

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

PCIC a/s/o LAURIE DiPASQUALE and :  
LAURIE DiPASQUALE, in her own right :  
**Plaintiffs** :

vs. :

MARGARET M. KIELY, ATTORNEY-IN-FACT :  
on behalf of CHRISTINE FEINSTEIN and :  
KEVIN H. WRIGHT, ESQUIRE :  
**Defendants** :

JUNE TERM, 2017

NO. 0645

**DOCKETED**

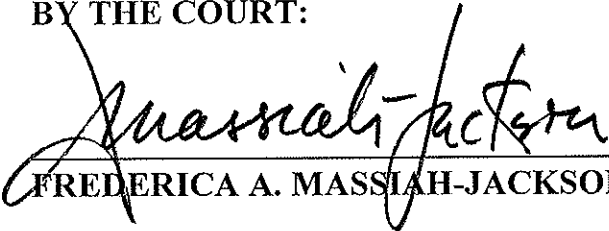
OCT 03 2018

F. BROWN  
DAY FORWARD

**ORDER**

And Now, this 3<sup>rd</sup> day of October, 2018, after considering the Preliminary Objections filed by Attorney Kevin H. Wright, the Responses filed by the Plaintiffs, and for the reasons set forth in the Memorandum filed this date, it is hereby **ORDERED** that the Preliminary Objections are **Sustained** in their entirety and Plaintiffs' Complaint is **DISMISSED WITH PREJUDICE**.

BY THE COURT:

  
FREDERICA A. MASSIAH-JACKSON, J.

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MEMORANDUM in SUPPORT OF ORDERS SUSTAINING  
DEFENDANTS' PRELIMINARY OBJECTIONS

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MASSIAH-JACKSON, J.

DOCKETED

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F. BROWN  
DAY FORWARD

October *3rd*, 2018

**I. FACTUAL BACKGROUND and PROCEDURAL HISTORY**

Ms. Laurie DiPasquale is an insurance claims adjuster, who was an employee of the Philadelphia Contributorship Insurance Company (“Insurance Company”). In an earlier, 2016 litigation, Attorney Kevin H. Wright represented Attorney Margaret M. Kiely, who filed a civil action as Power-of-Attorney and fiduciary naming the Insurance Company and its adjuster, Ms. DiPasquale. The litigation was filed in Philadelphia at December Term, 2016, No. 3446.

By Order dated March 31, 2017, Ms. DiPasquale’s Preliminary Objections were sustained and claims against her were dismissed. On May 24, 2018, the Motion for Non-Suit filed by the Insurance Company was granted. Post-trial Motions were denied and that matter is currently on appeal at 1957 EDA 2018.

This civil action was initiated by Ms. DiPasquale, in her own right, and by her employer, the Insurance Company, as “subrogee” of Ms. DiPasquale. On September 12, 2017, Defendant-Kiely filed Preliminary Objections to the Complaint. A response was filed on September 20, 2017. **Control No. 17091364**. The civil action was stayed from October, 2017, through July, 2018. On August 13, 2018, Defendant-Wright filed Preliminary Objections. A response was filed on August 29, 2018. **Control No. 18081669**. Both sets of Preliminary Objections have been assigned to this Court (September 7 and September 25, 2018).

After careful consideration of the Preliminary Objections filed by the Defendants-Kiely/Wright, Responses filed by the Plaintiffs-DiPasquale and the Insurance Company, and after reviews of the several underlying litigations, this Court concludes that the Preliminary Objections are Sustained in their entireties and the Plaintiffs' Complaint is Dismissed With Prejudice.

## **II. LEGAL DISCUSSION**

### **A. Invasion of Privacy – False Light Is Dismissed as a Matter of Law**

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In Pennsylvania, an attorney is entitled to absolute immunity for communications, including pleadings, which are issued in the regular course of judicial proceedings. See generally, Freundlich & Littman, LLC v. Feierstein, 157 A.3d 526 (Pa. Superior Ct. 2017) quoting Bochetto v. Gibson, 860 A.2d 67, 71 (Pa. 2004), and numerous cases cited at 157 A.3d 530-532.

In the case at bar, as in Freundlich & Littman, supra, this litigation reveals implicit and explicit allegations of harassment, intimidation, pressure to settle, and retaliation.

