9).

MUNICIPAL AUTHORITIES / JURISDICTION / ARBITRATION

Municipal water authorities have the power to negotiate the terms of their contracts with other municipal water authorities relating to the sale for resale of water, and such contracts may include a term requiring the parties to arbitrate disputes arising under the contract.

MUNICIPAL AUTHORITIES / CONTRACTS

Section 5607(d)(19) of the Municipal Authorities Act, 53 Pa.C.S.A. §5607(d)(19), does not restrict the terms of a contract which may be entered into by a municipal authority.

MUNICIPAL AUTHORITIES / CONTRACTS

The very existence of a contract between one municipal water authority and other municipal water authorities for the provision of water services is evidence of the providing authority's election that 53 Pa.C.S.A.§6507(d)(9) does not apply.

MUNICIPAL AUTHORITIES / MUNICIPAL AUTHORITIES ACT

53 Pa.C.S.A. §5607(d)(19) grants municipal authorities the right to supply water to other municipal authorities.

MUNICIPAL AUTHORITIES ACT / EXCLUSIVE JURISDICTION

The Pennsylvania legislature did not include an exclusive jurisdiction provision within 53 Pa.C.S.A. §5607(d)(19), and the exclusive jurisdiction provision of 53 Pa.C.S.A. §5607(d)(9) does not pertain to §5607(d)(19) or any other of the enumerated rights of the Municipal Authorities Act.

MUNICIPAL AUTHORITIES ACT / EXCLUSIVE JURISDICTION

Each of the enumerated rights under 53 Pa.C.S.A. §5607(d) is separate and distinct, so an exclusive jurisdiction clause in one provision cannot be transferred to another provision if not explicitly stated.

STATUTORY CONSTRUCTION

Where a remedy or method of procedure is provided by an act of assembly, the directions of such act must be strictly construed.

CONTRACT INTERPRETATION / JURISDICTION

Where no exclusive jurisdiction provision applies, the Court must look to the intention of the contracting parties.

CONTRACT INTERPRETATION

Contract interpretation implores courts to avoid an interpretation which renders contract provisions purposeless, meaningless and superfluous.

MUNICIPAL AUTHORITIES ACT / POWER TO FIX RATES

When a municipality exercises its right to sell water to third parties, including other municipalities, its rights and duties are delineated within the contract, not the authority's statutorily delegated power to fix rates within its service area under 53 Pa.C.S.A. §5607(d)(9).

MUNICIPAL AUTHORITIES ACT / CONTRACT INTERPRETATION

The legislature did not intend to permit a municipality to expand its water service area by contract. Therefore, if a contract is required to provide water services, then the parties are to be held to the freely-negotiated terms of the contract.

MUNICIPAL AUTHORITIES ACT / POWER TO FIX RATES

An authority's exclusive power to fix rates is limited to its service area, and when two authorities contract for water services, the amount charged is governed by the contract.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 12178-2011

Appearances: Mark Shaw, Esq. Attorney for Plaintiffs Millcreek Township Water Authority and Summit Township Water Authority
Christopher Sinnott, Esq. and Charles Zwally, Esq., Attorney for Defendant Erie City Water Authority

MEMORANDUM OPINION

Dunlavey, Michael E., J. December 15, 2011

AND NOW to-wit, this 14th day of December 2011, upon consideration of Defendant's Notice of Appeal and review of the record in this matter, it is hereby **ORDERED, ADJUDGED and DECREED** that the Court renders the following opinion:

A. PROCEDURAL POSTURE

This case stems from a June 15, 2011 complaint filed by the Millcreek Township Water Authority and the Summit Township Water Authority to Compel Arbitration on a water rate dispute between the Plaintiffs and the Defendant, Erie City Water Authority. In response to the Complaint,

several pleadings were filed by both Plaintiffs and Defendant, resulting in a hearing on September 8, 2011. As a result of the hearing, this Court ordered that the parties resolve the dispute through arbitration as dictated by the contracts.

B. FINDINGS OF FACT

On November 23, 2003, the Erie City Water Authority (hereinafter the "ECWA") and the Millcreek Township Water Authority (hereinafter the "MTWA") entered into a Water Services Agreement. A similar agreement was entered into between ECWA and the Summit Township Water Authority (hereinafter the "STWA") on June 6, 2006. Both agreements provide for sale for resale water by ECWA to MTWA and STWA, respectively.

A dispute arose out of the contracts regarding the amounts Plaintiffs were charged as bulk customers, resulting in STWA and MTWA submitting written requests for mediation to ECWA under section 7.04 of the Agreements. Section 7.04 provides as follows:

Section 7.04. Mediation; Arbitration

(a) If any dispute among the parties hereto, the dispute shall be referred to the Consulting Engineers for mediation. The referral shall be made by written notice from any one of the parties hereto to the other parties, whereby each party shall direct its Consulting Engineer to confer in an effort to resolve the dispute. If the Consulting Engineers representing the parties hereto are unable to resolve the dispute, any one of the parties may request that the Consulting Engineers select a third, independent Consulting Engineer with experience in design and operation of municipal water systems to mediate the dispute. The mediation sessions shall be informal and each party shall be permitted to make such presentations as the Consulting Engineers shall deem reasonable. The medication process hereunder shall be completed within ninety (90) days following referral of the dispute from the date of the written notice referring the dispute reference above. Each party shall bear the cost of its Consulting Engineer and the costs of the third Consulting Engineer appointed to mediate, if any, shall be divided equally among the parties. The Consulting Engineers shall have access to all records, accounts and other information relating to the dispute.

(b) If any dispute arises between the parties hereto that cannot be satisfactorily resolved by mediation by the Consulting Engineers as provided above, other than matters in which the Pennsylvania Public Utility Commission or any other court or administrative agency may have exclusive jurisdiction, the

> subject of such disputes shall be submitted to the commercial dispute section of the American Arbitration Association for resolution. The costs of arbitration shall be in accordance with the Uniform Arbitration Act, 42, Pa.C.S.A. Section 7301, et seq. The arbitration award or decision shall be final and binding among the parties.

Ninety days elapsed from the time MTWA and STWA submitted their written request to ECWA and the dispute was not satisfactorily resolved by mediation. Therefore, Plaintiffs filed a Demand for Arbitration and Statement of Claim with the commercial dispute section of the American Arbitration Association. ECWA filed objections to Plaintiffs' Demand for Arbitration claiming that the matter was not subject to arbitration. The arbitration is currently being held in abeyance by the AAA until the dispute regarding the applicability of arbitration is resolved.

No issues of material fact exist in this matter, but simply a matter of law determining which section of the Municipal Authorities Act, 53 Pa. C.S.A. § 5607 applies to the dispute.[1]

C. ANALYSIS

The question in this litigation are two sections of the Municipal Authorities Act (hereinafter the "Act"), Sections 5607(d)(9) and 5607(d)(19). The ECWA argues that the dispute involves water rates, thus it falls under Section 5607(d)(9), whereas MTWA and STWA argue that the dispute involves a third party contract to sell water, thus 5706(d)(19) applies. This Court finds that the two rate disputes, one between the ECWA and STWA and the second between ECWA and MTWA should be resolved under the arbitration provision present in the two contracts.

1. ECWA States that § 5607(d)(9) Applies to the Dispute

ECWA argues that this rate dispute is required to be handled under 5706(d)(9). Furthermore, ECWA states that the agreements incorporate Section 5607(d)(9)[2] by reference within Section 4.02(b), Rates-Standards, stating that, "Rates of E.C.W.A. shall be 'reasonable and uniform' as required by Section 5607(d)(9) of the Authorities Act, 53 Pa C.S.A. § 5607(d)(9)," thus the referenced section should apply in its entirety. Section 5607(d)(9) states as follows:

> **(d) Powers.** - - Every authority may exercise all powers necessary or convenient for the carrying out of the purposes set forth in this section, including, but without limiting the generality of the foregoing, the following rights and powers:

[1] "There are no disputes of any material fact and this matter is ripe for decision." Plaintiffs' Motion for Rule to Show Cause, ¶ 17. "Admitted." Defendant's Response to Motion for Rule to Show Cause, ¶ 17.

[2] The STWA and ECWA Agreement refers to Section 4 B(h), the predecessor to 5706(d)(9).

. . .

(9) - To fix, alter, charge and collect rates and other charges **in the area served** by its facilities at reasonable and uniform rates to be determined exclusively by it for the purpose of providing for the payment of the expenses of the authority, the construction, improvement, repair, maintenance and operation of its facilities and properties . . . . Any person questioning the reasonableness of the authority's services, including extensions thereof, may bring suit against the authority in the court of common pleas of the county where the project is located or, if the project is located in more than one county, in the court of common pleas of the county where the principal office of the project is located. The court of common pleas shall have exclusive jurisdiction to determine questions involving rates and services. Except in municipal corporations having a population density of 300 persons or more per square mile, all owners of real property in eighth class counties may decline in writing the services of a solid waste authority.

Section 5607(d)(9) only applied to a municipal authority's service area. None of the parties stipulate that Millcreek Township and Summit Township are part of ECWA's service area as required to fall within Section 5607(d)(9). In fact, the agreements between ECWA and STWA and ECWA and MTWA explicitly state that there are sections of Summit and Millcreek Townships which are not within the service area of ECWA. The service areas are designated within the agreement definitions and Article III, Service Areas, which clearly delineate that not all of the area considered by the contracts was within ECWA's service area.[3] If the agreements considered areas not within the service area of ECWA, then the Municipal Authorities Act permits a municipal authority, here ECWA, to provide services outside its service area.

2. MTWA and STWA States that Section 5607(d)(19) Applies

MTWA and STWA claim that the dispute is governed by § 5607(d)(19) because the agreement is between a municipal authority and third parties, not to customers within the service area, as indicated by the presence of separate contracts between the entities. The Act grants municipalities the right to enter into contracts with third parties, as found under Section

[3] "M.T.W.A. Service Area" means the portion of the Township which are served by the M.T.W.A. Water Systems as more particularly described and set forth on Exhibit A are attached hereto and made a part hereof." *Water Service Agreement between MTWA and ECWA*, Article I, Definitions.

"S.T.W.A. Service Area" means the portion or portions of the Township which are served by the S.T.W.A. Water Systems as more particularly described and set forth on Exhibit A attached hereto and made a part hereof."

5607(d)(19) of the Act, which states as follows:

> (19) To enter into contracts to supply water and other services to and from municipalities that are not members of the authority or to and for the Commonwealth, municipalities, school districts, persons or authorities and fix the amount to be paid therefore.

When ECWA decided to contract with STWA and MTWA, it utilized the right granted under Section 5607 (d)(19). The contracts did not place exclusive jurisdiction with the Court of Common pleas for rate disputes, but rather included an arbitration clause.

Section 5607(d)(19) does not restrict the terms of a contract which may be entered into by a municipal authority. Therefore, ECWA, STWA and MTWA had the power to negotiate the terms of the contracts, to include a term requiring the parties to arbitrate disputes arising under the contract. Gaffer Ins. Co. v. Discovery Reinsurance Co., 936 A.2d 1109, 1115 (Pa. Super. 2007).

3. This Court finds that §5607(d)(19) Applies

When the ECWA chose to provide water services to SWTA and MTWA, it determined that 5607(d)(9) did not apply, evidenced by the very existence of the third-party contracts created by the parties. If ECWA believed that it had the right to provide water to SWTA and MTWA via its service area, then no contracts would have been required. Thus, this Court evaluates the rights and jurisdiction granted under the Act's Section 5607(d)(19).

Section 5607(d)(19) grants municipal authorities the right to contract to supply water to other municipal authorities. Once ECWA and MTWA and STWA decided to collaborate on water services, two agreements were drafted and signed under the right vested to the ECWA under Section 5607(d)(19). The contracts, freely entered into, each included an arbitration clause. This Court must determine if the arbitration clauses are permitted under the Act and, if so, if the arbitration clause applies to the dispute at hand under contract interpretation.

a. Section 5607(d)(19) Does Not Grant Exclusive Jurisdiction to the Court of Common Pleas

Section 5607(d)(19) does not contain an exclusive jurisdiction provision. The exclusive jurisdiction provision of Section 5607(d)(9) does not pertain to Section (d)(19), or any other of the enumerated rights of the Act. Each of the enumerated rights under Section 5607(d) is separate and distinct, so an exclusive jurisdiction clause in one provision cannot be transferred to another provision if not explicitly stated. The Pennsylvania legislature did not include an exclusive jurisdiction provision within Section 5607(d)(19). Thus, "[w]here a remedy or

method of procedure is provided by an act of assembly, the directions of such act must be strictly construed. ***Gaebel v. Thornbury Township,*** 303 A.2d 57, 60 (Pa. Cmwlth. 1973) (citing ***Knup v. Philadelphia,*** 126 A.2d 399 (Pa. 1956)). This Court cannot override legislative intent not to include an exclusive jurisdiction provision. Therefore, the Court must look to the intent of the parties in negotiating the agreements.

b. Interpretation of Agreements Between ETWA and STWA and ECWA and MTWA

The parties negotiated the terms of the agreements to include a rates section and an arbitration clause. While the arbitration clause did include a provision to remove disputes with exclusive jurisdiction from the arbitration arena, ECWA has not established that the rate dispute under the agreements between STWA and MTWA are subject to the exclusive jurisdiction of the Erie County Court of Common Pleas.

ECWA relies on one sentence mentioning Section 5607(d)(9) within the Rates, Standards section of the agreements, as intending to incorporate the entire statutory section into the agreements. This argument cannot be accepted by this Court. The fact the contract mentions only three words of Section 5607(d)(9) explicitly precludes this Court from permitting the entirety of the statute section to prevail under the contract interpretation principle of *expresso unis exclusion allerius,* the expression of one thing is the exclusion of the other. This Court must find that the parties only meant to include that the rates would be "reasonable and uniform," not the exclusive jurisdiction clause as it was not included by the parties, but rather excluded.

This Court must adhere to another general concept of contract interpretation. If this Court were to determine that the Erie County Court of Common Pleas has exclusive jurisdiction over the rate disputes between ECWA and STWA and MTWA, then it would in essence be finding that the arbitration sections and the rates sections of the agreements are superfluous and purposeless. Contract interpretation implores courts to avoid an interpretation which renders contract provision "purposeless, meaningless and superfluous." Gaffer Ins. Co., 936 A.2d at 1115. Therefore, this Court respects the contract provisions freely negotiated by the parties as binding finding that the rate disputes between the parties do not fall under Section 5607(d)(9) of the Act, but rather Section 5607(d)(19).

c. Statutory Interpretation of 5607(d)(9) and 5607(d)(19)

ECWA's reliance on Section 5607(d)(9) is misplaced. ECWA exercised its right to sell water outside its service area under the terms of two separate and distinct contracts with similar terms. When a municipality exercises its right to sell water to third parties, including other municipalities, its

rights and duties are delineated within the contract, not the authority's statutorily delegated power to fix rates within its service area under 5607(d)(9). ***Beaver Falls Municipal Authority v. Municipal Authority of the Borough of Conway,*** 689 A.2d 379, 383 (Pa. Cmwlth. 1997) appeal denied, 704 A.2d 639 (Pa. 1997) (holding that when an authority sells water outside its service area, "the terms of the sale of water are to be fixed by contract, and the rights and duties of the parties are limited to those set forth in the contract"). This Court agrees with the ***Beaver Falls*** Court that the legislature did not intend to permit a municipality to expand its service area by contract. Therefore, if a contract is required to provide water services, then the parties are to be held to the freely negotiated terms of the contract.

In ***Township of Raccoon v. The Municipal Water Authority of the Borough of Aliquippa,*** 598 A.2d 757 (Pa. Cmwlth. 1991), appeal denied, 606 A.2d 904 (Pa. 1992), the Commonwealth Court held that an authority's exclusive power to fix rates is limited to its service area, and that when two authorities contract for water services, the amount charged for such services is governed by the contract. ***Township of Raccoon*** interpreted a prior version of the Municipality Authority Act, 53 P.S. § 306 B, which enumerated the rights of a municipal authority. The case revolved around subsections 4 B(h) and 4 B(p) which are similar to §§ 5607(0(9) and (19) of the current Act. Here, the Court reiterated its finding in ***Township of Aston v. Southwest Delaware County Municipal Authority,*** 535 A.2d 725, 728 (Pa. Cmwlth. 1988), stating that:

> "while Section 4 B(h) speaks of fixing reasonable and uniform rates "in the area served by [a municipality authority's] facilities," there is no such limitation where an authority contracts with another, presumably outside that area. In the case of a contract under Section 4 B(p), a municipal authority is given the power to fix the rates to be paid for its services, without the statutory limitation that they be "reasonable and uniform." The discrepancy is not illogical when the difference between the two situations is examined. In the first case, under Section 4 B(h), a municipal authority is granted the exclusive authority to set rates for its services. The recipient of these services has no input into the ratemaking process. It is therefore protected by the provision requiring the rates to be reasonable and uniform and subject to judicial review. Such is not the case when two municipal bodies contract for services, as under Section 4 B(p). That section allows a municipal authority to fix the rate for its services, but that rate, of course, will be the subject of negotiation before a contract is concluded."

This Court believes that ***Township of Raccoon*** and ***Township of Aston*** clearly state that if a municipal authority contracts with a third party for services, then the parties are bound by terms of their contracts.

If the legislature had contemplated third-party sales to be handled under Section 5607(d)(9), then this Court would have to find Section 5607(d)(19) superfluous since it permits the amount to be paid by third parties to be fixed by contract, not by the providing authority.

D. CONCLUSION

General contract interpretation principles and statutory interpretation of the Municipal Authorities Act, 53 Pa. C.S.A. 5607(d)(9) and (d)(19) require this Court to find that the rate dispute between ECWA and SWTA, as well as the rate dispute between ECWA and MTWA, are required to adhere to the freely negotiated arbitration clauses contained within the respective agreements.

BY THE COURT:
/s/ **MICHAEL E. DUNLAVEY, JUDGE**

MELANIE S. MUSARRA, Plaintiff
v.
WILLIAM J. ANDERSON, Defendant

FAMILY LAW / DIVORCE / AGREEMENT BETWEEN THE PARTIES

An oral agreement by the parties placed on the court record is enforceable when the parties give their unequivocal assent to the terms.

FAMILY LAW / DIVORCE / AGREEMENT BETWEEN PARTIES

Even if a written agreement is contemplated at the time an oral agreement is placed on the record, it is not required to bind the parties when assent is given to the oral agreement.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 13614-2007

Appearances: Stanley G. Berlin, Esq., on behalf of the Plaintiff
Melissa Hayes Shirey, Esq., on behalf of the Defendant

MEMORANDUM OPINION

Brabender, J., January 5, 2012

This matter is before the Court on the Defendant's Motion for Special Relief to Enforce Settlement and for Entry of Decree of Divorce. The Defendant seeks an Order finding the economic issues of the parties were resolved by oral agreement and/or a written agreement executed by Defendant. Defendant also seeks the entry of a Divorce Decree pursuant to Section 3301(d) of the Divorce Code. The Plaintiff asserts the economic issues of the parties have not been resolved, but otherwise does not object to the entry of a Divorce Decree. Following a hearing held December 29, 2011, the Court finds the parties entered into an enforceable oral marital settlement agreement on December 11, 2007 before the Honorable Michael E. Dunlavey and may praecipe for entry of a Divorce Decree.

FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiff, Melanie S. Musarra, filed 8 Complaint in Divorce under Sections 3301 (c) and (d) of the Divorce Code on August 23, 2007.

On December 11, 2007, a support *de novo* hearing was held before the Honorable Michael E. Dunlavey on the Plaintiff's support complaint. The Plaintiff appeared and was represented by counsel. The Defendant, William J. Anderson, appeared, *pro se*. Plaintiff's counsel advised the Court the parties had "resolved a lot of issues, including the support issue." *Tr. 12/11/07, p. 2; Defendant's Exhibit No. 1*. Defendant confirmed this. *Tr. 12/11/07, p. 2*. In lieu of proceeding with a hearing, Plaintiff's counsel placed on the record the essential terms of a marital settlement agreement reached by the parties, and the parties' agreement

concerning support. *Tr. 12/11/07, pp. 2-3*. Plaintiff's counsel advised the Court as follows:

> MR. BERLIN: Your Honor, *in an attempt to resolve all of the economic issues related to this case, the parties have agreed as follows*: The real estate currently located at 806 Fair Avenue, which is in joint name, will be transferred by means of a quit claim deed of Mr. Anderson to Ms. Musarra. She will be assuming all responsibility for all liens, including the mortgage and taxes and other obligations related to the house.
>
> THE COURT: As of the date of the transfer?
>
> MR. BERLIN: As of today.
>
> THE COURT: As of--?
>
> MR. BERLIN: As of today. Everything that is against the house as of this moment she will be assuming.
>
> THE COURT: Okay.
>
> MR. BERLIN: And in return Ms. Musarra is going to give up all right, title and interest, and waive all right, title and interest, to Mr. Anderson's profit sharing or I think it's a pension plan that has a comparable value; plus he's going to pay Ms. Musarra $3,000 that she's going to utilize to pay some current debt.
>
> And finally, there's an automobile that Mr. Anderson drives, Mr. Anderson did, but is in Ms. Musarra's name. Ms. Musarra is going to transfer that automobile, the title to it, to Mr. Anderson and Mr. Anderson will see to it that it is refinanced solely in his name thereby releasing Miss Musarra from any obligation.
>
> The support will stay as it currently is until the divorce, at which time the support will cease and there will be no alimony going one way or the other.
>
> And we will, of course, drop the current hearing that we've scheduled for today.

Tr. 12/11/07, pp. 2-3 (emphasis added).

Thereafter, the following exchange occurred:

> THE COURT: All right, that sounds like a good resolution for both parties, both accept it?
>
> MS. MUSARRA: Yes.

MR. ANDERSON: Yes sir.

MR. BERLIN: I'll prepare an agreement. Mr. Anderson said he will sign it and we'll file for the divorce.

THE COURT: All right. Cooperate with each other and get it done.

MR. ANDERSON: Thank you.

(Hearing concluded)

Tr. 12/11/07, pp. 3-4.

Following the hearing, the Court entered an Order directing Plaintiff's counsel "to prepare an agreemend (sic) stipulated by both parties," *Court Order dated December 11, 2007, Erie Co. Docket No. NS200701573; Defendant's Exhibit No. 2.*

On January 3, 2008, Plaintiff's counsel sent the parties a proposed Marriage Settlement Agreement, accompanied by a cover letter which referred to the agreement as a "first draft." In the letter, Plaintiff's counsel asked the parties to contact him if any changes were necessary and, if the agreement was acceptable, to schedule an appointment in early January to sign final divorce documents for filing with the court, *Answer to Motion for Special Relief, Exhibits "A" and "B".* The terms placed on the record on December 11, 2007 were included in the written agreement prepared by Plaintiff's counsel.

On January 16, 2008, Defendant executed the Marriage Settlement Agreement prepared by Plaintiff's counsel. Plaintiff's counsel witnessed Defendant's signature. Plaintiff's counsel executed an Attorney's Certification as Plaintiff's counsel which reads as follows:

> The undersigned hereby certifies that he is an attorney at law, duly licensed and admitted to practice in the Commonwealth of Pennsylvania; that he has been employed by Melanie S. Musarra, a party to this Agreement, and that he has advised such party with respect to this Agreement and explained to such party the meaning and legal effect of it; and that such party has acknowledged a full and complete understanding of the said Agreement and its legal consequences, and has freely and voluntarily executed the Agreement in my presence. The undersigned has no reason to believe that the party did not freely and voluntarily execute the said Agreement.

Defendant's Motion for Special Relief, Exhibit "A". However, the document which bears Defendant's signature and the Attorney's Certification was not signed by Plaintiff.

On January 18, 2008, Plaintiff's counsel wrote to Defendant, advising "that Ms. Musarra has now contacted me and advised me that she does

not accept the terms of the Agreement which I prepared for both of you to consider," Plaintiff's counsel stated "Apparently she has some concerns about your actions and the safeguards that you will comply with the terms us well as the amount of debt which she would be assuming. *Answer to Motion for Special Relief, Exhibit "C"*.

Defendant subsequently hired a lawyer.

On October 4, 2010, Defendant's counsel wrote to Plaintiff's counsel requesting a fully executed copy of the marital settlement agreement and Plaintiff's Affidavit of Consent/Waiver of Notice. *Defendant's Motion for Special Relief Exhibit "B"*.

On April 20, 2011, Defendant filed an Affidavit under Section 3301 (d) of the Divorce Code acknowledging the marriage was irretrievably broken.

On May 9, 2011, Plaintiff tiled a Counteraffidavit Under Section 3301(d) of the Divorce Code, advising she opposed entry of a divorce decree due to equitable distribution issues and wished to claim economic relief.

On November 9, 2011, Defendant filed the instant Motion for Special Relief to Enforce Settlement and for Entry of Decree of Divorce.

On December 20, 2011, Plaintiff filed an Answer to Motion for Special Relief to Enforce Settlement and for Entry of Decree of Divorce.

Defendant continues to pay support to Plaintiff.

At the hearing on December 29, 2011, Plaintiff's counsel asserted Plaintiff did not believe the parties reached an agreement on December 11 2007 resolving the economic issues. Also, Plaintiff's counsel asserted the statements placed on the record on December 11, 2007 occurred during a support proceeding. Plaintiff's counsel asserted the Marriage Settlement Agreement executed by Defendant on January 16, 2008, was merely a draft or a proposal for the parties' consideration. Plaintiff asserted she was unaware until some later point in time the amount of debt she was left with and the agreement did not take this into consideration. Plaintiff also asserted the Defendant failed to refinance the vehicle by the time Plaintiff's counsel sent the Agreement to her for signature.

Plaintiff's counsel advised Plaintiff does not object to a divorce decree being entered pursuant to Section 3301(d). Plaintiff, however, does not believe the economic issues between the parties have been resolved. Accordingly, Plaintiff asserts a divorce should not be granted until the economic issues are resolved. The unresolved economic issues identified by Plaintiff are Plaintiff's unawareness of certain debt as of an unspecified time and the fact the motor vehicle was not refinanced when Plaintiff was asked to sign the Marriage Settlement Agreement.

DISCUSSION

The parties entered into a binding of a marital settlement agreement on December 11, 2007.

> A property settlement agreement is enforceable by utilizing the same rules of law used in determining the validity of contracts. It is established law in this Commonwealth that parties may bind themselves contractually prior to the execution of a written document through mutual manifestations of assent, even where a later formal document is contemplated. The intent of the parties to be bound is a question of fact which must be determined by the factfinder.

Luber v. Luber, 614 A.2d 771, 773 (Pa.Super. 1992)(internal citations omitted)

The terms placed on the record during proceedings before Judge Dunlavey were clear.

It was Plaintiff's counsel who stated the parties had "resolved a lot of issues" and placed on the record the essential terms the parties agreed to "in an attempt to resolve all of the economic issues related to this case." The vast majority of terms placed on the record concerned economic issues pertaining to the divorce and were not limited to the issue of support. "There is a long held presumption in the law that what an attorney does in the course of his business is presumed to be by the authority of his client," *Himelright v. Himelright*, 22 Pa. D. & C.4th 483, 488 (1994).

At no time has either party or counsel indicated the terms placed on the record before Judge Dunlavey were other than the essential terms envisioned for the marital settlement enforcement between the parties. Without stating more, Plaintiff generally asserts she was unaware of the extent of the debt she was left with under the parties' agreement. However, Plaintiff's acceptance of the terms placed on the record by her counsel was unequivocal. No contingencies or conditions precedent were stated or requested.

The parties placed on the record their unequivocal assent to the terms as recited by Plaintiff's counsel.

A later formal document memorializing the terms of the agreement placed on the record on December 11, 2007 was contemplated. A Marriage Settlement Agreement prepared by Plaintiff's counsel pursuant to the Court's directive on December 11, 2007 was, in fact, subsequently executed by Defendant. However, a written agreement was not required to bind the parties to the oral contract entered into on December 11, 2007.

