FILED FOR RECORD BY EMAIL
2024 MAR 25 PM 03:37
JEREMY S. BREON
PROTHONOTARY
CENTRE COUNTY, PA

JONES DAY
Andrew R. Stanton, Esquire
PA Attorney ID No. 93409
Susan E. Kessler, Esquire
PA Attorney ID No. 322558
Nathaniel G. Ecker, Esquire
PA Attorney ID No. 331710
500 Grant Street, Suite 4500
Pittsburgh, PA 15219-2514
Telephone: (412) 391-3939
Fax: (412) 394-7959
astanton@jonesday.com
skessler@jonesday.com
necker@jonesday.com
Attorneys for Defendants Board of Trustees of The Pennsylvania State University, Matthew Schuyler, and Non-Party David Kleppinger

---

BARRY J. FENCHAK, Plaintiff, v. THE PENNSYLVANIA STATE UNIVERSITY BOARD OF TRUSTEES, and MATTHEW SCHUYLER IN HIS OFFICIAL CAPACITY AS CHAIRMAN, Defendants.	:	COURT OF COMMON PLEAS CENTRE COUNTY, PENNSYLVANIA CIVIL ACTION NO. 2024-CV-1843-CI

BRIEF IN SUPPORT OF DEFENDANTS' EMERGENCY MOTION FOR PROTECTIVE ORDER AND STAY OF DISCOVERY

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. STATEMENT OF QUESTIONS INVOLVED 4

III. BACKGROUND 4

IV. ARGUMENT 10

A. The Discovery Is Irrelevant Because the Court Already Rejected Plaintiff's Section 2503(7) Claim, and Nothing Any Witness Could Say Has Any Impact on the Analysis. 11

B. Plaintiff Cannot Excuse His Extreme Delay, and the Discovery Is Intolerably Burdensome. 15

C. Plaintiff's Requests Are No More Than a Baseless Fishing Expedition. 18

TABLE OF AUTHORITIES

Page

CASES

In re Est. of Simpson,
305 A.3d 176, 187 (Pa. Super. Ct. 2023) 14

Frankenberry v. Ferguson,
No. 105 C.D. 2017, 2017 WL 2960380 (Pa. Commw. Ct. July 12, 2017) 10

Fullman v. Kurtz,
No. 988 C.D. 2012, 2013 WL 3948873 (Pa. Commw. Ct. Feb. 7, 2013) 19

In re Application By Nonprofit Corp. Trs. To Compel Inspection Of Corp. Info.,
No. 1593 14

In re Est. of Burger,
852 A.2d 385 (Pa. Super. Ct. 2004), *aff'd*, 898 A.2d 547 (Pa. 2006) 14

Kerns v. Methodist Hosp.,
574 A.2d 1068 (Pa. Super. Ct. 1990) 10, 16

Luckett v. Blaine,
850 A.2d 811 (Pa. Commw. Ct. 2004) 10, 11, 19

Machen v. Machen & Mayer Electrical Mfg. Co.,
85 A. 100 (Pa. 1912) 15

McGarry v. Broadmoor Custom Homes, Inc.,
563 A.2d 934 (Pa. Super. Ct. 1989) 12

Pennsylvania Tpk. Comm'n v. Elec. Transaction Consultants Corp.,
230 A.3d 548 (Pa. Commw. Ct. 2020) 14

Reeves v. Middletown Athletic Ass'n,
866 A.2d 1115 (Pa. Super. Ct. 2004) 16

Stevens v. Dep't of Transp.,
309 A.3d 193 (Pa. Commw. Ct. 2024) 12

Thomas by Thomas v. Duquesne Light Co.,
500 A.2d 1163 (Pa. Super. Ct. 1985) 12, 13

Wade, Goldstein, Landau, and Abruzzo, P.C. v. Clark,
2019 WL 5212435 (Pa. Super. Ct. Oct. 16, 2019) 3, 11

Wertz v. Kephart,
542 A.2d 1019 (Pa. Super. Ct. 1988) 16

STATUTES

15 Pa.C.S. § 5512 ..... 4, 5, 7

15 Pa.C.S. § 5512(a) 14, 15

15 Pa.C.S. § 5512(e) 1, 7

15 Pa.C.S. § 5793 7

42 Pa.C.S. § 2503(7) ..... passim

RULES

Pa. R.C.P. 1023.1 19

Pa. R.C.P. 1023.1(c)(3) 18

Pa. R.C.P. 4003.1 15

Pa. R.C.P. 4003.1(a) 4

Pa. R.C.P. 4007.3 11

Pa. R.C.P. 4012 19

Pa. R.C.P. 4012(a) 1, 10

Pa. R.C.P. 4013 1

OTHER AUTHORITIES

Webster's Ninth New Collegiate Dictionary 14

Webster's Third New International Dictionary 14

Pursuant to Pa. R.C.P. 4012(a) and 4013, Defendants, The Pennsylvania State University ("Penn State" or the "University") Board of Trustees (the "Board") and Matthew Schuyler, in his official capacity as now former Chair of the Board (collectively with the Board, "Defendants"), as well as non-party David Kleppinger, file this brief in support of their Emergency Motion for a Protective Order and for a stay of discovery preventing Plaintiff from taking discovery in this matter, which was dismissed in full and with prejudice on January 6, 2026. *See* Jan. 6, 2026 Op. and Order ("Summary Judgment Order").

I. INTRODUCTION

On January 6, 2026, this Court granted summary judgment in Defendants' favor and dismissed the Amended Complaint with prejudice. Summary Judgment Order at 4. As part of that Order, the Court expressly rejected Plaintiff's argument that a question of material fact remained as to Plaintiff's entitlement to attorneys' fees under 42 Pa.C.S. § 2503(7) (as incorporated by reference in 15 Pa.C.S. § 5512(e)), and granted summary judgment as to that claim as well. The Court properly recognized that: (i) litigation sanctions can only be awarded under Section 2503(7) for "dilatory, obdurate or vexatious conduct during the pendency of a matter," and (ii) there was "no conduct during the pendency of" this matter "rising to the level of sanctionable conduct." Summary Judgment Order at 3–4 (emphasis in original). The time to appeal has lapsed, the Court's Summary Judgment Order is final, and this case is over.

Plaintiff elected to ignore the Court's Summary Judgment Order, and on January 28, 2026, filed a Petition for Sanctions pursuant to 42 Pa.C.S. § 2503(7), the same exact claim that the Court already considered and dismissed with prejudice. Mot. ¶ 5. The Petition, which can and should be summarily denied, is scheduled for argument on June 30, 2026, and it does nothing more than re-hash the same facts and arguments that the Court already considered and rejected. *Compare* Petition ¶¶ 38–48, 54–63 (identifying Defendants' conduct as "vexatious" and "dilatory" under 42 Pa.C.S. § 2503(7)) *with* Summary Judgment Order at 4 (holding that there was "no reasonable basis" to claim that either party acted "vexatiously" nor was there "conduct during the pendency of the matter rising to the level of sanctionable conduct" under 42 Pa.C.S. § 2503(7)). Ironically, the Petition itself is a dilatory, obdurate, and vexatious refusal to accept this Court's clear ruling that no sanctionable conduct occurred in this litigation.

Now, Plaintiff is trying to resurrect his dismissed sanctions claim via the Petition, and take post-summary judgment discovery on that already-dismissed claim. Defendants can locate no precedent for Plaintiff's bizarre gambit, and the Court should not entertain it. After litigating this case for 18 months without serving a single discovery request, Plaintiff wants to take post-judgment depositions—on a claim that was dismissed with prejudice—of Mr. Schuyler, non-party David Kleppinger, and possibly other third parties, and has demanded to do so with two-weeks' notice. Mot. ¶¶ 7–13.

Defendants requested that Plaintiff's counsel identify authority supporting Plaintiff's right to take these post-judgment depositions. *Id.* ¶ 8. Unsurprisingly, he did not do so. In the most factually analogous case Defendants could locate, the Superior Court affirmed a decision by the Chester County Court of Common Pleas summarily rejecting a voluntarily dismissed party's request for sanctions, and corresponding request for discovery, where the sanctions motion merely "recount[ed] the procedural history of this case, as well as the parties' prior dispute," both of which were "already of record before the court." *Wade, Goldstein, Landau, and Abruzzo, P.C. v. Clark,* 2019 WL 5212435, at *4 (Pa. Super. Ct. Oct. 16, 2019).

This Court should do the same here. The Court already properly granted summary judgment and held that there was no dispute of fact regarding whether sanctionable conduct had occurred during the pendency of the litigation. Nothing has changed since the final judgment was entered in Defendants' favor, and Plaintiff's attempt to resurrect a dismissed claim, and take new discovery on that dismissed claim, is frivolous.

Even if the Court were to allow Plaintiff a second bite at the apple on the Section 2503(7) sanctions claim, no discovery is necessary. The Petition is based entirely on characterizing run-of-the-mill, on the record litigation conduct as sanctionable—citing actions like the filing of an Answer and withdrawing of Preliminary Objections as the supposed offending conduct. Petition ¶¶ 54–60.

There is no discovery needed to conclude that nothing sanctionable occurred in this litigation.[1]

II. STATEMENT OF QUESTIONS INVOLVED

Is there good cause to issue a protective order and stay discovery to prevent Mr. Fenchak from obtaining discovery in this matter?

Suggested Answer: Yes. The Court dismissed Plaintiff's claims with prejudice on January 6, 2026, and his pending Sanction Petition is limited to information that is already in the possession of both parties and the Court. As such, he has no plausible basis to claim that Mr. Schuyler, Mr. Kleppinger, or indeed anyone, is in possession of any discoverable information "relevant to the subject matter involved in the pending action," under Pa. R.C.P. 4003.1(a).

III. BACKGROUND

Plaintiff initiated this action on July 16, 2024, by filing a Civil Complaint (the "Initial Complaint") asserting two counts. Count I sought a declaration that, pursuant to 15 Pa.C.S. § 5512, Plaintiff was entitled to certain information relating to the Penn State Endowment (the "Endowment Information"), *see* Initial Compl. ¶¶ 34–35; and Count II sought an injunction against alleged "retaliatory acts against Plaintiff," including removal from the Board and "permanent injunctive relief ordering Defendants to refrain from withholding" the Endowment Information, *see id.* ¶¶ 36–38.

On August 27, 2024, Plaintiff amended his Complaint (the "Amended Complaint"). In Count I, Plaintiff added a demand for a contract between the

[1] Defendants will file a separate Response to the Petition addressing, in full (and for the second time), the meritless arguments presented therein.

University and Elevate Collegiate Ticketing, LLC (the "Elevate Contract"), as well as a request for attorneys' fees under 15 Pa.C.S. § 5512.[2] Am. Compl. ¶¶ 84–108, 123–33. Count II sought permanent injunctive relief enjoining the Board from withholding documents and preliminary injunctive relief enjoining "retaliatory acts," including removal from the Board. *Id.* ¶¶ 134–69. Defendants filed Preliminary Objections to the Amended Complaint on September 16, 2024.

One week later, on September 23, 2024, Plaintiff filed an Emergency Motion for Preliminary Injunction to prevent the Board from voting on his removal pursuant to a September 9, 2024, Joint Proposal Resolution for Removal issued by the Board Chair and Chair of the Board's Governance Committee. That Joint Proposal followed the unanimous removal recommendation of the Governance Committee, which was based on an inappropriate interaction Plaintiff had with a female University employee after a Board event held on Penn State's Altoona campus. The Court ultimately granted Plaintiff's request on October 9, 2025, and enjoined Defendants "from removing Plaintiff from the Board of Trustees by vote." Oct. 9, 2024 Op. and Order at 12. The Court further ordered that the "Preliminary Injunction will remain in effect until the earliest of (*i*) its dissolution by the Court, (*ii*) the conclusion of the underlying litigation in this matter, or (*iii*) the conclusion

[2] As this Court has recognized, Section 5512 does "not contain a separate attorney's fees provision, and there is no entitlement to attorney's fees" under that statute. Summary Judgment Order at 4. Instead, Section 5512 includes only a cross-reference to 42 Pa.C.S. § 2503(7). *See id.*

of all terms for which Plaintiff has been duly elected to the Board." *Id.* (emphasis in original).

