

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

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DeSIMONE, INC., et al.	:	
	:	November Term, 2001
Plaintiffs,	:	No. 00207
v.	:	
	:	Commerce Program
PHILADELPHIA AUTHORITY FOR	:	
INDUSTRIAL DEVELOPMENT, et al.	:	
	:	
	:	Control No. 31991
Defendants.	:	

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**ORDER and MEMORANDUM**

**AND NOW**, this 10th day of June 2003, upon consideration of the Motion for Summary Judgment of Defendant Brian J. O'Neill, all responses in opposition, the respective memoranda, all matters of record, and after oral argument thereon, and in accordance with the contemporaneous Memorandum Opinion, it hereby is **ORDERED** and **DECREED** that said Motion is **GRANTED**.

It is further **ORDERED** that the complaint against Brian J. O'Neill is **DISMISSED**.

**BY THE COURT:**

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***GENE D. COHEN, J.***

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**MEMORANDUM OPINION**

***GENE D. COHEN, J.***

Before the Court is the Motion for Summary Judgment of Councilman Brian J. O'Neill.

For the reasons fully set forth below, said Motion is **granted**.

**I. Background<sup>1</sup>**

In 1981, 3.5 acres of land owned by the City of Philadelphia (the "City") was leased to the Philadelphia Authority for Industrial Development ("PAID") so that the parcel could be subleased for commercial or commercially-related development (the "Property"). The Property adjoins the Northeast Airport and lies within the Tenth Council District of Councilman Brian J. O'Neill. The dispute among the parties centers on the efforts of plaintiff DeSimone, Inc. ("DeSimone") to sublease the Property from plaintiff Lone Star Steakhouse and Saloon of Pennsylvania ("Lone Star") and develop a car dealership in its place.

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<sup>1</sup>The lengthy allegations of Plaintiffs' Amended Complaint (the "Complaint") are fully set forth in this court's earlier opinion styled, DeSimone, Inc. v. City of Philadelphia et al., 2002 WL 1023439 (Pa. Com. Pl. 2002)(Herron, J.).

On or about July 6, 2000, Lone Star and DeSimone entered into an agreement for the sale and purchase of assets, whereby it was agreed that DeSimone would purchase all of Lone Star's assets, including its interest as sublessee. (Compl. Exh. F). The agreement of sale between Lone Star and DeSimone was contingent upon the sublessor's approval of the assignment of Lone Star's interests to DeSimone. (Id. at Exh. C, Exh. D). On or about August 16, 2000, DeSimone received a letter rejecting its proposal from James Tyrrell, Deputy Director of Aviation, Property Management and Business Development for the City's Commerce Department, Division of Aviation. (Pl. Resp. Exh. 2.C).

The decision whether to approve the requested sublease assignment from Lone Star to DeSimone (the "Assignment") was a determination to be made by the executive branch of the City and officials at PAID. (Pl. Resp. at 2). In their Complaint, Plaintiffs alleged the existence of an "informal agreement" or "unwritten rule" that O'Neill's approval had to be obtained for assignment of their sublease. (Pl. Resp. Exhs. 1, 2). In his Answer to the Complaint, O'Neill admits that he possesses no right to either approve or disapprove any proposal for the use of the land adjoining the Northeast Airport. (O'Neill Answer ¶ 42). However, it is undisputed that Councilman O'Neill voiced his opposition to the project to various representatives of the City and PAID.

Plaintiffs have brought suit against PAID, alleging, *inter alia*, that it unreasonably withheld its consent to the Assignment. Plaintiffs also assert that Councilman O'Neill improperly interfered with their attempts to assign the sublease of the Property and have sued him in both his individual and official capacities for injunctive relief and damages. (Compl. ¶5; Def. Mem. at 1). Councilman O'Neill has moved for summary judgment on the claims against

him personally, arguing that: 1) no genuine issue of fact exists as to Plaintiffs' cause of action against the Councilman for tortious interference with contractual relations; and 2) all of the actions taken by Councilman O'Neill in connection with the Assignment were protected by the Councilman's absolute legislative and governmental immunity from suit under the Speech and Debate Clauses of the U.S. Constitution (Art. I, § 6) and the Pennsylvania Constitution (Art. II, § 15), the doctrine of absolute immunity afforded high public officials and the Political Subdivision Tort Claims Act, 42 Pa.C.S. §§ 8541, *et seq.* (Def. Mem. at 2). Each argument will be addressed in turn.