CONCLUSION

The Court finds the parties entered into an enforceable oral marital settlement agreement on December 11, 2007 before the Honorable Michael E. Dunlavey.

ORDER

AND NOW, to-wit, this 5th day of January, 2012, upon consideration of Defendant's Motion for Special Relief to Enforce Settlement and for Entry of Decree of Divorce, the Court hereby finds the parties entered into an enforceable oral marital settlement agreement on December 11, 2007 before the Honorable Michael E. Dunlavey.

BY THE COURT:
/s/ **Daniel J. Brabender, Jr., Judge**

ISABELL'S PAINTED GARDENS, LTD, Appellant

v.

BOARD OF SUPERVISORS, MCKEAN TOWNSHIP, ERIE COUNTY, PENNSYLVANIA,

and

MICHAEL AND SHERYL STEMPKA, et al., Appellees

ZONING ORDINANCE / JUDICIAL REVIEW / MATTERS OF DISCRETION

Where the court does not take additional evidence, the court is limited to determining whether the board abused its discretion or committed legal error. An abuse of discretion occurs when the board's findings are not supported by substantial record evidence.

ZONING ORDINANCE / JUDICIAL REVIEW / WEIGHT OF EVIDENCE

In weighing evidence presented before the board, the court may not substitute its interpretation for that of the board because determinations of credibility and the weight of the evidence are to be made by the board.

ZONING ORDINANCE / JUDICIAL REVIEW / SUBSTANTIAL EVIDENCE

The fact that there is a significant amount of evidence contrary to board's finding does not mean that the finding is unsupported; a single witness or piece of evidence, if credible and substantial, may be sufficient to carry the day.

ZONING ORDINANCE / PERMITS, CERTIFICATES AND APPROVALS / EVIDENCE AND FACT QUESTIONS

Once it is shown that the proposed use qualifies as a conditional use under the ordinance, a presumption arises that the proposed use is consistent with the general welfare.

ZONING ORDINANCE / CONSTRUCTION, OPERATION AND EFFECT / CONSTRUCTION BY BOARD OR AGENCY

It is well settled law that a zoning hearing board's interpretation of its own zoning ordinance is entitled to great deference and weight.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA Civil Action No. 15647-2010

Appearances: Robert Glance, Esq., Attorney for Appellant
John Shimek, Esq., Attorney for McKean Twp. Board of Supervisors
George Schroeck, Esq., Attorney for Stempka, et al.

OPINION

Garhart, J., November 1, 2011

Before the Court is the land use appeal of Isabell's Painted Gardens, Ltd ("Appellant"). Appellant appeals from the McKean Township Board

of Supervisors ("Board") denial of Appellant's request for a conditional use of her property. For the reasons stated below, the Decision of the Board is AFFIRMED.

A. FACTUAL AND PROCEDURAL BACKGROUND

Set forth below is the Findings of Fact, as stated by the Board in its Decision of November 18, 2010:

> The Applicant, Misty O'Connor ("O'Connor"), is the sole member of [Appellant], a Pennsylvania Limited Liability Company. O'Connor owns and has lived at 4530 Golden Road in McKean Township (the "Property") for eleven (11) years, and operates [Appellant] at that same address. The Property is zoned A-1 Conservation District.
>
> The Property consists of [11] acres on the north side of Golden Road. [footnote omitted.] The O'Connor residence is on the Property. There is parking for approximately two hundred (200) cars along Golden Road. A pavilion with a capacity of fifty (50) people sits near the center of the Property, and there is a small cabin with no power source, water, or sewer facilities. The Property also contains two ponds, a volleyball court, and hiking trails.
>
> [Appellant] offers the Property to the public for a fee. In 2010, twelve events were held at the Property from May 13 through October 2, including garden club meetings, family reunions, and weddings. While [Appellant] had provided catering early on, the customers were made responsible for arranging their own catering and alcoholic beverages. Those in attendance at events numbered 16 to 180. At weddings, large tents are erected in the event of inclement weather. O'Connor testified that hiking, volleyball, soccer, swimming, fishing, and kayaking are offered in conjunction with the other events, but that no one had booked the Property solely for [the previously mentioned activities]. [Appellant] maintains a website advertising its services. While O'Connor testified that the use of the Property is seasonal, the website calls the Property a year-round facility. The website also states that [Appellant] can accommodate up to five hundred (500) guests. O'Connor's Application[1] maintains that the use of the Property for [Appellant's] activities constitutes as Open Land Recreational Use.
>
> [paragraph omitted].

[1] Appellant's application to the Board also included a packet of supporting documentation. *See id.* at 26-68. Included in the packet is documentation of the efforts Appellant has gone to remedy complaints made by neighbors, and to comply with the requirements of the Ordinance. *See id.* at 32-38.

> Several neighbors complained about the increased and unsafe traffic associated with the operation of [Appellant], the objectionable noise (especially loud music) coming from the Property, attendees trespassing on adjacent properties and turning their cars around in nearby private driveways, attendees posting directional signs on private property, and attendees ignoring the road closed signs. [remainder of paragraph omitted].

Certified Record at 73-74.

In denying the Appellant's request for a conditional use within the A-1 Conservation District, the Board stated that Appellant's proposed use of the land did not conform to the definition of Open Land Recreational Use[2] in the following respects:

> [w]hile O'Connor purports to be conducting an Open Land Recreational Use (which is a "use by right" for the A-1 Conservation District), the use described on the O'Connor Application and [Appellant] website and testified to by O'Connor and her supporters is that of a banquet facility. The catered events, some including alcohol and live or taped music — weddings, family reunions, graduation parties — are conducted inside the pavilion and banquet tents, rather than in "open spaces." Parties, weddings, and reunions are not the kind of "open land" "recreation" detailed in Section 201 of the Ordinance. O'Connor herself testified that the truly "recreational" uses of the land — volleyball, soccer, kayaking, fishing, swimming, and hiking — are ancillary and subordinate to the banquet uses of the property.

Id. at 76-77.

To buttress support for its denial of Appellant's application, the Board also reasoned that Appellant's proposed use would conflict with the stated purpose[3] of the A-1 Conservation District, as Appellant's use would have "more than a 'minimal impact on district lands.'" *Id.* at 77.

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[2] The Board admits that although Open Land Recreational Uses is an enumerated conditional use of this type of land pursuant to McKean's Zoning Ordinance ("Ordinance"), and that Exhibit A of the Ordinance specifically refers the reader to see Section 201 with respect to the definition of Open Land Recreational Uses, Open Land Recreational Uses is not specifically defined in Section 201 of the Ordinance. The Board, however, utilized the following definitions contained in the Ordinance to render its Decision: (1) Open Space; (2) Outdoor Commercial Recreational Uses; and (3) Indoor Commercial Recreational Uses. Additionally, the Board, pursuant to Section 200 of the Ordinance, utilized the definition of "recreation" contained within the 1993 Tenth Edition of Merriam Webster's Collegiate Dictionary. *Id.* at 76.

[3] Pursuant to the Ordinance, the stated purpose of the A-1 Conservation District is "to conserve areas of McKean Township while permitting development which will have a minimal impact on district lands." *Id.* at 76.

The Board pointed to evidence on the record of increased traffic, safety issues, objectionable noise, and trespassing, all of which is associated with Appellant's proposed use of the land. *Id.*

On December 17, 2010, Appellant timely filed its notice of appeal. The allegations of error with respect to the Board's Decision are as follows:

1. The Board erred in not determining that Appellant's proposed use of the land constituted an Open Land Recreational Use.
2. The Board erred in not applying the correct standard of law with respect to the proposed use's adverse affect on the public welfare.
3. In the alternative, if the Board is deemed to have applied the correct standard of law with respect to adverse affect, the Board erred in determining that Appellant proposed use causes more than a minimal impact on district lands.
4. The Board should be estopped from denying Appellant's Application for a Conditional Use permit because the Zoning Administrator gave Ms. O'Connor verbal approval to use the Property as proposed.[4]
5. The Board breached its duty of good faith, in that it failed to assist the Appellant after the Appellant received misinformation from the Zoning Administrator.
6. The Ordinance is vague, in that "Open Land Recreational Uses" is not defined.
7. The Board's application of the Ordinance with respect to Appellant's Application violates the Equal Protection Clause of the Pennsylvania Constitution.

B. DISCUSSION

1. Standard of Review

Where the Court does not take additional evidence, the Court is limited to determining whether the board abused its discretion or committed legal error. *Twp. of Exeter v. Zoning Hearing Bd. of Exeter,* 962 A.2d 653, 659 (Pa. 2009). An abuse of discretion occurs when the board's findings are not supported by substantial evidence in the record. *Id.* Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

Further, in weighing evidence presented before the zoning hearing board, the trial court may not substitute its interpretation for that of the board because determinations about the credibility and the weight to be

[4] Appellant admits that the Board never made a factual or legal determination on this issue. (Notice of Appeal ¶ 102.) In addition, at the hearing, counsel for Appellant conceded that the Zoning Administrator's verbal approval was "not necessarily binding." N.T., Hearing, 10/7/10, at 10.

given to the evidence are to be made by the board. *In re: Cutler Group, Inc.*, 880 A.2d 39 (Pa.Cmwlth. 2005), *appeal denied*, 897 A.2d 461 (Pa. 2006). The fact that there may be a significant amount of testimony or evidence contrary to the Zoning Board's findings does not mean, in and of itself, the Board's findings are unsupported. A single witness or piece of evidence, if credible and substantial, may be sufficient to carry the day. *Taliaferro v. Darby Twp. Zoning Hearing Bd.*, 873 A.2d 807 (Pa. Cmwlth. 2005), *appeal denied*, 887 A.2d 1243 (Pa. 2005).

2. Appellant's Proposed Use as an Open Land Recreational Use

Appellant correctly points out that it has the burden to persuade the Board that its proposed use qualifies as a conditional use pursuant to the Ordinance, and once it does so, a presumption arises the proposed use is consistent with the general welfare. *Aldridge v. Jackson Twp.*, 983 A.2d 247, 253 (Pa.Cmwlth. 2009). Here, Appellant's primary proposed use includes providing a venue for weddings, parties, family reunions, and other gatherings. *See* Certified Record at 31.

Under Pennsylvania law,

> In interpreting the language of a zoning ordinance to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.

53 P.S. § 10603.1. However, the Court also notes it is well settled law that a zoning hearing board's interpretation of its own zoning ordinance is entitled to great deference and weight. *Arter v. Philadelphia Zoning Board of Adjustment*, 916 A.2d 1222, 1229 (Pa.Cmwlth. 2007).

The Court holds the Board was correct in determining that providing a venue for special events such as weddings, reunions, and parties did not qualify as an Open Land Recreational Use. Although the Appellant relies heavily on the fact that this specific category is not specifically defined in the Ordinance, the Court believes the definitions relied upon by the Board are sufficient to justify its Decision. 'Open land recreation' and 'outdoor recreation' are substantially similar terms. Under the definition of Outdoor Commercial Recreational Uses, activities such as golf, softball, tennis, swimming, and hiking are included. Certified Record at 76. Activities such as weddings, reunions, and parties, some of which include live music and alcohol, are not included in this definition.

Appellant also relies heavily on the fact that it offers swimming, hiking, etc...on the Property. However, there is substantial evidence in the record that supports the Board's finding that these activities are ancillary to Appellant's main purpose of providing a venue for special

events. Indeed, Appellant's own brochure states that hiking, swimming, etc...are offered as amenities to guests who book the Property for a special event. *See id.* at 52.

C. CONCLUSION

For the reasons stated above, the Decision of the Board is AFFIRMED. The Court need not address the remaining issues in order to resolve this appeal. Further, the issues outlined as 4 through 7 above are not issues properly before this Court on this appeal. Here, the Court need only review what the Board decided below — the denial of Appellant's Application for a conditional use permit. An Order in accordance with this Opinion will be issued contemporaneously.

ORDER

AND NOW, this 1st day of November, 2011, upon consideration of Appellant's Land Use Appeal, the briefs of the parties, and the arguments of counsel, and after conducting an independent review of the record, it is hereby ORDERED and DECREED that Decision of the Board is AFFIRMED, and Appellant's appeal is DISMISSED

BY THE COURT:
/s/ **John Garhart, Judge**

DOMINICK D. DiPAOLO, Plaintiff

v.

TIMES PUBLISHING COMPANY, d/b/a Erie Times News, CYBERINK, LP, d/b/a goerie.com, LISA THOMPSON, EDWARD PALATTELLA, JR., and MICHAEL MACIAG, Defendants

PLEADINGS / PRELIMINARY OBJECTIONS

The Pennsylvania Rules of Civil Procedure allow any party to file preliminary objections. All preliminary objections shall be raised at one time and shall state specifically the grounds relied upon and may be inconsistent. It is well established that in ruling on preliminary objections, the court must accept as true all well-pled facts which are relevant and material, as well as all inferences reasonably deducible therefrom. For the court to sustain the defendants' preliminary objections, their right to relief must be clear and free from doubt.

PLEADINGS / PRELIMINARY OBJECTIONS

With regard to a preliminary objection in the nature of a demurrer, the question is whether, on the facts averred, the law says with certainty that no recovery is possible and the only time a demurrer may be sustained is when the plaintiff has clearly failed to state a claim on which relief may be granted.

TORTS / DEFAMATION

The Uniform Single Publication Act, 42 Pa.C.S.A. §8343(a), sets forth the burden of proof on the plaintiff, who must prove the following: (1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) the understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of a conditionally privileged occasion.

TORTS / DEFAMATION

A publication is defamatory if it tends to blacken a person's reputation or expose him to public hatred, contempt, or ridicule, or injure him in his business or profession. The court must consider whether the statement tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third parties from associating or dealing with him.

TORTS / DEFAMATION

In cases concerning public officials, there are more stringent proof requirements. Specifically, the public official plaintiff has the burden of proving both that the statements were false and that they were made with actual malice. Actual malice requires a plaintiff to prove that the defendants published an untrue statement with knowledge that it was false or with reckless disregard of whether it was false or not.

TORTS / DEFAMATION

The burden of proving actual malice is a heavy one and requires more than a showing of negligence, carelessness or bad judgment in the publication of an allegedly defamatory article. The plaintiff must meet his burden by presenting to the jury clear and convincing evidence that the defendants realized their statement was false or that they actually entertained serious doubt as to the truth of the statement.

TORTS / DEFAMATION

While actual malice may be shown by circumstantial evidence of events surrounding the publication of the offending statement, such evidence must tend to establish fabrication, or at least the publisher had obvious reasons to doubt the veracity of the informant or the veracity of his reports.

TORTS / DEFAMATION

A statement is defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or deter third persons from associating or dealing with him.

TORTS / DEFAMATION

It is the function of the court to determine whether the published statements can fairly and reasonably be construed to have the libelous meaning ascribed to it by the party. The statements must be viewed as a whole and in the context of the other words in the statement.

TORTS / DEFAMATION

The defamatory meaning of the publications may be found in the innuendo of published statements apart from the exact content of an individual statement. To establish defamation by innuendo, the innuendo must be warranted, justified and supported by the publication.

TORTS / DEFAMATION

The test to be applied in evaluating any statement is the effect the article is fairly calculated to produce, the impression it would naturally engender, in the minds of the average person among whom it is intended to circulate.

TORTS / DEFAMATION

The fair report privilege grants media defendants qualified immunity from defamation liability when they report on official governmental proceedings. No responsibility attaches so long as the account of the official action or proceedings is fair, accurate and complete, and is not published solely for the purpose of causing harm to the person defamed. However, this qualified immunity is forfeited if the publisher steps out of the scope of the privilege or abuses the occasion. This can be done by exaggerated additions, or embellishments to the account.

TORTS / DEFAMATION

The court determines whether the fair report privilege applies to a case, but the jury decides whether the fair report privilege has been abused.

PLEADINGS / PRELIMINARY OBJECTIONS

Generally, the fair report privilege is an affirmative defense which may not be decided on preliminary objections. However, the plaintiff's failure to file preliminary objections to the defendants' preliminary objections waives this procedural defect, thereby enabling the court to rule on whether the affirmative defense defeats the claim against which the defense has been invoked.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 14004-2011

Appearances: Peter H. Kurzweg, Esq., and Matthew L. Kurzweg, Esq., Attorneys for Plaintiff
Craig A. Markham, Esq., Attorney for Defendants

OPINION

Bozza, J. July 23, 2012

The plaintiff, Dominick DiPaolo, a magisterial district judge, has filed a civil action setting forth three counts of libel regarding a series of print and online articles and blogs published on November 14 and 28, 2010, and April 16 and 17, 2011. The defendants include the Times Publishing Company and Cyberink, business entities that publish the Erie Times-News newspaper and GoErie.com, an online newspaper, and that are collectively referred to as the Times-News defendants. The individual defendants include three employees of the Times-News defendants: Edward Palattella, Lisa Thompson and Michael Maciag. Each defendant has filed preliminary objections in the nature of a demurrer to all counts as well as to the claim for punitive damages.[1]

This case encompasses a factual setting that resulted from an action initiated by the Office of the Pennsylvania Attorney General (Attorney General). On October 28, 2010, the Attorney General filed suit against Unicredit America Incorporated (Unicredit), an Erie-based debt collection company, alleging Unicredit engaged in certain debt collection activities that violated Pennsylvania consumer protection laws as well as the Pennsylvania Rules of Civil Procedure. Am. Compl. ¶¶ 19-21. It was the Attorney General's position that Unicredit improperly filed numerous civil actions in Magisterial District Judge Dominick DiPaolo's office, thereafter obtaining judgments against most of the debtors in those actions. Then, in an effort to pressure the debtors to

[1] The defendants also objected to the plaintiff's inclusion of attorney's fees and costs of litigation as a measure of damages in paragraph 144(h) of the amended complaint. Prelim. Objections ¶¶ 12-13. However, the plaintiff has consented to striking paragraph 144(h) "with the caveat that Plaintiff is, upon a successful outcome of the litigation, entitled to record costs as requested in the three *ad damnum* clauses." Br. in Opp'n to Prelim. Objections 13.

satisfy the judgments, it was alleged Unicredit conducted phony post-judgment proceedings in a fake courtroom presided over by someone impersonating a judge. *Id*. at ¶ 22.

The action initiated by the Attorney General as well as subsequent court proceedings held before the Honorable Michael E. Dunlavey on November 2 and 10, 2010 resulted in significant press coverage, including articles published in the Erie Times News and online at GoErie.com, in which attention was paid to the role Judge DiPaolo and/or his office may have played in the unfolding case. It is out of these reports that the instant action in defamation emanates. Essentially, the plaintiffs amended complaint sets forth a number of allegations concerning the libelous character of the defendants' articles. Argument on the defendants' preliminary objections was held before the undersigned on May 15, 2012. This opinion follows.

Standard of review

The Pennsylvania Rules of Civil Procedure allow any party to file preliminary objections. Pa.R.C.P. No. 1028(a). "All preliminary objections shall be raised at one time. . . . [and] shall state specifically the grounds relied upon and may be inconsistent." Pa.R.C.P. No. 1028(b). It is well established that in ruling on preliminary objections, the court must accept as true all well-pled facts which are relevant and material, as well as all inferences reasonably deducible therefrom. For the court to sustain the defendants' preliminary objections, their right to relief must be clear and free from doubt. *Bower v. Bower,* 611 A.2d 181, 182 (Pa. 1992). In the present case, since the defendants' preliminary objections are in the nature of a demurrer, "[t]he question ... is whether, on the facts averred, the law says with certainty that no recovery is possible," and the only time a demurrer may be sustained is when "the plaintiff has clearly failed to state a claim on which relief may be granted." *Eckell v. Wilson,* 597 A.2d 696, 698 (Pa. Super. 1991). If there is any doubt as to the adequacy of a plaintiff's complaint, a demurrer should not be sustained. *Id.*

The Law of Defamation

The law of defamation is an amalgam of common law and constitutional principle, both of which have long been recognized and affirmed in our jurisprudence. Particular legal nuance incorporating First Amendment concerns arises in defamation actions involving public officials. *See N.Y. Times Co. v. Sullivan,* 376 U.S. 254 (1964). Moreover, Pennsylvania has adopted an explicit statutory scheme that sets forth with precision the elements of a cause of action in defamation. The Uniform Single Publication Act sets forth the burden of proof on the plaintiff, who must prove the following:

(1) The defamatory character of the communication.
(2) Its publication by the defendant.
(3) Its application to the plaintiff.
(4) The understanding by the recipient of its defamatory meaning.
(5) The understanding by the recipient of it as intended to be applied to the plaintiff.
(6) Special harm resulting to the plaintiff from its publication.
(7) Abuse of a conditionally privileged occasion.

42 Pa. Cons. Stat. § 8343(a).

Most significantly, in cases concerning public officials, there are more stringent proof requirements. Specifically, the public official plaintiff has the burden of proving both that the statements are false and that they were made with actual malice. *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899 (Pa. 2007); *Manning v. WPXI, Inc.*, 886 A.2d 1137 (Pa. Super. 2005). Actual malice requires a plaintiff to prove that the defendants published an untrue statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Am. Future Sys., Inc. v. Better Bus. Bureau*, 872 A.2d 1202, 1211 (Pa. Super. 2005) (quoting *N.Y. Times Co.*, 376 U.S. 254).

In this case, the specific question raised by the defendants in their preliminary objections is whether the allegations of fact set forth in the amended complaint are sufficient to carry the plaintiff's burden of proving the alleged statements relating to Magisterial District Judge DiPaolo are capable of a defamatory meaning. However, this issue is inextricably related to an assessment of the truth or falsity of the publications at issue.

The general rule is "[a] statement is defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or deter third persons from associating or dealing with him." *Kurowski v. Burroughs*, 994 A.2d 611, 616 (Pa. Super. 2010) (quoting *Rutt v. Bethlehems' Globe Pub'g Co.*, 484 A.2d 72, 76 (Pa. Super. 1984)). It is the function of the court to determine whether the published statement "can fairly and reasonably be construed to have the libelous meaning ascribed to it by the party." *Id.* at 617. Moreover, the statements must be viewed as a whole and in the context of the other words in the statement. *Id.* And, importantly in this case, it has also been recognized that the defamatory meaning of the publications may be found in the "innuendo" of published statements apart from the exact content of an individual statement. *ToDay's Hous. v. Times Shamrock Commc'ns, Inc.*, 21 A.3d 1209, 1215 (Pa. Super. 2011). "To establish defamation by innuendo, the 'innuendo must be warranted, justified and supported by the publication.'" *Livingston v. Murray*, 612 A.2d 443, 449 (Pa. Super. 1992) (quoting *Thomas Merton Ctr. v. Rockwell Intl Corp.*, 442 A.2d 213, 217 (Pa. 1981)), *appeal denied*, 617 A.2d 1275 (1992). The question becomes whether the innuendo or implication of the statements could

be fairly and reasonably construed to imply the defamatory meaning alleged by the plaintiff.

A. Demurrer to All Counts: Failure to Prove Defamatory Innuendo

The defendants have demurred to each count on the basis that the innuendo the plaintiff attaches to various truthful statements is not "warranted, justified nor supported by the subject publications." Prelim. Objections ¶ 19. They also assert the plaintiff failed to allege the defendants intended to convey the false and defamatory meaning ascribed to the statements by the plaintiff. *Id*. at ¶ 21.

1. November 14 Article: "Probe of Erie debt collector widens"

Count I of the amended complaint alleges libel against the Times-News defendants and defendants Thompson and Palattella for a November 14, 2010 article that ran in both the print and online editions of the newspaper. Am. Compl. ¶¶ 137-44. This article was co-authored by Thompson and Palattella and was titled "Probe of Erie debt collector widens." *Id*. Ex. B. In relevant part, the article stated:

> The [Unicredit] business may now be shuttered, but the scrutiny of its practices might only be starting.
>
> Federal agents, Dunlavey and even one of Unicredit's former clients have taken notice of the information surfacing in the case, which, according to what Dunlavey said in court, could include a look at the practices in the office of Erie 6th Ward District Judge Dominick DiPaolo.
>
> **Feds interested?**
>
> FBI Special Agent Gerald Clark and Assistant U.S. Attorney Marshall Piccinini, who heads the U.S. Attorney's Office in Erie, attended the last hearing for Unicredit on Wednesday. They sat quietly in the back of the courtroom, left quickly at the conclusion of the hearing and declined to comment.
>
> . . . .
>
> **Judge cites rule violations**
>
> From the bench on Wednesday, Judge Dunlavey cited multiple rules and procedures he believes Unicredit's practices violated.
>
> . . . .
>
> Dunlavey said his review showed Unicredit was filing legal judgments against debtors in the improper venues. Many were filed at District Judge DiPaolo's office . . . , which is in the same office complex as Unicredit . . . , and near the company's "debt resolution center" . . . , at which the state Attorney General's Office charges depositions were taken in a "mock courtroom."
>
> . . . .
>
> Dunlavey said rules governing district judges required that

> judgments be filed in the debtor's district court or where the debt was incurred.
>
> He also said many cases were improperly captioned, with the original creditor not appearing on the notices being sent to the debtors.
>
> In some cases, it appeared assignment of the debt from one party to Unicredit were not filed, he said.
>
> The chief counsel of the state Supreme Court's Judicial Conduct Board, Joseph J. Massa Jr., declined to comment on whether violations cited by Dunlavey would be investigated.
>
> According to the Judicial Conduct Board website, such concerns would be a matter within the board's jurisdiction.
>
> DiPaolo has not responded to requests for comment.

Id.

a. Magisterial District Judge DiPaolo's Allegations

The amended complaint alleges that this November 14 article portrayed the plaintiff in an "inaccurate and harmful light" by "assert[ing] or impl[ying] that Judge Dunlavey suggested that Judge DiPaolo was a target of multiple investigations." Am. Compl. ¶ 60. It appears from the plaintiff's brief that his position centers on two primary concerns. First, the plaintiff argues the following statement from the article is false:

> Federal agents, Dunlavey and even one of Unicredit's former clients have taken notice of the information surfacing in the case which, according to what Dunlavey said in court, could include a look at the practices in the office of Erie 6th Ward District Judge Dominick DiPaolo.

Br. in Opp'n to Prelim. Objections 14. The plaintiff maintains Judge Dunlavey never said anything about anyone taking "a look at the practices" in Magisterial District Judge DiPaolo's courtroom. *Id* at 14-15.

The second concern of the plaintiff, which is related to the first, as best as can be discerned from the brief, is that the article suggests Judge Dunlavey was seeking an investigation of the plaintiff by the Judicial Conduct Board and Dunlavey was blaming Judge DiPaolo for various procedural rules violations. *Id*. at 15-16. Specifically, Judge DiPaolo references the following portion of the article:

> Dunlavey said rules governing district judges required that judgments be filed in the debtor's district court or where the debt was incurred.
>
> He also said many cases were improperly captioned, with the original creditor not appearing on the notices being sent to the debtors.
>
> In some cases, it appeared assignment of the debt from one

> party to Unicredit were not filed, he said.
>
> The chief counsel of the state Supreme Court's Judicial Conduct Board, Joseph J. Massa Jr., declined to comment on whether violations cited by Dunlavey would be investigated.
>
> According to the Judicial Conduct Board website, such concerns would be a matter within the board's jurisdiction.
>
> DiPaolo has not responded to requests for comment.

Id. at 16. According to the plaintiff, these statements, when coupled with the headline "Judge cites rules violations," lead to the inference that Judge Dunlavey was blaming Magisterial District Judge DiPaolo for the rules violations. *Id*.