Four months later, on February 14, 2025, the Board and Plaintiff entered into a joint stipulation of confidentiality (so ordered by the Court on February 20, 2025), and the Board provided the information Plaintiff sought in Count I of his Amended Complaint, including 510 pages of information relating to the Endowment and a complete, unredacted copy of the Elevate Contract, on February 15, 2025. Six days later, on February 21, 2025, Defendants withdrew their Preliminary Objections.

On February 27, 2025, Defendants filed a Motion to Dissolve the Preliminary Injunction. Following another evidentiary hearing, the Court dissolved the injunction on May 16, 2025, finding that it had "been mooted by Plaintiff's receipt of the information that he originally requested." May 16, 2025 Op. and Order at 3.

On June 16, 2025, Plaintiff's fellow Trustees removed him from the Board by a vote of 30–4. Summary Judgment Order at 1. Defendants then moved for summary judgment on November 4, 2025, arguing that both counts of the Amended Complaint were tied to Plaintiff's former status as a Trustee and had therefore been mooted by his removal from the Board. Defendants further argued that Plaintiff's request for documents had been independently mooted because, as

the Court had previously recognized, Plaintiff had already received the documents forming the basis of his claim. *See* May 16, 2025 Op. and Order at 3.

On November 21, 2025, Plaintiff filed his opposition to Defendants' Motion for Summary Judgment. Notably, Plaintiff did not engage with Defendants' mootness arguments relating to his removal from the Board; instead, he opposed the motion solely to preserve his claim for attorneys' fees under 15 Pa.C.S. §§ 5512 and 5793 of the Nonprofit Corporation Law. *See* Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment 14–17, 18–20. In doing so, Plaintiff asserted that "[a]ny suggestion of the defendants that their behavior . . . was not dilatory or vexatious within the meaning in Section 5512(e) of the Nonprofit Corporation Law . . . gives rise to a genuine issue of material fact as to whether plaintiff is entitled to an award of reasonable attorney's fees." *Id.* at 17.

The Court granted Defendants' motion in its entirety, and dismissed Plaintiff's claims with prejudice, on January 6, 2026. Summary Judgment Order at 3–4. In relevant part, the Court held there was no genuine issue of material fact with respect to Plaintiff's demand for attorneys' fees. The Court properly recognized that: (i) 42 Pa.C.S. § 2503(7) was the sole basis on which Plaintiff could seek fees for his claims, as pleaded, (ii) litigation sanctions can only be awarded under Section 2503(7) for "dilatory, obdurate or vexatious conduct during the pendency of a matter," and (iii) there was "no conduct during the pendency of"

this matter "rising to the level of sanctionable conduct." Summary Judgment Order at 3–4 (emphasis in original).

On January 28, 2026, Plaintiff filed a Petition for Sanctions. The Petition raised no additional relevant information that had not been in the record when the Court granted Defendants summary judgment. First, the Petition includes allegations regarding pre-litigation conduct, which this Court has already properly held is categorically irrelevant under Section 2503(7) because the statute is expressly limited to "**conduct during the pendency of a matter.**" *See* 42 Pa.C.S. § 2503(7) (emphasis added). Second, it recites the procedural history of the case, with certain errors and omissions. *See, e.g.*, Petition ¶¶ 19 (omitting that the parties submitted a joint motion for entry of stipulated confidentiality agreement governing Plaintiff's confidentiality obligations with respect to the requested documents, so-ordered by the Court on February 20, 2025), 28 (stating incorrectly that "[o]n June 16, 2025, plaintiff was deemed ineligible to serve as a Board of Trustee member candidate" and omitting that Plaintiff was actually removed by his peers via a 30–4 vote), 31 (ignoring that the Court's order "granting Defendants' Motion for Summary Judgment" included a ruling rejecting an award of attorneys' fees under 42 Pa.C.S. § 2503(7)—exactly what Plaintiff seeks in his petition for sanctions).

Plaintiff never served a single discovery request at any point in the 18-month period this litigation was active. Then, on March 11, 2026 (42 days after filing the

Petition, and 64 days after his claims were dismissed), Plaintiff's counsel emailed Defendants' counsel, requesting the availability of Schuyler and non-party David Kleppinger, the current Chair of the Board, to be deposed in this matter. Mot. ¶ 7. Plaintiff demanded a response by March 16, or he would schedule the depositions "unilaterally." *Id.* On March 16, Defendants' counsel responded, stating that they were unaware of any authority permitting Mr. Marino to pursue discovery in a dismissed case, and asking him to identify any authority that would support the request. *Id.* ¶ 8.

Plaintiff refused to confer, and instead—on March 18, 2026—purported to notice Mr. Schuyler's deposition for April 1, 2026. Then, on March 20, 2026, Plaintiff asked Defendants' counsel to accept service of a subpoena to depose non-party David Kleppinger on April 2, 2026. To the best of Defendants' knowledge, Plaintiff has not issued any further discovery requests at this time. However, Defendants understand that Plaintiff sent a letter dated March 11, 2026, to the Court, requesting that the Court issue two subpoenas to appear and testify and two subpoenas for the production of documents, in this matter. Mot. ¶ 13. Plaintiff did not confer with Defendants before sending this letter, and Plaintiff has not informed Defendants of whether they intend to issue subpoenas to any other non-parties, in addition to Mr. Kleppinger.

IV. ARGUMENT

Pennsylvania Rule of Civil Procedure 4012(a) provides that "[u]pon motion by a party or by the person from whom discovery . . . is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense[.]"

"In supervising discovery, the trial court has broad discretion to take such action as it deems appropriate to [e]nsure *prompt* and *adequate* discovery." *Kerns v. Methodist Hosp.*, 574 A.2d 1068, 1073 (Pa. Super. Ct. 1990) (emphasis in original); *see also Luckett v. Blaine*, 850 A.2d 811, 819 (Pa. Commw. Ct. 2004) ("Every court has the inherent power to schedule disposition of the cases on its docket to advance a fair and efficient adjudication. Incidental to this power is the power to stay proceedings, including discovery."); *Frankenberry v. Ferguson*, No. 105 C.D. 2017, 2017 WL 2960380, at *7 (Pa. Commw. Ct. July 12, 2017) ("[T]he court may grant a protective order and stay discovery upon good cause 'for the convenience of the parties ... and in the interests of justice.'") (citing Pa. R.C.P. 4007.3; *Luckett*, 850 A.2d at 819).

Rejecting Plaintiff's proposed discovery is a matter of common sense: The time to take discovery is *before* your claims are dismissed with prejudice on summary judgment, not *after*. This entire exercise is a waste of both judicial and party resources, and the Court can and should put an end to it now. *Wade,* 2019

WL 5212435, at *4 (Superior Court affirmed order by Court of Common Pleas, summarily denying sanctions motion by voluntarily dismissed party without allowing discovery where the motion merely "recount[ed] the procedural history of this case, as well as the parties' prior dispute," both of which were "already of record before the court.").

A. The Discovery Is Irrelevant Because the Court Already Rejected Plaintiff's Section 2503(7) Claim, and Nothing Any Witness Could Say Has Any Impact on the Analysis.

The Court's prior holding was correct—there was no sanctionable conduct here. Summary Judgment Order at 4. Plaintiff cannot create a right to discovery by ignoring the Court's Summary Judgment Order and reasserting his dismissed sanctions claim in the form of a post-judgment Petition. The Court can and should stop there and grant this Motion on that basis.

But even if the Court permitted Plaintiff to resurrect his dismissed Section 2503(7) claim via the Petition, there is nothing that Mr. Schuyler or Mr. Kleppinger can possibly say that will have any bearing whatsoever on the analysis. Discovery is therefore inappropriate. *Cf. Thomas by Thomas v. Duquesne Light Co.*, 500 A.2d 1163, 1167 (Pa. Super. Ct. 1985) (affirming trial court's ruling on summary judgment while discovery requests were outstanding where discovery sought could not have impacted outcome of motion).

As the Court already recognized, Section 2503(7) expressly limits the inquiry to "conduct during the pendency of [the] matter." Summary Judgment

Order at 4 (quoting and citing 42 Pa.C.S. § 2503(7)) (emphasis in original); *see also Stevens v. Dep't of Transp.*, 309 A.3d 193, 206 (Pa. Commw. Ct. 2024) ("Attorneys' fees may be awarded under Section 2503 only for prohibited conduct that occurs during, but nor prior to, litigation."); *McGarry v. Broadmoor Custom Homes, Inc.*, 563 A.2d 934, 935 (Pa. Super. Ct. 1989). Thus, any discovery into pre-litigation conduct, or post-litigation conduct, has no possible relevance.

Setting aside his claims regarding pre-litigation conduct, Plaintiff has identified the following litigation conduct as a basis for his sanctions claim: (i) filing preliminary objections on September 16, 2024, and later withdrawing them on February 21, 2025; (ii) moving for a protective order on January 6, 2025; and (iii) filing an answer on March 4, 2025. *See* Petition ¶¶ 55, 54, 57.

This was all routine, on-the-docket activity in full view of the Court, and the Court already ruled that this ordinary-course litigation activity is not sanctionable. Summary Judgment Order at 4. Rightly so—it defies common sense to claim that filing an answer, for example, can justify sanctions. And there is nothing that Mr. Schuyler, Mr. Kleppinger, or anyone could possibly say to transform these run-of-the-mill litigation actions into sanctionable conduct. Discovery is therefore unnecessary. *Cf. Thomas*, 500 A.2d at 1167 (affirming trial court's ruling on summary judgment while discovery requests were outstanding where discovery sought could not have impacted outcome of motion).

It is worth briefly addressing how far away Plaintiff is from possibly meeting the Section 2503(7) standard, to underscore the lack of any basis to take discovery:

No Dilatory Conduct: At no point did Defendants miss a deadline, seek an extension, or do anything to delay the closing of pleadings. Further, Defendants cooperated with Plaintiff to seek a reasonable resolution of the dispute, *see* Nov. 19, 2024 Continuance Request (referencing settlement discussions), and ultimately produced the requested documents without Court intervention within seven months of when Mr. Fenchak filed his original complaint, and less than six months from the filing of his Amended Complaint). Mot. ¶ 2. The entire course of litigation on Count I boils down to limited preliminary motion practice before the Parties negotiated a resolution without so much as a single discovery request being served on either side. *Id.* The record thus unavoidably refutes any possibility "that counsel displayed a lack of diligence that delayed proceedings unnecessarily." *In re Est. of Burger*, 852 A.2d 385, 391 (Pa. Super. Ct. 2004), *aff'd*, 898 A.2d 547 (Pa. 2006).

No Obdurate Conduct: Obdurate conduct requires that a party be "stubbornly persistent in wrongdoing." *Burger*, 852 A.2d at 391 (quoting Webster's Ninth New Collegiate Dictionary); *see also Pennsylvania Tpk. Comm'n v. Elec. Transaction Consultants Corp.*, 230 A.3d 548, 562 n.12 (Pa. Commw. Ct. 2020) (noting that "'Obdurate' means 'stubbornly resistant in wrongdoing,'

'resistant to persuasion or softening influences,' 'inflexible,' or 'unyielding.'") (quoting Webster's Third New International Dictionary). Defendants did not engage in *any* wrongdoing during the course of the litigation; they merely invoked their statutory right to deny Mr. Fenchak documents that bore no reasonable relation to the performance of his duties as a director. *See* 15 Pa.C.S. § 5512(a); *In re Application By Nonprofit Corp. Trs. To Compel Inspection Of Corp. Info.*, No. 1593, LEXIS 20702, at *7–8 (Pa. Ct. Com. Pl. Centre Cnty. Nov. 19, 2015) (recognizing that nonprofit corporations may decline information requests where the documents sought are not reasonably related to the performance of the director's duties). And there is no world in which Defendants' litigation conduct could be described as "stubbornly resistant." To the contrary, even though Defendants maintain that Mr. Fenchak was not entitled to the Endowment Information and Elevate Contract, they nonetheless worked in good faith to negotiate a resolution without so much as a single discovery request being served in the action.

No Vexatious Conduct: Vexatious conduct is "done 'without sufficient grounds in either law or in fact and ... [with] the sole purpose of causing annoyance.'" *In re Est. of Simpson*, 305 A.3d 176, 187 (Pa. Super. Ct. 2023) (citation omitted; alteration in original). As noted above, Defendants' actions in this dispute were firmly grounded in the applicable law, based on the plain text of 15 Pa.C.S § 5512(a), as interpreted by Pennsylvania Courts. In contrast, Plaintiff

based his entire claim on facially inapplicable case law considering the right of for-profit directors to corporate documents, ignoring the contradictory plain text of the superseding statute. *See, e.g.*, Am. Compl. ¶ 24 (quoting and citing *Machen v. Machen & Mayer Electrical Mfg. Co.*, 85 A. 100 (Pa. 1912)).