### **DISCUSSION**

#### **A. Plaintiffs' Claim For Intentional Interference With Contractual Relations Against Councilman O'Neill Fails As A Matter of Law**

In their Complaint, Plaintiffs allege that Councilman O'Neill improperly and unlawfully interfered with their attempts to assign the sublease of the Property. (Compl. ¶ 106). Under Pennsylvania law, "[o]ne who intentionally and improperly interferes with the performance of a contract . . . between [plaintiff] and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability for the pecuniary loss resulting to the [plaintiff] from the failure of the third person to perform the contract." Restatement (Second) Torts § 766; Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 429-31, 393 A.2d 1175, 1181-83 (1978). The elements of a cause of action for interference with contractual relations are as follows:

- (1) the existence of a contractual relation between the complainant and a third party<sup>2</sup>;

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<sup>2</sup> It is questionable, here, whether a valid contract existed between Lone Star and DeSimone. On or about July 6, 2000, Lone Star and DeSimone entered into an agreement for the sale and purchase of

- (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation;
- (3) the absence of privilege or justification on the part of the defendant; and
- (4) the occasioning of actual legal damage as a result of the defendant's conduct.

Al Hamilton Contracting Co. v. Cowder, 434 Pa. Super. 491, 644 A.2d 188, 191 (1994);

Strickland v. Univ. of Scranton, 700 A.2d 979 (Pa. Super. 1997).

In deciding whether summary judgment is warranted, the court must construe the facts of record in a light that is most favorable to the non-moving party, in this case Plaintiffs, and resolve all doubts and reasonable inferences as to the existence of a genuine issue of material fact in that party's favor. Telega v. Sec. Bureau Inc., 719 A.2d 372 (Pa. Super. 1998). A court must grant a motion for summary judgment where, as here, the non-moving party fails to "adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor." Ertel v. Patriot-News Co., 544 Pa. 93, 101-02, 674 A.2d 1038, 1042 (1996). Applying this standard at bar, this court finds that Plaintiffs' tortious interference claim against Councilman O'Neill fails as a matter of law.

**1. Plaintiffs Have Failed To Set Forth Any Evidence of Impropriety By Councilman O'Neill**

In determining whether a particular course of conduct is improper for purposes of a claim for intentional interference with contractual relations, the court must look to § 767 of the

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assets, whereby it was agreed that DeSimone would purchase all of Lone Star's assets, including its interest as sublessee. (Compl. Exh. F). However, the agreement of sale between Lone Star and DeSimone was contingent upon the sublessor's approval of the assignment of Lone Star's interests to DeSimone. (Id. at Exh. C, Exh. D). Obviously, such approval was never given here, which is the basis of the instant lawsuit.

Restatement (Second) of Torts, which sets forth the following factors for consideration: 1) the nature of the actor's conduct; 2) the actor's motive; 3) the interests of the other with which the actor's conduct interferes; 4) the interests sought to be advanced by the actor; 5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; 6) the proximity or remoteness of the actor's conduct to the interference; and 7) the relations between the parties. Adler, 482 Pa. at 429-31, 393 A.2d at 1181-83; Strickland, 700 A.2d at 979; Small v. Juniata College, 452 Pa. Super. 410, 682 A.2d 350 (1996). The issue in each case is whether the interference is improper under the circumstances and “whether, upon a consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another.” Restatement (Second) of Torts, § 767 cmt. b.

Considering these factors, this court finds that Plaintiffs have failed to demonstrated that Councilman O’Neill acted improperly or engaged in any wrongful conduct. Construing the facts in a light most favorable to Plaintiffs, there has been no showing that Councilman O’Neill acted for his own benefit, profited at the public’s expense, acted to further a non-public purpose or acted in any other capacity than his official one. As for Plaintiffs’ allegation that Councilman O’Neill was acting to further the interests of a campaign contributor, there has been no evidence presented to support such a claim, only bald accusations. In fact, the record itself belies these allegations. While it has been conceded that Councilman O’Neill voiced his opposition to various representatives of the City and PAID, the mere expression of an opinion to the parties ultimately responsible for making the decision regarding the Assignment does not warrant liability here, absent evidence of impropriety.