Judge DiPaolo also averred that the article was published with actual malice because it was published with the knowledge that it was false or with reckless disregard as to whether it was false. In his amended complaint, he goes on to list a number of factual allegations in support of this position. See Am. Compl. ¶ 142.

b. Discussion

Accepting as true all of the plaintiff's well-pled facts, the court concludes he has stated a claim for libel with regard to the November 14 article. Although the amended complaint includes multiple recitations of fact with regard to the content of the article, Magisterial District Judge DiPaolo makes it clear in his brief that his position is not dependant on the existence of defamatory innuendo but rather arises from his assertion of a materially false statement. See Br. in Opp'n to Prelim. Objections 14. The statement at issue, with the allegedly false content highlighted, is set forth as follows:

> Federal agents, Dunlavey and even one of Unicredit's former clients have taken notice of the information surfacing in the case which, **according to what Dunlavey said in court, could include a look at the practices in the office of Erie 6th Ward District Judge Dominick DiPaolo.**

Id. (emphasis added). According to the plaintiff's brief, "[t]his statement is literally false. There is no innuendo - it plainly states that a respect local jurist, Judge Dunlavey, said something that he did not say: that Judge DiPaolo's practices could be the subject of the ongoing Unicredit investigation." *Id*. The plaintiff then goes on to point to other aspects of the article that provide context for his conclusion.

A significant portion of the transcript of the November 10 hearing conducted by Judge Dunlavey is included in the amended complaint. *See* Am. Compl. ¶ 47. The transcript does not contain any direct statements by Judge Dunlavey to the effect that there could be further efforts to look at the practices of Judge DiPaolo's office. The question is whether the

alleged statement in the article is capable of defamatory meaning.

It is the role of the court to determine whether the words of the statements at issue are capable of a defamatory meaning. *Tucker v. Phila. Daily News*, 848 A.2d 113, 123-24 (Pa. 2004). As noted above, the trial court must decide whether it can reasonably be construed to have the libelous meaning ascribed to it by the plaintiff. *Zartman v. Lehigh County Humane Soc.*, 482 A.2d 266, 269 (Pa. Super. 1984). "A publication is defamatory if it tends to blacken a person's reputation or expose him to public hatred, contempt, or ridicule, or injure him in his business or profession." *Agriss v. Roadway Express, Inc.*, 483 A.2d 456, 461 (Pa. Super. 1984) (internal citations omitted). The court must "consider whether the statement tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third parties from associating or dealing with him." *Tucker*, 848 A.2d at 124 (internal quotations omitted) (quoting *Birl v. Phila. Elec. Co.*, 167 A.2d 472, 475 (Pa. 1960)).

To the extent the plaintiff's claim is based on the existence of a material falsity, Magisterial District Judge DiPaolo has set forth a claim for defamation. When considered in the context of the entire article and given the limited standard of review applicable at the pleading stage of the case, it must be concluded the allegedly false statement is capable of a defamatory meaning. While the plaintiff has pled few facts concerning the impact of the statement on his reputation, given the early nature of the proceedings, the averments are minimally sufficient to allow the case to proceed. *See id*. at 126.

Although the plaintiff's brief seems to indicate otherwise, the allegations in the amended complaint concerning the November 14 article can be construed as attempting to set forth a claim based on defamation by innuendo. Specifically, the plaintiff alleges the article contains other statements implying the possibility of a further review of the practices of the plaintiff's office. Am. Compl. ¶¶ 62, 63, 137(b). In that regard, the plaintiff points out the authors noted an Assistant U.S. Attorney and an FBI agent were present and observed the hearing before Judge Dunlavey. *Id*. at ¶ 63. This assertion has not been challenged as untruthful. And the plain and reasonable inference of their attendance, in the circumstances presented, is that they are conducting or may be considering conducting an investigation into the Unicredit case, which would obviously include a review of the legal process that preceded Unicredit's deceptive collection practices. Therefore, Judge DiPaolo has not sufficiently pled an action in libel based on a defamatory innuendo arising out of the presence of federal law enforcement officials at the hearing.

In addition, the truthfulness of the following statements contained in the November 14 article has not been challenged by the plaintiff:

> The chief counsel of the state Supreme Court's Judicial Conduct Board, Joseph J. Massa Jr., declined to comment on whether violations cited by Dunlavey would be investigated.
>
> According to the Judicial Conduct Board website, such concerns would be a matter within the board's jurisdiction.

Id. at ¶ 65. It does appear the plaintiff suggests the mere mention of the Judicial Conduct Board in the manner chosen by the authors gives rise to an unfair inference that such an inquiry will occur. However, when viewed in the context of Judge Dunlavey's other observations at the November 10 hearing, it is apparent such a conclusion is not warranted.

Judge Dunlavey's statements give rise to his obvious concern that there were significant rule violations that facilitated Unicredit's efforts to deceive debtors. Moreover, his comments at the hearing concerning the court's responsibility to assure adherence to the rule of law in all judicial proceedings were also accurately referenced in the article at issue. When the statements concerning the Judicial Conduct Board's jurisdiction are seen in the context of the entire piece, it is apparent the inference that a Board inquiry is possible is fair and reasonable, although there is nothing in the article to imply it was likely. See *Kurowski,* 994 A.2d at 617 (noting that statements must be viewed as a whole and in the context of the other words in the publication). A cause of action in libel has not been sufficiently pled by the plaintiff on the basis that Judge DiPaolo was defamed by an innuendo resulting from the defendants' statements noting that the Judicial Conduct Board has authority over the matters raised by Judge Dunlavey.

Because the plaintiff is a public figure, he must demonstrate the article was published with actual malice. *Weaver,* 926 A.2d at 903. The burden of proving actual malice is a heavy one and requires more than a showing of negligence, carelessness or bad judgment in the publication of an allegedly defamatory article. *Dunlap v. Phila. Newspapers, Inc.*, 448 A.2d 6, 16 (Pa. Super. 1982). Ultimately, the plaintiff must meet his burden by presenting to the jury clear and convincing evidence that the defendants realized their statements were false or that they actually entertained serious doubt as to the truth of the statements. *Oweida v. Tribune-Review Publ'g Co.*, 599 A.2d 230, 242 (Pa. Super. 1991) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 n.30 (1984)). Thus, while actual malice may be shown by circumstantial evidence of events surrounding the publication of the offending statement, such evidence must tend to establish fabrication, or at least that the publisher had obvious reasons to doubt the veracity of the informant or the veracity of his reports. *Lewis v. Phila. Newspapers, Inc.*, 833 A.2d 185, 192 (Pa. Super. 2003) (internal citations and quotations omitted).

Notwithstanding the stringent standards for proving actual malice, the court finds the allegations of fact when accepted as true are sufficient to

meet the minimum threshold pleading requirements. The facts recited in the amended complaint, although circumstantial in nature, would, if believed by the jury, be sufficient to conclude the defendants knew Judge Dunlavey did not say the practices of Magisterial District Judge DiPaolo may be looked at. See, e.g., Am. Compl. ¶ 142.

2. November 28 article: "Legal ruling questioned"; "Unicredit lawyer: Debt collector, judge not involved with kickback"

Count II of the amended complaint alleges libel against the Times-News defendants[2] and defendants Thompson and Palattella[3] for a November 28, 2010 article which ran in both the print and online editions of the newspaper. Am. Compl. ¶ 147. The article was written after Krista Ott, Unicredit's attorney, filed a motion for reconsideration and for post trial relief asking Judge Dunlavey to reconsider the injunction imposed in the November 10 hearing that forced Unicredit to immediately cease all collection practices. *Id*. ¶ 76. The motion contained attorney Ott's statement that, "[b]ased upon the record, . . . it appears that the court believes that there is a kickback scheme involving Unicredit and Magisterial District Justice DiPaolo's office." Defs.' App. in Supp of Prelim. Objections Ex. 4, ¶ 8. The November 28 article was titled "Legal ruling questioned," and had a subtitle "Unicredit lawyer: Debt collector, judge not involved with kickback." Am. Compl. Ex. C. Excerpted in relevant part, the article reads as follows:

> Dunlavey said it appeared Unicredit established a "ghost system of justice" by first obtaining judgments against debtors in the wrong venue - mainly Erie 6th Ward District Judge Dominick DiPaolo's office - and then using those judgments and sham court proceedings in Unicredit's offices to extracts payments from debtors.
>
> . . . .
>
> But in a newly filed response, Unicredit's lawyer, Krista Ott, charges that Dunlavey, without supporting evidence, appears to believe "there is a kickback scheme involving Unicredit and

[2] Though the ad damnum clause of this count does not request damages against Cyberink, L.P., the court notes that count II's heading includes Cyberink, L.P. as a defendant for this count. Thus, because the heading gives notice that the plaintiff is including Cyberink, L.P. as a defendant in this count, the plaintiff's failure to include Cyberink, L.P. in the ad damnum clause is not fatal to this count as against Cyberink, L.P. To hold otherwise would be to elevate form over substance, and the court notes that the Rules of Civil Procedure require the rules "be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties." Pa.R.C.P. No. 126.

[3] The court notes that paragraph 81 of the amended complaint alleges Thompson wrote this article. In paragraph 147, however, the amended complaint alleges both Thompson and Palattella wrote the article. The attached exhibit shows only Thompson as the author of the November 28 print article.

> Magisterial District Justice DiPaolo's office."
>
> Ott said there is no evidence to support that allegation and that the "basis apparently stems from the Court's personal belief and predetermined opinions about this case."
>
> . . . .
>
> He said it appeared that Unicredit had "abused the legal process with the creation of a ghost system of justice."

Id.[4]

a. Magisterial District Judge DiPaolo's allegations

Judge DiPaolo alleges this article, as well as subsequent republications of statements it contained, was defamatory because it harmed the reputation of Judge DiPaolo by stating or suggesting:

a. Judge Dunlavey had issued a legal ruling finding that Judge DiPaolo was involved in a kickback scheme with Unicredit;
b. Judge Dunlavey had said or suggested th[at] Judge DiPaolo was involved in Unicredit's "ghost system of justice;" and
c. Judge DiPaolo actually was involved in a kickback scheme with Unicredit.

Am. Compl. ¶ 148.

Specifically, Judge DiPaolo alleges the combination of the headline of the article and the republication of attorney Ott's statement that "there is a kickback scheme involving Unicredit and Magisterial District Judge DiPaolo's office" was defamatory. *Id*. ¶ 90. Judge DiPaolo also maintains it was defamatory to suggest Judge Dunlavey stated the "ghost system of justice" began with the obtaining of judgments against debtors in the wrong venue, i.e., Magisterial District Judge DiPaolo's office. *Id*. ¶ 88.

Judge DiPaolo also averred the article was published with actual malice in that the article was published with knowledge that it was false or with reckless disregard as to whether it was false. In his amended complaint, he goes on to list a number of factual allegations in support of this position. *See* id. ¶ 151.

b. Discussion

It appears from the plaintiff's brief that he agrees most of the statements at issue are in fact true. Br. in Opp'n to Prelim. Objections 17-18. In particular, he notes that attorney Ott filed a pleading in which she stated it appears Judge Dunlavey believes her client and Magisterial District Judge DiPaolo were involved in a kickback scheme. *Id*. at 17. The plaintiff also acknowledges that, in court, attorney Ott denied such

[4] Additionally, the amended complaint alleges "the 'ghost system of justice' quote was subsequently republished in articles dated December 12, 2010, December 21, 2010, December 22, 2010 and February 9, 2011 in articles written by both Thompson and Palattella, and was defamatory in each of those subsequent articles." Am. Compl. ¶ 147.

a scheme existed and therefore her statement as reported as the article's subtitle was true. *Id*.

The plaintiff does take issue with the accuracy of the following statement:

> Dunlavey said it appeared Unicredit established a "ghost system of justice" by first obtaining judgments against debtors in the wrong venue - mainly Erie 6th Ward District Judge Dominick DiPaolo's office - and then using those judgments and sham court proceedings in Unicredit's offices to extracts payments from debtors.

Id. at 18. Judge DiPaolo asserts in his amended complaint that the statement represents an inaccurate paraphrase of what Judge Dunlavey said at the hearing. *Id*. at 19. It is his position Judge Dunlavey never said the "ghost system of justice" he referenced began with the obtaining of judgments in the wrong venue of Magisterial District Judge DiPaolo's office. *Id*. Specifically, Judge DiPaolo maintains the statements at issue lead to the inference that Judge Dunlavey ruled "Unicredit and DiPaolo were involved in a kickback that was part of what Judge Dunlavey termed a 'ghost system of justice.'" *Id*.

To the extent it is the plaintiff's position that Judge Dunlavey never said the "ghost system of justice" began with the filing of judgments in the wrong venue, he has stated a cause of action in libel. The suggested inference that Judge DiPaolo was, together with Unicredit, a part of an abuse of the legal process that facilitated the deception of debtors is reasonable and capable of defamatory meaning.

On the other hand, besides the accurate republication of attorney Ott's statement, there is nothing in the article to suggest Judge Dunlavey "ruled" Judge DiPaolo was part of a kickback scheme. Such a conclusion is strained and therefore not a reasonable conclusion and as a matter of law not actionable. The only other reference to a "kickback" was in comments Judge Dunlavey made at a November 10 hearing about Common Pleas judges in another county, which were accurately reported by the defendants, and the article made no effort to relate that report to the plaintiff.

It is noteworthy that, once again, the plaintiff has pled very little concerning the impact of the statements and their inferences on his reputation. Nonetheless, at this early stage of the proceedings, the full effects of the statements are not known, and the case should be allowed to proceed as set forth above. *See Tucker,* 848 A.2d at 126.

With regard to the defendants' demurrer on the basis of insufficient facts supporting a finding of actual malice, the court finds, for similar reasons to those set forth above regarding the November 14 article, the plaintiff has pled sufficient facts to allow his claim to go forward. See Am. Compl. ¶151.

3. April 16 and 17 Articles and Blogs[5]

Count III of the amended complaint alleges libel against the Times-News defendants and defendants Thompson, Palattella, and Maciag for a series of articles and blogs published April 16 and 17, 2011. Maciag wrote the blog which appeared in GoErie.com on April 16, 2011, and Thompson and Palattella wrote the April 17, 2011 "Times In-Depth" article which ran in both the print and online editions.[6] See Am. Compl. Exs. D, E, G.

a. April 16 blog: "Dockets filed by Judge DiPaolo missing original creditor"

In the online blog, titled "Dockets filed by Judge DiPaolo missing original creditor," Maciag wrote:

> We reviewed hundreds of cases for Sunday's [April 17] story on Unicredit and Erie 6th Ward District Judge Dominick DiPaolo.
>
> While looking at the court dockets, we noticed that DiPaolo did not list the name and address of original creditors on nearly all of 394 judgments he issued.
>
> This makes it unclear whether the creditor lived within DiPaolo's ward.
>
> Here's a further explanation from reporter Ed Palattella:
>
> > Each of Erie County's 15 district judges handled judgments involving Erie debt collector Unicredit America Inc., according to records filed in Erie County Court. Those records show Erie 6th Ward District Judge Dominick DiPaolo handled the most cases, and that the records filed in his office rarely listed the original creditors.
> >
> > The records filed with the county's other district judges routinely listed the names of the original creditors. The records were filed at the Erie County Courthouse between April 1, 2009 and Oct. 28, or the general time frame covered in a suit the state Attorney General's Office filed against Unicredit on Oct. 28.
>
> Below is an example of two dockets on file at the Erie County Courthouse. The first docket, issued by DiPaolo, lists Unicredit as the plaintiff.
>
> On the next page, you'll see that District Judge Brenda

[5] The plaintiff contends these next articles and blogs were written as a series, and the court will therefore consider them as such.

[6] The court notes that Thompson and Palattella were billed as co-authors of the article in the print edition, but only Thompson was listed as the author of the article in the online edition. *See* Am. Compl. Exs. D, E.

> Nichols, of Corry, lists a creditor as the plaintiff, though Unicredit brought the case before her on the creditor's behalf. Nichols and Erie County's other district judges routinely listed the creditor this way, while DiPaolo did not for most cases.

Am. Compl. Ex. G. The blog contained hyperlinks to PDF images of the two judgments referenced in the blog.

It is DiPaolo's position the blog piece, when viewed in the context of the other April publications, defamed him by creating a false inference that he improperly carried out his duties with regard to Unicredit's cases due to a familial relationship with a Unicredit principle. Br. in Opp'n to Prelim. Objections 21. Specifically, he maintains the assertions that he handled these cases differently in various ways from other district judges are false. Am. Compl. ¶ 157(d). Further, Judge DiPaolo alleges when read together with the April 17 article concerning his handling of cases of relatives, the defamatory meaning is "more insidious." Br. in Opp'n to Prelim. Objections 21.

b. April 17 "Times In-Depth" article: "Judge's cases from outside district"

The April 17 piece was a long and involved article setting forth the results of what apparently was an investigation of certain procedural practices of Magisterial District Judge DiPaolo's office as they were, applied to the handling of Unicredit's debt collection cases. *See* Am. Compl. Exs. D, E. Thompson and Palattella included examples of particular cases that involved Unicredit and were filed and adjudicated in some manner in the plaintiff's office. *Id*. at Exs. D, E. They also explained, how the debt collection system works, compared the practices of DiPaolo's office with those of a number of magisterial district judges throughout Erie County, and provided a statistical breakdown of Unicredit's cases. *Id*. at Exs. D, E. The authors also presented very specific information about the nature of the familial relationship between the plaintiff and the principles of Unicredit and provided a graphic to help explain it. *Id*. at Ex. E. Further information was presented with regard to the Pennsylvania rules for magisterial district judges as they applied to the handling of cases involving relatives. *Id*. at Exs. D, E.

The following excerpts are from the April 17 "Times In-Depth" article:

> In many of the Unicredit cases DiPaolo handled, both the debtors and creditors were not located in the ward of DiPaolo, who is related to Unicredit's president and his family.
>
> DiPaolo's handling of Unicredit cases, in which the debtor, or debtor and creditor, were outside his ward, runs counter to the practices of several of the county's other 14 district judges, according to court records and interviews.
>
> . . . .

The records show Unicredit sought 394 judgments - or 68 percent of the total number - in DiPaolo's court. In 355 of those 394 cases, debtors lived outside DiPaolo's ward, which covers the southwestern section of the city of Erie and includes Unicredit's offices. In the other 39 of the 394 cases, the debtors lived inside DiPaolo's ward.

. . . .

Family connections

DiPaolo shares family ties with Unicredit and rents office space with a family affiliated with Unicredit, according to court records and other public information.

DiPaolo is the first cousin once removed of Michael J. Covatto, 49, the president of Unicredit, who routinely signed documents Unicredit initially filed at DiPaolo's office.

The rules dictate a district judge must disqualify him- or herself from any proceeding "in which their impartiality might reasonably be questioned."

. . . .

Comparing the numbers

How Unicredit obtained the judgments from DiPaolo varied from typical practices as described by other local district judges. Of the total of 578 Unicredit cases filed countywide, DiPaolo handled 394 and the other district judges handled the rest, or 184. The county has 15 district judges, six of whom are in the city.

In all but a handful of the 184 cases that originated in courts other than DiPaolo's, the debtors or creditors lived in the district judge's district, according to court records.

. . . .

What other magistrates do

Erie 5th Ward District Judge Joseph Lefaiver, at 460 E. 26th St., said he gets frequent calls from lawyers in Pittsburgh or Philadelphia who represent debt-collection companies in those areas. They want to sue someone in Erie for an unpaid debt, Lefaiver said, and they want to know whether the debtor's address is in Lefaiver's ward or elsewhere in the, city.

"They file where the debtor lives," he said.

. . . .

Mack, the 1st Ward district judge, described a similar approach in her court at 824 E. Sixth St. If a person comes in to file a civil complaint, the staff shows a card that outlines the criteria for filing a complaint in a district court: The individual the person wants to sue must live or work in Mack's district or the incident in question must have occurred in the district.

> . . . .
>
> Greene Township District Judge Sue Strohmeyer said her staff also starts by asking those who wish to file a civil complaint a question. "Did it happen in the district or does the defendant live here?"
>
> . . . .
>
> Millcreek Township District Judge Paul Manzi said his staff also questions potential plaintiffs to see if their cases belong in his court.

Id. at Exs. D, E. Though the body of the article was the same in both print and online editions, the online edition had a different headline than the print edition, and the print edition additionally had different headlines on each page. *Id*. at ¶ 96. The headline of the article on GoErie.com was "In Unicredit debt-collection cases, one Erie magistrate was busiest." *Id*. at Ex. D. The main headline of the article in the Erie Times News was "Judge's cases from outside the district;" the article continued on page 6A, which had the headline "Unicredit: DiPaolo handled most cases;" and, finally, page 7A's headline was "Judge: DiPaulo [sic] takes relative's cases." *Id*. at Ex. E.

c. Magisterial District Judge DiPaolo's allegations

The amended complaint alleges that this series of publications harmed Judge DiPaolo's reputation by making false assertions to the effect that he allowed or followed improper practices and gave special treatment to Unicredit cases because of his kinship relationship with one of the officers of the corporation.[7] *Id*. at ¶157(a)-(c), (g). He maintains these articles were published with actual malice in that the defendants published the article with knowledge that it was false or with reckless disregard of whether it was false and recites a number of factual statements to support this claim. *Id*. at ¶159.

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[7] The amended complaint alleges the following "untruths":

a. That Judge DiPaolo had intentionally captioned those Unicredit cases that he heard to conceal that the creditors and/or debtors in those cases were out of his jurisdiction;
b. That Judge DiPaolo improperly heard cases in which his relatives were a party;
c. That Judge DiP aolo had extended judicial favors to Unicredit based on an attenuated familiar relationship;
d. That Judge DiPaolo applied practices in his office that differed from other Magisterial District Judges in an improper effort to help Unicredit;
e. That a Judge had stated that "DiPaolo takes relatives [sic] cases;"
f. That a Judge or the Attorney General had called Judge DiPaolo's practices "unconscionable;" and
g. That Judge DiPaolo had knowledge of a jurisdictional deficit in the Unicredit related cases filed in his office, that he had a duty to raise that jurisdictional deficit, and that he did not do so because he was related to one of Unicredit's principals.

Am. Compl. ¶ 157.

d. Discussion

It is the plaintiff's position that the April publications convey a defamatory meaning by giving rise to several false inferences. Br. in Opp'n to Prelim. Objections 20-21. He does not claim any of the verbatim statements contained in the article or blogs were materially false. Instead, the plaintiff is maintaining that although Unicredit's practices attendant to the filing of debt collection cases in his jurisdiction may have been improper, the suggestion he personally did anything wrong is false. *Id*. Furthermore, the fact that he had some family connection to an officer of Unicredit does not mean he treated Unicredit cases improperly. *Id*. Finally, it is the plaintiff's position that his actions were not in violation of the rules of procedure and did not differ from those of other magisterial district judges in Erie County. Am. Compl. at ¶ 157.

The issue is whether the publications, although containing true statements, led to inferences which are false and capable of defamatory meaning. "The test to be applied in evaluating any statement is the effect the article is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate." *Baker v. Lafayette Coll.*, 532 A.2d 399, 402 (Pa. 1987) (internal quotations omitted) (quoting *Corabi v. Curtis Pub'g Co.*, 273 A.2d 899, 907 (Pa. 1971)). Accepting as true the plaintiff's factual assertions, it is apparent his overall position is the defendants intended to convey the impression that, because of a family connection, Magisterial District Judge DiPaolo intentionally allowed Unicredit to improperly file and process debt collection cases in his office. There can be little doubt such an impression is a reasonable conclusion which could be drawn by the defendants' readers, who likely represent a cross-section of general public in northwest Pennsylvania. Such an allegation would certainly be more than an embarrassment to the plaintiff and would likely diminish the community's view of his integrity and judgment. *See Tucker*, 848 A.2d at 124.

Similarly, the court concludes, for similar reasons as those set forth above, the plaintiff's allegations of fact with regard to the assertion of actual malice are sufficient to support his claim of defamation. See Am. Compl. ¶ 159.

B. Demurrer to All Counts: Fair Report Privilege

The defendants' second preliminary objection argues these publications are protected by the fair report privilege. Prelim. Objections ¶ 22. The fair report privilege grants "media defendants . . . qualified immunity from defamation liability when they report on official governmental proceedings." *Weber v. Lancaster Newspapers, Inc.*, 878 A.2d 63, 72 (Pa. Super. 2005).

> No responsibility attaches so long as the account of the official action or proceeding is fair, accurate and complete, and is not published solely for the purpose of causing harm to the person defamed. However, this qualified immunity is forfeited if the publisher steps out of the scope of the privilege or abuses the occasion. This can be done by exaggerated additions, or embellishments to the account.

DeMary v. Latrobe Printing & Publ'g Co., 762 A.2d 758, 762 (Pa. Super. 2000) (internal citations and quotations omitted). The court determines whether the fair report privilege applies to a case, but the jury decides whether the fair report privilege has been abused. *First Lehigh Bank v. Cowen*, 700 A.2d 498, 503 (Pa. Super. 1997).

Generally, the fair report privilege "is an affirmative defense which may not be decided on preliminary objections." *DeMary*, 762 A.2d at 761 (quoting *Gordon v. Lancaster Osteopathic Hosp. Ass'n Inc.*, 489 A.2d 1364, 1376 (Pa. Super. 1985)). However, the plaintiff's failure to file preliminary objections to the defendants' preliminary objections waives this procedural defect, thereby enabling the court to rule "on whether the affirmative defense defeats the claim against which the defense has been invoked." *Id.* at 762. The court is still bound, however, by the standard of review applicable to preliminary objections, i.e., the court is "compelled to review the averments in the [plaintiff's] complaint solely for legal sufficiency of the claims asserted, accepting as true all well pled averments of fact." *Id.*

Initially, the court finds the fair report privilege would apply to those aspects of the publications which are reports of the court proceedings or official government actions at issue in this case. The defendants were reporting generally on the Attorney General's case against Unicredit, the November 10, 2010 hearing in front of Judge Dunlavey, and Unicredit's motion for reconsideration. These situations clearly fall within the "official action or proceeding" contemplated by the fair report privilege.

Having determined the fair report privilege applies to the publications of the defendants, the court is mindful of the fact that it may not itself decide whether the privilege has been abused. The court may only consider whether the facts pled by the plaintiff, if true, would be sufficient to allow a jury to conclude the fair report privilege had been abused.

The plaintiff alleges the defendants abused the fair report privilege in the November 14 article by "attribut[ing] a statement to Judge Dunlavey (that the investigation could include a look into the practices of Judge PiPaolo) that Judge Dunlavey never said" and by "providing additional sting" when it mentioned the Judicial Conduct Board, which Judge Dunlavey never referenced "in any context." Br. in Opp'n to Prelim. Objections 23; Am. Compl. ¶¶ 73, 141. With regard to the

November 28 article, the plaintiff alleges the fair report privilege was abused "by misquoting or mischaracterizing both the November 10, 2010 Order and the Motion for Reconsideration and adding additional sting to the report of the judicial proceedings" because the article suggested "that the existence of a 'kickback scheme' was not Ott's own frivolous legal argument, but instead that it was the 'legal ruling' or belief of Judge Dunlavey." Am. Compl. ¶¶ 90, 150. As for the April series of publications, the plaintiff alleges the fair report privilege was abused because the defendants "misquot[ed] or mischaraceriz[ed] the pleadings and publics records" in order to "suggest that public records support a finding that DiPaolo was responsible for improperly captioning cases so that he could improperly enter judgment in favor of Unicredit." Br. in Opp'n to Prelim. Objections 24; Am. Compl. ¶ 158. The court finds that these allegations, if true, would allow a jury to determine the defendants had put an inaccurate, exaggerated spin on the plaintiff's involvement in the Unicredit case such that the fair report privilege had been abused.