There is nothing that a deposition of Mr. Schuyler, Mr. Kleppinger, or anyone else, could add to this analysis. The procedural history of Defendants' routine conduct during the litigation is known to the Court and Plaintiff. To the extent Plaintiff purports to require discovery into the reasoning behind Defendants' tactical decisions during this case, that discovery is clearly barred by attorney-client privilege and/or work product protection. *See* Pa. R.C.P. 4003.1 (party may obtain discovery regarding "not privileged" information "which is relevant to the subject matter involved in the pending action.").

B. Plaintiff Cannot Excuse His Extreme Delay, and the Discovery Is Intolerably Burdensome.

Courts routinely prohibit discovery where "a reasonable period for discovery had expired," and "the opposing party failed to demonstrate the materiality of the outstanding discovery *or* the opposing party failed to demonstrate that it had proceeded in a timely manner with respect to the discovery sought." *Kerns*, 574 A.2d at 1073–74 (no abuse of discretion where trial court denied continuance for discovery after summary judgment was filed, where request was "unquestionably speculative," and there was "absolutely no indication why this request could not

have been made" earlier); *Wertz v. Kephart*, 542 A.2d 1019, 1022 (Pa. Super. Ct. 1988) (trial court abused discretion by allowing deposition to go forward on the eve of trial when the witness's identity and location had been known for years); *Reeves v. Middletown Athletic Ass'n*, 866 A.2d 1115, 1124 (Pa. Super. Ct. 2004) (recognizing that "[a]lthough parties must be given a reasonable time to complete discovery before a trial court entertains any motion for summary judgment, the party seeking discovery is under an obligation to seek discovery in a timely fashion").

This standard is easily met. Plaintiff's Amended Complaint was dismissed with prejudice over a month before Plaintiff took any steps to obtain discovery. Plaintiff opposed summary judgment by specifically invoking his Section 2503(7) sanctions claim, and the Court specifically held that no sanctionable conduct had occurred and that no dispute of fact existed. Summary Judgment Order at 4. To say that a reasonable time for discovery on Plaintiff's dismissed claim has passed is an understatement.

Plaintiff's list of supposedly sanctionable actions, *see* § IV.A., *supra,* also illustrates inexcusable delay. The attorneys' fee demand was included in Plaintiff's Amended Complaint, filed August 27, 2024. Am. Compl. ¶¶ 132–33. Yet for the whole case, he made no attempt whatsoever to take the discovery that he now claims he needs to support it. To put a finer point on it, if Plaintiff actually believes that (i) filing preliminary objections on September 16, 2024, was

sanctionable conduct, and (ii) he requires discovery to prove this claim, then it must be unacceptable for him to wait over a year to seek that discovery (and then to only do so after his first attempt to obtain attorneys' fees failed and his case was dismissed with prejudice).

To the extent it is even necessary to consider, the burden of Plaintiff's proposed discovery is also intolerably high. After 18 months of litigation, without *any* attempt to take discovery, Plaintiff flatly refused to confer regarding his late discovery demand. Mot. ¶¶ 8–9. Instead, he noticed a deposition of Mr. Schuyler for April 1, 2026, with only two weeks' notice, thus requiring Defendants to spend time and money preparing this emergency request. *Id.* ¶ 9. Mr. Schuyler was only ever named as a defendant in this matter in his official capacity as Chair of the Board. *Id.* ¶ 10. He has since completed his term as Chair of the Board, and he resides out of state. *Id.* Plaintiff has zero justification for forcing an out-of-state former defendant to prepare for and attend a deposition (even if virtual), on such an unreasonable timeline. Plaintiff then purported to issue a subpoena to non-party David Kleppinger for a deposition on April 2, 2026. *Id.* ¶ 11. For Mr. Kleppinger, Plaintiff provided only thirteen days' notice. The burden here is likewise high, especially considering that Mr. Kleppinger is not even a party to the lawsuit.

C. Plaintiff's Requests Are No More Than a Baseless Fishing Expedition.

Plaintiff's counsel signed the Petition, certifying that "the factual allegations [therein] have evidentiary support." Pa. R.C.P. 1023.1(c)(3). If that certification was accurate, then Plaintiff should already have the evidence he needs to support his motion, and he should not be permitted to take discovery now. If not, then Plaintiff's counsel should not have filed the Petition in the first place.

Either way, the discovery requests should be seen for what they are: A fishing expedition wherein Plaintiff hopes to find a basis for a Petition that he had no good faith basis to file, or to serve some purpose that is unrelated to this case.[3] In addition to calling into question the validity of Plaintiff's counsel's certification under Pa. R.C.P. 1023.1, filing a sanctions motion and then seeking discovery to support it gets things exactly backward, and is improper. "Discovery is appropriate to unearth facts necessary to prove a claim, not to conduct 'a 'fishing expedition' to determine whether a cause of action exists.'" *Fullman v. Kurtz*, No. 988 C.D. 2012, 2013 WL 3948873 at *4 (Pa. Commw. Ct. Feb. 7, 2013) (quoting *Luckett*, 850 A.2d at 818). Plaintiff already filed his Petition—if he did not have the facts he needed, then he should not have filed it at all.

---

[3] The timing suggests an effort to subvert the order of Judge Marston in the Eastern District of Pennsylvania, staying discovery in a now-pending federal case based on effectively the same facts, which is particularly egregious because Plaintiff agreed that discovery should not commence in that matter until Judge Marston resolves a currently pending motion to dismiss. Mot. ¶¶ 20–22.

The Court should not allow Plaintiff to sleep on his rights for over 18 months and then issue burdensome discovery requests at this late stage. A protective order and stay of any additional discovery are necessary here to prevent unreasonable annoyance, oppression, burden, and expense. Pa. R.C.P. 4012. For the foregoing reasons, Defendants and non-Party David Kleppinger respectfully request that this Court grant the Emergency Motion for Protective Order and preclude Plaintiff from pursuing any discovery in this dismissed action.

March 25, 2026

Respectfully Submitted,

JONES DAY

/s/ Andrew R. Stanton

Andrew R. Stanton, Esquire
PA Attorney ID No. 93409
Susan E. Kessler, Esquire
PA Attorney ID No. 322558
Nathaniel G. Ecker, Esquire
PA Attorney ID No. 331710
500 Grant Street, Suite 4500
Pittsburgh, PA 15219-2514
Telephone: (412) 391-3939
Fax: (412) 394-7959
astanton@jonesday.com
skessler@jonesday.com
necker@jonesday.com

Attorneys for Defendants, Board of Trustees of The Pennsylvania State University and Matthew Schuyler and Non-Party David Kleppinger

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provision of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Defendant Board of Trustees of The Pennsylvania State University, and Matthew Schuyler

Signature: /s/ *Andrew R. Stanton*
Name: Andrew R. Stanton

Attorney No. (if applicable): 93409

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served upon the following known counsel and parties of record this 25th day of March 2026, **via email**, as follows:

Steven F. Marino, Esq.
Joseph Auddino, Esq.
Marino Associates
301 Wharton Street
Philadelphia, PA 19147
smarino@marinoassociates.net
jauddino@marinoassociates.net

BY: */s/ Andrew R. Stanton*
Andrew R. Stanton, Esquire
PA Attorney ID No. 93409
500 Grant Street, Suite 4500
Pittsburgh, PA 15219-2514
Telephone: (412) 391-3939
Fax: (412) 394-7959
astanton@jonesday.com

Attorney for Defendants, Board of Trustees of The Pennsylvania State University and Matthew Schuyler and Non-Party David Kleppinger

DATE: March 25, 2026

Appendix to Brief in Support of Emergency Motion for a Protective Order, Pursuant to Local Rule 210

2019 WL 5212435
Only the Westlaw citation is currently available.
NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37
Superior Court of Pennsylvania.

WADE, GOLDSTEIN, LANDAU, AND ABRUZZO, P.C.

v.

Timothy CLARK and Corinne Clark, Appellants

No. 1639 EDA 2018
|
Filed October 16, 2019

Appeal from the Judgment Entered July 26, 2018, in the Court of Common Pleas of Chester County Civil Division at No. 2013-06330

BEFORE: SHOGAN, J., MURRAY, J., AND FORD ELLIOTT, P.J.E.

MEMORANDUM BY FORD ELLIOTT, P.J.E.:

*1 Timothy Clark ("Mr. Clark") and Corrine Clark ("Ms. Clark") appeal from the July 26, 2018 judgment entered in the Court of Common Pleas of Chester County. As discussed herein, Ms. Clark has no appeal before this court. Additionally, Wade, Goldstein, Landau & Abruzzo, P.C. ("Wade"), has filed a "motion for dismissal of appeal pursuant to a *per curiam* order filed October 30, 2018," based on substantial defects in Mr. Clark's brief. We deny Wade's motion for dismissal and affirm the judgment.

The underlying case reflects a lengthy litigation between all the parties involved in the issues surrounding this transaction. Wade was successful in the underlying action. The record reflects that on July 3, 2013, Wade commenced the underlying action against Mr. Clark; Matthew Arrison, Esq.; Great White Marketing, Inc. ("Great White"); John Ralston Woodruff, Esq.; and The Woodruff Law Firm (John Ralston Woodruff, Esq., and The Woodruff Law Firm collectively referred to as "Woodruff") by praecipe to issue writ of summons. In the praecipe, Wade identified the primary claim as "malicious prosecution." (Wade's praecipe to issue writ of summons, 7/3/13.) Thereafter, the proceedings were terminated with respect to Attorney Arrison. With leave of court, Wade filed a complaint, an amended complaint, and a second amended complaint. The second amended complaint contained four claims, including wrongful use of civil proceedings and abuse of process that allegedly stemmed from lawsuits filed by Woodruff on behalf of Mr. Clark and Great White, which was an entity owned by Mr. Clark, against Wade. The second amended complaint also included a count alleging fraudulent conveyance against Mr. Clark, Great White, Ms. Clark, and Woodruff. A protracted litigation ensued.

On March 4, 2015, a default judgment was entered against Woodruff. The litigation continued as against Mr. Clark, Ms. Clark, and Great White. On April 12, 2017, Woodruff filed a petition to strike/open default judgment, which the trial court subsequently denied. (Order of court, 6/14/17.) Woodruff then filed a motion for reconsideration. The trial court entered an order denying the motion for reconsideration on July 21, 2017. On July 25, 2017, however, the trial court entered an order stating that "in view of the Motion of [Woodruff] for Reconsideration of [Woodruff's] Petition to Strike/Open Default Judgment and/or for Indemnity or Contribution, it is hereby ordered that [the trial c]ourt's Second Final Administrative Conference Order dated June 15, 2017, is amended[.]" (Order of court, 7/25/17 (electronically signed).) The order then goes on to amend the conference schedule with respect to filing deadlines for submission of final expert reports. On August 2, 2017, Mr. Clark filed an answer to the "motion of John Woodruff to indemnify/contribution." (Mr. Clark's "answer by [Mr. Clark] to motion of John Woodruff to indemnify/contribution," 8/2/17 (full capitalization omitted).) The record reflects that the indemnification/contribution litigation between Mr. Clark and Woodruff ensued.

*2 On February 27, 2018, with leave of court, Wade filed a praecipe to partially discontinue, without prejudice, with respect to Mr. Clark, Ms. Clark, and Great White.[1] On March 12, 2018, Mr. Clark filed a "petition for sanctions and to tax fees as costs sur rule 2503(7) and (9)." On March 19, 2018, Ms. Clark filed a petition "for an award of counsel fees pursuant to 42 Pa.C.S.[A.] § 2503(7), (9)." On April 25, 2018, the trial court entered an order denying Mr. Clark's petition for sanctions and to tax fees as costs pursuant to 42 Pa.C.S.A. § 2503(7) and (9). Also on April 25, 2018, the trial court entered an order denying Ms. Clark's petition for an award of counsel fees pursuant to 42 Pa.C.S.A. § 2503(7) and (9).