In this Complaint, Count I brings a claim for Wrongful Use of Civil Proceedings, pursuant to 42 Pa. C.S. §8351. Count II, is grounded on Restatement (Second) of Torts §652E, Publicity Placing Ms. DiPasquale in a False Light in the underlying 2016 action.

Defendants-Kiely/Wright assert that even if accurate (which it is not) they are judicially immune from any liability as to Count II. This Court agrees.

Plaintiffs-DiPasquale and the Insurance Company contend that by initiating civil proceedings for breach of contract and failing to attach a copy of the contract to the Complaint, caused “undue tension, duress and angst” to Ms. DiPasquale. Further, initiating and continuing the underlying matter for alleged improper purposes, “could severely impact Ms. DiPasquale’s professional development . . . .”. Paragraphs 41-49 of Complaint.

The Supreme Court in Schanne v. Addis, 121 A.3d 942 (Pa. 2015), articulates an overview of the strong policy to provide immunity for all statements, communications and pleadings. The Court quoted Restatement (Second) of Torts §588, and noted that even potentially defamatory statements for use in pending judicial proceedings may be protected. See, Richmond v. McHale, 35 A.3d 779 (Pa. Superior Ct. 2012). Accordingly, the demurrer is sustained as to Count II because Defendants-Kiely/Wright are immune from liability. Paragraphs 41 through 49 are stricken with prejudice.

Ms. DiPasquale and the Insurance Company also suggest that because the Defendants raised the affirmative defense of immunity by way of Preliminary Objections, then this Court may not consider it. Rule 1030 of the Pennsylvania Rules of Civil Procedure.

First, it must be noted that these Plaintiffs failed to file Preliminary Objections to the Defendants’ Preliminary Objections. Thus, no formal objection has been preserved. See, Farinacci v. Beaver County, 511 A.2d 757 (Pa. 1986); Rufo v. Bastian-Blessing Co., 207 A.2d 823 (Pa. 1965). Further, it is significant that our Appellate Courts have

recognized that it is not necessary to adhere to a rigid rule when no purpose is served by a delay in the ruling when immunity is clear on the face of the Complaint. Ms. DiPasquale and the Insurance Company did not suggest any new facts which they would present in response to New Matter. They do not argue that they are deprived of an opportunity to counter the immunity defense.

In Feldman v. Hoffman, 107 A.3d 821 (Pa. Commonwealth Ct. 2014), the Appellate Court provided a comprehensive review of the procedural issue, and commented at 107 A.3d 829:

“[Appellant] acknowledges that Pennsylvania courts have long recognized a limited exception to this rule and have allowed parties to plead the affirmative defense of immunity as a preliminary objection where the defense is clearly applicable on the face of the complaint. *Greenberg v. Aetna Ins. Co.*, 427 Pa. 511, 235 A.2d 576 (1967); *Logan v. Lillie*, 728 A.2d 995 (Pa.Cmwlt.1999); *Tiedeman v. Philadelphia*, 732 A.2d 696 (Pa.Cmwlt.1999); *Chester Upland School District v. Yesavage*, 653 A.2d 1319 (Pa.Cmwlt.1994); *State Workmen’s Ins. Fund, Com., Dep’t of Labor and Industry v. Caparo Real Estate Inc.*, 160 Pa.Cmwlt. 581, 635 A.2d 705 (1993); *Wurth by Wurth v. City of Philadelphia*, 136 Pa.Cmwlt. 629, 584 A.2d 403 (1990).”

Finally, if substantive review were necessary, these Plaintiffs are unable to establish a cause of action for False Light. Restatement (Second) of Torts) §652E states:

“One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.”

Plaintiff-DiPasquale was expressly identified as the employee and claims adjuster for Philadelphia Contributorship Insurance in the underlying litigation. The Complaint filed at December Term, 2016, No. 3446 identifies the parties, and at Paragraph 5 states:

“5. Defendant, Laurie DiPasquale, is a claims adjuster with Philadelphia Contributorship, a business address at 210 South Fourth Street, Philadelphia, Pennsylvania, 19106.”