C. Demurrer to All Counts: Punitive Damages

The defendants' third preliminary objection argues the plaintiff cannot recover punitive damages because he cannot demonstrate common law malice. Prelim. Objections ¶ 28. In order for a public figure to recover punitive damages, both actual malice and common law malice[8] must be shown. *DeMary v. Latrobe Printing & Publ'g Co.*, 762 A.2d 758, 765 (Pa. Super. 2000). "Actual malice focuses on the defendant's attitude towards the truth, whereas common law malice focuses on a defendant's attitude towards the plaintiff." *Id.* at 764. Common law malice "involves conduct that is outrageous (because of the defendant's evil motive or his reckless indifference to the rights of others), and is malicious, wanton, reckless, willful, or oppressive." *Sprague v. Walter*, 656 A.2d 890, 922 (Pa. Super. 1995). The court's focus in this inquiry must be "on the defendant's disposition toward the plaintiff at the time of the wrongful act." *Id.*

In addition to alleging specific facts relating to Palattella's evil motive towards Judge DiPaolo, the plaintiff also alleges the defendants knew the defamatory statements they were publishing about him were untrue. *See* Am. Compl. ¶¶ 122-35, 142(g), 151(g), 159(i). Further, the plaintiff argues the April series, which contained "mostly old news," was "published within a month before the primary elections[ ] in which Judge DiPaolo was running for reelection," leading to the inference the defendants were attempting to keep Judge DiPaolo from being reelected. Br. in Opp'n to Prelim. Objections 24-25; Am. Compl. ¶ 95. If proven,

[8] It is worth noting that the existence of common law malice also defeats the fair report privilege. *DeMary v. Latrobe Printing & Publ'g Co.*, 762 A.2d 758, 764-65 (Pa. Super. 2000).

the facts alleged in the amended complaint attributable to defamation claims are adequate to support a finding of common malice.

An appropriate Order shall follow.

ORDER

AND NOW, TO-WIT, this 23rd day of July, 2012, for the reasons set forth in the foregoing **OPINION**, it is hereby **ORDERED, ADJUDGED, and DECREED** that Defendants' Preliminary Objections to Amended Complaint are **OVERRULED.**

/s/ **John Bozza, Judge**

ROBERT J. CUMMINS, d/b/a BOB CUMMINS CONSTRUCTION CO., Plaintiff

v.

KAPPE ASSOCIATES, INC., SPENCER TURBINE, INC., PAUL A. LOGAN, ESQUIRE, and POWELL, TRACHTMAN, LOGAN, CARRIE, BOWMAN & LOBARDO, Defendants

CIVIL PROCEDURE / PRELIMINARY OBJECTIONS

Courts will take judicial notice of public statutes and thus such laws need not be specifically pleading provided sufficient facts are alleged to bring the case within the statute in question.

CIVIL PROCEDURE / PRELIMINARY OBJECTIONS

Pa.R.C.P. 1019 requires that the material facts on which a cause of action or defense is based shall be stated in a concise and summary form. Allegations in a complaint will satisfy this rule if they (1) contain averments of all the facts the pleader will eventually have to prove in order to recover and (2) they are sufficiently specific so as to enable the defendant to prepare his/her defense.

CIVIL PROCEDURE / PRELIMINARY OBJECTIONS

The question presented by a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Only factual allegations are to be considered true for purposes of a demurrer, not conclusions of law. The only time a demurrer should be sustained is when the plaintiff has clearly failed to state a claim upon which relief may be granted. If there is any doubt as to the adequacy of the complaint, a demurrer should not be sustained.

CIVIL PROCEDURE / PLEADINGS / WRONGFUL USE OF CIVIL PROCEEDINGS

Wrongful use of civil proceedings and malicious prosecution are often used interchangeably in Pennsylvania

CIVIL PROCEDURE / PLEADINGS / WRONGFUL USE OF CIVIL PROCEEDINGS

A cause of action for wrongful use of civil proceedings governed by the Dragonetti Act, 42 Pa.C.S.A. 8351 et seq., requires a plaintiff to allege and prove that (1) the defendant has procured, initiated or continued civil proceedings against him; (2) the proceedings were terminated in his favor; (3) the defendant did not have probable cause for his action; (4) the primary purpose for which the proceedings were brought was not that of securing proper discovery, joinder of parties or adjudication of the claim on which the proceedings were based; and (5) the plaintiff has suffered damages.

CIVIL PROCEDURE / PLEADINGS / WRONGFUL USE OF CIVIL PROCEEDINGS / PROBABLE CAUSE

Probable cause is only a question of law for the Court to decide if the Court can determine whether probable cause exists under an admitted or clearly established state of facts. If facts material to the issue of probable cause are in controversy, the existence of probable cause may be submitted to the jury.

CIVIL PROCEDURE / PLEADINGS / WRONGFUL USE OF CIVIL PROCEEDINGS / PROBABLE CAUSE

A person who takes part in the procurement, initiation or continuation of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of facts upon which the claim is based and either (1) reasonably believes that under those facts the claim may be valid under the exiting or developing law; (2) believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information; or (3) believes as an attorney of record, in good faith that his procurement, initiation or continuation of a civil cause is not intended to merely harass or maliciously injure the opposite party.

CIVIL PROCEDURE / WRONGFUL USE OF CIVIL PROCEEDINGS / DAMAGES

The Dragonetti Act provides that a plaintiff is entitled to recover for (1) the harm normally resulting from any arrest or imprisonment, or any dispossession or interference with the advantageous use of his land, chattels or other things, suffered by him during the course of the proceedings; (2) the harm to his reputation by any defamatory matter alleged as the basis of the proceedings; (3) the expense, including any reasonable attorney fees, that he has reasonably incurred in defending himself against the proceedings; (4) any specific pecuniary loss that has resulted from the proceedings; (5) any emotional distress that is caused by the proceedings; and (6) punitive damages according to law in appropriate cases

DAMAGES / PUNITIVE DAMAGES

Whether a defendant's actions arise to outrageous conduct lies within the sound discretion of the fact-finder.

DAMAGES / PLEADING

Damages are either general or specific. General damages are those that are the usual and ordinary consequence of the wrong done. Special damages are those that are not the usual and ordinary consequence of the wrong done but which depend on special circumstances. General damages may be proven without specifically pleading then; however, special damages may not be proved unless special facts giving rise to them are averred.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 10454 - 2007

Appearances: Gregory A. Henry, Esq., Attorney for Plaintiff
Todd B. Narvol, Esq., and Jason C. Giurintano, Esq., Attorneys for Defendant Kappe Associates, Inc.
John B. Fessler, Esq., Attorney for Defendant Spencer Turbine, Inc.
Dennis J. Roman, Esq., and Charlene S. Seibert, Esq., Attorneys for Defendants Logan and Powell, Trachtman, Logan, Carrie, Bowman & Lombardo

OPINION

Connelly, J. January 23, 2012

This matter is before the Court pursuant to Preliminary Objections filed by Defendant Kappe Associates, Inc. (hereinafter "Defendant Kappe"), Defendant Spencer Turbine, Inc. (hereinafter "Defendant Spencer"), and Defendants Logan and Powell, Trachtman, Logan, Carrie, Bowman & Lobardo (hereinafter "Defendants Logan and Powell"). Robert J. Cummins d/b/a Bob Cummins Construction Co. (hereinafter "Plaintiff") opposes.

Procedural History/Statement of Facts

On February 2, 2007, Plaintiff commenced this action by filing a praecipe for writ of summons against Defendants. Plaintiff filed his Complaint on April 1, 2011 alleging Wrongful Use of Civil Proceedings. Plaintiff alleges the underlying action was filed in the federal district court in Erie, Pennsylvania[1] on June 27, 2002 by Defendants Kappe and Spencer against Plaintiff, Stewart Mechanical, Inc. (hereinafter "Stewart"), and the Smethport Borough Authority (hereinafter "the Authority"). *Complaint*, ¶ 7. Plaintiff alleges Defendants Logan and Powell were legal counsel for and represented Defendants Kappe and Spencer in the underlying action. *Id.*

The facts surrounding the underlying action are as follows. The Authority "hired [Plaintiff] as the general contractor for [a p]roject" expanding and improving the Authority's waste water treatment plant. *Kappe Associates v. Bob Cummins Construction et al.*, No. 1:02-cv-00204-MBC (Erie), p. 2 (W.D. Pa. Feb. 3, 2005). Plaintiff then "entered into a subcontract with [Stewart]," whereby Stewart would "provide and install specific waste water treatment equipment, along with startup services and warranties." *Id.* The contract between Plaintiff and Stewart

[1] The underlying action can be found at docket number 1:02-cv-00204-MBC (Erie) in the United States District Court for the Western District of Pennsylvania.

was for $628,190.00. *Id.* at p. 14.

Defendants Kappe and Spencer "agreed to provide Stewart with the necessary equipment and services the [p]roject required." *Id.* The underlying action alleged Defendants Kappe and Spencer only contracted with Stewart because Plaintiff assured Defendants Kappe and Spencer "that Stewart was creditworthy and that payment was guaranteed from either [Plaintiff or Stewart] to Kappe and Spencer." *Complaint, No. 1:02-cv-00204-MBC (Erie),* In ¶¶ 14-15 [hereinafter "Underlying Action Complaint"].

Thereafter, Defendants Kappe and Spencer delivered the products and invoiced Stewart for $85,000.00 and $56,000.00, respectively. *Kappe Associates,* No. 1:02-cv-00204-MBC (Erie), at p. 3. Defendant Kappe "received partial payment from Stewart in the amount of $40,221.00, leaving an outstanding balance of $46,932.00," which Stewart never paid. *Id.* With regard to Defendant Spencer's invoice, "Stewart sent Spencer a check in the amount of $53,500.00. This check was dishonored for insufficient funds." *Id.* Defendant Spencer never received any of the $56,000.00 owed to it by Stewart. *Id.* It is undisputed that Plaintiff "paid Stewart for most of the equipment and related services it purchased from Stewart," though Plaintiff "continue[d] to owe Stewart an unpaid balance of $11,566.29." *Id.*

When Defendants Kappe and Spencer were unable to collect from Stewart, Defendant Spencer sent a letter dated April 27, 2001 "notif[ying] both [Plaintiff and the Authority] that [Defendants Kappe and Spencer] had been unable to collect from Stewart on their invoices, and that they were seeking these funds from [Plaintiff] and the Authority." *Id.* In response, Plaintiff wrote the Authority a letter dated May 11, 2001 and copied Defendants Kappe and Spencer on the correspondence, explaining that the Procurement Code[2] "provided the Authority with an absolute defense and provided [Plaintiff] with a conditional defense to any contractual or quasi-contractual liability which could be asserted by Defendants Kappe and Spencer." *Complaint, ¶¶ 9, 12*. Specifically, the letter stated, "because neither the Borough of Smethport nor the [Authority] was in privity with [Defendant Spencer], neither entity can have any liability whatsoever to it," and "because [Plaintiff] paid Stewart

[2] Title 62 of the Pennsylvania Consolidated Statutes is referred to as the Procurement Code. *See 62 Pa. C.S. § 101* ("Short Title of part. This part shall be known and may be cited as the Commonwealth Procurement Code."). At issue in the present case is section 3939 of the Procurement Code:

> (a) *No obligation to third parties.* --The government agency shall have no obligation to any third parties for any claim.
> (b) *Barred claims.* --Once a contractor has made payment to the subcontractor according to the provisions of this subchapter, future claims for payment against the contractor or the contractor's surety by parties owed payment from the subcontractor which has been paid shall be barred.

62 Pa. C.S. § 3939.

Mechanical, Inc. in full,[3] neither [Plaintiff] nor its bonding company can have any liability whatsoever to [Defendant Spencer]." *Id. at* ¶ 9.

On June 18, 2001, Defendant Spencer replied by letter, noting that Plaintiff offered no proof of payment to Stewart. *Complaint, attached June 18, 2001 letter, p. 1.* Defendant Spencer then explained that Stewart's nonpayment constituted a "material breach" that "relieved Spencer of any prospective obligations regarding the underlying contract, including, *inter alia,* equipment check out and start-up, warranty or any related services respecting the equipment." *Id.* at p. 2. Furthermore, Defendant Spencer wrote,

> to the extent that any of Spencer's intellectual property is currently in the possession of the [Authority] or [Plaintiff], which was procured by or on behalf of Stewart . . . , Spencer revokes all licenses and demands the immediate return of this proprietary intellectual property. Notice is hereby provided that further use of these materials is prohibited without the written prior consent of Spencer and that these materials are protected by the Copyright laws.

Id. Defendant Spencer then agreed to "consider offers from the [Authority] to purchase a limited, non-exclusive license to utilize the intellectual property, purchase an equipment warranty from Spencer, and procure start-up services for the [Authority] upon the payment of the total sum of $56,000," which was the amount Stewart owed Defendant Spencer. *Id.*

The Authority responded by way of letter on June 20, 2001. The Authority expressed its "opinion that the Authority ha[d] no responsibility for payment to [Defendant Spencer] under the Procurement Code." *Complaint, attached June 20, 2001 letter.* Furthermore, the Authority had "no intention of returning any of what [Defendant Spencer] describe[d] as 'Spencer's intellectual property.' As far as [the Authority was] concerned, [it had] no legal obligation to do so." *Id.*

A little over a year later, on June 27, 2002, Defendants Kappe and Spencer filed the underlying action, arguing that Stewart's conduct constituted theft and that Plaintiff had admitted Stewart "obtained Kappe's and Spencer's copyrighted intellectual and other property through theft." *Underlying Action Complaint, ¶¶ 21, 26.* The underlying action therefore alleged copyright infringement (Count I) and equitable restitution/unjust enrichment (Count III) against Plaintiff, Stewart and the Authority; fraud and conversion (Count II) against Plaintiff

[3] This letter erroneously stated that Plaintiff had paid Stewart in full, but as noted earlier, $11,566.29 remained unpaid on the $628,190.00 contract. *See Kappe Associates,* No. 1:02-cv-00204-MBC (Erie), at p. 14.

and Stewart; and quantum meruit (Count IV) against Plaintiff and the Authority. *Underlying Action Complaint.* Included in Defendants' complaint, in addition to the allegation that Defendants Kappe and Spencer only contracted with Stewart because Plaintiff orally guaranteed Stewart's payment, was an allegation that Plaintiff insisted he would pay what Stewart owed Defendants Kappe and Spencer only after Stewart was prosecuted. *Id. at ¶ 22.*

Plaintiff and the Authority both filed motions for summary judgment. Plaintiff's motion was only for partial summary judgment, because Plaintiff acknowledged that a question of material fact existed as to whether Plaintiff had orally guaranteed payment to Defendants Kappe and Spencer. The federal district court granted the Authority's motion for summary judgment and Plaintiff's motion for partial summary judgment. The federal district court found Defendants' theft argument meritless and determined that the Procurement Code insulated both the Authority and Plaintiff from liability for Stewart's nonpayment.

Thereafter, Plaintiff sent Defendants a letter on March 2, 2005 threatening to file a motion for sanctions if Defendants did not withdraw the remaining claim against Plaintiff (Count II for fraud and conversion) within thirty days. *Complaint, attached March 2, 2005 letter.* On March 22, 2005, Defendants withdrew the underlying action. *Docket, No. 1:02-cv-00204-MBC (Erie).*

Plaintiff's Complaint alleges Defendants filed the underlying action when they knew it to be meritless in order to extort money from either Plaintiff or the Authority. *Complaint, ¶¶ 35-37.* Plaintiff alleges his contract with the Authority required he indemnify the Authority against "any and all claims, actions or proceedings, whether groundless or not, which were instituted against the Authority by third parties." *Id. at ¶ 22.* Plaintiff alleges the underlying action therefore cost him $10,000 in his own attorney's fees and $45,641.05 in the Authority's attorney's fees. *Id. at ¶ 23.* Plaintiff is demanding "the sum of $55,641.05 together with appropriate pre-judgment and post-judgment interest, . . . punitive/exemplary damages in excess of $50,000.00 together with appropriate interest thereon, . . . costs of this action and . . . such other relief as the Court deems just and proper." *Id. at p. 10.*

Defendants filed preliminary objections arguing: Plaintiff failed to cite the Dragonetti Act in his Complaint; wrongfully included the phrase "malicious prosecution" in the title of Count I; failed to plead facts legally sufficient to support a cause of action for wrongful use of civil proceedings; and seeks improper damages.

The Court must address these arguments in light of the applicable Pennsylvania law.

Findings of Law

Pennsylvania Rule of Civil Procedure 1028 allows "any party to any pleading" to file preliminary objections. *Pa. R.C.P. 1028(a).* "All preliminary objections shall be raised at one time. . . . [and] shall state specifically the grounds relied upon and may be inconsistent." *Pa. R.C.P. 1028(b).* In ruling on preliminary objections, a court must accept as true all well-pled facts which are relevant and material, as well as all inferences reasonably deducible therefrom. *Bower v. Bower,* 611 A.2d 181, 182 (Pa. 1992). In order to sustain preliminary objections, it must appear with certainty, or be "clear and free from doubt" based on the facts as pleaded, "that the pleader will be unable to prove facts legally sufficient to establish his right to relief." *Id.*

To that end, the Court has weighed the applicable law as it relates to the facts of this case along with the merit of the arguments presented by both Plaintiff and Defendants. The Court must address the following specific issues: whether Plaintiff's failure to cite the Dragonetti Act is fatal to his claim; whether Plaintiff's inclusion of "malicious prosecution" in brackets in Count I's title is fatal to his claim; whether Plaintiff has pled facts legally sufficient to support a wrongful use of civil proceedings action; and whether Plaintiff is entitled to the damages he seeks.

I. Failure to cite to the Dragonetti Act

Defendant Spencer preliminarily objects to Plaintiff's failure to cite the statute under which his claim was brought. Defendant Spencer argues that "Plaintiff cites no statutory basis for his cause of action, and therefore it is assumed he is pursuing a common-law cause of action." *Defendant Spencer's Preliminary Objections, ¶ 14.* Defendant Spencer argues that Pennsylvania has codified the common law wrongful use of civil proceedings action and therefore "the exclusive remedy for a Wrongful Use of Civil Proceedings claim is the Dragonetti Act, and Plaintiff has not pled this in his Complaint." *Id. at ¶ 17.*

Similarly, Defendant Kappe's preliminary objection argues "Pennsylvania law does not recognize a common law claim for civil malicious prosecution. The claim was codified in 1980. The Complaint does not identify any statutory basis for the claim of malicious prosecution," and so Defendant Kappe argues the Complaint should be dismissed with prejudice. *Defendant Kappe's Brief in Support, p. 6* (internal citation omitted).

Defendants Kappe and Spencer correctly note that Plaintiff's Complaint does not reference the Dragonetti Act, either by name or its statute citation. However, Defendants Kappe and Spencer cite no legal authority for their assertions that Plaintiff's Complaint must cite to any specific statutory authority. In fact, courts in Pennsylvania have held the opposite:

> [A]s a rule universally recognized, . . . courts will take judicial notice of its public statutes. Such laws need not be pleaded or proved; it is not necessary to allege a violation of the statute, but, of course, the statement must set forth sufficient facts to bring the case within the statute. . . . [Therefore, w]here the facts relied upon bring the case within the statute, it is not necessary to plead it.

Goldberg v. Friedrich, 124 A. 186-87 (Pa. 1924) (internal citations omitted). *See also Godina v. Oswald*, 211 A.2d 91, 93 (Pa. Super. 1965) ("Statutes need not be specifically pleaded but there must be set forth sufficient facts to bring the case within the statute in question.") (citing *Goldberg*).

Pennsylvania is a fact-pleading state. *Lerner v. Lerner,* 954 A.2d 1229, 1235 (Pa. Super. 2008). Our Rule of Civil Procedure 1019(a) provides that the "material facts on which a cause of action or defense is based shall be stated in a concise and summary form." *Pa. R.C.P. 1019(a)*. This rule is meant "to enable the adverse party to prepare his case." *Smith v. Wagner*, 588 A.2d 1308, 1310 (Pa. Super. 1991) (citations and brackets omitted). It requires a complaint "do more than give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. [The complaint] should formulate the issues by fully summarizing the material facts. . . ., i.e., those facts essential to support the claim." *Id.* Allegations in a complaint will satisfy this Rule "if (1) they contain averments of all the facts the pleader will eventually have to prove in order to recover, and (2) they are sufficiently specific so as to enable the defendant to prepare his defense." *Id.*

In the instant case, the Complaint labels Count I as "Wrongful Use of Civil Proceedings [Malicious Prosecution]." *Complaint, p. 7*. Plaintiff listed the elements he would be required to prove for a wrongful use of civil proceedings action under the Dragonetti Act. *Id. at ¶ 28*. All of the Defendants identified the Dragonetti Act, 42 Pa. C.S. § 8351 *et seq.*, as Plaintiff's cause of action. All of the Defendants advanced preliminary objections that argued Plaintiff failed to satisfy the wrongful use of civil proceedings elements as laid out in the Dragonetti Act. Thus, Defendants were all obviously aware that Plaintiff's Complaint implicated the Dragonetti Act. Because Plaintiff is not required to specifically allege a violation of the Dragonetti Act, and because Plaintiff's Complaint is sufficiently specific so as to enable the Defendants to prepare their defenses, the preliminary objections relating to Plaintiff's failure to cite the Dragonetti Act are OVERRULED.

II. Malicious prosecution

Defendant Kappe's and Spencer's preliminary objections also argue that Plaintiff's Complaint should be dismissed because Plaintiff included "malicious prosecution" in brackets in Count I's title. They argue that such a claim would require the underlying cause of action be a criminal one, and the underlying action was clearly civil in this case. *Defendant Spencer's Preliminary Objections, ¶¶ 28-30; Defendant Kappe's Preliminary Objections, ¶¶ 21-23.*

This Court observes that "wrongful use of civil proceedings" and "malicious prosecution" are often used interchangeably in Pennsylvania case law. In *Werner v. Plater-Zyberk*, for example, appellant filed a wrongful use of civil proceedings action after appellees' suit alleging appellant violated the federal Racketeering Influence and Corrupt Organization Act was dismissed. 799 A.2d 776 (Pa. Super. 2002). When summarizing the facts of the case, the Superior Court stated appellant's complaint "asserted that . . . [appellees] were liable for . . . committing the torts of malicious prosecution and/or abuse of legal process," but then later the Superior Court explained the complaint "alleges that [a]ppellees engaged in a course of conduct toward [appellant] that constituted both abuse of legal process and wrongful use of civil proceedings as these torts are framed by Pennsylvania state law." *Id*, at 781, 783. Additionally, the Superior Court stated that "allegations of malicious prosecution invoke Pennsylvania's statutory law in the form of the wrongful use of civil proceedings statute or Dragonetti Act." *Id.* at 785. *See also Coatesville v. Jarvis*, 902 A.2d 1249, 1249-50 (Pa. Super. 2006) (noting that the trial court's statement of facts explained that appellant filed the action "alleging malicious prosecution, as codified under 42 Pa.C.S. § 8351 (the Dragonetti Act)," and proceeding with an analysis of the case under the wrongful use of civil proceedings elements without correcting the trial court's statement of facts). Thus, the fact that Plaintiff's Complaint includes "malicious prosecution" in brackets in Count I's title is of no consequence. The preliminary objections as to Plaintiff's inclusion of "malicious prosecution" in brackets in Count I's title are OVERRULED.

III. Legal Insufficiency

All Defendants offer demurrers as to the legal sufficiency of the facts pled by Plaintiff to support a claim for wrongful use of civil proceedings. "The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible." *Eckell v. Wilson*, 597 A.2d 696, 698 (Pa. Super. 1991) (internal citations omitted). Only the factual allegations in a complaint are considered to be true for the purposes of a demurrer, not the pleader's conclusions of law. *Id.* Testing the sufficiency of the facts requires that "all material facts set forth in the complaint as well as all inferences reasonably deducible therefrom

are admitted as true for the purposes of review." *Id.* The only time a demurrer should be sustained is when "the plaintiff has clearly failed to state a claim on which relief may be granted." *Id.* If there is any doubt as to the adequacy of the plaintiff's complaint, a demurrer should not be sustained. *Id.*

A claim for wrongful use of civil proceedings is governed by the Dragonetti Act at 42 Pa. C.S. § 8351 *et seq.* The elements for this cause of action are as follows:

> (a) Elements of action. — A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings [if]:
>
> (1) he acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and
>
> (2) the proceedings have terminated in favor of the person against whom they are brought.

42 Pa. C.S. § 8351(a). The burden on the plaintiff is to allege and prove:

> (1) The defendant has procured, initiated or continued the civil proceedings against him.
>
> (2) The proceedings were terminated in his favor.
>
> (3) The defendant did not have probable cause for his action.
>
> (4) The primary purpose for which the proceedings were brought was not that of securing the proper discovery, joinder of parties or adjudication of the claim on which the proceedings were based.
>
> (5) The plaintiff has suffered damages . . . .

42 Pa. C.S. § 8354.

Though Defendants explicitly challenge only the third and fourth factors of probable cause and improper purpose, this Court also notes that Plaintiff has alleged facts sufficient to satisfy the first, second, and fifth factors at this preliminary objection stage, i.e. that Defendants initiated the underlying action against Plaintiff, that the underlying action was terminated in Plaintiff's favor, and that Plaintiff suffered damages as a result of the underlying action. There is no question that Defendants Kappe and Spencer, represented by Defendants Logan and Powell, filed suit in federal district court against Plaintiff and the Authority. *Complaint*, ¶ *7*. Additionally, there is no question that Defendants withdrew Count I for copyright infringement, Plaintiff's and the Authority's motions for summary judgment were granted as to Counts III and IV (equitable

restitution/unjust enrichment and quantum meruit), and Defendants later withdrew Count II (fraud and conversion).[4] *Id. at ¶¶ 15, 17-18, 21.* Finally, Plaintiff has alleged that it cost $55,641.05 to defend against the underlying action and that Plaintiff "has suffered frustration, an extensive loss of his business time and damage to his reputation."[5] *Id. at ¶¶ 26, 40, p. 10.* Thus, for the purposes of this preliminary objections analysis, these alleged facts are sufficient to satisfy the first, second, and fifth factors listed above.

This Court must next consider whether Plaintiff has pled facts sufficient to satisfy the third factor regarding probable cause. Contrary to the assertion of Defendants Logan and Powell,[6] lack of probable cause is not always a question of law for the court to determine. Probable cause is only a question of law for a court to decide if the court can determine "whether [probable cause] exists *under an admitted or clearly established state of facts." Simpson v. Montgomery Ward & Co.,* 46 A.2d 674, 677 (Pa. 1946) (emphasis added). However, "if facts material to the issue of probable cause are in controversy," the existence of probable cause "*may be submitted to the jury." Broadwater v. Sentner,* 725 A.2d 779, 782 (Pa. Super. 1999) (quoting *McKibben v. Schmotzer,* 700 A.2d 484, 493 (Pa. Super. 1997)) (emphasis in original).

Initially, this Court will address the arguments of Defendants Spencer

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[4] Defendants Logan and Powell argue, in a footnote, that the withdrawal of Count II "had nothing to do with the merits of the claim and thus did not constitute a favorable termination of the proceedings in favor of [Plaintiff], an argument for a later day if necessary." *Preliminary Objections of Defendants Logan and Powell, p. 16 n. 8* (emphasis in original). Though Defendants Logan and Powell do not advance a complete argument on this issue, for the sake of thoroughness, this Court will briefly address this point.

To determine "whether withdrawal or abandonment constitutes a final termination of the case in favor of the person against whom the proceedings are brought . . . depends on the circumstances under which the proceedings are withdrawn." *Bannar v. Miller*, 701 A.2d 242, 248 (Pa. Super. 1997) (internal citation omitted). In *Bannar,* the plaintiff in the underlying action did not withdraw the claim until the day the trial was called. *Id.* In deciding that this constituted a final determination in favor of the defendant in the underlying action, the Superior Court reasoned that the facts "tend[ed] to establish neither clients nor attorneys were attempting to properly adjudicate the claim. A last-second dismissal in the face of imminent defeat is not favorable to appellants. Appellants did not answer the bell in the fight they started, which is a victory for the other side." *Id.*

In the case before this Court, the facts alleged by Plaintiff are that Defendants were informed on March 2, 2005 that Plaintiff would be seeking sanctions against Defendants if Count II was not withdrawn within thirty days, and Defendants withdrew Count II on March 22, 2005, twenty days after receiving Plaintiff's letter. *Complaint, ¶¶ 20, 21.* Such facts suggest that Defendants knew the action was meritless and that sanctions would be imposed on them if the suit continued. Defendants' actions support the inference that - in the face of imminent defeat - Defendants withdrew rather than face sanctions. For the purposes of these preliminary objections, Plaintiff's alleged facts are sufficient to satisfy the second factor relating to favorable termination of the underlying action.