The record reflects that on June 13, 2018, Mr. Clark and Ms. Clark filed one notice of appeal from "the Order of April 25, 2018 denying without a Hearing Petition for Sanctions and to

Tax as Fees and Costs rendered by the [trial court]." (Notice of appeal, 6/13/18.)[2] Attached to that notice of appeal is the trial court's April 25, 2018 order denying Mr. Clark's petition for sanctions. Therefore, because the trial court entered a separate order denying Ms. Clark's petition for counsel fees and Ms. Clark did not appeal from that order, Ms. Clark has no appeal before this court.

The record further reflects that the trial court ordered Mr. Clark to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Mr. Clark timely filed a Rule 1925(b) statement which contained 18 claims of error. (Mr. Clark's "statement of matters complained of sur Rule 1925(b)," 6/21/18 (full capitalization omitted).) The trial court filed a Rule 1925(a) opinion that briefly addressed "the issue that is woven throughout the [c]oncise [s]tatement" and incorporated the reasons for dismissal as set forth in the order that dismissed Mr. Clark's petition for sanctions. (Trial court opinion, 7/3/18 at 1-2.)

On June 20, 2018, this court entered an order directing Mr. Clark to show cause as to why the appeal should not be quashed for want of a final order. (***Per curiam*** order of court, 6/20/18.) Mr. Clark did not respond. On July 19, 2018, this court entered an order noting that a "[r]eview of this matter indicates that no judgment has been entered on the trial court docket as required by Pa.R.A.P. 301." (***Per curiam*** order, 7/19/18.) In accordance with this court's policy, the order then directed Mr. Clark to praecipe the trial court prothonotary to enter judgment. (***Id.***) The order further stated that upon compliance, the notice of appeal previously filed would be treated as filed after entry of judgment. (***Id.***) Mr. Clark complied by providing this court with an updated docket sheet showing that judgment was entered on July 26, 2018.

3** On October 9, 2018, Wade filed an application to dismiss Mr. Clark's appeal alleging, among other things, that Mr. Clark failed to file a timely brief and that Mr. Clark attempts to improperly broaden the scope of the appeal. (Wade's motion for dismissal of appeal, 10/9/18.) On October 30, 2018, this court denied Wade's application to dismiss without prejudice to raise the issue before the merits panel. (Per curiam*** order of court, 10/30/18.) On January 22, 2019, Wade filed a motion for dismissal of appeal pursuant to that ***per curiam*** order. (Wade's "motion for dismissal of appeal pursuant to ***per curiam*** order filed October 30, 2018" (full capitalization omitted).) In its motion for dismissal, Wade requests that we dismiss the appeal for Mr. Clark's various violations of the Pennsylvania Rules of Appellate Procedure.

Mr. Clark raises the following issues for our review:

1. Did the Court deny due process by denying the Petition for Sanctions for Fees under 42 Pa. C.S.[A.] 2503 summarily without permitting [Mr. Clark] to make a Record focused upon the issue of the Petition where the Court had prohibited any adverse deposition for the previous three years, and the opportunity to submit Briefs or make oral argument after the Court withdrew Rule to Show Cause mandating deposition ex parte[?]

2. Did the Court commit abuse of discretion by manifest unreasonableness by resolving all issues against [Mr. Clark and Ms. Clark], not analyzing the position of each [Mr. Clark and Ms. Clark] separately, without permitting either one to make a record upon their separate claims for abuse in litigation from 2014 forward including (1) not discontinuing the action in July 31, 2015 when the total value of both judgments upon a legal bill of about $13,000 was **$$54,785.20** [sic] upon happenstance (2) utter failure to provide reasoned grounds to initiate and continue the suit against [Ms.] Clark for conduct of her husband already reduced to judgment in 2013 (2) suing [Mr.] Clark in 2013 for contract damages, and fraud damages both of which were denied at trial in 2013 in the prior case and continuing the suit for tort damages without prevailing wholly on the prior claim (3) prolonging of the case for twenty-two months by filing false claims including that the case was "settled" unilaterally in 2016 for the purpose to avoid near impending trial (4) illicitly placing [Mr. Clarks'] lawyers on "witness" list in 2015 to slow down the proceedings and (5) falsely claiming [Mr. Clark's] lawyer should be disqualified by conflict not until late 2017 again at the cusp of trial rather than immediately in 2015 when it raised the issue casually within its Conference Memorandum by listing both lawyers as witnesses to avoid trial[?]

Mr. Clark's brief at 7 (emphasis in original).

At the outset, we note that even though Mr. Clark's counseled brief is largely incomprehensible and attempts to improperly broaden the scope of the appeal outside of the order appealed from, we decline Wade's request to dismiss on those bases. Instead, we will dispose of the issue that Mr. Clark raises before this court and that he raised with the trial court, which is that the trial court abused its discretion in denying Mr. Clark's motion for sanctions in the form of attorney's fees

because the trial court prohibited him from making a record to support the award.

In addressing a trial court's order awarding or denying counsel fees, our review is limited solely to determining whether the trial court abused its discretion. ***Thunberg v. Strause***, 682 A.2d 295, 299 (Pa. 1996). "An abuse of discretion occurs where the trial court 'reaches a conclusion that overrides or misapplies the law, or where the judgment exercised is manifestly unreasonable, or is the result of partiality, prejudice, bias, or ill will.' " ***Brady v. Urbas***, 111 A.3d 1155, 1161 (Pa. 2015).

*4 Here, Mr. Clark requested counsel fees "for sanctions against [Wade]" under 42 Pa.C.S.A. 2503(7) and (9)[3] "for its dilatory, obdurate or vexatious conduct during the pendency of a matter and for its arbitrary, vexatious and bad faith conduct in commencing the matter." (Mr. Clark's "petition for sanctions and tax fees as costs sur Rule 2503(7) and (9)," 3/12/18 at 1 (emphasis omitted).) In denying Mr. Clark's request, the trial court explained that:

> [t]he court finds no need for the creation of an additional record or a hearing in order to evaluate the legal claims presented in this petition. First, the present petition more properly reads as a motion than a petition. The "petition" recounts the procedural history of this case, as well as the parties' prior dispute. Both of which, however, are already of record before the court. The petition simply restates the history of this case and concludes that based upon the record the court should find vexatious conduct (and the like) on the part of the [Wade]. Yet, the allegations in [Mr. Clark's] petition are in sum a re-assertion of the claims and disputes that occurred prior to the filing of the instant case and are not a proper basis for an award of fees. Furthermore, as the court has noted in past orders, it has been assigned this case for five (5) years in pre-trial administration and is quite familiar with the allegations and claims. The court has resolved numerous motions and petitions filed by the parties challenging one another's conduct and it has personally observed the parties' and their counsel's conduct during pre-trial conferences. Thus, in answering the question whether [Wade's] conduct during the litigation was suit [sic] was "dilatory, obdurate or vexatious" or whether the action was filed without "reason," the court concludes the answer is that it was not.
>
> Although [Wade's] claim may not have been a strong one in [Mr. Clark's] view, the record does not support an award of attorneys' fees. An award of counsel fees is intended as a sanction against those who seek to use legal avenues to harass other parties, or attempt to obtain a benefit to which they would not otherwise be legally entitled. The court finds that such was not the case here.

Order of court, 4/25/18 at 2 n.1. In its Rule 1925(a) opinion, the trial court further explained that:

> [a]s the court noted in its appealed from Order, [Mr. Clark] raised issues that involved facts that were of record – filings made, assertions contained therein, disposition of prior cases and so on. Although in cases where facts may be unclear or disputed an evidentiary hearing may be required, in this case the facts and challenged conduct was [sic] of record before the court. Thus, the court concluded that no additional evidentiary hearing was necessary.

Trial court opinion, 7/3/18 at 1-2 (citation omitted).

We have reviewed the extensive record in this case and discern no abuse of discretion.

Judgment affirmed. Motion for dismissal of appeal pursuant to ***per curiam*** order filed October 30, 2018 denied.

All Citations

Not Reported in Atl. Rptr., 2019 WL 5212435

Footnotes

1 In Wade's brief to this court, it explained that it decided to forego recovery against Mr. Clark, Ms. Clark, and Great White because Attorney Woodruff appeared capable of satisfying the judgment entered against him. (Wade's brief at 15.)

2 The record reflects that a second notice of appeal was filed on June 19, 2018, which stated that "Timothy Clark and Corrine Clark hereby appeals [sic] from the Order of April 25, 2018 denying without Hearing Petition for Sanctions and to Tax as Fees as Costs rendered by the Honorable Mark Tunnel." (Notice of appeal, 6/19/18 (full capitalization omitted).) No order was attached to the June 19, 2018 notice of appeal. We note, however, that because Ms. Clark filed a petition "for award of counsel fees pursuant to 42 Pa.C.S.[A.] § 2503(7), (9)" and the trial court entered a separate order specifically

denying Ms. Clark's petition, it is clear that the notice of appeal filed on June 19, 2018 is not from the order denying Ms. Clark's petition.

3 Section 2503(7) permits an award of counsel fees as a sanction "for dilatory, obdurate or vexatious conduct during the pendency of a matter." 42 Pa.C.S.A. § 2503(7). Section 2503(9) permits an award of counsel fees where "the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith." ***Id.*** at § 2503(9).

End of Document

© 2026 Thomson Reuters. No claim to original U.S. Government Works.

2017 WL 2960380
Only the Westlaw citation is currently available.

See Pa. Commonwealth Court Internal Operating Procedures, Sec. 414 before citing.

Commonwealth Court of Pennsylvania.

Joseph P. FRANKENBERRY, Appellant

v.

Tammy S. FERGUSON, Superintendent at S.C. I. Benner, in her official as well as her personal capacity; R. Rupert, A–Block Unit Mngr at S.C. I. Benner, in her official capacity; A. Nelson, AB–Blocks Counselor, in her official capacity and, Dr. Xue, Chief Psychiatrist, CHCA at S.C. I. Benner, in his official capacity

No. 105 C.D. 2017
|
Submitted: April 28, 2017
|
FILED: July 12, 2017

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge HONORABLE ANNE E. COVEY, Judge HONORABLE JAMES GARDNER COLINS, Senior Judge

MEMORANDUM OPINION

JUDGE COHN JUBELIRER

*1 Joseph P. Frankenberry (Frankenberry) appeals, pro se, from an Order of the Court of Common Pleas of Centre County (trial court) sustaining the preliminary objections (POs) filed by Appellees Tammy S. Ferguson, R. Rupert, and A. Nelson (Appellees).[1] The trial court granted Appellees' demurrer and dismissed Frankenberry's Complaint and First Amendment to Complaint (together, Complaint), with prejudice.

I. Background

In his Complaint, Frankenberry, who is currently incarcerated in the State Correctional Institution at Benner Township (SCI–Benner), argues the following: his "Z" Code status (single cell classification) was arbitrarily and capriciously removed, and removal of his "Z" Code status was discriminatory and violated his rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Frankenberry alleges that Appellees removed his "Z" Code status after meeting for a Housing Status Review and completing a DC–46 Vote Sheet. He asserts that Appellee Ferguson, Superintendent at SCI–Benner, makes the final determination in inmate housing matters and chose to remove his "Z" Code status despite the other Appellees' votes that such should be maintained. Frankenberry argues that his "Z" Code status should be retained because he is 73 years old, has been incarcerated for 35 years, is serving a life sentence, has had "Z" Code status for 20 years, suffers from mental and physical health problems, is active on the Psychiatric Review Team (PRT) Roster, and has a record that demonstrates aggressive behavior toward others. Accordingly, Frankenberry asserts that removal of his "Z" Code status was arbitrary and capricious and violates his constitutional rights. Frankenberry claims that these factors, considered together, show that removal of "Z" Code status places him in imminent and inevitable harm's way. Frankenberry is seeking monetary damages for these actions, as well as injunctive relief. The Complaint was accompanied by a petition for a temporary restraining order and/or preliminary injunction (Petition) to prevent Appellees from removing his "Z" Code status. Frankenberry then requested related documents for discovery.

Frankenberry subsequently filed his First Amendment to Complaint, incorporating his original Complaint with his new claim: that double-celling (*i.e.* housing two inmates in the same cell) amounts to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Frankenberry asserts that double-celling under the conditions averred at SCI–Benner is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment because of the size of the cells and the time inmates are confined daily therein.