In determining whether an actor’s conduct was wrongful, the court may also consider “the

interests sought to be advanced by the actor” and the “the social interests in protecting the freedom of action of the actor....” Strickland, 700 A.2d at 979. The record in this case is devoid of any facts which establish that the Councilman was acting for any other purpose than to voice his opposition to a plan which would directly impact his constituents. Councilman O’Neill was elected by his constituency to ensure their rights to representation in the democratic process. Surely, the Councilman would not be able to fulfill this obligation if he is not free to speak on their behalf. Councilman O’Neill derives his office from the will of the people and, therefore, should not be found liable for expressing same.

Moreover, there has been no evidence of any usurpation of the decision making process by Councilman O’Neill; in fact, the deposition testimony in this case demonstrates to the contrary. The facts of record clearly demonstrate that, while Councilman O’Neill’s opposition may have been taken into account, the ultimate decision regarding the Assignment was that of PAID, which, along with the City, voiced its own concerns regarding the project. The Councilman’s opinion remained that -an opinion being expressed on behalf of his constituency- and there have been no allegations that he acted unlawfully or exerted any undue influence. Plaintiffs have failed to present sufficient evidence from which a reasonable jury could conclude otherwise.

Plaintiffs attempt to bolster their claim with the assertion that “despite the fact that Councilman O’Neill had no official business being involved in the approval or disapproval of the requested sublease assignment, plaintiffs were advised by the City and PAID...that the real

decision maker here was defendant O’Neill.”<sup>3</sup> (Pl. Resp. at 12). However, this argument is nothing more than a red herring as respect the Councilman. The real issue in this case is whether PAID and/or the City acted “unreasonably” in withholding consent to the Assignment, in violation of the sublease. Thus, the weight given to Councilman O’Neill’s opinion may be relevant in determining the reasonableness of PAID’s decision, however it does not create a cause of action against Councilman O’Neill, either individually or in his official capacity, for tortious interference with contractual relations.

## **2. Councilman O’Neill’s Conduct was Privileged**

As previously stated, in order to succeed on a claim for intentional interference with contractual relations, the plaintiff must demonstrate “the absence of privilege or justification on the part of the defendant.” Al Hamilton, 644 A.2d at 191. It is important to note that this court need not find the existence of legislative immunity in order to find that Councilman O’Neill’s conduct was privileged for purposes of a tortious interference claim.<sup>4</sup> The two issues require an entirely different inquiry.

Pennsylvania courts have discussed the definition of "privilege" in the context of a claim for intentional interference in great detail. Unlike other intentional torts such as intentional injury to person or property or defamation, this branch of tort law has not developed a

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<sup>3</sup>Plaintiffs further argue that Councilman O’Neill’s vocal opposition of the Assignment to various members of PAID and the City violated the Philadelphia Home Rule Charter, which explicitly prohibits a councilman from “interfering” with the performance of duties by "any other employees in any department, board or commission of the City." Phila. Home Rule Charter, § 10.10-100. However, this court find this argument unpersuasive, having already found that plaintiffs have failed to demonstrate any wrongful “interference” on the part of Councilman O’Neill.

<sup>4</sup> Regardless, the issue of legislative immunity is fully discussed in Section II.B, *infra*.

crystallized set of definite rules as to the existence or non-existence of a privilege to act in the manner stated in Restatement (Second) of Torts §§ 766, 766A or 766B.<sup>5</sup> Ruffing v. 84 Lumber Co., 410 Pa. Super. 459, 468, 600 A.2d 545, 549 (1992); Philadelphia Plaza-Phase II v. Bank of Am. Nat'l Trust and Sav. Assoc., 2002 WL 1472338 (Pa. Com. Pl. 2002). Because of this, Pennsylvania courts have held that "the absence of privilege or justification on the part of the defendant is merely another way of stating that the defendant's conduct must be improper." Philadelphia Plaza, 2002 WL 1472338 at \*5; Adler, 482 Pa. at 433 n. 17, 393 A.2d at 1184 n. 17 (noting that Restatement (Second) of Torts § 767 "focuses upon whether conduct is 'proper,' rather than 'privileged' ").

As previously stated, this court has already found that Councilman O'Neill's conduct was proper, and therefore privileged. See Section II.A.1, *supra*. A motion for summary judgment is proper in those cases where, as here, the pleadings, depositions, answers to interrogatories, and admissions on file, along with the affidavits and all other matters filed on the record, demonstrate that there is no genuine issue of material fact, and that as a result the moving party is entitled to a judgment as a matter of law. Grossman v. Rosen, 424 Pa. Super. 463, 623 A.2d 1 (1993); Frederick v. Action Tire Co., 744 A.2d 762 (Pa. Super. 1999). Accordingly, Councilman O'Neill's Motion for Summary Judgment is granted and the claims against him dismissed.