[5] Though Defendants contest the type and amount of damages Plaintiff seeks to recover, they do not challenge that Plaintiff did incur some damages.

[6] "As an initial matter, the presence or absence of probable cause for the bringing of earlier litigation is a threshold question that a trial court alone must resolve . . . ." *Preliminary Objections of Defendants Logan and Powell,* ¶ 47.

and Kappe that probable cause exists in this case because 1) the federal district court determined probable cause existed and 2) Plaintiff admits it exists. Defendant Spencer argues that "there has been a judicial determination that probable cause existed in the Underlying Action." *Defendant Spencer's Preliminary Objections, ¶ 19.* Defendant Spencer argues that the federal district court's

> ruling expressly noted that Kappe's and Spencer's claims for Fraud and Conversion against [Plaintiff] could proceed, because [Plaintiff] agreed there were disputed questions of material fact to be resolved, and that [Plaintiff] was not even seeking summary judgment as to those claims.
>
> Since there were disputed questions of material fact as to some of Spencer's claims against [Plaintiff] - claims as to which [Plaintiff] chose not to move for summary judgment - it follows that Spencer had a sufficient factual and legal basis to proceed against Cummins.

Defendant Spencer's Brief in Support, p. 7.

Similarly, Defendant Kappe argues that, "as a matter of law, probable cause existed for the claims in the federal lawsuit against [Plaintiff]. In fact, [Plaintiff] admits that probable cause existed for the underlying claims against him . . . ." *Defendant Kappe's Preliminary Objections, ¶ 32.* Defendant Kappe argues that

> Plaintiff expressly stated that he did 'not dispute that [Plaintiff's] alleged guarantee of Stewart's debt to [Defendants Kappe and Spencer] is a disputed fact precluding summary judgment on Count II of [the underlying action].' In addition, [Plaintiff's] only allegation about the claims against him in the underlying federal action avers that the claims against him in the federal action were 'of doubtful legal merit.' Not only did Kappe believe that the facts could support it and [Defendant Spencer's] claims in the federal action but, based on the allegations and exhibits to the Complaint, so, too, did [Plaintiff] and his counsel, as they acknowledged material issue of fact existed to preclude the entry of summary judgment on all claims.

Defendant Kappe's Brief in Support, p. 7 (internal citations omitted).

Defendant Spencer's and Kappe's arguments are unpersuasive. The only judicial determination related to this issue in the underlying action was that certain allegations made by Defendants were not appropriate for disposition at the summary judgment stage - not that the presence of such created the necessary probable cause that would insulate Defendants Kappe and Spencer from liability for wrongful use of civil proceedings. When ruling on a motion for summary judgment, a court determines

whether there are genuine issues of material fact to be submitted to the fact-finder, but it does not necessarily follow that the presence of such disputed facts automatically creates probable cause for the action to have been initiated. Consider, for example, Plaintiff's contention that Defendants Kappe and Spencer were lying when they alleged Plaintiff orally guaranteed the payment of Stewart's debts. *See Complaint, ¶ 34* ("Defendants possessed no evidence and had no cause to believe that [Plaintiff] ever induced Kappe and Spencer to extend credit to Stewart or ever guaranteed Stewart's payment(s)"). Such a lie would create a disputed question of material fact such that granting summary judgment would be inappropriate, but it would not operate to create probable cause. Thus, the presence of disputed issues of material fact at the summary judgment stage in the underlying action is not dispositive of whether there was probable cause to bring the action in the first place.

Additionally, contrary to the assertion that Plaintiff "agreed" that probable cause existed by acknowledging that disputed questions of material fact existed, Plaintiff acknowledged exactly what the federal district court did: that the disputed facts in the underlying action were not appropriate for disposition at the summary judgment stage. Plaintiff's reply brief in support of his motion for summary judgment in the underlying action stated: "[Plaintiff] does not dispute that his alleged guarantee of Stewart's debts to [Defendants Kappe and Spencer] is a disputed fact precluding summary judgment on Count II of the [Underlying Action]. Accordingly, [Plaintiff] did *not* request summary judgment as to Count II." *Preliminary Objections of Defendants Logan and Powell, Ex. F at p. 7 ((Plaintiff's] Reply Brief in Support of his Motion for Partial Summary Judgment)* (emphasis in original). This statement acknowledges the existence of disputed facts; it does not admit the presence of probable cause in the underlying action.

Thus, this Court will consider whether Plaintiff has alleged facts sufficient to demonstrate a lack of probable cause. Probable cause is defined in the Dragonetti Act as follows:

> A person who takes part in the procurement, initiation or continuation of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either:
>
> (1) reasonably believes that under those facts the claim may be valid under the existing or developing law;
>
> (2) believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information; or
>
> (3) believes as an attorney of record, in good faith that his procurement, initiation or continuation of a civil cause is not intended to merely harass or maliciously injure the opposite party.

42 Pa. C.S. § 8352.

With regard to Count I (copyright infringement) of the underlying action, Plaintiff alleges that Defendants, after Plaintiff and the Authority filed their motions for summary judgment, "acknowledged . . . that the copyrights of both Defendants Kappe and Spencer. . . were, in fact, never registered pursuant to the Federal Copyright Act . . . and, accordingly, withdrew Count I." *Complaint, ¶ 15.* Plaintiff alleges Defendants "knew, or should have known, before commencing the [underlying] action . . . , that Defendants Kappe and Spencer never registered their copyrights and, therefore, never had any basis for the copyright claims." *Id. at ¶ 33*. These allegations - that Defendants were able to verify the copyright claims and therefore knew or should have known there was no valid copyright - certainly indicate a lack of probable cause for filing Count I.

On this point, Defendants Logan and Powell argue that they were "entitled to rely upon the statements of their clients" as to the validity of the copyrights. *Preliminary Objections of Defendants Logan and Powell, ¶ 73,* However, Plaintiff has not alleged that Defendants Logan and Powell lacked probable cause because they improperly relied on statements made by Defendants Kappe and Spencer. Plaintiff has alleged all Defendants, including Defendants Logan and Powell, "knew or should have known" the copyrights were invalid, and such is sufficient to survive preliminary objections.

As to Count II (fraud and conversion), Plaintiff alleges Defendants "possessed no evidence and had no cause to believe that [Plaintiff] ever induced Kappe and Spencer to extend credit to Stewart of ever guaranteed Stewart's payment(s) to Kappe and Spencer." *Complaint, ¶ 34.* Furthermore, Plaintiff alleges Defendants withdrew Count II of their complaint after Plaintiff notified Defendants he would be seeking sanctions against Defendants if Count II was not withdrawn. *Id. at ¶¶ 20-21.* Such allegations are sufficient to survive preliminary objections as they create a question of material fact as to whether Defendants had any evidence of Plaintiff's alleged oral guarantee of Stewart's payment and whether Defendants withdrew the final Count of their complaint because they knew their action was meritless.

Defendants Logan and Powell argue for a second time that they were allowed to rely on their clients' representations as to this oral guarantee. *Preliminary Objections of Defendants Logan and Powell, ¶ 69.* Again, however, this argument ignores the fact that Plaintiff's Complaint imputes knowledge of the falsity of the oral guarantee to Defendants Logan and Powell. Plaintiff's allegations are sufficient for the purposes of this preliminary objections analysis.

With regard to Counts III and IV, Plaintiff alleges he informed Defendants over one year prior to the filing of the underlying action that the Procurement Code "provided the Authority with an absolute defense

and provided [Plaintiff] with a conditional defense to any contractual or quasi-contractual liability which could be asserted by Defendants Kappe and Spencer." *Complaint, ¶ 12.* Defendants argue they had a reasonable basis for pursuing these Counts in spite of the Procurement Code "in light of: (a) the criminal conduct of Stewart Mechanical; (and] (b) the absence of a full payment by [Plaintiff] . . ." *Preliminary Objections of Defendants Logan and Powell, ¶ 56.*

Regarding the theft argument as against the Authority,[7] the federal district court opined as follows:

> [Defendants Kappe and Spencer] argue that because of Stewart's conversion and criminal theft, the Authority did not get lawful title to the equipment and intellectual property. They strenuously assert that summary judgment is improper because there is a disputed issue of fact as to whether Stewart's conduct was criminal. We agree with the Authority that this is a red herring, and has no bearing on the case before us.

Kappe Associates, No. 1:02-cv-00204-MBC (Erie), at p. 8. The theft argument as against Plaintiff was likewise determined to be meritless:

> [Defendants Kappe and Spencer] also argue that summary judgment is improper because [Plaintiff] obtained their equipment as a result of Stewart's theft, and therefore, as a matter of law, did not have title to convey the equipment to the Authority. . . . This argument has no merit. The undisputed record shows that Stewart did not steal [Defendant Kappe's and Spencer's] property. Rather, Stewart breached a contract by refusing to fully pay for products [Defendants Kappe and Spencer] provided, and by paying for some of these products with a check drawn on insufficient funds.

Kappe Associates, No. 1:02-cv-00204-MBC (Erie), at p. 15.

This Court agrees with the federal district court's opinion that the theft argument was without merit. Defendants Logan and Powell, writing on behalf on Defendant Spencer, even expressed their "analysis and legal opinion" that Stewart's nonpayment constituted a "material breach" that "relieved Spencer of any prospective obligations regarding the underlying contract, including, *inter alia,* equipment check out and start-up, warranty or any related services respecting the equipment." *Complaint, attached June 18, 2001 letter, p. 2.* Thus, the fact that Defendants advanced a theory of theft in the underlying action does not shield them from potential liability in this present action.

[7] The claims as against the Authority are relevant in this case because Plaintiff is alleging damages incurred from having to indemnify the Authority against this action.

Finally, Defendants argue that under developing case law, they had a reasonable basis for filing the underlying action based on the fact that Plaintiff had not paid Stewart in full.[8] Defendants rely on *Ferrick Construction Co. v. One Beacon Ins. Co.* to support this argument. 2008 Phila. Ct. Corn. Pl. LEXIS 187 (2008), *aff'd without opinion*, 986 A.2d 1289 (Pa. Super. 2009). In *Ferrick*, the trial court opined that the Procurement Code only shields a general contractor from claims for payment by suppliers or a subcontractor's subcontractor if the general contractor had made full payment to its subcontractor. *Ferrick*, 2008 Phila. Ct. Corn. Pl. LEXIS at *7-8 ("For the Prompt Payment Act[9] to be applicable *all payments* must be made by the general contractor to the subcontractor.") (emphasis in original).

There are several problems with this argument. First, *Ferrick* was not then and is not now controlling on this issue. *Ferrick* is a trial court case affirmed without opinion by the Superior Court. While it holds persuasive value, it does not have precedential value. Commonwealth cases, however, are binding on this Court, and a Commonwealth case on point exists: *Trumbull Corp. v. Boss Construction, Inc.*, 768 A.2d 368 (Pa. Commw. 2001). In *Trumbull*, a supplier was seeking recovery under a general contractor's bond. The Commonwealth Court determined the Prompt Pay Act barred the supplier from recovering against the general contractor because the general contractor "made payments to [the subcontractor]." *Trumbull*, 768 A.2d at 370. The Commonwealth Court did not require the general contractor to have paid the subcontractor in full. Thus, the controlling law on this issue is - and was when the underlying action was filed - *Trumbull*, which counsels that Plaintiff was protected from liability by the Procurement Code for having made payments to Stewart.

Second, even the persuasive value of *Ferrick* is minimal, as the facts of this case do not square with the facts of *Ferrick*. In *Ferrick*, the trial court specifically noted: "The record shows that while [the general contractor's] last payment to [the subcontractor] was in August, the contaminated soil continued to be removed in September and October. According to the contract, [the subcontractor] was entitled to payment from [the general contractor] for that work, even though the work had been done by [the subcontractor's subcontractor]." *Ferrick*, 2008 Phila. Ct. Com. Pl. LEXIS at *8. In *Ferrick*, then, there was an explicit determination that work had been done by the subcontractor's subcontractor after the

[8] The Court notes that this argument has absolutely no bearing on whether Defendants had probable cause to initiate the underlying action against the Authority. The Procurement Code absolutely insulated the Authority from liability in this case, regardless of whether and how much Plaintiff paid Stewart.

[9] Title 62 Pa. C.S. § 3901 *et seq.* of the Procurement Code is sometimes referred to as the Prompt Pay Act.

general contractor had stopped paying the subcontractor, and so there was unquestionably a determination that a portion of the subcontractor's subcontractor performance had not been paid for. In the present case, however, the federal district court found just the opposite:

> The undisputed evidence shows that [Plaintiff] paid a total of $477,178.29, by check, [directly] to Stewart. . . . The evidence shows that the amounts [Plaintiff] paid by check far exceed the total amount of $102,932.00 Stewart owed to [Defendants Kappe and Spencer]. . . . Furthermore, as the dates of [Plaintiff's] check show, [Plaintiff] was paying Stewart regularly before Kappe and Spencer invoiced the order from Stewart, which was on 11/16/00, and continued to pay Stewart after 12/26/00, when Stewart wrote Spencer the check which was returned for insufficient funds.

Kappe Associates, No. 1:02-cv-00204-MBC (Erie), at p. 14.

Third, in their response to Plaintiff's motion for summary judgment, Defendants did not argue that Plaintiff must have made full payment *period,* but rather that Plaintiff could not demonstrate that the payments he *did* make fully covered the equipment and materials supplied by Defendants. Defendants wrote in their brief: "Having failed to fully pay Stewart *for the work completed by [Defendants Kappe and Spencer],* [Plaintiff] is not afforded the protections of § 3939 . . . ." *Complaint, attached Memorandum of Law in Opposition to [Plaintiff's] Motion for Summary Judgment, p. 8* (emphasis added). The "crucial question" identified by Defendants in their brief was whether "the funds that remain unpaid to Stewart [were], even partially, for the equipment supplied by [Defendants Kappe and Spencer]?" *Id.* at p. 9. Defendants gave specific examples of how Plaintiff's "various invoices, requests for payments, and checks" failed to completely account for the cost of the materials and equipment supplied by Defendants Kappe and Spencer.[10] *See id. at p. 9-10.* If, as Defendants now argue, they were arguing that Plaintiff's failure to make full payment all together precluded him from benefiting from the protections of the Procurement Code, such an item-by-item analysis would have been unnecessary. They would have simply argued that Plaintiff was $11,566.29 short of full payment to Stewart, not that a question of material fact remained as to whether that amount "even partially, [was] for the equipment supplied by [Defendants Kappe and

[10] It is worth mentioning that the Commonwealth Court in *Trumbull* also addressed this argument:

> [The supplier] asserts that [the general contractor] failed to identify which of the estimated payments from PennDOT covered the materials supplied by [the supplier] and failed to prove that payments to [the subcontractor] were made within the time required. However, such compliance need not have been proved with absolute certainty, but only by a preponderance of the evidence.

Trumbull, 768 A.2d at 371. As explained above, the federal district court found Plaintiff had met this burden.

Spencer]." *Id. at p. 9.*

Finally, this Court notes that Defendants in the underlying action chose to abandon their action instead of following it through and appealing the federal district court's decision. Abandoning their case and by extension their right to appeal is at odds with Defendants' contention that they believed developing law[11] might turn in their favor. *Cf. Broadwater v. Sentner*, 725 A.2d 779, 784 (Pa. Super. 1999) ("Sentner argues that because the law on the issue of paternity was changing at the time of the commencement of the underlying proceedings, he had a reasonable belief that Deems had a cause of action. However, after our independent review of the above pertinent cases, we find Sentner's argument to be specious. Moreover, Appellees' voluntarily [sic] withdrawal from the case with prejudice belies this contention as well.").

Plaintiff has pled facts sufficient to support Plaintiff's contention that Defendants lacked probable cause to proceed on the underlying action. A lack of probable cause, however, is not enough for a wrongful use of civil proceedings action. Plaintiff will also have to demonstrate Defendants acted with an improper purpose.

Defendant Kappe argues that Plaintiff "wholly fails to allege a factual predicate to establish that Kappe asserted the claims against him for an improper purpose." *Defendant Kappe's Preliminary Objections, ¶ 32.* However, Plaintiff's Complaint alleges

> the Defendants, knowing, in advance, that they had no cause of action whatsoever against the Authority and no probable cause of action against [Plaintiff], procured, initiated and continued the civil action . . . for the purpose of extorting, from the Authority and from [Plaintiff], money to which Kappe and Spencer were not entitled to receive from the Authority or from [Plaintiff].

Complaint, ¶ 37. This assertion is sufficient to allege that Defendants acted with an improper purpose, i.e. to extort money from Plaintiff.[12] *See, e.g., Shaffer v. Stewart*, 473 A.2d 1017, 1021 (Pa. Super. 1983)

[11] This Court also questions Defendants' interpretation of the phrase "developing law." Defendants can only point to *Ferrick* for the proposition that the Procurement Code requires full payment, and this Court notes that Defendants Logan and Powell were the attorneys of record in *Ferrick* as well. It seems to this Court that "developing law" requires more activity on this point than a single trial court case in which Defendants themselves are attempting to make the same argument as they were in the underlying action.

[12] This Court notes that Defendants Logan and Powell also argue that Plaintiff's "only allegation is that the purpose of the lawsuit was to 'extort' money from [Plaintiff] which [Defendants Kappe and Spencer were] not entitled to recover from him." *Preliminary Objections of Defendants Logan and Powell, ¶ 77.* Defendants Logan and Powell then argue that "[Plaintiff] has not alleged any purpose of attorney-defendants other than the proper adjudication of [the] claim." *Id. at ¶ 79.* However, as Defendants Logan and Powell themselves acknowledge, Plaintiff alleges Defendants were attempting to extort money from him, and such a use of the legal system would not be proper adjudication.

("An allegation that a caveat to a will has been filed not for purposes of contesting the will but to extort a settlement in favor of disinterested parties states an improper purpose within the meaning of 42 Pa. C.S. §8351.").

Plaintiff's Complaint is legally sufficient to allege a cause of action for wrongful use of civil proceedings against Defendants, and the preliminary objections as to this point are OVERRULED.

IV. Damages

The Dragonetti Act provides that a

> Plaintiff is entitled to recover for the following:
>
> (1) The harm normally resulting from any arrest or imprisonment, or any dispossession or interference with the advantageous use of his land, chattels or other things, suffered by him during the course of the proceedings.
>
> (2) The harm to his reputation by any defamatory matter alleged as the basis of the proceedings.
>
> (3) The expense, including any reasonable attorney fees, that he has reasonably incurred in defending himself against the proceedings.
>
> (4) Any specific pecuniary loss that has resulted from the proceedings.
>
> (5) Any emotional distress that is caused by the proceedings.
>
> (6) Punitive damages according to law in appropriate cases.

42 Pa. C.S. § 8353.

Initially, Defendants Kappe and Spencer object that Plaintiff has requested attorney's fees for this action, which is not permitted under the Dragonetti Act. Though Plaintiff acknowledged at oral arguments that he has no right to attorney's fees for the present action and maintained that the Complaint seeks attorney's fees only for the underlying action, for the purposes of clarity, these preliminary objections are SUSTAINED IN PART insofar as they relate to a request for attorney's fees for the present case.

However, Defendants also challenge Plaintiff's damages demand because it includes attorney's fees incurred by the Authority in the underlying action. Defendants Logan and Powell argue that the Dragonetti Act does not entitle Plaintiff to someone else's attorney's fees and that Plaintiff has no standing to request someone else's attorney's fees. *Preliminary Objections of Defendants Logan and Powell, ¶¶ 87, 90* (emphasis in original). Defendant Spencer simply argues that "Plaintiff seeks to recover the Authority's attorney's fees, which he would have no right to do in any event." *Defendant Spencer's Preliminary Objections, ¶ 37.* Finally, Defendant Kappe argues that the Authority's attorney's fees are not permitted under the Dragonetti Act as they were not attorney's

fees incurred by Plaintiff in defending himself against the action, and Defendant Kappe argues that the Authority's fees "do not constitute `any specific pecuniary loss' . . . [because Plaintiff] did not incur these costs from the federal action, but instead, [Plaintiff] claims the costs were related to his contract with [the Authority]." *Defendant Kappe's Preliminary Objections, ¶ 49, 50.*

Plaintiff is not seeking these attorney's fees as attorney's fees incurred by him in defending against the underlying action but instead as a specific pecuniary loss resulting from the proceedings. Defendant Kappe's argument that these damages did not arise from the underlying action are unpersuasive. Plaintiff alleges he lost out on $45,641.05 because of the underlying action. At this point, Plaintiff's allegations generally and reasonably seem to qualify as "any specific pecuniary loss" contemplated by the Dragonetti Act. Defendants' preliminary objections as to this issue are OVERRULED.

Defendant Kappe also argues that Plaintiff "has pleaded no factual basis to assert" a claim for punitive damages. *Defendant Kappe's Preliminary Objections, ¶ 64.* More specifically, Defendant Kappe argues Plaintiff "does not specify any conduct that is outrageous or evidences evil motive or reckless indifference to others." *Id. at ¶ 67.* Plaintiff has alleged that Defendants filed a meritless claim that they knew to be meritless for the sole purpose of extorting money from either Plaintiff or the Authority. Whether Defendants' "actions arise to outrageous conduct lies within the sound discretion of the fact-finder." *Pestco, Inc. v. Associated Prods.*, 880 A.2d 700, 709 (Pa. Super. 2005) (quoting *SHV Coal, Inc. v. Continental Grain Co.*, 587 A.2d 702, 705 (Pa. 1991)). Plaintiff's alleged facts on this issue are sufficient for the purposes of this preliminary objections analysis and Defendant Kappe's preliminary objection on this point is OVERRULED.

Finally, Defendant Kappe argues Plaintiff "fails to properly allege any facts to support the special damages for 'frustration, an extensive loss of his business time and damage to his reputation', which he seeks in the Complaint, and these damages must be stricken." *Defendant Kappe's Preliminary Objections, ¶ 70.* Pennsylvania Rule of Civil Procedure 1019(f) requires that "[a]verments of time, place and items of special damage shall be specifically stated." *Pa. R.C.P. 1019(f).* Under Pennsylvania law,

> Damages are either general or special. General damages are those that are the usual and ordinary consequences of the wrong done. Special damages are those that are not the usual and ordinary consequences of the wrong done but which depend on special circumstances. General damages may be proven without specifically pleading them; however, special damages may not be proved unless special facts giving rise to them are averred.

Hooker v. State Farm Fire & Cas. Co., 880 A.2d 70, 77 (Pa. Commw. 2005). In the present case, Plaintiff's alleged damages for "frustration, an extensive loss of his business time and damage to his reputation" are not general damages as they are not "the usual and ordinary consequences of the wrong done." *Id.* Thus, because Plaintiff has not alleged special facts relating to these special damages, Plaintiff is precluded from recovering special damages in this case. Defendant Kappe's preliminary objection on this point is SUSTAINED.

ORDER

AND NOW, TO-WIT, this 23rd day of January, 2012, for the reasons set forth in the foregoing **OPINION,** it is hereby **ORDERED, ADJUDGED, and DECREED** that the Preliminary Objections of Defendants Kappe, Spencer, Logan and Powell are **SUSTAINED IN PART and OVERRULED IN PART.** Specifically, to the extent that Plaintiff is seeking attorney's fees for the present action, the preliminary objection on this issue is **SUSTAINED.** To the extent that Plaintiff is seeking special damages, the preliminary objection on this issue is **SUSTAINED**. All other preliminary objections are **OVERRULED.**

BY THE COURT:
/s/ Shad Connelly, Judge

L.A.B., Plaintiff
v.
J.P.M., Defendant

FAMILY LAW / CHILD CUSTODY

Under 23 Pa.C.S.A. § 5328, the court's primary consideration in child custody matters is the best interest of the child determined by utilizing the "best interest factors," giving "weighted consideration" to factors affecting the safety of the child.

FAMILY LAW / CHILD CUSTODY

Pursuant to 23 Pa.C.S.A. § 5329(a), where a party seeks custody, the court shall consider whether that party, or member of that party's household, has been convicted of or pleaded guilty or no contest to any of the offenses listed in Section 5329(a), and before making any order of custody to that parent, determine whether the party or household member poses a threat of harm to the child and whether counseling is necessary for that offending individual.

FAMILY LAW / CHILD CUSTODY

Under 23 Pa.C.S.A. § 5329(d), if the court determines that counseling is necessary under Section 5329(c), it must appoint a qualified professional specializing in treatment relating to the particular offense to provide counseling that may include a program of treatment or individual therapy designed to rehabilitate the offending individual, which address issues regarding physical and sexual abuse, the psychology of the offender, and the effects of the offense on the victim.

FAMILY LAW / CHILD CUSTODY

Where the court awards custody to a party that has committed an offense under 23 Pa.C.S.A. § 5329(a) or whose household member has committed an offense under 23 Pa.C.S.A. §5329(a), the court may require subsequent evaluations concerning the rehabilitation of the offending individual and the well-being of the child, and if it determines the offending person poses a threat of physical, emotional, or psychological harm to the child, it may schedule a hearing to modify the custody order, pursuant to 23 Pa.C.S.A. § 5329(e)(2).

FAMILY LAW / CHILD CUSTODY

The court may order a party to pay all or a portion of the costs of counseling and evaluations under 23 Pa.C.S.A. § 5329(f).

FAMILY LAW / CHILD CUSTODY / RELOCATION

Under 23 Pa.C.S.A. § 5337(a), when there is a proposed relocation, the court must also consider ten relocation factors to determine the best interests of the child, giving "weighted consideration" to factors that affect the safety of the child.

FAMILY LAW / CHILD CUSTODY / RELOCATION

While each party has the burden of establishing the integrity of

that party's motives in either seeking relocation or seeking to prevent relocation, the party proposing the relocation has the burden of establishing that the relocation will serve the best interest of the child, pursuant to 23 Pa.C.S.A. § 5337(i).

FAMILY LAW / CHILD CUSTODY

In a custody action, "there shall be no presumption that custody should be awarded to a particular parent," 23 Pa.C.S.A. § 5327(a), and in determining the best interest, "no party shall receive preference based upon gender," 23 Pa.C.S.A. § 5328(b).

FAMILY LAW / CHILD CUSTODY

Where a member of the party's household has been convicted of two offenses listed at 23 Pa.C.S.A. § 5329(a) and has significant, dysfunctional contact with the child, an evaluation pursuant to 23 Pa.C.S.A. § 5329(c) must be granted, and the household member must not have any contact with the child pending court review of the evaluation report.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA FAMILY DIVISION - CUSTODY
NO. 14111-2011

Appearances: Karen L. Klapsinos, Esq., on behalf of Plaintiff
John R. Evanoff, Esq., on behalf of Defendant

MEMORANDUM OPINION

Brabender, J., March 9, 2012

This matter is before the Court on Plaintiff's Complaint for Custody/ Shared Custody, Defendant's Petition for Special Relief Pursuant to 23 Pa.C.S.A. §5329 and Defendant's Request for Adversarial Hearing.

The Plaintiff, L.A.B., is the child's mother. The Defendant, J.P.M., is the child's father. The child is R.M., who is six years old, born September 9, 2005. The mother resides in Erie, Pennsylvania with her paramour, B.S.G., who is the subject of Defendant's Section 5329 request. The father resides in Ligonier, Pennsylvania.

Each parent seeks primary physical custody of the child. The father objects to the mother's request for custody pursuant to Section 5329 due to B.S.G.'s criminal record. The father wants the Court to permit the child to live with him. The father wants the Court to provide for an initial criminal conviction evaluation of B.S.G. pursuant to Section 5329 to determine whether he poses a threat of harm to the child and whether counseling is necessary.

No custody order existed prior to the mother's custody Complaint and the father's requests for primary custody and an evaluation pursuant to Section 5329. The child had been living with the mother in Erie. The parties shared physical custody by mutual agreement. The child had periods of visitation with the father who lived in Pittsburgh, Pennsylvania.