*2 Appellees filed POs in the nature of a demurrer, accompanied by a motion to stay discovery, which crossed in the mail with Frankenberry's First Amendment to Complaint. In their POs, Appellees assert that Frankenberry's Complaint makes no viable claim with regard to equal protection, discrimination, or cruel and unusual punishment. Appellees also argue that Frankenberry failed to plead any viable claim against Rupert and Nelson, as Frankenberry failed to establish

that they "engaged in any action or decision contrary to what Plaintiff alleges his interest is, *i.e.* retaining his Z Code." (Appellees' Br. in Support of POs at 8.) Upon receipt of the First Amendment to Complaint, Appellees filed an additional demurrer, stating that Frankenberry failed to state a cruel and unusual punishment claim based on the size of his shared cell.[2]

Frankenberry filed objections to the POs, asserting that Appellees' objections were without legal merit. Accordingly, Frankenberry requested that discovery be allowed to continue.

The trial court granted Appellees' motion to stay discovery. After a hearing, the trial court denied Frankenberry's Petition. The trial court then issued the August 29, 2016 Opinion and Order sustaining Appellees' POs and dismissing Frankenberry's Complaint.

With regard to the equal protection and discrimination claims, the trial court reasoned that all of Frankenberry's allegations in regard to this matter are mere conclusions unsupported by facts. The trial court explained that, to the extent Frankenberry asserts an equal protection claim, prisoners are not a suspect classification and the decision to remove "Z" Code status must be evaluated under a rational basis test. Thus, as Appellees' "Z" Code status review process falls within their discretion, the trial court found that Frankenberry failed to allege an equal protection claim.

With regard to the removal of "Z" Code status constituting cruel and unusual punishment, the trial court reasoned that Frankenberry failed to show that this resulted in a denial of the minimum civilized measure of life's necessities. The trial court added that Frankenberry's allegations of "mental anguish" and "imminent harm" are speculative and, accordingly, fail to set forth a claim. (Trial Ct. Op. at 5.)

The trial court next addressed Frankenberry's allegations of cruel and unusual punishment based on cell size, reasoning that double-celling alone is not a denial of life's necessities nor does it violate contemporary norms of decency. As Frankenberry did not allege any other issue with housing conditions at SCI–Benner, the trial court found that he had failed to state a cruel and unusual punishment claim based on the cell size.

As the trial court found that double-celling is not, per se, unconstitutional, Appellees Rupert and Nelson were dismissed as parties. The trial court reasoned that Frankenberry does not have a claim against them based solely on their alleged failure to adhere to a policy statement and, as no constitutional violation was committed, no claims remained against Appellees Rupert and Nelson.

II. Frankenberry's Appeal

Frankenberry filed a timely notice of appeal[3] from the trial court's August 29, 2016 Order accompanied by an Application for Relief requesting a Temporary Restraining Order with the Superior Court of Pennsylvania, which noted that this matter is within the appellate jurisdiction of the Commonwealth Court.[4] The Superior Court directed Frankenberry to show cause as to why this appeal should not be transferred, to which he timely responded acknowledging this Court's jurisdiction in this matter. Accordingly, the Superior Court transferred this appeal, along with Frankenberry's Application for Relief to this Court for disposition.

***3** On appeal, Frankenberry argues that: the trial court erred in sustaining the demurrer when Appellees removed his longstanding "Z" Code status without rationale or justification; Appellees' demurrer should not have been sustained with regard to his claim that double-celling constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution; removal of his "Z" Code status was discriminatory, which implicates the Fourteenth Amendment Equal Protection claim that he had specifically asserted in his Complaint; and the trial court's decision to grant Appellees' protective order resulting in a stay of discovery denied him the opportunity to support his arguments with evidence and seek redress for his claims.[5] Because the trial court did not err in finding that Frankenberry failed to state a cause of action under the alleged facts and did not abuse its discretion in staying discovery, we affirm the dismissal of the Complaint.

Preliminarily, we note that, when an appellate court reviews a trial court's order sustaining preliminary objections in the nature of a demurrer, "the standard of review is *de novo* and the scope of review is plenary." *Balletta v. Spadoni*, 47 A.3d 183, 188 n.2 (Pa. Cmwlth. 2012). This Court's review is limited to determining whether there has been an error of law or an abuse of discretion. *Jones v. City of Phila.*, 893 A.2d 837, 842 n.3 (Pa. Cmwlth. 2006). The standard of review for a demurrer is limited, as the question presented by a demurrer is whether the law says with certainty that no recovery is

possible on the facts set forth in the complaint. *Bilt–Rite Contractors, Inc. v. The Architectural Studio*, 866 A.2d 270, 274 (Pa. 2005); *MacElree v. Phila. Newspapers, Inc.*, 674 A.2d 1050, 1056 (Pa. 1996). Courts evaluate such objections by accepting as true all well-pled facts in the complaint and reasonable inferences arising from those facts. *Kull v. Guisse*, 81 A.3d 148, 154 n.3 (Pa. Cmwlth. 2013). A demurrer does not admit any conclusions of law in the complaint. *Hoffman v. Misericordia Hosp. of Phila.*, 267 A.2d 867, 868 (Pa. 1970). A demurrer should be sustained if the complaint shows *prima facie* that the claim is devoid of merit. *Id.* If any doubt exists as to whether a demurrer should be sustained, such doubt should be resolved in favor of overruling it. *Bilt–Rite*, 866 A.2d at 274; *Hoffman*, 267 A.2d at 868.

A. "Z" Code Status Removal

Frankenberry alleges that the trial court erred as a matter of law by sustaining Appellees' demurrer when Appellees removed Frankenberry's longstanding "Z" Code status without rationale or justification. DOC has a policy which applies to determinations about an inmate's eligibility for "Z" Code status.[6] In accordance with the Policy, "DOC considers several factors, including misconduct reports, recommendations from medical and psychiatric staff and reports from other staff members who have knowledge of the inmate's behavior." *Johnson v. Horn*, 782 A.2d 1073, 1074 (Pa. Cmwlth. 2001). In addition, inmates who are "evaluated by psychiatric or psychological staff as having mental health problems [such that they are viewed as] (1) dangerous to self; (2) dangerous to others; (3) self-mutilative; (4) unable to care for self; and/or (5) active on the [PRT] roster" shall be "carefully reviewed by staff and **considered**" for the program. Policy at 5–2 (emphasis added) (footnote omitted). When an annual "Z" Code status review results in a recommended change, "a DC–46, [v]ote [s]heet along with other relevant information shall be circulated to the Facility Manager [Appellee Ferguson] who shall make the final decision. The staff action and rationale for "Z" Code housing status shall be documented ...." Policy at 5–3.

*4 Frankenberry argues that the trial court failed to note that Appellee Ferguson revoked his "Z" Code status despite the other Appellees' votes that it be maintained and did not provide him with the rationale for her decision, which he deems was arbitrary and capricious. Accepting all of these allegations as fact, as we must, Frankenberry has not stated a claim by arguing that Appellee Ferguson's actions in implementing DOC policy were arbitrary and capricious. Under state law, an inmate does not have the right to confinement in a housing unit of his choosing. 37 Pa. Code § 93.11(a); *see Yount v. Dep't of Corr.*, 966 A.2d 1115, 1117 n.1 (Pa. 2009). Additionally, prison officials have discretion to transfer a prisoner for any reason or for no reason at all. *Meachum v. Fano*, 427 U.S. 215, 228 (1976); *Yount*, 966 A.2d at 1117 n.1. When adopting and executing policies and practices, "prison officials must be accorded wide ranging deference," as they are best situated to adopt solutions "that in their judgment are necessary to preserve internal order and to maintain institutional security." *Robson v. Biester*, 420 A.2d 9, 12 (Pa. Cmwlth. 1980) (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)). Federal law similarly holds that the placement of prisoners within the prison system falls within the "wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than the federal courts." *Meachum*, 427 U.S. at 225.

Applying the law to this case, Appellee Ferguson has discretion to make final decisions regarding an inmate's "Z" Code status. Appellee Ferguson followed the Policy when deciding to revoke Frankenberry's "Z" Code status. Indeed, prior to the revocation of his "Z" Code status, a vote sheet was circulated, it was presented to Appellee Ferguson for review and a final decision, and the action and rationale were properly documented. Nowhere does the Policy require that the Facility Manager communicate the rationale for a "Z" Code status decision to the inmate. Further, simply because an inmate meets the qualifications for "Z" Code status does not mean that inmate is "entitled to a declaration that he be assigned single cell status under the Policy." *Johnson*, 782 A.2d at 1077 (holding that an inmate with Hepatitis C was not entitled to "Z" code status). Inmates that fit these criteria are only entitled to be **considered** for "Z" Code status. Therefore, the trial court did not err in deferring to Appellee Ferguson's decision to revoke Frankenberry's "Z" Code status and finding that Frankenberry failed to state a claim.

B. Double–Celling and Eighth Amendment

Frankenberry next asserts that revocation of his "Z" Code status caused him to be placed in a double-cell and that double-celling inmates violates the Eighth Amendment[7] prohibition against cruel and unusual punishment. The Eighth Amendment is "intended to protect and safeguard a prison inmate from an environment where degeneration is probable and self-improvement unlikely because of the conditions existing which inflict needless suffering, whether physical or mental." *Battle v. Anderson*, 564 F.2d 388, 393 (10th Cir.

1977) (citing *Estelle v. Gamble*, 429 U.S. 97 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976)). Though there is "[n]o static 'test' ... by which courts determine whether conditions of confinement are cruel and unusual," it is "measured by 'the evolving standards of decency that mark the progress of a maturing society.' " *Tillery v. Owens*, 907 F.2d 418, 426 (3d Cir. 1990) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)). Prison officials must ensure that inmates are not deprived of the "minimal civilized measure of life's necessities," including food, clothing, shelter, sanitation, medical care, and personal safety. *Tindell v. Dep't of Corr.*, 87 A.3d 1029, 1041 (Pa. Cmwlth. 2014) (quoting *Rhodes*, 452 U.S. at 346).

In order to succeed on an Eighth Amendment claim against a prison official, an inmate must show two requirements:

> First, the deprivation alleged must be, objectively, sufficiently serious; a prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities. For a claim (like the one here) based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm.
>
> ***5** The second requirement follows from the principle that only the unnecessary and wanton infliction of pain implicates the Eighth Amendment. To violate the Cruel and Unusual Punishments Clause, a prison official must have a sufficiently culpable state of mind. In prison-conditions cases that state of mind is one of deliberate indifference to inmate health or safety.

Farmer v. Brennan, 511 U.S. 825, 834 (1994) (internal quotation marks, footnote, and citations omitted); *see also Neely v. Dep't of Corr.*, 838 A.2d 16, 20 n.6 (Pa. Cmwlth. 2003).

This Court has determined that "[i]n the absence of substantial evidence in the record to indicate that the officials have exaggerated the response to these considerations, the Court should defer to [prison officials'] expert judgment in such matters." *Robson*, 420 A.2d at 12. Thus, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987).

Frankenberry's Complaint alleges that double-celling inmates in cells that are approximately 85 square feet for 17 hours a day is per se unconstitutional, citing *Tillery*. However, *Tillery* did not establish a per se rule, holding instead that a court must consider the totality of the circumstances in determining the constitutional adequacy of the housing. 907 F.2d at 427–28. In *Tillery*, the conditions of the prison included overcrowding, pervasive violence and insecurity, deficient medical and mental health care, subnormal ventilation, plumbing, showers, fire safety concerns, limited opportunities for out-of-cell recreation, long periods of double-celling, and inadequate screening before double-celling, which resulted in "fatal pairings" of inmates. *Id.* Accordingly, *Tillery* determined that "the constitutionality of double-celling must be analyzed in the context ... that almost every element of the physical plant and provision of services [in this case] falls below constitutional norms." *Id.* at 427. Therefore, under the totality of the circumstances in *Tillery*, "double-celling violated the Eighth Amendment prohibition against cruel and unusual punishment." *Id.* at 428. However, other courts have found double-celling to be permissible, where "the general prison conditions [are] otherwise adequate." *Id.* at 427.

Frankenberry argues that double-celling, when considered in combination with the other conditions of confinement at SCI–Benner, deprives the inmates of the minimal civilized measure of life's necessities and violates the norms of decency, resulting in cruel and unusual punishment in violation of the Eighth Amendment. Taking Frankenberry's descriptions of conditions within SCI–Benner as true, the cells are approximately 85 square feet (42.5 square feet per man, per cell) and inmates spend approximately 17 hours per day confined therein. Frankenberry has both a psychologist and psychiatrist who see him on a semi-monthly basis, in addition to a Unit Team that has knowledge of his behavior and sees him on a daily basis. The Court can infer based on the list of medications prescribed to Frankenberry and discussions of treatment for various health problems that he has regular access to a physician, and there are no allegations that other SCI–Benner inmates do not also. Frankenberry supplies no further allegations of the conditions within SCI–Benner in his Complaint.[8] Rather, he argues that there is physical and mental suffering inherent in two men confined in a small space for extended periods of time.