At the initial paragraph of each count of the eight Count Complaint, Paragraph [5.] was “incorporated . . . as though the same were set forth herein more fully at length.” DiPasquale and Insurance Company assert in both responses to the Preliminary Objections that Ms. DiPasquale “was a private citizen who was falsely sued” and “plaintiff [DiPasquale] was clearly sued as an individual private citizen in the underlying action and not as an employee.” Memoranda, dated September 20, 2017 and August 27, 2018, unpagged. This conclusion is incorrect on its face.

False Light invasion of privacy can be established only when there is a major representation of a person’s character, history or activities. The elements include private facts which would be highly offensive to a reasonable person. The complaint at issue identifies a series of disagreements relating to decisions made about insurance coverages (Homeowners and Umbrella Policies) which the claims adjuster determined on behalf of her employer. See generally, Doe v. Wyoming Valley Health Care System, Inc., 987 A.2d



758, 765-767 (Pa. Superior Ct. 2009); Strickland v. University of Scranton, 700 A.2d 979, 987 (Pa. Superior Ct. 1997); Rush v. Philadelphia Newspapers, Inc., 732 A.2d 648, 654-655 (Pa. Superior Ct. 1999).

It is inappropriate for counsel to manipulate our Rules of Civil Procedure by filing a misrepresentation and then argue that the Court “must accept the facts alleged in the complaint as true.” See also, Kiely Memorandum, Paragraphs 68-69.

**B. The Plaintiffs Are Unable to Present a Prima Facie Case For Wrongful Use of Civil Proceedings**

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Pennsylvania’s Dragonetti Act provides at 42 Pa. C.S.A. §8351:

**“(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: (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.”

The term “probable cause” is determined at 42 Pa. C.S.A. §8352:

“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.”

In Morley v. Farnese, 178 A.3d 910 (Commonwealth Ct. 2018), the Appellate Court noted that whether there was probable cause for initiating or continuing to litigate in an underlying action is an issue of law for the Court, citing e.g. Broadwater v. Sentner, 725 A.2d 779, 782 (Pa. Superior Ct. 1999); Gentzler v. Atlee, 660 A.2d 1378, 1382 (Pa. Superior Ct. 1995).

Pertinent to the case at bar, the Superior Court has reiterated the very high standard that Plaintiffs in a Dragonetti Action must meet when suit is filed against attorneys. Morris v. DiPaolo, 930 A.2d 500, 504 (Pa. Superior Ct. 2007):

“Specifically, it must be re-emphasized that ‘[e]ven if an attorney lacked probable cause in filing a lawsuit on behalf of a client, he is not liable for wrongful use of civil proceedings unless he filed the lawsuit with an improper purpose.’ *Broadwater v. Sentner*, 725 A.2d 779, 784 (Pa.Super.1999), *appeal denied*, 562 Pa. 664, 753 A.2d 814 (2000). As a result ‘[a]n attorney is not required or expected to prejudge his client’s claim, and although he is fully aware that its chances of success are comparatively slight, it is his responsibility to present it to the court for adjudication if his client so insists after he has explained to the client the nature of the chances.’ *Id.*”

The Defendant-Wright is not liable unless he filed the underlying lawsuit with an improper purpose. It was his responsibility to present it to the Court. Similarly, Defendant-Kiely, with the fiduciary Power-of-Attorney for Christine Feinstein, had an obligation to present the claim to the Courts. It was Ms. Feinstein's coverage that was declined when she was sued in Montgomery County.

When considering whether Defendants-Kiely/Wright had probable cause in the underlying matter, we consider Ms. Christine Feinstein's position, that is, since at least 1991 she suffered from bipolar disorder, obsessive compulsive disorder, anxiety and depression. Without any investigation of these mental disorders Ms. DiPasquale, the employee of the Insurance Company advised that neither the Homeowners Policy nor Umbrella Policy would defend to cover Ms. Feinstein. Neither the agent nor the employer made an investigation of mental health issues of the insured.