In November of 2011, during an extended period of visitation with the child, the father moved from Pittsburgh to Ligonier.

After a hearing on February 10, 2012, the Court finds it is in the child's best interests to grant the father's requests for primary physical custody and an evaluation of B.S.G. pursuant to 23 Pa.C.S.A. §5329.

BACKGROUND

On November 17, 2011, the mother filed a Complaint for Custody, seeking shared custody and return of the child to her care in Erie following an extended visit with the father. Concurrently, the mother filed *ex parte* a Motion for Special Relief, requesting return of the child pending a Custody Conciliation Conference.

On November 17, 2011, the Honorable John J. Trucilla directed return of the child to the mother's care pending further proceedings. The child was retuned to the mother's care.

On December 20, 2011, the parties attended a Custody Conciliation Conference, represented by counsel.

A Custody Consent Order was entered December 22, 2011, pending an adversarial hearing. Pursuant to the temporary Custody Order, the parties shared physical and legal custody of the child. The child was to reside with the mother and have visitation with the father on alternating weekends. During Weekend One, the parties were to exchange custody in Cranberry, Pennsylvania. During Weekend Two, the father was responsible for transportation arrangements. A Christmas holiday schedule was established whereby the parent receiving the child was responsible for transportation.

On January 9, 2012, the father filed the instant Request for Adversarial Hearing.

Prior to the adversarial hearing, the father submitted a Petition for Special Relief Pursuant to 23 Pa.C.S.A. §5329 concerning criminal convictions of B.S.G. In 2002, following a jury trial, B.S.G. was convicted of Simple Assault and Endangering Welfare of Children.[1] In 2008, after entering a guilty plea, B.S.G. was convicted of Driving Under the Influence of Alcohol or Controlled Substance[2]. The father also cited a domestic incident in approximately 2010 involving the mother and B.S.G.

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[1] At Erie County Docket No. 1712-2001, B.S.G. was sentenced to nine to 36 months of incarceration for Simple Assault, 18 Pa.C.S.A. §2701(a)(1). He was sentenced to nine to 36 months of incarceration for the conviction of Endangering Welfare of Children, 18 Pa.C.S.A. §4304, concurrent. B.S.G. was convicted of causing bodily injury to an eleven month-old male child who was in his care at the time of the incident. The Criminal Complaint alleged the child's injuries consisted of bruises, welts and swelling to the left side of the child's face. The Criminal Complaint is attached hereto as Court Ex. 1.

[2] At Erie County Docket No. 2449-2008, B.S.G. was sentenced to electronic monitoring for 60 days followed by four months probation for Driving Under the Influence of Alcohol, 75 Pa.C.S.A. §3802(b).

Based on B.S.G.'s convictions and status as a household member of the mother, the father requested immediate transfer to him of custody. The father also requested an evaluation of B.S.G. pursuant to 23 Pa.C.S.A. §§5329(a) and (c) to determine whether B.S.G. poses a threat to the child and whether counseling for B.S.G. is necessary. The mother asserts B.S.G. is not a member of her household. She objects to the assessment of costs for an evaluation of B.S.G. due to financial constraints.

LEGAL STANDARDS

In this case, the Court must fashion a primary order of custody where no prior order existed. The parents live in two different locales in Pennsylvania. If the father's request for primary physical custody is granted, only the child would be relocating to Ligonier because the father already lives there.[3]

Under the Custody Act, 23 Pa.C.S.A. §§5321-5340, the court's primary consideration in child custody matters is the best interest of the child. 23 Pa.C.S.A. §§5323(a), 5328. The issue here is whether the living situation for the child at either the mother's home in Erie or the father's home in Ligonier serves the child's best interests. *See Klos v. Klos, 934 A.2d 724, 729 (Pa.Super. 2007).*

The Custody Act requires the court to determine the best interests of the child utilizing the "best interest factors" set forth at §5328(a)(1 through 16) in ordering any form of custody. "Weighted consideration" is to be given to those factors affecting the safety of the child. *23 Pa.C.S.A. §5328(a).*

The issue of primary custody necessarily involves consideration of the father's Section 5329 objection to the mother's request for custody. Pursuant to 23 Pa.C.S.A. §5329(a), where a party seeks any form of custody, the court shall consider whether that party or member of that party's household has been convicted of or has pleaded guilty or no contest to any of the offenses listed at Section 5329(a). Before making any order of custody to that parent, the court must consider such conduct and determine the party does not pose a threat of harm to the child. The Court is to provide for an evaluation to determine whether the party or household member who committed an offense under Section 5329(a) poses a threat to the child and whether counseling is necessary for that party or household member. *23 Pa.C.S.A. §5329(c).*

If the Court determines counseling is necessary under Section 5329(c), the Court is to appoint a qualified professional specializing in treatment relating to the particular offense to provide counseling to the offending person. *23 Pa.C.S.A. 5329(d)(1).* Counseling may include a program of

[3] For a discussion of a similar situation involving a primary custody determination which resulted in the relocation of a child, rather than relocation of a parent with a child, *see Klos v. Klos*, 934 A.2d 724, 729 (Pa.Super. 2007).

treatment or individual therapy designed to rehabilitate the offending individual which addresses, but is not limited to, issues regarding physical and sexual abuse, the psychology of the offender and the effects of the offense on the victim. *23 Pa.C.S.A. §5329(d)(2).*

Where the Court awards custody to a party who committed an offense under Section 5329(a) or who shares a household with an individual who committed an offense under Section 5329(a), the Court may require subsequent evaluations concerning the rehabilitation of the offending individual and the well-being of the child subsequent to the order. If, upon review of a subsequent evaluation, the court determines the offending person poses a threat of physical, emotional or psychological harm to the child, the Court may schedule a hearing to modify the custody order. *23 Pa.C.S.A. §5329(e)(2).*

The Court may order a party to pay all or a portion of the costs of counseling and evaluations. *23 Pa.C.S.A. §5329(f).*

This matter does not involve a request by a parent to relocate out of the area with a child where a prior custody Order exists. Here, no prior order of custody is in place. The parents already reside in different locales. An Order granting the father primary physical custody will have the net effect of relocating the child from this area to the father's residence in Ligonier, Pennsylvania.

To the extent a relocation analysis applies, the standards are as follows.

As to any proposed relocation, the Court must also consider ten relocation factors in determining the best interests of the child. *See 23 Pa.C.S.A. §§5337(a), (h)(1 through 10).* "Weighted consideration" is to be given those factors which affect the safety of the child. *23 §5337(h).*

The party proposing the relocation has the burden of establishing that the relocation will serve the best interest of the child as shown under the relocation factors at 23 Pa.C.S.A. §5337(h). *23 Pa.C.S.A. §5337(i)(1).* Each party has the burden of establishing the integrity of that party's motives in either seeking the relocation or seeking to prevent the relocation. *23 Pa.C.S.A. §5337(i)(2).*

In any custody action between parents, "there shall be no presumption that custody should be awarded to a particular parent." *23 Pa.C.S.A., §.5327(a).* Moreover, in determining the best interest of a child in a custody matter, "no party shall receive preference based upon gender." *23 Pa.C.S.A. § 5328(b).*

DISCUSSION

The parties are not married. They met online. Their relationship ended on a sour note. Paternity was established when the child was approximately four months old. At that time, the father became involved in the child's life. The parents communicated fairly well about the child. However, the mother was not forthcoming with information to enable the father to obtain school or medical information or medical treatment

for the child.

Prior to August of 2011, the father had visitation with the child approximately two or more weeks at a time every other month and during holidays by agreement. The father also took the child on vacations. Typically the father provided transportation for exchanges of custody.

The child was scheduled to start Kindergarten on approximately August 31, 2011 at the Earl C. Davis Primary School in North East, Pennsylvania. However, the child did not begin school until approximately December 1, 2011.

In August of 2011, the maternal grandmother found the child's home conditions with the mother unacceptable. The poor home conditions included lack of hot water and the stench of cat urine and cat feces which caused the child to have observable difficulty breathing and the maternal grandmother to have burning of the eyes. The condition of the child's bedroom was described as "unbelievable" and cat feces were found in it. The child appeared malnourished. The maternal grandmother reported this information to the child's father and the paternal grandparents. The child's grandparents assisted the father in obtaining physical custody of the child soon thereafter.

At the time, the father lived in Pittsburgh in a two-bedroom apartment. The child resided with the father in Pittsburgh from August of 2011 until November of 2011. In November of 2011, the father moved to Ligonier, Pennsylvania with the child to be closer to the paternal relatives. The father testified he intended to enroll the child in school in Ligonier. In retrospect, the father testified he should have enrolled the child in school sooner. The father retuned the child to the mother's care in November of 2011.

From August of 2011 to November of 2011, the father facilitated communication between the mother and the child by telephone. The child gained approximately 10 pounds during this time.

The father believed removing the child from the mother's residence in August of 2011 was in the child's best interests. Previously, the father had concerns about the child's nutrition and weight, the condition of the child's clothing the mother sent for visitation, the child's hygiene and the mother's overall parenting skills. He had hoped the mother would "come around." However, in August of 2011, the father believed it was necessary to "rescue" the child.

The father did not learn of B.S.G.'s criminal record until shortly before the adversarial hearing.

The father is requesting a criminal conviction evaluation of B.S.G. to determine if B.S.G. poses a threat to the child and whether counseling for him is necessary.

The Mother: Current Situation and Caregiving Environment

The mother has a heart defect. She tires easily. She completed the 11th grade. She receives SSI benefits. She is employed part-time at Kwik Fill. She also receives Public Assistance. A friend or B.S.G. babysits the child while the mother is working.

The mother was involved in a domestic incident with B.S.G. in August of 2010. The mother sustained a concussion from a blow to the face. She developed a black eye. The mother stabbed B.S.G. She testified she did not intend to inflict a deep wound. Both were under the influence of alcohol. The mother sought medical treatment for her injuries.

Although the mother learned of B.S.G.'s criminal record at the beginning of their relationship, she withheld this information from the father. The mother testified she keeps the father informed of the child's progress in school. She testified she has not listed the father as a school contact for the child because he lives in Ligonier.

The mother's testimony indicates B.S.G. spanks the child. The mother confirmed B.S.G.'s use of Tabasco Sauce on broccoli fed to the child. B.S.G. babysits the child and the mother has left B.S.G. alone with the child. The mother testified B.S.G. has not harmed the child.

The mother testified the father has been consistently involved in the child's life. The father paid child support after paternity was established. At the father's request the mother discontinued the support action.

At times, the mother's residence has had a strong odor of cat feces and cat urine. Bags of empty beer cans have been observed in the mother's kitchen. Cat feces have been found on the floor. The mother admitted to a flea infestation at her residence when the child was an infant.

At times, the mother uses inappropriate language directed at the child.

The mother does not promote the child's relationship with the father. The mother offered no particular reason for not wanting the father to spend time with the child, The mother does not want the child to refer to the father's fiance' as "Mom."

The mother testified the child is disruptive in school and the child's behavior affects his relationships with other children. The child's physician referred the child for therapy but the mother could not afford the expense. The mother has contacted Safe Harbor Behavioral Health concerning the child's developmental delays.

In the mother's estimation, her relationship with the child's maternal grandmother is "horrible."

The mother does not believe the child is malnourished.

The mother proposes a custody schedule whereby the father has custody of the child in July and August. The mother wants custody of the child in June. During the school year, the mother is reluctant to share custody with the father. She testified the child would have difficulty adjusting to exchanges of custody because the child has fun with the

father and they play games together. She testified the father spoils the child and the mother cannot compete with this. Also, the mother cannot assist with exchanges of custody because she does not have a driver's license.

The Mother's Boyfriend: B.S.G.

B.S.G. is 32 years old. He graduated from high school. He has never been married. He has no children. He is employed at Lakeview Country Club. He denied current abuse of alcohol or drugs.

B.S.G. is a member of the mother's household. He has been involved with the child for approximately three and one-half years. He resided with the mother and child on a full-time basis until the domestic incident with the mother in August of 2010. Since then, he has lived with the mother and child on weekends. During the week, B.S.G. spends significant time at the mother's residence. As the mother's paramour, he recently attended a meeting convened by the child's school principal concerning a perceived lack of medical treatment.

B.S.G. was convicted of two offenses listed at 23 Pa.C.S.A. §5329(a): Endangering Welfare of Children,[4] and Driving Under the Influence of Alcohol.[5] *See 23 Pa.C.S.A. §5329(a).*

B.S.G.'s methods of disciplining the child include spanking. He admitted to using Tabasco Sauce as a tool to convince the child to eat vegetables. He uses inappropriate language directed at the child.

The Court finds the circumstances of the Endangering Welfare conviction involving a slap to the face of an eleven-month old infant leaving bruises, welts and swelling to the child's face of grave concern, given the evidence of B.S.G.'s treatment of this father's child. As stated on the record, the Court finds the father's request for a Section 5329 evaluation is appropriate and must be granted.

The Father: Current Situation and Caregiving Environment

The father is 29 years old. He graduated from high school. He resides in Ligonier, Pennsylvania. The father has been self-employed since approximately April of 2011 as owner of a video production company. He receives unemployment compensation benefits. The father lives with his fiance, D.D.

D.D. is 24 years old. She is employed in a hair salon. She was convicted at Erie County Docket No. 1291-2010 of Driving Without a License, 75 Pa.C.S.A. §1501(a), a summary offense, in September of 2011.

The child has his own bedroom and bathroom in the father's condominium unit.

The child's paternal grandparents live in Ligonier within a few miles

[4] 18 Pa.C.S.A. §4304.
[5] 75 Pa.C.S.A. §3802(b).

of the father's residence. They are retired and available to assist with childcare. The paternal grandparents have a loving relationship with the child. Other paternal family members reside in the area.

The father has a loving relationship with the child. The father describes his bond with the child as strong. During visitation the father engages in play activities with the child and they watch television together. The father testified he would place the child's needs above his own.

The father testified the child has a loving relationship with his fiance'. The fiance engages in activities with the child and shows the child affection. The father testified the child inquires about the fiance's whereabouts when she is not present and readily shows her affection.

The father denied a history of alcohol abuse or current drug use.

The father proposes to send the child to R.K. Mellon School. The father testified he believes the school will meet the child's needs. The school offers small classrooms, activities and sports activities. The school has programs for children with special needs.

The father testified the travel time between Ligonier and Erie is approximately three hours.

The father testified he would facilitate a positive relationship between the mother and the child. The father proposes he will assist the child in telephoning the mother in the evening, provide her with transportation to attend the child's school events in Ligonier and will otherwise encourage the mother to be involved in the child's life.

The father proposes the following custody schedule with the mother. During the school year, the child would have visitation with the mother two weekends per month. The parents would alternate custody for major holidays. The child would spend Mother's Day with the mother and Father's Day with the father. The mother would have liberal visitation during school breaks.

The father and the paternal grandparents have a good relationship with the child's maternal grandmother. They cooperate well concerning child care issues.

The Child

The child was born two months premature. His lungs were underdeveloped at birth. The child has developmental delays. The child is thin. The child displays symptoms of ADHD. The child has great difficulty staying focused. The child is behind academically due behavioral issues and his late start in Kindergarten.

The child received special education support services at the preschool level through the North East Head Start program. He is considered at risk for future special education due to hyperactivity and difficulty paying attention. *Plaintiff's Ex, No. 1.*

The child is good-natured and energetic. He comes to school clean and well-kept.

On one occasion, the child's maternal grandmother found the child covered in fleas after being in the mother's care.

Ever since B.S.G. used Tabasco Sauce as a tool to encourage the child to eat his vegetables, the child has a hyper-response whenever he sees a bottle of Tabasco Sauce. The child becomes distraught and difficult to console.

BEST INTEREST ANALYSIS

Utilizing the relevant best interest factors at 23 Pa.C.S.A. §5328(a) (1 through 16) the Court finds the living situation for the child at the father's home in Ligonier presently serves the child's best interests. It is also in the child's best interests for the mother to have liberal periods of partial custody outside the presence of B.S.G. pending the outcome of the Section 5329 evaluation.

The father's Section 5329 requested must be granted. B.S.G. shall undergo an evaluation pursuant to 23 Pa.C.S.A. §§5329(a) and (c). The mother shall pay the cost of the evaluation and any necessary counseling.[6] A report with findings and recommendations of the evaluator shall be sent this Court. The report shall include the evaluator's opinions whether B.S.G. poses a threat to the child and whether counseling is necessary. Until the Court determines whether B.S.G. poses a threat of harm to the child, the mother's periods of partial custody shall not occur with B.S.G. present or on the same premises.

§5328(a)(1) Which party more likely to encourage and permit frequent and continuing contact between child and another party. The Court finds the father is the party more likely to encourage and permit frequent and continuing contact between the child and the other parent.

§5328(a)(2) Present and past abuse by party or household member, any continued risk of harm to child or abused party and which party can better provide adequate physical safeguards and supervision. The mother and B.S.G. have demonstrated abusive behavior toward each other. In August of 2010, the mother and B.S.G. were involved in a domestic incident necessitating medical treatment for the mother. B.S.G. has convictions for offenses listed at 23 Pa.C.S.A. §5329(a). An evaluation shall be ordered to determine if B.S.G. poses a threat of harm to the child and whether counseling is necessary. B.S.G. speaks inappropriately to the child, spanks the child and applies Tabasco Sauce to the child's food as a teaching aide. At times the mother's home conditions have been inappropriate for the child. Currently the father can better provide adequate physical safeguards and supervision for the child.

[6] It is suggested the mother and B.S.G. contact Family Services of Northwestern Pennsylvania or Catholic Charities Counseling and Adoption Services, Inc. for an evaluation.

§5328(a)(3) Parental duties performed by each party. The evidence suggests the father performs parental duties on behalf of the child sufficient to satisfy his basic physical and emotional needs. The evidence suggests the living environment provided by the mother has been unhealthy at times and the child may have received inadequate nutrition in the mother's care.

§5328(a)(4) Need for stability and continuity in child's education and family and community life. As with any child, the need exists for stability and continuity in R.M.'s education and family and community life. The need for stability and continuity in these areas may be heightened due to the child's special needs and developmental delays.

§5328(a)(5) Availability of extended family. The paternal grandparents with whom the child enjoy a loving relationship reside near the father in Ligonier, Pennsylvania. The father has a good relationship with his parents. The paternal grandparents are readily available to assist the father in caring for the child. The child's maternal grandmother who enjoys a loving relationship with the child resides in Ohio. The poor relationship between the mother and the maternal grandmother may impact the amount of contact the maternal grandmother has with the child while he is in the mother's care. The father and the maternal grandmother have a good relationship.

§5328(a)(6) Child's sibling relationships. No evidence was adduced concerning this factor.

§5328(a)(7) Well-reasoned preference of child, based on child's maturity and judgment. The child is six (6) years old. The Court did not interview the child.

§5328(a)(8) Attempts of parent to turn child against other parent, except if domestic violence where reasonable safety measures are necessary to protect child. There is no evidence either parent attempted to turn the child against the other parent.

§5328(a)(9) Which party more likely to maintain loving, stable, consistent and nurturing relationship with child adequate for child's emotional needs. Presently, the father is more likely to maintain a loving, stable, consistent and nurturing relationship with the child adequate for his emotional needs.

§5328(a)(10) Which party more likely to attend to child's daily physical, emotional, developmental, educational and special needs. The father did not register the child for a Kindergarten program while the child was in the father's care from August of 2011 to November of 2011. The father intended to register the child for Kindergarten in Ligonier. When the child has been in the father's care, the father has provided for the child's essential needs. Under the present circumstances, the Court believes the father is more likely to attend to the child's daily physical, emotional, developmental, educational and special needs.

§5328(a)(11) Proximity of residences of parties. The distance between the parents' residences is not an insurmountable obstacle to preserving the relationship between the child and the mother through suitable custody arrangements, considering the logistics and financial circumstances of the parties. In the past, the father lived in Pittsburgh. The mother has lived with the child in Sharon, Altoona and North East, Pennsylvania. The parties cooperated then in establishing a visitation schedule that preserved the relationship between the father and the child. The father has demonstrated a willingness to assist the mother with exchanges of custody.

§5328(a)(12) Availability to care for child or ability to make appropriate child care arrangements. The father's availability to care for the child or ability to make appropriate child care arrangements exceeds that of the mother.

§5328(a)(13) Level of conflict between the parties and willingness and ability to cooperate with one another. Effort to protect child from abuse by party not evidence of unwillingness/inability to cooperate. Except for the issues presented to the Court for decision, the level of conflict between the parties is relatively low. Until August of 2011, the parties demonstrated cooperation in their shared custody, arrangement.

§5328(a)(14) History of drug or alcohol abuse of party or member of party's household. The domestic incident of August of 2010 raises concern about alcohol and physical abuse on the part of the mother and B.S.G.

§5328(a)(15) Mental and physical condition of party or member of party's household. No evidence concerning a mental or physical condition that would interfere with parenting was introduced.

§5328(a)(16) Any other relevant factor. B.S.G. was convicted of two offenses listed at 23 Pa.C.S.A. §5329(a). B.S.G. is a member of the mother's household. He has significant contact with the child. He lives at the mother's residence during weekends and otherwise spends significant time at the residence. The mother relies upon B.S.G. to babysit the child. The mother withheld B.S.G.'s criminal history from the child's father for years. The mother and B.S.G. have behaved violently toward one another. The domestic incident of August of 2010 suggests they have abused alcohol. B.S.G. spanks the child. He uses Tabasco Sauce as a tool to train the child to eat vegetables. The child has special needs and is developmentally delayed. Unsanitary and potentially health-threatening conditions existed at the mother's residence in August of 2011. The child is in need of a stable, loving and nurturing environment. The child has a close relationship with the father's fiance and the child's paternal grandparents. It is in the child's best interests to reside with the father and have visitation with the mother. The father's request B.S.G. receive

an evaluation pursuant to 23 Pa.C.S.A. §5329(c) must be granted. B.S.G. must not have contact with the child pending court review of the evaluation report.

The Court finds the father's request for primary physical custody must be granted.

RELOCATION ANALYSIS

To the extent the relocation factors may apply, they are analyzed as follows.

Utilizing the relevant "relocation factors" at 23 Pa.C.S.A. § 5337(h)(1 through 10), the Court finds the father has established relocation of the child will serve the child's best interests. *See 23 Pa.C.S.A. §5337(i)(1).* The father established integrity of motives in seeking the relocation. The father loves the child. The father wants to provide the child with a stable and nurturing environment. The father wants to protect the child from harm. He wants to extract the child from conditions with the mother and B.S.G. he perceives as harmful or potentially harmful to the child. The father wants to foster a loving relationship between the mother and the child.

The mother established integrity of motives in seeking to prevent the relocation. The mother believes the child's needs are met in her care. The mother does not perceive B.S.G. as presenting a risk of harm to the child. While the mother's perceptions may be skewed, they appear genuine. The Court finds it is in the child's best interests to grant the relocation request.

§5337(h)(1) Nature, quality, extent of involvement and duration of child's relationship with party proposing to relocate and with nonrelocating party, siblings and other significant persons in child's life. The child has primarily resided with the mother. The child has had ongoing contact with the father the majority of the child's life. The child has spent less time in the father's care, however, the quality of father's contact and involvement in the child's life has been high. Paternal family members have maintained quality contact with the child. Little information was provided about the quality of the contact the child has with the mother. The maternal grandmother has a loving relationship with the child. However, the poor relationship between the maternal grandmother and the mother limits the maternal grandmother's contact with the child.

As of August of 2011, the quality of conditions at the mother's residence was poor. The mother's paramour, B.S.G., spanks the child, uses abusive language directed at the child and inappropriately uses Tabasco Sauce to teach the child good nutritional habits. The child has developmental delays and special needs. In the estimation of the child's grandparents, the child was malnourished. The father removed the child from unhealthy living conditions at the mother's residence in August of 2011.

§5337(h)(2) Age, developmental stage, needs of child and likely impact of relocation on child's physical, educational and emotional development, taking into consideration any special needs of child. The child is young. He began Kindergarten in December of 2011. He is not entrenched in the current school environment. A new school environment will not adversely affect the child. The child's proposed school in Ligonier has programs to address the child's special needs. On the balance, the child's need for stability and structure and the perceived ability of the father's living environment in Ligonier to better meet those needs outweighs any disadvantages to the child in switching Kindergarten programs at this time. The father met the child's nutritional needs. The child gained weight in the father's care. The child loves the father and his fiance' and enjoys being in their company. The child must remain in the father's care at least during the pendency of B.S.G.'s evaluation and the processing of the evaluation results and recommendations.

§5337(h)(3) Feasibility of preserving relationship between nonrelocating party and child through suitable custody arrangements, considering logistics and financial circumstances of parties. Considering the distance between the parties' residences, the father's history of cooperation with transportation arrangements for exchanges of custody, and the support of the paternal grandparents, preserving the child's relationship with the mother through suitable custody arrangements will be feasible.

§5337(h)(4) Child's preference, taking age and maturity of child into consideration. The child is six years old, has special needs and is developmentally delayed. The Court did not interview the child at the hearing.

§5337(h)(5) Whether there is established pattern of conduct of either party to promote or thwart relationship of child and other party. No evidence was adduced concerning this.

§5337(h)(6) Whether the relocation will enhance general quality of life for party seeking relocation, including, but not limited to, financial or emotional benefit or educational opportunity. The father already lives in Ligonier. This is not the case of a parent who seeks to relocate with a child. The father lived in Pittsburgh, Pennsylvania for at least two years before moving to Ligonier in November of 2011. The father moved to Ligonier to live closer to his parents. Based on the father's desire to live closer to his parents, it is believed the move to Ligonier will emotionally benefit the father. The paternal grandparents have a positive, loving relationship with the child. To the extent the father is granted physical custody of the child, the father will receive a derivative benefit from the emotional support the paternal grandparents provide to the child.

§5337(h)(7) Whether relocation will enhance general quality of life for child, including but not limited to, financial or emotional benefit or educational opportunity. The child has a loving relationship with the father, the father's fiance' and the paternal grandparents. It will emotionally benefit the child to reside with the father and his fiancé who live in close proximity to the paternal grandparents.

Little evidence was adduced about the child's relationship with the mother. The mother uses inappropriate language directed at the child. As of August of 2011, the mother's home conditions were poor and potentially threatening to the child's health. The child appeared malnourished. The child has special needs, physically and emotionally.

B.S.G. relates to the child in a dysfunctional manner. He uses inappropriate language directed at the child. B.S.G. spanks the child. His nutritional training techniques are negative influences in the child's life. They have caused the child emotional upset. B.S.G. must undergo a criminal conviction evaluation pursuant to Sections 5329(a) and (c).

The child displays symptoms consistent with ADHD. The child is especially vulnerable to problems caused or exacerbated by emotional distress.

Under these circumstances, the Court finds the general quality of the child's life will be enhanced by granting the father's request for primary physical custody.

§5337(h)(8) Reasons and motivation of each party for seeking or opposing the relocation. The father, his fiance and his parents, who live nearby, love the child. The father wants the child to receive the benefits of living in the loving, nurturing environment the father can provide. The father wants to extract or rescue the child from an environment the father perceives as negative and emotionally and physically unhealthy. The father's motives in wanting to relocate the child to live with him in Ligonier are genuine.

The mother cites no reason in particular for opposing the child's relocation. She feels she cannot compete with the fun and other benefits the child receives when he is in the father's care. She does not want the child to refer to the father's fiancé as the child's mother. She does not perceive her home conditions as unhealthy or inadequate for the child's physical or emotional needs. She does not believe B.S.G. presents a risk of harm to the child. Regardless of the accuracy of the mother's perceptions, the mother's motives in opposing relocation of the child appear genuine.

§5337(h)(9) Present and past abuse committed by a party or member of party's household and whether there is a continued risk of harm to child or abused party. The domestic incident of August of 2010 raises concern about alcohol and physical abuse on the part of the mother and B.S.G. B.S.G.'s criminal convictions in 2001 for Simple Assault

and Endangering Welfare, his relationship with the mother, his ongoing presence in the mother's home and the nature and level of his contact with the child raise concern about the well-being of the child while in the mother's care. Also, an evaluation of B.S.G. pursuant to 23 Pa.C.S.A. §5329(c) based on his criminal convictions is appropriate.