***6** The conditions that Frankenberry describes in his Complaint fall short of the totality of the circumstances standard in *Tillery*. While we accept as true that inmates at SCI–Benner are confined to 85 square-foot double-cells for long periods of time, Frankenberry presents no evidence that the facilities are otherwise inadequate. There is no evidence that inmates at SCI–Benner are not provided with adequate

medical and mental health care. There is no evidence that prison officials at SCI–Benner are not adequately screening for "fatal pairings" when double-celling inmates, especially as Frankenberry was "advised to find a cellie" of his choice to share with when he was notified that his "Z" Code status would be removed. (Complaint Exhibit A.) There is no evidence that conditions at SCI–Benner are not otherwise adequate and square footage alone is insufficient to constitute cruel and unusual punishment. Though Frankenberry avers that the length of time spent in his 85 square foot cell is what makes this cruel and unusual, when viewed in the totality of the circumstances, this Court agrees with the trial court in finding that Frankenberry failed to state a claim regarding a violation of the Eighth Amendment.

C. Discrimination and Equal Protection Claim

Though Frankenberry does not expressly raise his Equal Protection argument as an issue on appeal, he does mention discrimination in his brief, and accordingly this Court will briefly address this argument as it was contained in his Complaint and is addressed by Appellees in their brief to this Court. In his Complaint, Frankenberry alleges that Appellees' decision to remove his "Z" Code status was discriminatory in violation of the Equal Protection Clause of the Fourteenth Amendment.[9]

The Equal Protection Clause

> is not a command that all persons be treated alike but, rather, "a direction that all persons **similarly situated** should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 ... (1985) (emphasis added). The level of scrutiny applied to ensure that classifications comply with this guarantee differs depending on the nature of the classification. Classifications involving suspect or quasi-suspect class, or impacting certain fundamental constitutional rights, are subject to heightened scrutiny. *Id.* Other classifications, however, need only be rationally related to a legitimate government goal. *See Chapman v. United States*, 500 U.S. 453, 465 ... (1991) (applying rational basis test to classification based on nature of offense).

Artway v. Attorney Gen. of State of N.J., 81 F.3d 1235, 1267 (3d Cir. 1996). "Neither prisoners nor indigents are suspect classes." *Abdul–Akbar v. McKelvie*, 239 F.3d 307, 317 (3d Cir. 2001). Additionally,

> no two prisoners, being different human beings, will possess identical backgrounds and characters. Indeed, it is difficult to believe that any two prisoners could ever be considered "similarly situated" for the purpose of judicial review on equal protection grounds of broadly discretionary decisions because such decisions may legitimately be informed by a broad variety of an individual's characteristics.

Reider v. Com. Bureau of Corr., 502 A.2d 272, 276 (Pa. Cmwlth. 1985) (quoting *Rowe v. Cuyler*, 534 F. Supp. 297, 301 (E.D. Pa.), *aff'd*, 696 F.2d 985 (3d Cir. 1982)).

In his Complaint, Frankenberry states that his "Z" Code status was removed in order to grant "Z" Code status to trans-gender inmates, while he simultaneously argues that his "Z" Code status was arbitrarily and capriciously removed. Neither of these arguments is supported by facts, but taken as true, the arguments are contradictory. Even so, Frankenberry does not argue that he is similarly situated with trans-gender inmates and so, as prisoners are not a suspect class, any equal protection claim must be evaluated under a rational basis test. DOC's Policy requires that Appellees consider the unique characteristics of the inmate. Viewed in light of the discretionary authority granted to corrections officials, a rational basis existed to remove Frankenberry's "Z" Code status. Accordingly, Frankenberry fails to state a claim under the Equal Protection Clause of the Fourteenth Amendment.

D. Stay of Discovery

*7 This Court finds no merit to Frankenberry's claim that the trial court's order staying discovery amounts to judicial error. Discovery matters are within a trial court's discretion and should only be overturned by a reviewing court if abuse of that discretion is evident. *Luckett v. Blaine*, 850 A.2d 811, 818 (Pa. Cmwlth. 2004). As a challenge to a discovery order constitutes a legal question, our scope of review is plenary. *In re Hasay*, 686 A.2d 809, 812 (Pa. 1996).

The trial court's decision to stay discovery was granted upon Appellees' motion for a protective order. The Pennsylvania Rules of Civil Procedure permit parties to file such a motion[10] and for the court to order a stay of proceedings until its disposition.[11] *Luckett*, 850 A.2d at 819. Indeed, the trial court "has the inherent power to schedule disposition of the cases on its docket to advance a fair and efficient adjudication. Incidental to this power is the power to stay proceedings, including discovery. How this can best be done is a decision properly within the discretion of the trial courts." *Id.* (citation omitted). Thus, the court may grant a protective order and stay discovery upon good cause "for the convenience of

parties ... and in the interests of justice." Rule 4007.3 of the Pennsylvania Rules of Civil Procedure, Pa. R.C.P. No. 4007.3.[12]

Frankenberry argues that the trial court's decision to stay discovery denied him the opportunity to pursue and prosecute allegations that would be supported by evidence in the Appellees' records. While Pennsylvania allows discovery to aid in preparing pleadings,[13] this does not "authorize a 'fishing expedition' to determine whether a cause of action exists." *Luckett*, 850 A.2d at 818 (citation omitted). When a complaint has been filed, discovery may be granted provided that the plaintiff has presented a *prima facie* case therein. *Id.* (citing *McNeil v. Jordan*, 814 A.2d 234, 246 (Pa. Super. 2002)). As Frankenberry asserts that he cannot establish his case without the requested discovery, his right to discovery is defeated for failing to set forth a *prima facie* case. Because Frankenberry did not present a *prima facie* case, the trial court's decision to grant the demurrer is wholly appropriate. Therefore, there was no abuse of discretion in the trial court's decision to grant a stay of discovery before ruling on the Appellees' POs.

III. Conclusion

*8 For the foregoing reasons, this Court hereby affirms the Order of the trial court granting Appellees' POs and dismissing Frankenberry's Complaint with prejudice against Tammy S. Ferguson, R. Rupert, and A. Nelson.[14]

ORDER

NOW, July 12, 2017, the Order of the Court of Common Pleas of Centre County, in the above-captioned matter, is **AFFIRMED**. Joseph P. Frankenberry's Application for Relief is hereby **DISMISSED** as moot.

All Citations

Not Reported in Atl. Rptr., 2017 WL 2960380

Footnotes

1 Employed at State Correctional Institution at Benner Township, respectively, as Superintendent, A–Block Unit Manager, and AB–Blocks Counselor. Dr. Xue filed separate preliminary objections, which were sustained in a subsequent order and are not at issue in this appeal.

2 In the time between the filing of the Complaint and First Amendment to Complaint, Frankenberry's "Z" Code status was revoked and he was double-celled.

3 Though the notice of appeal was not filed with the clerk of the trial court as required by Rule 905(a)(1) of the Pennsylvania Rules of Appellate Procedure, Pa. R.A.P. 905(a)(1), Rule 905(a)(4) mandates that when appeals are

> filed in an incorrect office within the unified judicial system, the clerk shall immediately stamp it with the date of receipt and transmit it to the clerk of the court which entered the order appealed from, and ... the notice of appeal shall be deemed filed in the trial court on the date originally filed.

Pa. R.A.P. 905(a)(4); *see also Howard v. Dep't of Transp.*, 73 A.3d 648, 649 (Pa. Cmwlth. 2013).

4 *See* Sections 761(a)(1)(v) and 762(a)(1)(i) of the Judicial Code, 42 Pa. C.S. §§ 761(a)(1)(v), 762(a)(1)(i); *Balshy v. Rank*, 490 A.2d 415, 416 (Pa. 1985).

5 Though Frankenberry argues these points in a different order in brief, we have rearranged these points for ease of resolution.

6 DOC Policy 11.2.1: Reception and Classification, 5–1—5–4, *available at* http://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/11.02.01%20Reception%20and%20Classification.pdf (last visited July 11, 2017).

7 "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

8 Frankenberry raises additional adverse conditions in his brief on appeal, but as they were not pled in his Complaint, they will not be considered by this Court.

9 "No State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

10 Rule 4012(a)(1) of the Pennsylvania Rules of Civil Procedure states:

> (a) Upon motion by a party or by the person from whom discovery or deposition is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense, including one or more of the following:
>
> (1) that the discovery or deposition shall be prohibited ....

Pa. R.C.P. No. 4012(a)(1).

11 Rule 4013 of the Pennsylvania Rules of Civil Procedure provides:

> The filing of a motion for a protective order shall not stay the deposition, production, entry on land or other discovery to which the motion is directed unless the court shall so order. The court for good cause shown may stay any or all proceedings in the action until disposition of the motion.

Pa. R.C.P. No. 4013.

12 This Rule states:

> Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

Pa. R.C.P. No 4007.3.

13 Rule 4001(c) of the Pennsylvania Rules of Civil Procedure provides:

> Subject to the provisions of this chapter, any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery, or for preparation of pleadings, or for preparation or trial of a case, or for use at a hearing upon petition, motion or rule, or for any combination of the foregoing purposes.

Pa. R.C.P. No. 4001(c).

14 As the trial court's ruling on the POs is affirmed, Frankenberry's Application for Relief transferred from the Superior Court to this Court for disposition is dismissed as moot.

End of Document

© 2026 Thomson Reuters. No claim to original U.S. Government Works.

In re Application

Common Pleas Court of Centre County, Pennsylvania

November 19, 2015, Filed

NO. 1593 FOR 2015

Reporter
2015 Pa. Dist. & Cnty. Dec. LEXIS 20702 *

IN RE: APPLICATION BY NONPROFIT CORPORATION TRUSTEES TO COMPEL TNSPECTION~OF~CORPORATE ' INFORMATION

Judges: **[*1]** Daniel Lee Howsare, Judge

Opinion by: Daniel Lee Howsare

Opinion

MEMORANDUM

In this matter, seven (7) trustees of the Pennsylvania State University, a nonprofit corporation, seek certain materials generated as a result of the "Freeh Investigation" conducted following the revelation of sexual misconduct by former assistant football coach Gerald A. Sandusky. The trustees base their request on a provision of the Pennsylvania Non-Profit Corporation Law, specifically, 15 Pa.C.S.A. § 5512. That section provides as follows:

(a) **General rule.—** To the extent reasonably related to the performance of the duties of the director, including those arising from service as a member of a committee of the board of directors, a director of a nonprofit corporation is entitled:

(1)in person or by any attorney or other agent, at any reasonable time, to inspect and copy corporate books, records and documents and, in addition, to inspect, and • receive information regarding, the assets, liabilities and operations of the corporation and any subsidiaries of the corporation incorporated or otherwise organized or created under the laws of this Commonwealth that are controlled directly or indirectly by the corporation; and

(2)to demand that the corporation **[*2]** exercise whatever rights it may have to obtain information regarding any other subsidiaries of the corporation.

(b) **Proceedings for the enforcement of inspection by a director.—** If the corporation, or an officer or agent thereof, refuses to permit an inspection or obtain or provide information sought by a director or attorney or other agent acting for the director pursuant to subsection (a) or does not reply to the request within two business days after the request has been made, the director may apply to the court for an order to compel the inspection or the obtaining or providing of the information. The court shall summarily order the corporation to permit the requested inspection or to obtain the information unless the corporation establishes that the information to be obtained by the exercise of the right is not reasonably related to the performance of the duties of the director or that the director or the attorney, or agent of the.director is likely to use the information in a manner that would violate the duty of the director to the corporation. The order of the court may contain provisions protecting the corporation from undue burden or expense and prohibiting the director from **[*3]** using the information In a manner that would violate the duty of the director to the corporation.

In order to better interpret this section, we will look at the history in Pennsylvania of a trustee's entitlement to corporate information.