**B. Councilman O'Neill's Conduct Is Protected By Legislative Immunity**

Councilman O'Neill asserts that his actions are protected by absolute legislative and

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<sup>5</sup>These sections address intentional interference with performance of contract by a third party, intentional interference with another's performance with his own contract and intentional interference with prospective contractual relations.

governmental immunity under the Speech and Debate Clauses of the U.S. Constitution (Art. I, § 6) and the Pennsylvania Constitution (Art. II, § 15), the doctrine of absolute immunity afforded high public officials and the Political Subdivision Tort Claims Act, 42 Pa.C.S. §§ 8541, *et seq.* (Def. Mem. at 2). Even though this court need not find the existence of legislative immunity in order to find that Councilman O'Neill's conduct was privileged for purposes of a tortious interference claim, the issue is significant and must be addressed.

In Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998), the U.S. Supreme Court noted that legislative immunity applied to local as well as to federal, state and regional legislators and "attaches to all actions taken 'in the sphere of legitimate legislative activity.'" The Bogan Court also emphasized that "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the person performing it."<sup>6</sup> Id. The Third Circuit likewise adopted the approach of focusing on the act at issue and applied a two-pronged test for determining what constitutes "legislative activity":

First, the act must be "substantively" legislative, *i.e.* legislative in character. Legislative acts are those which involve policy-making decision [sic] of a general scope or, to put it another way, legislation involves line-drawing. Where the decision affects a small number or a single individual, the legislative power is not implicated, and the act takes on the nature of administration. In addition, the act must be "procedurally" legislative, that is, passed by means of established legislative procedures. This principle requires that constitutionally accepted procedures of enacting the legislation must be followed in order to assure that the act is a legitimate, reasoned decision representing the will of the people which the governing body has been chosen to serve.

Gallas v. Supreme Court of Pennsylvania, 211 F.3d 760 (3d Cir. 2000). Clearly, actions related to the passage of legislation or legislative procedure fall within the sphere of legitimate

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<sup>6</sup>The Pennsylvania Supreme Court, in analyzing the scope of legislative immunity, also focuses on whether a particular action falls within the "legitimate legislative sphere." Consumers Education and Protective Assoc. v. Nolan, 470 Pa. 372, 382-3, 368 A.2d 67, 681 (1977).

legislative activity. See, e.g., Nolan, 470 Pa. at 382-3, 368 A.2d at 681; Consumer Party of Pa. v. Commonwealth, 510 Pa. 158, 171-75, 507 A.2d 323, 329-31.

It is not as clear to what extent the scope of legislative immunity extends to activities which take place outside the legislative chamber. For example, such immunity has been held not extend to those decisions rendered while performing “administrative functions.” Ryan v. Burlington County, NJ, 889 F.2d 1286, 1290 (3d Cir. 1989); see also Hamilton v. Hennessey, 783 A.2d 852 (Pa. Commw. 2001) *aff’d* 569 Pa. 101, 800 A.2d 927 (2002)(court refused to extend legislative immunity to newsletters issued by a state representative because the preparation of the particular newsletter "although 'related' to official business, was not a protected activity").

First, it is important to note that much of the case law interpreting the breadth of legislative immunity arises in the context of civil rights claims brought pursuant to 42 U.S.C. § 1983. To maintain a claim under § 1983, a plaintiff must establish a deprivation of a federally protected right violated by a person acting under color of state law. 42 U.S.C. §1983. The claim against Councilman O’Neill is not an § 1983 claim, rather it is a state law tort claim for interference with contractual relations. Thus, the allegedly wrongful “act” in this case is not the deprivation of a federally protected right, rather the “act” complained of is Councilman O’Neill’s opposition to the Assignment, or in other words, his speech. This raises obvious First Amendment implications.<sup>7</sup> The Third Circuit in Gallas, which was faced with a § 1983 claim

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<sup>7</sup>Although not raised by the parties, this Court finds that Councilman O’Neill’s conduct would also arguably be entitled to First Amendment protection. Pursuant to the Noerr-Pennington doctrine, an individual is immune from liability for exercising his or her First Amendment right to petition the government. This doctrine originated with the United States Supreme Court’s decisions in E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (“Noerr”), and United Mine

rather than a claim for tortious interference, parenthetically noted the potential First Amendment implications in attempting to hold public officials liable “for trying to influence a body exercising legislative functions to act in a particular way.” Gallas, 211 F.3d 777, n.21.<sup>8</sup>