§5337(h)(10) Any other factor affecting the best interest of child. See discussion at best interests factor §5328(a)(16), above.

The Court finds the father's request to relocate the child must be granted.

CONCLUSION

Pursuant to a best interest analysis, it is in the child's best interests to grant the father's request for primary physical custody and permit the child to relocate to Ligonier to live with the father. The custodial environment offered by the father is presently better suited to the child's current needs.

The Court must grant the father's request for an evaluation of B.S.G. pursuant to Section 5329 of the Custody Act. Until the results of the evaluation are fully processed and the Court determines whether B.S.G. poses a threat of harm to the child and whether counseling is necessary, the child shall not have contact with B.S.G.. The mother shall be granted liberal periods of partial physical custody with the child outside the presence of B.S.G.

To the extent the relocation factors may apply, the father established it is in the child's best interests to permit the child to relocate to live with the father at the father's residence in Ligonier, Pennsylvania. The father established the integrity of his motives in seeking relocation of the child. The mother established the integrity of her motives in opposing the father's request.

A Custody Order will be entered consistent with this Memorandum Opinion.

ORDER

AND NOW, to-wit, this 9th day of March, 2011 after a hearing on Plaintiff's Complaint for Custody/Shared Custody, Defendant's Request for Adversarial Hearing and Defendant's Petition for Special Relief Pursuant to 23 Pa.C.S.A. §5329, and in consideration of the best interests of the child, R.M., it is hereby **ORDERED** the following Custody Order shall remain in effect until further Order:

1. The parents shall share legal custody of the child. The child is: R.M., born September 9, 2005.

2. The father, J.P.M., shall have primary physical custody of the child. The mother, L.A.B., shall have partial physical custody of the child.

3. The child shall be move to the father's residence in Ligonier,

Pennsylvania over the child's Easter school break. The child shall reside with the father and the mother shall have partial physical custody of the child as follows:

a. During the school year, every third weekend the child shall be with the mother from Friday at 5:00 p.m. until Sunday at 3:00 p.m. The custody exchange shall occur in Cranberry, Pennsylvania, unless mutually agreed upon otherwise.

b. During summer school break, the child shall be with the mother for six (6) weeks. Unless agreed upon otherwise, the weeks shalt be consecutive. The start and end dates of the mother's period(s) of partial custody during the summer shall be mutually agreed upon. The custody exchange(s) shall occur in Cranberry, Pennsylvania unless agreed upon otherwise.

4. The Holiday Schedule shall be as follows:

a. The parties shall reach agreement concerning the holiday/school break for Thanksgiving of 2012, Christmas of 2012 and Easter of 2013. Unless otherwise agreed upon, the following year the child shall be with the other parent for the respective holiday. In subsequent years, custody shall accordingly alternate.

b. The child shall be with the mother on Mother's Day Weekend from 5:00 p.m. on Friday until 3:00 p.m. on Sunday, and with the father on Father's Day Weekend.

c. Custody exchanges for the Holiday Schedule shall occur in Cranberry, Pennsylvania, unless mutually agreed upon otherwise.

d. Each parent shall plan a birthday celebration for the child on one of their regularly scheduled custody days near the child's birthday.

e. ALL HOLIDAY SCHEDULES SHALL SUPERSEDE ANY OTHER PARTIAL CUSTODY OR VISITATION SCHEDULE UNLESS MUTUALLY AGREED UPON OTHERWISE.

5. There shall be open telephone communication at reasonable times and intervals.

6. Each parent shall keep the other informed of current address and telephone numbers.

7. Each parent shall keep the other informed of the child's health, progress in school and general welfare and shall consult the other parent concerning major decisions affecting the child.

8. Each parent is entitled to receive directly from schools, health care providers and other relevant sources information concerning the child. **The mother shall cooperate and assist the father in obtaining the child's school, medical and dental records by Easter school break, or as soon thereafter as practical, to aid in the child's transition.**

9. Neither parent shall engage in conduct that presents to the child a negative or hostile view of the other.

10.This custody arrangement may be modified by agreement of the

parties when required for the best interest of the child. The term "mutual agreement" contemplates good faith discussions by both parents to reach an agreement as to specific dates and times of partial custody or visitation, and the unilateral determination of one parent to deny contact shall be viewed as a violation of this provision.

11. If not already done, the parties shall attend the "Children Cope With Divorce Seminar" even if/though the parties were never married to one another.

12. **Pursuant to 23 Pa.C.S.A. §§5329 (a) and (c), the mother's paramour, B.S.G., shall undergo an initial evaluation relative to the convictions for Simple Assault, Endangering the Welfare of Children and Driving Under the Influence of Alcohol.**

a. The parties shall agree upon an evaluator to perform the initial evaluation of B.S.G. The mother shall schedule the evaluation of B.S.G. by Friday, March 23, 2012. The mother shall supply the evaluator with a photocopy of this Order and accompanying Memorandum Opinion with Court Exhibit.

b. The evaluation shall result in a report. The report shall include and address the following:

1. Whether B.S.G. poses a threat to the child;

2. Whether counseling for B.S.G. relating to the nature of any of the offenses is necessary;

3. If counseling is recommended, the evaluator shall indicate whether counseling should also include a program of treatment or individual therapy designed to rehabilitate B.S.G., and the nature of that program or individual therapy.

4. If counseling is recommended, the evaluator shall recommend for the Court's consideration qualified professionals who specialize in treatment relating to the particular offense(s) for which counseling is recommended.

c. The evaluator shall send copies of the report to the undersigned, the parties' attorneys, and the Erie County Office of Custody Conciliation.

d. The mother shall pay the cost of the evaluation and the report, unless otherwise agreed upon.

e. The Court will consider the report in determining whether B.S.G. poses a threat of harm to the child.

f. Until this determination, B.S.G. shall have no contact with the child. The mother's periods of partial custody shall not occur with B.S.G. present or on the same premises.

g. The mother shall notify the Court, the father and the Office of Custody Conciliation of the date and time of the scheduled evaluation.

h. Until the child moves to the father's residence, the mother

shall not permit B.S.G. to have contact with the child. If or once this cannot be arranged, then the child shall move to the father's residence at the earliest possible time.

13. NOTIFICATION OF OBLIGATIONS PRIOR TO RELOCATION. Relocation is a change in the child's physical residence which significantly impairs the ability of a non-relocating party to exercise custody of the child. Relocation of the child shall not occur unless either (1) every individual with custody rights consents to the relocation; or (2) the court approves the relocation. For a full understanding of your rights and obligations regarding relocation, you must refer to Section 5337 of Pennsylvania's Domestic Relations Code. Nevertheless, as a general course of action, the following applies:

I. **Any party proposing relocation must:**

A. At least 60 days prior to relocation, *send notice* of the proposed relocation, *via certified mail, return receipt requested*, to every individual with custody rights to the child.
   1. The notice shall include the address of the new residence; new mailing address; names and ages of individuals who will live in the new residence; home telephone number of the new residence (if available); name of the new school district and school; date of the proposed relocation; the reasons for the proposed relocation; a proposed custody schedule; any other information deemed appropriate and a warning that failure to file an objection to the relocation within 30 days after receipt of the notice will foreclose the non-relocating party from objecting to the relocation.
   2. If, subsequent to serving the notice of relocation, you become aware of information regarding the relocation that you did not previously have, you must promptly inform every individual who received notice of the relocation.

B. With the notice of relocation, you must *provide a counter-affidavit*. A form counter-affidavit is provided in the Domestic Relations Code (23 Pa.C.S.A. Section 5337).

C. If a timely objection to relocation is not filed, you must, prior to relocation, file: (1) an affidavit of notice; (2) proof of service that proper notice was given (the return receipt with the addressee's signature); (3) a copy of the full notice sent; (4) a petition to confirm the relocation and modify any existing custody order; and (5) a proposed order.

II. Any party objecting to relocation must, within 30 days of receipt of the notice of relocation: (1) complete and file with the court a verified counter-affidavit; and (2) serve a copy of the counter-affidavit on the other party via c*ertified mail, return receipt requested.* Failure to file a timely counter-affidavit to the relocation will preclude you from

objecting to the relocation.

14. Jurisdiction of the aforementioned child and this matter shall remain in the Court of Common Pleas of Erie County, Pennsylvania unless and until jurisdiction would change under the Uniform Child Custody Jurisdiction and Enforcement Act, 23 Pa.C.S.A. Section 5401 *et seq.*

15. VIOLATION OF THIS ORDER BY ANY PERSON MAY RESULT IN CIVIL AND CRIMINAL PENALTIES, INCLUDING PROSECUTION PURSUANT TO SECTION 2904 OF THE PENNSYLVANIA CRIMES CODE, INTERFERENCE WITH CUSTODY OF CHILDREN.

BY THE COURT:
/s/ **Daniel J. Brabender, Jr., Judge**

ROBERT SANTOS and DIANE SANTOS, Plaintiffs

v.

ERIE INSURANCE EXCHANGE, Defendant

CIVIL PROCEDURE / DISCOVERY / SANCTIONS

The court may make an appropriate order if a party fails to serve sufficient answers or objections to written interrogatories. Pa.R.C.P. 4019(a)(1)(i).

CIVIL PROCEDURE / DISCOVERY

Mental impressions of a party's attorney and mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics of a non-attorney party representative are not discoverable.

CIVIL PROCEDURE / DISCOVERY

Privilege log that identifies documents withheld by date and vague descriptions, such as "claims administrative notes" and "internal evaluations document" must be amended to provide sufficient descriptive information to allow determination of whether non-discoverable mental impressions/evaluations are contained within.

CIVIL PROCEDURE / DISCOVERY

No discovery shall be permitted which would cause unreasonable annoyance, embarrassment, oppression, burden or expense or which is beyond the scope of discovery as set forth in Rules 4003.1 through 4003.6 or which would require the making of an unreasonable investigation. Pa. R.C.P 4011(b)(c) & (e).

CIVIL PROCEDURE / DISCOVERY

Requests for names and addresses of any person who witnessed any occurrence giving rise to, or in relation to, this lawsuit and for all writings, memoranda and documents created by any party, witness or representative were vague and unreasonably burdensome.

CIVIL PROCEDURE / DISCOVERY

In response to request for identity of all witnesses expected to be called at trial, together with a statement describing their expected testimony and documents created by those witnesses, it was permissible for defendant to state that since it was unsure which witnesses will testify, this information will be provided within its Rule 212.2 pretrial narrative statement.

CIVIL PROCEDURE / DISCOVERY

In response to requests to identify any reasons why plaintiffs would be barred from recovery and to state whether defendant disputed the cause of plaintiff's injuries and supporting documentation, it was permissible to state that investigation was ongoing and therefore that defendant could not fully respond. Court ruled that although defendant stated it could not fully respond, it must answer specifically to extent such information is known at present time.

CIVIL PROCEDURE / DISCOVERY

If in response to a discovery request, a party states, in good faith, that he has not yet obtained the services of an expert who is expected to testify at trial, the opposing party is protected from prejudice because there is an affirmative duty to seasonably supplement this discovery response. Pa.R.C.P. 4007.4(1)

CIVIL PROCEDURE / DISCOVERY

Defendant is not required to release to plaintiff surveillance video tape of plaintiff prior to the time that plaintiff submits to a deposition.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 12835-2011

Appearances: Timothy D. McNair, Esq., Attorney for Plaintiffs
Gregory P. Zimmerman, Esq., Attorney for Defendant

OPINION

Connelly, J., April 4, 2012

The matter before the Court is pursuant to a Motion to Compel Answers To Interrogatories and Request for Production of Documents filed by Robert and Diane Santos (hereinafter "Plaintiffs").

Statement of Facts and Procedural History

On November 6, 2008, Plaintiff Robert Santos'[1] car was struck by a truck driven by David Fink.[2] *Plaintiffs' Complaint, ¶¶ 1-2.* As a result of the collision, Plaintiff suffered serious injuries including rib fractures, neck pain, and headaches. *Plaintiffs' Complaint, ¶¶ 2-3.* On October 25, 2010, Plaintiffs submitted a UIM claim to Defendant. Plaintiffs' Complaint, 4. On December 1, 2011, this Court granted Defendants Motion to Stay Discovery limiting the scope of discovery to matters pursuant to the breach of contract claim. *Order, J. Connelly, December 1, 2011.*

On November 2, 2011, Plaintiffs served twenty-six (26) interrogatories and eighteen (18) requests for production of documents[3] on Defendant. *Plaintiffs' First Motion to Compel Discovery, ¶¶ 1-2.* On January 3, 2012 Defendant objected to twenty two (22) of twenty six (26) interrogatories and seventeen (17) of eighteen (18) document requests. *Plaintiffs' First Motion to Compel Discovery, ¶ 2.*

On February 6, 2012, Plaintiffs filed their motion to compel discovery and brief in support. *Plaintiffs' First Motion to Compel Discovery, ¶ 1.* Defendant opposes the motion. *Defendant's Response to Plaintiffs' First Motion to Compel, ¶ 1.* On February 17, 2012, Plaintiffs filed a motion

[1] "Plaintiff" will refer to Robert Santos.

[2] Plaintiffs settled with David Fink for his Travelers Insurance bodily injury liability limit of $25,000. *Plaintiffs' Complaint, ¶¶ 3-5.*

[3] Requests for production of documents will be referred to as "questions".

to modify the December 1, 2011 Order. *Plaintiffs' Motion to Modify Stay of Discovery, ¶ 1.* This Court upheld the severance of the UIM and bad faith claims as well as the stay of discovery related to the bad faith claim. *Order, J. Connelly,* February 22, 2012. Therefore, Plaintiffs' Motion to Modify the December 1, 2011 Order has been rendered moot.

On March 7, 2012, Defendant filed its Answer and New Matter. *Defendant's Answer and New Matter, ¶ 1.* On March 14, 2012, Plaintiffs filed their Reply to Defendant's Answer and New Matter.[4] *Plaintiff's Reply to Defendant's Answer and New Matter, ¶ 1.*

Analysis

Plaintiffs aver Defendant's objections to Interrogatories and Questions should be overruled and Defendant compelled to answer pursuant to Pa.R.C.P. No. 4019. *Plaintiffs' First Motion to Compel Discovery, in ¶¶ 1, 3, 6.* "The court may, on motion, make an appropriate order if a party fails to serve ... sufficient answers or objections to written interrogatories under Rule 4005..." *Pa.R.C.P. No. 4019(a)(1)(i).*

> The trial court is responsible for '(overseeing] discovery between the parties and therefore it is within that court's discretion to determine the appropriate measure necessary to insure adequate and prompt discovering of matters allowed by the Rules of Civil Procedure.'

Berkeyheiser v. A-Plus Investigations, Inc., 936 A.2d 1117, 1125 (Pa. Super. 2007)(citation omitted). Plaintiffs' Interrogatories and Questions are similar and will be addressed together.

OBJECTIONS AS TO INFORMATION PROTECTED BY THIS COURT'S DECEMBER 1, 2011 ORDER

Defendant objected to Interrogatories 2, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and Questions 1 through 17 to the extent the interrogatories and questions seek information protected by this Court's December 1, 2011, Order. *Plaintiff's First Motion to Compel Discovery, Exhibit C and Exhibit D, ¶¶ 1-13 and 1-7.* Plaintiffs withdrew their Motion to Compel as to Interrogatories 11-15 and seek only to compel discovery related to their UIM claim. *Plaintiffs' Brief in Support of Motion to Compel Discovery Responses, ¶ 3.* Accordingly, Defendant is compelled to answer Interrogatories and Questions to the breach of contract claim only.

INTERROGATORY 7

Interrogatory 7 requests Defendant identify any bars to Plaintiff's bad faith claim. *Plaintiff's First Motion to Compel Discovery, Exhibit C, ¶¶ 3-4.* All discovery pursuant to the Bad Faith claim is stayed pending

[4] Answers and New Matter and Replies thereto must be served upon Judge Connelly's chambers or else they will not be considered in the future.

outcome of the UIM claim. *Order, J. Connelly, December 1, 2011*. Therefore, Plaintiffs' Motion to Compel Discovery as to Interrogatory 7 is denied.

OBJECTIONS AS TO MENTAL IMPRESSIONS AND EVALUATIONS OF DEFENDANT/COUNSEL

Defendant also objected to Interrogatories 2, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and Questions 1 through 17 to the extent the interrogatories and questions seek information containing the mental impressions and evaluations of Defendant or its counsel. *Plaintiff's First Motion to Compel Discovery, Exhibit C and Exhibit D, ¶¶ 1-13 and 1-7.*

The Pennsylvania Rules of Civil Procedure state in relevant part:

> [D]iscovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa.R.C.P No. 4003.3.

Pursuant to Pa.R.C.P. 4003.3 "mental impressions of a party's attorney" and "mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics" of a non-attorney part representative are not discoverable and therefore Defendant cannot be compelled to provide an answer if doing so would reveal such information.

OBJECTIONS AS TO INFORMATION FOUND IN THE REDACTED CLAIMS FILE

Defendant's Privilege Log identifies documents as being redacted for reasons 1: "Relevance-Not reasonable calculated to lead to the discovery of admissible evidence" and 3: "Mental Impressions/Evaluations."[5] *Plaintiff's First Motion to Compel Discovery, Exhibit E, ¶ 1.* The documents in question are identified in the Privilege Log by date and vague descriptions such as "claims administrative notes" and "Internal evaluations document". *Id.*

QUESTIONS 1, 2, 7, 13, AND 15

Questions 1 and 2 inquire as to "all files and reports of investigations" excluding any privileged or undiscoverable documents. *Plaintiff's First Motion to Compel Discovery, Exhibit D, ¶ 1.* Question 7 requests the names and contact information of all potential witnesses. *Id. at ¶ 3.* Questions 13 and 15 request all documents between the parties and any documents referenced in response to Interrogatories. *Id. at ¶¶ 5-6.*

Defendant objects to these questions and instructs Plaintiff to review the redacted claims file. *Id. at 1-6.*

At this time the Court lacks sufficient information to determine whether discovery of these documents should be compelled. Defendant shall produce for Plaintiffs a more descriptive Privilege log sufficiently identifying the documents redacted for reasons 1 and 3 so as to determine if irrelevant information or non-discoverable mental impressions/ evaluations are contained within. Therefore, Plaintiffs' Motion to Compel Discovery of Questions 1 and 2, 7, 13, 15 is denied pending the production by Defendant of the supplemental more specific privilege log.

INTERROGATORY 1 AND QUESTIONS 8, 9, 10, AND 14

Interrogatory 1 requests the names and addresses of any persons who "witnessed any occurrence giving rise to or in relation to this suit" or who have any knowledge relating to Plaintiffs' case. *Plaintiff's First Motion to Compel Discovery, Exhibit C, ¶ 1.* Defendant objects to Interrogatory 1 as "vague, overly broad and burdensome" and avers Defendant is unaware of any such witnesses besides Plaintiff and the tortfeasor. *Id.*

Questions 8, 9, 10, and 14 request "all writings", "all memoranda", and all other documents created by any party, witness, or representative. *Plaintiff's First Motion to Compel Discovery, Exhibit D, ¶¶ 3-6.* Defendant objects to Questions 8, 9, 10, and, 14 claiming the requests are overly broad and burdensome. *Id.* The Pennsylvania Rules of Civil Procedure state

> No discovery or deposition shall be permitted which... would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party; is beyond the scope of discovery as set forth in Rules 4003.1 through 4003.6...or would require the making of an unreasonable investigation by the deponent or any party or witness

Pa.R.C.P. No. 4011(b)(c) & (e).

The Pennsylvania Superior Court vacated an order striking objections and remanded the matter to the trial court where the court could not determine "whether the materials and depositions requested might produce information that 'appears reasonably calculated to lead to the discovery of admissible evidence' under Rule 4003.1(b)" without a "studied analysis by the court of the voluminous discovery requests." *Berkeyheiser v. A-Plus Investigations, Inc.*, 936 A.2d 1125; *see also Yadouga v. Cruciani*, 66 Pa.D.&C.4th164, 171, 183 (Lackawanna 2004) (Finding interrogatories requesting 'all other writings, memoranda, data

[5] Plaintiffs are not compelling discovery of documents redacted for reason 2: Attorney-client communications. *Plaintiffs' Brief in Support of Motion to Compel Discovery Responses, ¶ 5 n.2.*

and tangible things which relate directly or indirectly to the incident...' to be "too generalized" and "unreasonably burdensome".)

Likewise, this Court finds the requests in Interrogatory 1 and Questions 8, 9, 10, and 14 to be vague and unreasonably burdensome. Therefore, Plaintiffs' Motion to Compel Discovery as to Interrogatory 1 and questions 8, 9, 10, and 14 is denied.

INTERROGATORY 2

Interrogatory 2 requests the identity of any person who "gave any statement or prepared any document...or any other tangible thing" relating to the case. *Plaintiff's First Motion to Compel Discovery, Exhibit C, ¶¶ 1-2.* Defendant answered interrogatory 2 stating it "did not take any recorded or written statements". *Plaintiff's First Motion to Compel Discovery, Exhibit C, ¶2.* Defendant avers, "unlike cases where liability is being contested, [Defendant] had no need to conduct a full investigation of the accident... includ[ing] photographs, statements, and other similar forms of investigation." *Id.* The Pennsylvania Rules of Civil Procedure state

> A party or an expert witness is under a duty seasonably to amend a prior response if he or she obtains information upon the basis of which he or she knows that ... the response though correct when made is no longer true.

Pa. R.C.P. No. 4007.4(2)(b).

Pursuant to Pa.R.C.P. 4007.4(2)(b), Defendant shall amend its response if the responses are no longer accurate. Therefore, Plaintiffs' Motion to Compel Discovery as to Interrogatory 2 is denied as there is no information at present to challenge the accuracy of the Defendant's response at this time.

INTERROGATORY 8 AND QUESTION 11

Interrogatory 8 and Question 11 inquire about affirmative defenses or new matter and any documents identified in Defendant's Answer and New Matter. *Plaintiff's First Motion to Compel Discovery, Exhibit C, ¶¶ 3-5.* Defendant objected to these interrogatories because Defendant had not yet filed its Answer or New Matter. *Id.* Defendant filed its Answer and New Matter on March 7, 2012. Pursuant to Pa.R.C.P. 4007.4(2)(b), Defendant shall amend its responses to Interrogatory 8 and question 11. Plaintiffs Motion to Compel Discovery as to Interrogatory 8 and Question 11 is granted.

INTERROGATORY 3 AND QUESTION 3

Interrogatory 3 and question 3 request "photographs, maps, drawings, surveys..." and "photographs, recordings, films, charts, sketches, graphs, and diagrams." *Plaintiff's First Motion to Compel Discovery, Exhibit C, ¶ 2. Plaintiff's First Motion to Compel Discovery, Exhibit D, ¶ 2.* Defendant states it is "not aware of any such materials" and "does not

have any...such evidence." *Id.; Id.* Pursuant to Pa.R.C.P. 4007.4(2)(b), Defendant shall amend its response if the responses are no longer accurate. Plaintiffs' Motion to Compel Discovery as to Interrogatory 3 and Question 3 is denied.

INTERROGATORIES 4, 5, 6, 10 AND QUESTION 17

Interrogatories 4, 5, and 6, and 10 request the identity of all witnesses expected to be called at trial, what they will testify about, and any documents created by the witnesses. Question 17 requests all documents that will be introduced at trial. *Plaintiff's First Motion to Compel Discovery, Exhibit D, ¶ 6.*

Defendant avers it is unsure which witnesses will testify or what documents it will use at trial. *Plaintiff's First Motion to Compel Discovery, Exhibit C, ¶¶ 2-3, 5.* Defendant avers it will list all its witnesses in its pre-trial narrative statement pursuant to the Pennsylvania Rules of Civil Procedure. *Id. at ¶2.*

> A pre-trial statement shall contain... a list of the names and addresses of all persons who may be called as witnesses by the party filing the statement... a list of all exhibits which a party intends to use at trial.

Pa.R.C.P. No. 212.2(a)(3) & (4).

This Court finds it acceptable for Defendant to identity its witnesses and exhibits in its pre-trial narrative statement pursuant to Pa.R.C.P. 212.2(a)(3) & (4). Therefore, Plaintiffs' Motion to Compel Discovery as to Interrogatories 4, 5, 6, 10, and Question 17 is denied.

INTERROGATORIES 9, 16, 17, 18, 19, 20, 21, 22, AND 23

Interrogatory 9 asks Defendant to identify any reasons why Plaintiffs would be barred from recovery. *Plaintiff's First Motion to Compel Discovery, Exhibit C, ¶¶ 4-5.* Interrogatories 16, 17, 18, 19, 20, 21, 22, and 23 inquire into any disputes as to the cause of Plaintiff's injuries and supporting documentation. *Plaintiff's First Motion to Compel Discovery, Exhibit C, ¶¶ 7-11.*

Defendant objects to these interrogatories on the ground Defendant has not completed its investigation, does not know which documents will be introduced at trial, and therefore "cannot fully respond". *Plaintiff's First Motion to Compel Discovery, Exhibit C, ¶¶ 4-5, 7-11; Plaintiff's First Motion to Compel Discovery, Exhibit D, ¶ 6.* Plaintiffs seek to compel responses averring that ongoing discovery is not sufficient cause for Defendant to not answer the interrogatories "at all". *Id.; Id., Plaintiffs' Brief in Support of Motion to Compel, ¶ 9.* Pursuant to Pa.R.C.P. 4019(a)(1)(i), this Court may make an order if a party fails to serve sufficient answers to interrogatories. *Pa.R.C.P. No. 4019 (a)(1)(i).*

The Pennsylvania Superior Court upheld sanctions imposed by the trial court in part for failure to comply with discovery requests where,

> "interrogatories requesting specific information ... were answered in vague and general terms...[such as] [a]n estimate which will be substantiated at trial'...'information already in defendant's possession'...[and] 'in accordance with contracts'".

Pride Contracting, Inc. v. Biehn Constr., Inc., 553 A.2d 82, 84-85 n.1 (Pa. Super. 1989).

Likewise, this Court finds Defendant stating it cannot "fully respond" to not excuse Defendant from responding specifically. Plaintiffs' Motion to Compel Discovery as to Interrogatories 9, 16, 17, 18, 19, 20, 21, 22, and 23 is granted as to whether or not any such information exists at the present time to the best of Defendant's knowledge.

INTERROGATORIES 24, 25, 26, AND QUESTIONS 4, 5, 6, AND 16

Interrogatories 24, 25, 26, and questions 4, 5, 6, and 16 request the identity, contact information, compensation, documents examined by, and reports of expert witnesses retained or relied upon in this matter. *Plaintiff's First Motion to Compel Discovery, Exhibit C, ¶¶ 11-12; Plaintiff's First Motion to Compel Discovery, Exhibit D, ¶¶ 2-3, 6.* Defendant objects to these interrogatories and questions to the extent they seek information about experts who will not be called at trial. *Id.; Id.* Defendant avers it "will identify all expert witnesses to be called at trial in its pre trial narrative statement..." *Id.; Id*.

The Pennsylvania Rules of Civil Procedure state,

> A party is under a duty seasonably to supplement the response with respect to any question directly addressed to the identity and location of persons having knowledge of discoverable matters and the identity of each person expected to be called as an expert witness at trial, the subject matter on which each person is expected to testify and the substance of each person's testimony as provided in Rule 4003.5(a)(1).

Pa.R.C.P. No. 4007.4(1).

The Pennsylvania Superior Court found,

> [I]f a plaintiff, in good faith, states that he has not yet obtained the services of an expert who is expected to testify at trial, the defendants would be protected from prejudice to their position because the plaintiff is still under an affirmative duty seasonably to supplement this response.

Royster v. McGowen, 439 A.2d 799, 802 (Pa. Super. 1982).