In *Machen, Appellant v. Electrical Mfg. Co.,* 237 Pa. 212, 85A. 100 (1912) the Pennsylvania Supreme Court took a broad approach. We quote at length from that opinion as follows:

...It is, therefore, apparent that the directors should at all reasonable times be permitted to inspect the books of the corporation. Judge Thompson in sustaining the right of a director to such inspection says in his admirable work on Corporations (2nd Ed.) vol 4, p. 993: "Of this right of the director it has been said: "The duty of a director is to direct, and if he neglects this duty he is certainly guilty of a moral wrong, it not a legal one. To perform this duty intelligently it is essential that he should keep himself informed as to the business affairs of the corporation and as to the acts of all its executive officers, and in order to keep himself so informed, he as the unqualified right to inspect its books, records and

documents.'"

The duty to manage the corporation rests alike upon each and every one of the directors, and, therefore, **[*4]** it is the right of each director to inspect, its books and documents. There doubtless may be differences of opinion among directors as to the management of the affairs of the corporation, but while the majority will control, they have not the authority and cannot be permitted to deprive the minority, by refusing an inspection of the books and papers, of the right to obtain information as to the affairs of the company. As said by Chief Justice Savage in People v. Throop, 12 Wend. (N. Y.) 183: "Surely such an outrage could not be defended, nor can we perceive any plausible apology for it." The appellees set up in the return to the alternative writ several reasons for refusing the appellant access to the books of the company, but conceding the truth of the matters alleged in the return it does not deprive him of the right of inspection. These reasons might be sufficient grounds to justify the stockholders in refusing to elect the appellant a director to manage the company's affairs, but that is a question to be considered and determined by the owners of the assets of the. company, the stockholder the majority of the board of directors. Certainly the right of a director to inspect is superior to that of a stockholder, and we have sustained the latter's **[*5]** right in the face of an averment in the return of a belief that the demand for inspection was not in good faith but for the purpose of using the information as a director in a competing company: Kuhbach v. Cut Glass Co., 220 Pa. 427. The other matters alleged as reasons for denying the plaintiff the right of inspection are likewise without merit They are for the consideration of the stockholders, not for the plaintiffs co-directors. He is responsible to the stockholders and not to his fellow-directors for the faithful discharge of his duties as a director. He has an unqualified right to Inspect the books of the corporation, and all that he need show to entitle him to an inspection is that he is a director of the company, that he has demanded permission to examine and that his demand has been refused: People v. Central Fish Co., 117 N. Y. App. Div. 77.

Under *Machen* the right of a director to inspect corporate information was unqualified. No restriction was placed on the material requested or the intended use. Furthermore, the Court was clear, that while the majority board of directors may control in deciding the affairs of the corporation, the majority could not deprive a minority director access to corporate information.

In *Strassburger, Aplnt. v. Phila. Record Co.*, 355 Pa. 485, 6A. 922 (1939) the Supreme Court of Pennsylvania **[*6]** provided as follows:

The general relation of a director to a business corporation is stated in section 408 of the Business Corporation law of 1933, P.L. 364,15 PS section 2852-408: "Relation of Directors and Officers to the Corporation. Officers and directors shall be deemed to stand in a fiduciary relation to the corporation, and shall discharge the duties of their respective positions in good faith and with that diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in their personal business affairs." As such fiduciary appellant was entitled to all the information available to enable him to perform his duties to the stockholders who are the real owners of the properly. He was entitled at any time to make such Inspection of its records as he considered necessary to inform himself for the proper performance of his duty to the stockholders; the statute did not limit him, in the examination, as it limited the stockholder whose right is defined by section 308B (P. L 382), 15 PS section 2852-308B; "Every shareholder shall have a right to examine, in person or by agent or attorney, at any reasonable time or times, for any reasonable purpose, the **[*7]** share register, books or records of account, and records of the proceedings of the shareholders and directors, and make extracts therefrom."

In making his examination the director is entitled to expert assistance, He must of course act in good faith and therefore may not exercise his right of examination for purposes that would be in conflict with the performance of his fiduciary relationship.

In *Strassburger,* the Court retained the idea that the subjective view of the requesting director would control in determining whether corporate information would "enable him to perform his duties to the corporation". However, the Court placed a restriction, i.e., that the director act in good faith and refrain from using the corporate information for purposes in conflict with his fiduciary obligation.

With the enactment of the Nonprofit Corporation Law of 1988, some changes were made. Section 5512 requires that the requested information be reasonably related to the performance of the duties of the director. Section 5512 retains the restriction set forth in *Strassburger* that requested corporation information must not be used by a director in a manner that violates his or her duty to the corporation. The burden of establishing **[*8]** either of

these restrictions is on the corporation. In the absence of either restriction, the statute provides the Court shall summarily order requested corporation information be provided to a director. We believe that prior law relating to a majority of directors restricting the request of a minority remains the same. In the absence of either of the above qualifications, the fact that a majority of directors may disagree with the request is not determinative.

We will first address the "reasonably related" issue. Section 201 of the Amended and Restated By Laws of the Pennsylvania State University, adopted November 14, 2014, provides in part as follows:

The affairs of the University shall be managed by a Board of Trustees.

Section 8.07 provides in part:

Members of the Board of Trustees stand in a fiduciary relationship to "the University" which" reposes special confidence "in each member. Members of the Board of Trustees shall act in good faith, wilt) due regard to the interests of the University, and shall comply with the fiduciary principles of conduct in addition to any other state or federal requirements.

The Pennsylvania Nonprofit Corporation Law, 15 Pa. C.S.A. §5712(a) provides in part as follows:

(a)Directors [*9] —A director of a nonprofit corporation shall stand in a fiduciary relation to the corporation and shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith, in a manner he reasonably believes to be in the best interests of the corporation and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances.

Thus, the duty of a member of the Board of Trustees of the Pennsylvania State University is to participate in managing the affairs of the University, as a fiduciary, acting in good faith and in a manner reasonably believed by the director to be in the best interests of the University. In order to deny Petitioners access to corporate information, the Respondent must establish that the requested information is not reasonably related to this duty. We must be mindful in making this determination, that prior to the enactment of Section 5512, no restriction on the information to which a director had access was imposed. We do not believe it was the intent in the enactment of this section to place a "high bar" on access to information such as a **[*10]** "formal finding" of relevancy. All that is required is that the requested information be reasonably or fairly related to the director's duties. This determination is one to be made solely by the Court.

Respondent asks that we place weight in making this determination on the action of the Board in addressing two proposed resolutions on October 28, 2015. The first proposed resolution, which was rejected, resolved as follows:

Therefore he it Resolved that the Board of Trustees shall immediately appoint a four person Ad Hoc Committee ("Freeh Committee") to include Albert L Lord, Anthony P. Lubrano and two members designated by the Chair, to examine the Freeh Report, meet with Freeh and his Investigative teal to pose relevant questions, review the full set of undisclosed communications between Freeh and University officials and Trustees, and report its findings and recommendations to the full Board. After deliberation, the Board will issue its own report to its several constituencies.

The second proposed resolution, which was adopted, provides as follows:

Whereas, the Board is neither expert nor experienced in resolving issues of conflicting facts, interpretation and credibility that would **[*11]** be necessary to be resolved in any efforts, to reach conclusions following any further factual investigation;

Whereas, pending or future criminal and civil proceedings, governmental and administrative proceedings and other factual investigations related thereto ("Related Proceedings") may shed further factual light on the issues covered by the Freeh Report;...

Whereas, the Board believes that overseeing the teaching, research and service mission of Penn State, supporting President Barron and his leadership and strategic direction of the University, providing a safe and secure environment for our students, faculty and staff, and children who participate in Penn State programs and activities, and meeting all of our compliance and ethical obligations should be the top priorities of the Board;

Therefore be it

Resolved that, consistent with its fiduciary duty and

priorities, the Board shall continue to actively monitor the discovery and factual investigations that are part of the Related Proceedings and, upon conclusion of such proceedings, shall determine whether any action is appropriate and in the best interests of Penn State.

The Board of Trustees, for reasons of its own limitations, the fact **[*12]** that other "related proceedings" were pending and its belief that overseeing the teaching, research and service mission of Penn State was a top priority, deferred action with regard to conducting its own investigation until conclusion of the "related proceedings". While this action may have been prudent on the part of the Board in regard to conducting its own investigation, we do not believe it should be given significant weight in resolving the reasonableness issue facing the Court. First, the law of *Machen* is still good, that-while tile-majority'sdecision-wlll-ControLin_a_matter_of_corporate_affairs, the majority cannot deny the minority access to corporate information. Further, the request here relates to other matters of University business.

Likewise, we do not accept Respondent's position stated in its brief as follows;

....Because a trustee is not called on as part of a trustee's duty to oversee lawsuits by reviewing an attorney's interview memoranda or other attorney work product, the FSS Materials do not reasonably relate to Petitioners' oversight duties to the University.

The duty of a director is to participate in managing University affairs in a manner reasonably believed by **[*13]** the director to be in the University's best interests. Whether a legal duty or a formal written document stating such a duty exists is in our view irrelevant. The question is whether the manner in which the Petitioners propose to address the University's affairs, by requesting access to the "source information", is unreasonable. Assuming the disqualifying factors are not established, we do not believe that it is.

Petitioners set forth in their brief the affairs of the University, which they are charged with managing (such as a number of pending lawsuits), and the reasons they believe the requested information is related to'their duty in that regard. We have reviewed this information, the Respondent's position, as well as the various documents included as exhibits. We are satisfied that a reasonable relationship exists and will deny Respondent's position on this issue.

Respondent also contends that Petitioners should not receive the requested information, because they are likely to use it in a manner that would violate their duty as directors. It bases this concern on the matters contained in the memorandum filed under seal on August 11, 2015. We have reviewed that memorandum and Respondent's **[*14]** response at length. We do not believe that the information is of such Import as to warrant a conclusion that a director will likely use the information in a manner violating his or her fiduciary duty. Additionally, it is our understanding that Petitioners have agreed to a requirement of confidentiality.

We will therefore allow access to the requested Information. There are, however, additional matters to be addressed. Section 5512 provides that the. court order "may contain provisions protecting the corporation from undue burden or expense and prohibiting the director from using the information in a manner that would violate the duty of the director to the corporation. We will first deal with the latter provision.

The Respondent in its brief objects particularly to the Petitioners being able to.view "who said what". While we will order that the information be released to the Petitioners, we understand the Respondent's concerns in some respects. The position that people may not come forward or be forthright in future investigations seems to us to be valid. To a lesser degree, the possibility that the information could be used against employees of the University is a concern. The Respondent's argument **[*15]** of confidentiality is more problematic, because we cannot reasonably conclude from the evidence that a promise of confidentiality was expressly made. In any event, in our order we intend to take measures to attempt to address these concerns.

The other matter to be addressed is preventing undue burden or expense. First, we do not accept Respondent's proposal of a multi-step screening process. We intend to take a more simple approach by providing Respondent significant time to comply with our order. If bona fide issues of expense or burden arise during that process, they can specifically be brought to the Court's attention for resolution.

Finally, we will require each side to pay their own counsel fees and costs.

WHEREFORE we enter the following:

ORDER OF COURT

And now, November 19, 2015, after hearing and substantial deliberation, the Order of the Court is as

follows:

1. Petitioner Trustees have the right under 15 Pa. C.S.A. §5512 to inspect and receive all materials and documents generated, prepared, gathered, received or relied upon by Freeh, Sporkin & Sullivan, LLP ("FSS") and/or Freeh Group International Solutions, LLC C'FGIS") in investigating and preparing the July 12, 2012 report of the special investigation **[*16]** counsel regarding the actions of the University related to the University sexual abuse committed by Gerald A. Sandusky or referenced in the report, including but not limited to, all interview notes referred to collectively hereinafter as "source material".

2. Within twenty (20) days of the date of this order, the Pennsylvania State University shall provide to Petitioner Trustees all source material that is not claimed to be protected from disclosure by privilege or confidentiality obligation or that is already in the public domain.

3. Within forty-five (45) days of the date of this order, the Pennsylvania State University shall provide to Petitioner Trustees all source material which the Pennsylvania State University claims is subject to a privilege or confidentially obligation. Such confidential information shall promlnently be_ labeled "CONFIDENTIAL" or "PRIVILEGED" at the time of production.

4. The Petitioner Trustees may discuss the information marked "CONFIDENTIAL" or "PRIVILEGED" only in a privileged executive session of the board or in communications with the University's legal counsel. Outside of a privileged executive session of the Board or in communication with the University's **[*17]** legal counsel, any discussion or disclosure to any one by Petitioner Trustees, except their present counsel, of the information marked "CONFIDENTIAL" or "PRIVILEGED" is expressly prohibited.