The issue has also arisen in the context of actions for defamation. For example, in Lindner v. Mollan, 544 Pa. 487, 677 A.2d 1194 (Pa.1996), the Pennsylvania Supreme Court held that high public officials "...are absolutely immune from intentional tort claims arising out of activity that occurred while performing their official duties.” Id. The court in Smith v. School District of Philadelphia, 112 F. Supp.2d 417, 426 (E.D. Pa. 2000), took note of the fact that "the Supreme Court of Pennsylvania ... has yet to decide whether the immunity for high public officials extends to other intentional torts [aside from defamation],” but predicted that the Supreme Court of Pennsylvania would apply absolute immunity to public officials for “civil suits for intentional infliction of emotional distress and invasion of privacy.” 112 F. Supp.2d at 426.

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Workers v. Pennington, 381 U.S. 657, 669-70 (1965) ("Pennington"). In Noerr and Pennington, the Court recognized that the "right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." Noerr, 365 U.S. at 138. The Court held such immunity existed “regardless of the defendants' motivations” in waging their campaigns, as it recognized that the right of individuals to petition the government "cannot properly be made to depend on their intent in doing so." Id. at 139. The Noerr-Pennington doctrine has been extended well-beyond the antitrust context and has also been found to extend beyond private citizens, to government officials who were participants in the act of petitioning or lobbying before other government bodies authorized to resolve the issues presented. See e.g., Mariana v. Fisher, 226 F. Supp.2d 575 (M.D. Pa. 2002)(Noerr-Pennington shielded state officials from antitrust suit); Manistee Town Center v. City of Glendale, 227 F.3d 1090, 1092 (9th Cir. 2000)(claim dismissed against City of Glendale county pursuant to Noerr-Pennington where City was sued for lobbying the county to stop the county from leasing space in a shopping center owned by the plaintiff).

<sup>8</sup> In Gallas, the Third Circuit was asked to determine whether individual Justices of the Pennsylvania Supreme Court could claim legislative immunity for their reorganization of the First Judicial District by order of March 26, 1996 that eliminated the position of Executive Administrator to create an Administrative Governing Board. Gallas, 211 F.3d at 773-77. The court found that the Justices were entitled to absolute legislative immunity. Id.

The Smith court based this determination on the Lindner Court's explanation that the Pennsylvania common law doctrine of absolute immunity for high public officials "rests upon the idea that conduct which would otherwise be actionable escape[s] liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation." See Smith, 112 F. Supp.2d at 426. See also Thornbury Noble, Ltd. v. Thornbury Twp., 2002 WL 442827 (E.D. Pa. 2002)(court held that the Supreme Court of Pennsylvania would hold that absolute immunity protects high officials from civil suits for intentional interference with prospective contractual relations).

With this in mind, it is clear that the "sphere of legislative activity" extends much farther than merely the debating and drafting of laws. Uniontown Newspapers, Inc. v. Roberts, 777 A.2d 1225 (Pa. Commw. 2001). Clearly, there could be no more of an "integral step in the legislative process" than a public official's right to speak on behalf of his constituency. Government officials are frequently called upon to be ombudsmen for their constituents. In this capacity, they intercede, lobby, and generate publicity to advance their constituents' goals, both expressed and perceived. "This kind of petitioning may be nearly as vital to the functioning of a modern representative democracy as petitioning that originates with private citizens." See Mariana v. Fisher, 226 F. Supp.2d 575 (M.D. Pa. 2002). To hold Councilman O'Neill liable because his actions were not within the "four corners of legislative activity," high public official's" belies the purpose of legislative immunity, namely to "ensure that legislators are free to represent the interests of their constituents without fear that they will be later called to task in courts for that representation." Eastland v. United States Servicemen's Fund, 421 U.S. 491

(1975); Powell v. McCormack, 395 U.S. 486, 503 (1969).

Based on the foregoing, this court finds that the umbrella of legislative immunity extends to protect elected officials from civil suits for intentional interference with contractual relations, where, as here, the facts demonstrate that the official is acting on behalf of his constituency.

### **CONCLUSION**

For the above-stated reasons, the Motion for Summary Judgment of Defendant Councilman Brian J. O'Neill is **granted**.

This Court will enter a contemporaneous Order consistent with this Opinion.

**BY THE COURT:**

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***GENE D. COHEN, J.***

Dated: June 10, 2003