Likewise, this Court finds pursuant to Pa.R.C.P. 4007.4 Defendant shall seasonably supplement its responses to Interrogatories 24, 25, 26, and Questions 4, 5, 6, and 16.

The Pennsylvania Rules of Civil Procedure state in relevant part:

> Discovery of facts known and opinions held by an expert, otherwise discoverable under the provisions of Rule 4003.1 and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:
> A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial...

Pa. R.C.P. No. 4003.5(a)(3).

Therefore, pursuant to Pa. R.C.P. 4003.5(a)(3), Defendant shall answer Interrogatories 24, 25, 26, and Questions 4, 5, 6, and 16 as to any experts retained and expected to testify at trial only.

The Erie County Rules of Civil Procedure limit the time defendants have to submit pre-trial statements to sixty (60) days after the close of discovery. *PA Erie Cty. Civ. LR 212.1(b)(2)(ii)(iii).* As Plaintiffs' pre trial statement must be filed within thirty (30) days after the close of discovery, this Court orders Defendant to supplement its responses to Interrogatories 24, 25, 26, and Questions 4, 5, 6, and 16 as the information becomes available. Plaintiffs' Motion to Compel Discovery as to Interrogatories 24, 25, 26, and Questions 4, 5, 6, and 16 is denied subject to the above stated caveat.

QUESTION 12

Question 12 requests all videotapes and other recordings taken by Defendant or anyone acting on their behalf. *Plaintiff's First Motion to Compel Discovery, Exhibit D, ¶ 5.* Defendant objects to the extent Plaintiffs are requesting surveillance tapes before Plaintiffs have submitted to a deposition. *Id*. The Pennsylvania Superior Court held,

> If the defense has films and decides it wants to use them, they should be exhibited to the plaintiff and his counsel ...'Before any of these disclosures, however, the defense must be given an opportunity to depose the plaintiff fully as to his injuries, their effects and his present disabilities.

Bindschusz v. Phillips, 771 A.2d 803, 811 (Pa. Super. 2001); *quoting Snead v. American Export-lsbrandtsen Lines, Inc.*, 59 F.R.D. 148, 150-151(E.D. 1973). Here, Plaintiffs have not been deposed. Therefore, Plaintiffs' Motion to Compel Discovery as to question 12 is denied.

ORDER

AND NOW, TO WIT, this 4th day of April 2012, it is hereby **ORDERED, ADJUDGED & DECREED**:

I. Plaintiffs' Motion to Compel Discovery as to Interrogatory 7 is **DENIED** pursuant to this Court's December 1, 2011 Order.

II. Plaintiffs' Motion to Compel Discovery of Questions 1 and 2, 7,

13, 15 is **DENIED** pending the production by Defendant of the supplemental more specific privilege log.

III. Plaintiffs' Motion to Compel Discovery as to Interrogatory 1 and Questions 8, 9, 10, and 14 is **DENIED** this Court finds the requests to be vague and unreasonably burdensome.

IV. Plaintiffs' Motion to Compel Discovery as to Interrogatory 2 is **DENIED** as there is no information at present to challenge the accuracy of the Defendant's response.

V. Plaintiff's Motion to Compel Discovery as to Interrogatory 8 and Question 11 is **GRANTED** as Defendant filed its Answer and New Matter on March 7, 2012.

VI. Plaintiffs' Motion to Compel Discovery as to Interrogatory 3 and Question 3 is **DENIED** as Defendant avers it has no such information.

VII. Plaintiffs' Motion to Compel Discovery as to Interrogatories 4, 5, 6, 10, and Question 17 is **DENIED** as the Court finds it acceptable for Defendant to identity its witnesses and exhibits in its pre-trial narrative statement pursuant to Pa.R.C.P. 212.2(a)(3) & (4).

VIII. Plaintiffs' Motion to Compel Discovery as to Interrogatories 9, 16, 17, 18, 19, 20, 21, 22, and 23 is **GRANTED** as to whether or not any such information exists at the present time to the best of Defendant's knowledge.

IX. Plaintiffs' Motion to Compel Discovery as to Interrogatories 24, 25, 26, and Questions 4, 5, 6, and 16 is **DENIED**. Defendant shall supplement its responses as to experts to be called at trial as the information becomes available.

X. Plaintiffs' Motion to Compel Discovery as to Question 12 is **DENIED** as Plaintiffs have not yet been deposed.

BY THE COURT:
/s/ **Shad Connelly, Judge**

RICHARD SUMMERVILLE and JOAN SUMMERVILLE, husband and wife, Appellants

v.

FAIRVIEW TOWNSHIP ZONING HEARING BOARD and FAIRVIEW TOWNSHIP, ERIE COUNTY, PA, Appellees

ZONING / ENFORCEMENT PROCEEDINGS

The standard of review of zoning board decisions is well settled. Where the Court does not take additional evidence, the Court is limited to determining whether the board abused its discretion or committed legal error.

ZONING / ZONING ORDINANCES

Where the intent of the local legislative body can be discerned by looking to the structure of the ordinance as a whole to ascertain legislative intent, a Court may give way to the rule of construction that the permissive nature of an ordinance provision should be taken in its broadest sense and restrictive provisions should be construed in the strictest sense.

ZONING / ACCESSORY USES

In determining whether the proposed use is appropriately defined as an accessory use, particularly where it might be considered "customarily incidental" to a principal use, the Court will apply an objective reasonable person standard.

ZONING / ZONING ORDINANCES

Whether a proposed use falls within a given category of permitted uses delineated in the Ordinance is a question of law subject to the Court's review.

ZONING / ACCESSORY USES

Using a building as a residence is not "customarily incidental" to any of the enumerated principal uses of a "I-1 Light Industrial District" zoning ordinance and is not a proper accessory use of the building where the building is intended to be utilized for commercial/industrial activity.

ZONING / ENFORCEMENT PROCEEDINGS

While the appearance of bias or impropriety is sufficient to trigger judicial scrutiny, invalidating a tribunal's decision is an extraordinary remedy, and recusal will not be required absent tangible evidence of record demonstrating bias, prejudice, capricious disbelief or prejudgment. No impropriety or bias was found where the tribunal devoted considerable time and thoroughly evaluated every issue before concluding that recusal was not warranted.

ZONING / VARIANCE

The court will not find a Variance by Estoppel where the Zoning Board's decision demonstrates reliance upon significant evidence that

the appellants acted in bad faith and did not rely innocently upon the validity of the use.

ZONING / ENFORCEMENT PROCEEDINGS

The court may not substitute its judgment for that of the Board regarding the weight and credibility of the testimony at the zoning violation hearing.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION No. 12658-2011

Appearances: Paul F. Burroughs, Esq., Attorney for Fairview Township
Edward J. Betza, Esq., Attorney for Fairview Township Zoning Hearing Board
Robert J. Glance, Esq., Attorney for Appellants

OPINION AND ORDER

Dunlavey, Michael E., J. April 4, 2012

AND NOW, to wit, this 4th day of April, 2012, comes the land use appeal filed by the appellant's, Richard Summerville and Joan Summerville (hereinafter "the Summerville's"), from a decision rendered by the Fairview Zoning Hearing Board (hereinafter "the Board") on or around June 14, 2011. For the reasons set forth below, the Board's decision is **AFFIRMED.**

I. FACTUAL AND PROCEDURAL BACKGROUND

On July 15, 2002 the Summerville's applied for a permit with Fairview Township (hereinafter "the Township") to construct a 60' x 100' storage shelter and office space located at 7440 Canal Road, Fairview, Pennsylvania 16415 (hereinafter "the Building").[1] The plot upon which the building was constructed at all times was classified as "I-1 Light Industrial" zoning district. The Summerville's plot was previously part of larger plot of land known as the "Maynard" plot. Prior to the enactment of the current zoning scheme the "Maynard" plot was subdivided. Several pre-existing residential structures, now non-conforming uses for an I-1 zone, surround the Summerville's Building.

In 2004 the Summerville's converted the office space of the Building into a personal residence and have since occupied the structure. On or around December 15, 2009, Jim Cardman (hereinafter "Cardman"), the Township's Planning and Zoning Administrator, discovered that the Summerville's were using the Building as their primary residence. On January 13, 2010, Cardman provided the Summerville's with a "Notice of Violation of Zoning Ordinance"[2] stating that the Summerville's were in

[1] Exhibit 3, Zoning Permit Master File Report
[2] Exhibit 4, Notice of Violation of Zoning Ordinance, dated January 13, 2010.

violation of the Fairview Township Zoning Ordinance Article II, Section 201[3] and Article VII, Section 707,[4] pertaining to "Heavy Industrial Districts." Subsequently, the Summerville's requested that the Fairview Township Supervisors grant an extension of time to vacate the property. Ultimately the parties agreed upon July 31, 2010.[5] The Summerville's did not vacate the residence on July 31, 2010, and on September 28, 2010, Mr. Cardman filed a civil complaint seeking a judgment against the Summerville's.[6]

On January 6, 2011, the civil complaint filed against the Summerville's was dismissed without prejudice[7] due to a clerical error in the original Notice of Violation dated January 13, 2010. The Notice incorrectly stated a violation of Article VII, Section 707, pertaining to "Heavy Industrial Districts", as opposed to the stated violation in the complaint filed September 28, 2010, Section 705 "Light Industrial District." On January 12, 2011, Cardman sent a second Notice of Violation of Zoning Ordinance,[8] therein incorporating the intended violation pertaining to Article VII, Section 705 "Light Industrial District."

Beginning March 1, 2011, the Board held a public hearing regarding the Summerville's alleged zoning violation. The Board that conducted the hearing was comprised of Township Chairman Tom Benson, Township Supervisor Tim Schroeck and Township Supervisor George Harmon. A continuation hearing was held on Tuesday, March 22, 2011 and the Board did not announce a decision until a public hearing on June 14, 2011. During the hearing, the Board examined three issues presented on appeal from the Summerville's: 1) whether Cardman erred when he issued the Summerville's a Notice of Violation on January 12, 2011; 2) whether the Summerville's presented sufficient evidence to entitle them to a use variance; and 3) whether the Summerville's presented sufficient evidence to entitle them to a variance by estoppel. The Board unanimously decided against the Summerville's on all three points and now the Summerville's are before this Court on appeal from the Boards' decision.

The parties appeared before this Court for oral argument on

[3] Article II Section 201: "Except as otherwise provided for no-impact home based business, this Ordinance is inclusive zoning in that no use may be operated in a District unless it is specifically included as a use by the right for that district and each parcel shall be limited to one principal use per lot."

[4] Article 7 Section 707: Does not permit living facilities within a heavy industrial district.

[5] *See* Exhibit 6, Supervisors of Fairview Township Workshop Meeting minutes from February 10, 2010; *See also* Exhibit 7, February 17, 2010 Letter addressed to Supervisors from Mr. Summerville; *See also* Exhibit 8, February 22, 2010, Letter from Supervisors to Mr. Summerville.

[6] Exibit A-1, Civil Complaint September 28, 2010.

[7] Exhibit A-2, Notice of Judgment, January 6, 2011.

[8] Exhibit 12, Notice of Violation of Zoning Ordinance, dated

February 21, 2012. The Court will address each of the Appellants' issues, however the Court believes the central issue for purposes of this appeal is whether or not the Summerville's use of the Building is deemed an "accessory use."

II. DISCUSSION

A. Issues on Appeal

The Summerville's argue the following: 1) the Board's decision was compromised due to bias or improper influence; 2) the Summerville's are entitled to a variance by estoppel; and 3) the Summerville's residential use of the Building is an "accessory use" pursuant Article VII Section 705(B)(4), "Accessory Uses" in the "I-1 Light Industrial District."

B. Standard of Review

The standard of review of zoning board decisions is well settled. Where the Court does not take additional evidence, the Court is limited to determining whether the board abused its discretion or committed legal error. *Twp. Of Exeter v. Zoning Hearing Bd. of Exeter,* 962 A.2d 653, 659 (Pa. 2009). "An abuse of discretion occurs when the board's findings are not supported by substantial evidence in the record. Substantial evidence is that relevant evidence which a reasonable mind would accept as adequate to support the conclusion reached." *Id.* at 659; *citing Borough of Fleetwood v. Zoning Hearing Bd. of Borough of Fleetwood,* 649 A.2d 651, 653 (Pa. 1994).

C. "Accessory Use"

The principal argument on appeal before this Court is whether or not the Summerville's use of the Building as residential structure is an "accessory use." Article VII Section 705(B) pertaining to an "Accessory Uses" states:

> The following accessory uses shall be permitted in the Light Industrial District providing the buildings and accessory buildings and uses comply with all requirements of other districts in which they are normally permitted under this ordinance.
>
> 1. On site cafeterias or restaurants specifically designed and only for use by those employees and management of permitted uses in the Light Industrial District.
> 2. On site recreational facility, auditoriums, meeting rooms or other buildings only for the mutual use of the permitted uses located within the District, for meetings, programs, displays recreation and other such users of the District may deem necessary. These facilities shall be prohibited for use by organizations, clubs, and fraternities not specifically associated with businesses in the District.

3. Signs. See supplementary Regulations, Section 827.

4. Other accessory uses *customarily incidental* to a permitted principal use.

Fairview Twp. Zoning Ord., Section 705(B)

The Summerville's argue that the use of the Building as a primary residence is "customarily incidental" to a permitted principal use within the "I-1 Light Industrial District." The permitted principal uses with an "I-1 Light Industrial District" are as follows:

> Only those industrial, manufacturing, compounding, processing, packaging or treatment uses and processes from the following listing are permitted when they comply with all federal, State, County, local environmental and other statutes and regulations.

1. Wholesale, warehousing and storage.
2. Highway freight, transportation and warehousing.
3. Transportation terminals.
4. The manufacturing, compounding, processing/packaging, treatment and distribution of such products as bakery goods, candy, cosmetics, pharmaceutical, toiletries, food and kindred products.
5. The manufacturing, compounding, processing/packaging, treatment and distribution of such products as bakery goods, candy, cosmetics, pharmaceutical, toiletries, food and kindred products.
6. Laboratories devoted to research, design, experimentation, processing and fabrication incidental therefor.
7. Utility, communication, electric and gas company operations.
8. Radio and television facilities and operations, telephone exchange and transformer stations.
9. Carpenter, electrical plumbing, welding, heating, or sheet metal shop, furniture upholstering shop, laundry and clothes cleaning establishments, printing shop or publishing plant.
10. Building material supplies, but not including stone crushing or concrete/asphalt mixing and/or manufacturing.
11. Assembly, manufacturing, compounding, processing, packaging or treatment.
12. Office buildings and buildings used for research and development (R&D facilities).
13. Automobile repair garages shall be permitted as a special exception when conducted entirely in a building and when not

> less than 100' from a residential district. Vehicles located on the lot for service shall have current registration plate affixed and be serviced within a 30 day period.
>
> Fairview Twp. Zoning Ord., Section 705(A)

This provision must be read in light of the Township's over-arching goal and the purpose of the zoning scheme. Article II, Section 202 regarding "Zoning Standards" states:

> Except as otherwise provided for no-impact home based business, this Ordinance is inclusive zoning in that no use may be operated in a District unless it is specifically included as a use by right for that district and each parcel shall be limited to one principal use per lot.
>
> Fairview Twp. Zoning Ord., Section 202

It is unclear how the Summerville's use of the Building as a primary residence is "customarily incidental" to any of the enumerated principal uses under Section 705(A). At oral argument, the Summerville's argued that it might be reasonable to conclude that the use of the Building as a primary residence is customarily incidental to one of the principle uses for the following reasons: 1) there are non-conforming uses located within the "I-1 Light Industrial District" that are in close proximity to the Summerville's Building; 2) the proportion of residential occupants exceeds that of industrial/commercial occupants in the immediate vicinity of the Summerville Building;[9] and 3) the Summerville's have the support of residents that live in the area.[10]

Absent a clear indication of how the Township intended the phrase "customarily incidental" to be defined, the Court must determine its meaning. Whether a proposed use falls within a given category of permitted uses delineated in a zoning ordinance is a question of law subject to this Courts review. *H.E. Rohrer, Inc. v. Zoning Hearing Bd. of Jackson Twp*, 808 A.2d 1014 (Pa. Cmwlth. 2002). Foundationally, ordinances are to be construed expansively, affording the landowner the broadest possible use and enjoyment of his land. *Id.* Undefined terms are given their plain meaning and any doubt is resolved in favor of the landowner and the least restrictive use of the land. *Caln Nether Co. L.P. v. Bd. of Supervisors of Thornbury Twp.*, 840 A.2d 484 (Pa. Cmwlth. 2004). "The permissive nature of an ordinance provision should be taken in its broadest sense and restrictive provisions should be construed in the strictest sense." *Hess v. Warwick Township Zoning Hearing Bd.,*

[9] Canal Road divides two zoning districts, the "1-1 Industrial Light District" where the Summerville's building is located, and an "R-3 Suburban District" where Hemlock Court Apartments are located

[10] (N T. March 22, 2011, at 122; Dorthy Deyab), (Id. at 123; Nancy Hornyak), (Id. at 131; Lucille Stanko)

977 A.2d 1216, 1221 (Pa. Cmwlth. 2009)(*internal citations omitted*). A Court may give way to this rule of construction if the intent of the local legislative body can be discerned by looking to the structure of the ordinance as a whole to ascertain legislative intent. *Id.* at 1222. (*Internal citations omitted*).

In the context of accessory uses, particularly those that might be considered "customarily incidental" to a principal use, the concept is best understood as invoking an objective reasonable person standard. *Hess,* 977 A.2d at 1224. The relevant considerations are as follows: 1) how frequently the proposed accessory use is found in association with the primary use; 2) the applicants particular circumstances; 3) the zoning ordinance and the indications therein as to the governing body's intent regarding the intensity of land use appropriate to the particular district; 4) the surrounding land conditions; and 5) any other relevant information, including general experience and common understanding. *Id.* at 1224. The goal is "to reach a legal conclusion as to whether a reasonable person could consider the use in question to be customarily incidental". *Id.* at 1224.

In *Hess* the Zoning Hearing Board of Warwick Township, Pennsylvania, determined that property owners were not permitted to raise and care for twenty-one Siberian Huskies on their residential property. The use was not "customary" in connection with or incidental to residential dwellings in the township and thus not a permitted "accessory use." The Township of Warwick sent a Notice of Violation of a zoning ordinance pertaining to the housing of five or more domesticated animals on a single property within a residential district. This usage was only permitted in a business district or by special exception. Although the relevant ordinance pertaining to the appellant's property permitted the sheltering of house hold pets, there existed a substantial question of fact regarding the permissible number of pets allowed.

In determining the definition and scope of "customarily incidental" the Court stressed the need for rationale construction:

> "In ascertaining the term, we initially not the irrationality in the zoning scheme suggested by Appellants argument. Under that construct, a land owner would be permitted to keep an unlimited number dogs in a residential zone as an accessory use regardless the size of the dog, the size of the property or the surrounding properties and without regulation as to set backs, fencing or proper waste disposal, while more than four dogs kenneled in a business district are subject to such regulation."
>
> Hess, 977 A.2d at 1222.

The Court determined that the "customarily incidental" use of housing pets within a residential district was reasonably limited by the kennel

regulations, concluding that the Appellant landowners' use of the property exceeded the customary use for house pets. *Id.* at 1224. The Court acknowledged that this fact alone might be sufficient to conclude that the use was not accessory to a principal use, however the Court further juxtaposed the residential district to a commercial district in light of the requirements and regulations pertaining to housing of pets on the property. *Id.* at 1225. Ultimately, the Court determined the Appellant's use within the residential district was not one supervisors nor a reasonable person could conclude was "customarily incidental" to the residence. *Id.* at 1225.

In this case, the Court acknowledges that the Township's zoning ordinance lacks a definition of what a "customarily incidental" use might be for zoning purposes. However, Section 705 taken in conjunction with Section 202, indicated to this Court is that a residential use is not "customarily incidental" to any of the permitted principal uses. First, Section 202 clearly delineates that the Township intends that any use of a land parcel be limited to an already identified use or "use by right" within the applicable zoning district. Next, Section 705(A) enumerates the uses by right, all of which indicate the Township's intention that the "I-1 Light Industrial District" be utilized for commercial/industrial activity. Finally, Section 705(B) pertaining to "Accessory Uses" delineates additional "uses by right" that are related to the operation of a commercial/industrial use or for the benefit of the employees of those operations.

While the Court determines that the Summerville's usage of the Building as a residence is not an "accessory use", other arguments must be addressed. The Summerville's first argument was concerning the multiple non-conforming uses in the immediate vicinity of the Summerville's plot. The record reveals that there are three single family dwellings currently situated within the "I-1 Light Industrial District." The Summerville's contend that these non-conforming uses support the argument that residential uses are permitted in this district, but this evidence is not dispositive. The "non-conforming" status of the surrounding residences is because they existed prior to the enactment of the current zoning scheme. Moreover, the Summerville's disregard the uses in the immediate vicinity of the Summerville's building, Carter Lumber, a "building material supplier", and Bonanti's Transmissions. Furthermore the "old Fairview casting building" was originally located in the now vacant field immediately east of the Summerville parcel. A satellite image depicts that the Summerville parcel is bordered by railroad tracks and large commercial properties. Second, the proportion of residential occupants to commercial/industrial occupants is misleading given this particular "I-1 Light Industrial District" abuts a "R-3 Suburban District."

Lastly, this Court recognizes the financial difficulty that the

Summerville's face in the event they can longer reside in the Building. Though sympathetic, the Court cannot disregard the fact that the Building is not being utilized in conformance with the zoning guidelines and that the Summerville's never obtained a variance prior to using the Building as residence.

Therefore, this Court agrees with the Board that the Summerville's use of the Building as a primary residence is not a use contemplated by the Township nor can it be considered "customarily incidental" to any of the enumerated principal uses of the zoning ordinance.

D. Alleged Impropriety & Bias of Zoning Hearing Board

The Summerville's allege that the Boards' decision was compromised by bias and impropriety undermining the fundamental fairness of hearing. The Summerville's assert the following alleged bias: 1) Board member Tim Schroeck (hereinafter "Schroeck") had an interest in the outcome of the proceeding because his wife, Judy Schroeck, is the secretary to the Zoning Officer Cardman; 2) Township Chairman and the Chairman of the Board Tom Benson (hereinafter "Benson") was appointed on the recommendation of Cardman; and 3) numerous other allegations which were unsupported by any documents or testimony in the record and as a result will not be addressed for purposes of this appeal.

While the appearance of bias or impropriety is sufficient to trigger judicial scrutiny, the extraordinary remedy of invalidating a tribunals' decision often depends upon something more tangible. *Caln Nether Co. L.P.*, 840 A.2d 484 (Pa. Cmwlth. 2004). Where the record demonstrates bias, prejudice, capricious disbelief, or prejudgment then recusal is warranted. *Id.* Furthermore, if a member of the tribunal thinks he is capable of hearing a case fairly his decision not to withdraw will ordinarily be upheld on appeal. *Id.*

The initial allegations raised by the Summerville's gave pause to this Court. However, close review of the transcripts and the record revealed that many of the arguments presented to the Board and this Court were unsubstantiated in the record. At the onset of the hearing before the Board, the Summerville's presented their argument for recusal, specifically the issue involving Schroeck. The Board conceded that Schroeck was married to another Township employee and recessed to discuss counsel's motion that the Board members recuse themselves. The Board voted on whether recusal was warranted and unanimously decided it was not.

On the second issue, the Summerville's rely heavily upon a January 5, 2011, letter from Benson to other members of the Township Board of Supervisors regarding enforcement of zoning ordinances and critique of Cardman. The letter indicates Benson's intent to inform fellow board members of recent tensions between township residents and zoning officials. In the final paragraph of the letter, Benson offers his unequivocal support for the service Cardman provides to the Township

in his capacity as the Zoning Administrator. However, the Court finds that the letter does not substantiate the claim that Cardman was involved or wielded influence over how members of the Board are selected.

The Board was patient throughout the Summerville's three lengthy hearings and devoted considerable time to hear every argument presented to them. Review of the record indicates that the Boards' decision was not biased and that no prejudice existed. Rather, the issues were thoroughly evaluated. Thus, it is the conclusion of this Court that no bias, prejudice, or impropriety existed, and the decision of the Board not to recuse themselves was justified.

E. Variance by Estoppel

Finally, the Summerville's contend that they are entitled to a use variance because Township officials knew they were using the Building as a residence as far back as 2004, and chose to do nothing about it.

Four factors are relevant to determine if the Summerville's are entitled to a variance by estoppel, the burden of which is on the Summerville's to prove each factor by "clear, precise, and unequivocal evidence." *Pietropaolo v. The Zoning Hearing Bd. of Lower Merion Twp.*, 979 A.2d 969, 980 (Pa. Cmwlth. 2009) *citing Springfield Twp. v. Kim*, 792 A.2d 717 (Pa. Cmwlth. 2002). A property owner must establish: 1) a long period of municipal failure to enforce the law, when the municipality knew or should have known of the violation, in conjunction with some form of active acquiescence in the illegal use; 2) the landowner acted in good faith and relied innocently upon the validity of the use throughout the proceeding; 3) the landowner has made substantial expenditures in reliance upon his belief that his use was permitted; and 4) denial of the variance would impose an unnecessary hardship on the appellant. *Id.* at 980. In land use proceedings, the board is the ultimate fact-finder and the exclusive arbiter of credibility and evidentiary weight. *Nettleton v. Zoning Bd. of Adjustment of the City of Pittsburgh*, 828 A.2d 1033 (Pa. 2003).

The Summerville's argument before the Board primarily focused on the first element regarding the Township's prior knowledge and alleged inaction regarding enforcement. Mr. Summerville testified that at some point in 2004 he had a discussion with Peter Kraus, a Township Supervisor, about using the Building as his primary residence. Mr. Summerville testified he informed "Pete" Kraus about the residential use, to which Mr. Kraus replied: "Don't let Jimmy [Cardman] find out." The Summerville's argue that based upon this discussion the Township knew or should have known that the Summerville's occupied the building beginning in 2004 and failed to take action until the Notice of Violation in 2010. However, the Board was presented with conflicting testimony from Peter Kraus, whereby he unequivocally denied ever having the conversation with Mr. Summerville.

Although additional evidence was presented to the Board concerning alleged hardship under the fourth element, the Board ultimately decided that the Summerville's showed repeated instances of bad faith under the second element, thus failing to satisfy the necessary requirements for a variance by estoppel. The instances of bad faith are as follows: 1) in 2002 Mr. Summerville inquired into the zoning classification for the parcel of land and had knowledge it was zoned "I-1 Light Industrial"; 2) Mr. Summerville obtained a permit to install an on-site sewage disposal system in compliance with the necessary requirements for a commercial property; 3) Mr. Summerville never attempted to contact Cardman to inquire to whether or not they might be able to convert the building into a residential use.

Even viewing the testimony and facts in a light most favorable to the Summerville's on the issue of estoppel, the Court finds that the Board's decision was not an abuse of discretion given the glaring deficiencies regarding the prior knowledge the Summerville's possessed regarding the zoning classification of the parcel of land at the time they constructed the Building. Moreover, this Court cannot substitute its judgment for that of the Board regarding the weight and credibility of the testimony at the zoning violation hearing. Thus, the Board's decision that the Summerville's failed to present evidence sufficient to establish a variance by estoppel is **AFFIRMED.**

III. CONCLUSION

The Court finds that the Fairview Township Zoning Hearing Board did not abuse its discretion nor did it erroneously enter a decision on the basis of legal error. Thus, for the reasons as explained above, it is the decision of this Court that the decision of the Board is **AFFIRMED**. An Order to this affect is incorporated with this Opinion.

ORDER

AND NOW, to wit, this 4th day of April, 2012, upon consideration of the certified record, the parties' briefs and oral argument on the same, it is hereby **ORDERED, ADJUDGED,** and **DECREED** that the June 14, 2011, decision by the Fairview Township Zoning Hearing Board is **AFFIRMED.**

BY THE COURT:
/s/ Michael E. Dunlavey, Judge