When considering the record presented, Ms. Feinstein reasonably believed that these facts may be valid to warrant further investigation and coverage. Ms. Kiely, as fiduciary and Power-of-Attorney had probable cause to initiate and continue the underlying action on behalf of Ms. Feinstein. Counsel Defendant-Wright initiated the action in good faith on behalf of his client, Ms. Feinstein. Ms. Feinstein and Ms. Kiely relied on advice from Defendant-Wright. See generally, Keystone Freight Corporation v. Stricker, 31 A.3d 967 (Pa. Superior Ct. 2011); Kit v. Mitchell, 771 A.2d 814 (Pa. Superior Ct. 2001); Hong

v. Pelagatti, 765 A.2d 1117 (Pa. Superior Ct. 2000). Defendants-Kiely/Wright clearly possessed good faith and probable cause when considering the circumstances of the situation.

Next, our Appellate Courts have reiterated the scope and breadth of the insurer's duty of good faith to its insureds. Ms. Feinstein, Attorney Kiely and Attorney Wright had every reason to expect that the Insurance Company, acting through its employee and agent, would evaluate and investigate the mental health claims proffered by Ms. Feinstein before summarily denying coverage. Terlestsky v. Prudential Property and Casualty Insurance Co., 649 A.2d 680 (Pa. Superior Ct. 1994). The insureds were not provided any indicia of a reasonable basis for denial of coverage under the two policies.

Justice Wecht opined in his Concurring Opinion of Rancosky v. Washington National Insurance Co., 170 A.3d 364, 379 (Pa. 2017):

“Many species of bad faith may flourish notwithstanding the absence of either ‘self-interest’ or ‘ill will.’ Shoddy claims-handling, lack of diligence, non-responsiveness, haphazard investigation, unreasonable denials, and the like, all may come within the statutory definition of bad faith while nonetheless falling short of the ‘self-interest’/‘ill will’ threshold. . . .”

See also, Berg v. Nationwide Mutual Insurance Co., 189 A.3d 1030 (Pa. Superior Ct. 2018), holding that bad faith claims are fact specific to assess whether an insurer's conduct was objective under the circumstances.

Under the circumstances presented here it was not unreasonable for Defendants-Kiely/Wright to name the insurance claims adjuster who denied Ms. Feinstein's claims for coverage. Would Philadelphia Contributor respond that the agent was exceeding the scope of employment? Would her employer accept vicarious liability responsibilities when Christine Feinstein, her doctors and her attorneys reasonably believed she suffered from serious mental illness? Attorney Wright and Attorney Kiely were entitled to know the specifics of the agency relationship between Ms. DiPasquale and the Insurance Company. As Plaintiff-Kiely argued in her Response to the DiPasquale Preliminary Objections, Control No. 17020223, dated February 22, 2017, the nature and extent of Ms. DiPasquale's involvement would be explored at the time of her scheduled deposition in March, 2017. See, e.g. Barrie v. Progressive Specialty Insurance Co., 2017 WL 115063 (E.D. Pa. 2017) where claims adjuster was sued.

In Paragraph 40 of the Plaintiffs' Complaint, it is alleged that Ms. DiPasquale has "potential liens for legal bills expended." Does this mean that her employer has declined to pay Ms. DiPasquale's legal bills for work done as its agent, claims adjuster and employee? As a so-called "subrogee" of Ms. DiPasquale, is Philadelphia Contributorship claiming that the legal fees for its employee, agent and claims adjuster are somehow separate and distinct from its vicarious liability obligations?

Finally, it is not clear to this Court why Plaintiffs DiPasquale and the Insurance Company suffered significant legal fees for litigation to remove Ms. DiPasquale from the case, for her deposition, and for filing “repeated” motions to dismiss. See, Paragraphs 34, 39 and 40 of Complaint. This Court sits as an experienced Trial Court, and in trial after trial, employees remain on the caption and on the verdict sheet. Plaintiffs herein should challenge the strategy, billable hours, and fees of counsel who represented them in the underlying action in order to recoup their legal fees. Certainly one summary judgment motion after the close of discovery would have sufficed.

### **III. CONCLUSION**

For all of the reasons set forth above, the Preliminary Objections filed by Attorney Margaret M. Kiely, fiduciary and Power-of-Attorney on behalf of Christine Feinstein are Sustained in their entirety. The Preliminary Objections filed by Attorney Kevin H. Wright are Sustained in their entirety. The Complaint is Dismissed With Prejudice.

**BY THE COURT:**

  
FREDERICA A. MASSIAH-JACKSON, J.

OCT. 3, 2018