5. Each Petitioner Trustee, prior to receiving any information pursuant to this order, shall execute the attached acknowledgment, shall have the same filed with the record of this case and shall provide a copy to Respondent.

6. The Court retains jurisdiction over matters relating to the terms and conditions of this order or matters of enforcement, including but not limited to contempt.

7. The parties shall be responsible for their own counsel fees and costs,

8. Petitioners' Motion to Unseal Response to Respondent's Under Seal Submission is hereby denied.

By the Court

/s/ [Signature]

Daniel Lee Howsare, Senior Judge 57th Judicial District, Specially Presiding

---

End of Document

2013 WL 3948873
Only the Westlaw citation is currently available.

THIS IS AN UNREPORTED PANEL DECISION OF THE COMMONWEALTH COURT. AS SUCH, IT MAY BE CITED FOR ITS PERSUASIVE VALUE, BUT NOT AS BINDING PRECEDENT. SEE SECTION 414 OF THE COMMONWEALTH COURT'S INTERNAL OPERATING PROCEDURES.

Commonwealth Court of Pennsylvania.

Andrew FULLMAN, Appellant,

v.

Judge Stewart L. KURTZ, Kimberly K. Gresko, Deborah J. Higgins, and Sandra McNeal.

No. 988 C.D.2012.
|
Submitted Dec. 21, 2012.
|
Decided Feb. 7, 2013.

MEMORANDUM OPINION

PER CURIAM.

***1** Before this Court is the appeal of Andrew Fullman (Fullman), pro se, from three Orders of the Court of Common Pleas of Huntingdon County (trial court), all dated April 13, 2012, that effectively dismissed with prejudice Fullman's Complaint. In his Complaint, Fullman alleged that the Honorable Judge Stewart L. Kurtz; Deborah J. Higgins, the administrator of the trial court (together, Judicial Defendants); and Kimberly K. Gresko,[1] the attorney for a physician previously sued by Fullman (collectively, Defendants), violated Fullman's constitutional rights, discriminated against him, or committed a fraud on the courts by causing or allowing his medical malpractice action against the Commonwealth of Pennsylvania, Department of Corrections (Department), and others to be non-prossed when Fullman alleges he was suffering from depression that kept him from timely prosecuting the case. For the following reasons, we affirm.[2]

The extensive history of Fullman's underlying medical malpractice case against the Department was previously described in this Court's opinions in *Fullman v. Pennsylvania Department of Corrections (Fullman I)* (Pa.Cmwlth., No. 910 C.D.2005, filed April 6, 2006) and *Fullman v. Pennsylvania Department of Corrections (Fullman II)* (Pa.Cmwlth., No. 783 C.D.2008, filed February 23, 2009) as follows:

> Fullman initiated an action for medical malpractice on April 29, 1996 in the Court of Common Pleas of Philadelphia County, which was later transferred in 1999 to the trial court .... Fullman alleges that, while he was incarcerated at SCI Smithfield, he was given negligent medical treatment by David Ruso, M.D.[3] beginning on or around May 1994. On July 31, 2003, Dr. Ruso filed a Motion for Non Pros and, on November 3, 2003, the trial court granted said motion and dismissed the case with prejudice. On November 19, 2003, Fullman filed a Request for Reconsideration and, on December 12, 2003, he filed a Motion/Request to Open Judgment of Non Pros (Motion).
>
> On October 26, 2004, the trial court entered an order and issued a memorandum denying Fullman's Motion. The trial court stated that since 1999, when the case was transferred to Huntingdon County, there had been little activity, and between January 1, 2002 and July 31, 2003, when Dr. Ruso filed his Motion for Non Pros, there was no activity. The trial court stated that Fullman had *never identified a theory of liability or produced an expert's report* with respect to the alleged negligence of Dr. Ruso. The trial court also noted that Fullman had also been unable, despite some effort on his part, to secure counsel to undertake his representation in the matter. The trial court granted Dr. Ruso's Motion for Non Pros after giving Fullman two opportunities to obtain counsel or to file "something meaningful." The trial court held that the eight-year delay in the case was inordinate and had, without question, prejudiced Dr. Ruso. In its discussion, the trial court held that Fullman failed to demonstrate a reasonable explanation or legitimate excuse for inactivity or delay, and did not demonstrate there was a meritorious cause of action. "The only explanation for the inactivity and delay in this case is the inability of Mr. Fullman to obtain counsel." This, the trial court concluded, was neither reasonable nor legitimate, given the eight-year delay since the action was commenced, and the ten years since the alleged injury occurred. Before the trial court, Fullman argued that "[w]ith respect to the expert reports, [he] is working on this, even though the medical record speaks pretty much for itself in proving medical negligence and malpractice."

However, the trial court noted that this argument reflected an attitude "common in pro se cases and demonstrates that Mr. Fullman does not understand or appreciate his burden in a malpractice action." Accordingly, the trial court denied Fullman's Motion.

*2 _____

FN3 Apparently Dr. Ruso's name [Russo] is misspelled in the caption and in the trial court's opinion.

.... On appeal, Fullman asserts that the trial court erred in denying his Motion because: (1) the trial court caused the delay by not answering or responding to his pending motions; and (2) his treating physician, Carla Rossi, M.D., wrote a three-page "medical impression" of the inadequate medical treatment provided to Fullman by Dr. Ruso, which is sufficient to prove a meritorious cause of action.

Fullman I, slip op. at 2–4 (emphasis in original) (citations omitted) (quoted in Fullman II, slip op. at 2–3). This Court held that the record showed that the eight-year delay in the case's prosecution was caused by Fullman's failure to obtain representation, not by any lack of diligence on the part of the trial court, which timely responded to the Fullman motions that were meritorious. *Fullman I,* slip op. at 5–6. Thus, this Court concluded that the trial court did not abuse its discretion in denying Fullman's Motion. *Id.* at 6. With regard to Fullman's argument that a three-page letter from his treating physician provided sufficient support for his burden of opening the judgment of non-pros, this Court noted that Fullman never submitted the letter to the trial court. *Id.* at 7. Therefore, this Court affirmed the trial court's order denying Fullman's Motion. *Id.* The Supreme Court denied Fullman's Petition for Allowance of Appeal from this Court's decision. *Fullman v. Pennsylvania Department of Corrections,* 590 Pa. 680, 912 A.2d 1294 (2006). Fullman then continued to pursue the matter:

Thereafter, Fullman apparently attempted to both appeal our disposition of the matter, as well as assert several constitutional claims, in federal court. In opinions by the United States District Court for the Middle District of Pennsylvania, and by the Third Circuit Court of Appeals, Fullman's complaint was ultimately dismissed for a failure to state a claim upon which relief could be granted, and for untimeliness. *See Fullman v. Pennsylvania Department of Corrections,* Civil Action No. 4:07CV–000079 (M.D. Pa. Jan 25, 2007), *appeal dismissed,* 265 Fed. Appx. 44 (3d Cir.2008).

On March 25, 2008, Fullman filed the Petition to Open the Judgment of Non Pros ... at issue herein, again requesting that the Trial Court open the judgment it had entered on November 3, 2003. By order dated March 27, 2008, the Trial Court denied Fullman's petition.

Fullman II, slip op. at 4–5. This Court generally stated that the issues Fullman raised in his attempt to overturn the trial court's decision not to open the judgment of non pros had already been litigated and considered on appeal. *Fullman II,* slip op. at 6–8. In response to a request from Dr. Russo that this Court enjoin or preclude Fullman from making further claims against Dr. Russo, this Court declined but stated, "we caution Fullman, in the strongest possible terms, against pursuing this matter in the duplicative manner, bereft of any legal merit whatsoever, in which he has presented the instant appeal." *Id.* at 10.

*3 Fullman filed the Complaint in the current matter on May 12, 2010. Fullman alleged that the reason he failed to pursue his medical malpractice case was that he was suffering from severe depression from 2002 through 2009. (Complaint ¶ 6.) Fullman alleged that Judge Kurtz: intentionally failed to consider Fullman's application to apply the *res ipsa loquitur* doctrine to his case, discriminated against Fullman by failing to put the case on hold until Fullman was able to proceed, and intentionally confused Fullman by instructing him to file "something meaningful." (Complaint ¶¶ 8, 10, 14, 20.) Fullman alleged that Ms. Gresko intentionally misled the trial court regarding the information Fullman had provided her in his responses to interrogatories and failed to inform the trial court of Fullman's depression. (Complaint ¶¶ 9, 11.) Fullman alleged that Judge Kurtz, Ms. McNeal, and Ms. Higgins intentionally prevented the filing of his November 4, 2004 Motion for Reconsideration in his medical malpractice case. (Complaint ¶ 28.) On the basis of these allegations, Fullman asserted claims for fraud, discrimination, and punitive damages. (Complaint at 8.)

On June 4, 2010, the Judicial Defendants filed Preliminary Objections pleading sovereign immunity, judicial immunity on the part of Judge Kurtz, quasi-judicial immunity on the part of Ms. Higgins, and a lack of jurisdiction on the basis of the doctrine of coordinate jurisdiction. (Preliminary Objections of Judicial Defendants ¶¶ 2, 4, 6.) On June 16, 2010, the Judicial Defendants filed a Motion for a Protective Order and Stay of Discovery requesting that the trial court not require them to answer Fullman's interrogatories until after disposing of their Preliminary Objections. Fullman objected to this motion and subsequently, on September 21, 2010, filed

Plaintiff's Praecipe to Compel Discovery. On July 6, 2010, Fullman filed a Praecipe to Enter Default Judgment against Ms. Gresko, which the trial court entered on the same date. On July 8, 2010, Ms. Gresko filed Preliminary Objections pleading that the punitive damages sought by Fullman's Complaint were improper where the claims asserted therein did not constitute reckless or otherwise egregious conduct on the part of Ms. Gresko. (Preliminary Objections of Gresko ¶¶ 4, 6–7.) On July 13, 2010, Ms. Gresko filed a Petition to Open Default Judgment, along with an Answer and New Matter. In the New Matter, Ms. Gresko asserted that the doctrines of collateral estoppel and res judicata were applicable to Fullman's claims against her. (Answer and New Matter of Defendant, Kimberly K. Gresko ¶¶ 46–47.) On March 10, 2011, Fullman filed a Motion to Amend Complaint, seeking to amend his Complaint to include averments regarding a Motion for Consideration *Nunc Pro Tunc* he attempted to file in his original medical malpractice case on August 6, 2010.

By Order dated April 13, 2012, the trial court sustained the Preliminary Objections of the Judicial Defendants on the basis of judicial immunity and quasi-judicial immunity and dismissed any outstanding motions or petitions not addressed by the trial court's April 13, 2012, Orders (including, apparently, Fullman's Praecipe to Compel Discovery) as moot. By separate Order, also dated April 13, 2012, the trial court granted Ms. Gresko's Petition to Open Default Judgment, opened and vacated the default judgment, and dismissed the Complaint as to Ms. Gresko on the grounds of collateral estoppel. By a third Order, the trial court dismissed, as moot, Fullman's Motion to Amend Complaint. Fullman now appeals to this Court.[3]

*4 Before this Court, germane to the trial court's orders, Fullman argues that the trial court erred in dismissing Ms. Higgins and Ms. McNeal as defendants and erred in denying Fullman's Praecipe to Compel Discovery.[4] However, in the three-page Argument section of his brief, Fullman only develops the argument that the trial court erred in failing to grant his Praecipe to Compel Discovery prior to dismissing his Complaint.[5] The Judicial Defendants respond that judicial immunity and quasi-judicial immunity are not only defenses against judgment, but defenses against suit. Ms. Gresko argues that Fullman's claims against her are barred by collateral estoppel. Ms. Gresko also asks that this Court award her $2,500.00 as a sanction against Fullman "to impress upon [Fullman] the seriousness and importance of this Court's prior and current rulings and to prevent any further frivolous litigation arising out of these matters." (Gresko's Br. at 4.)

Fullman argues that the trial court's failure to grant him discovery was harmful error and denied him due process. However, matters of discovery are within a trial court's discretion and should not be overturned by a reviewing court absent an abuse of that discretion. *Luckett v. Blaine,* 850 A.2d 811, 818 (Pa.Cmwlth.2004). In *Luckett,* this Court held that a trial court did not abuse its discretion in staying discovery until after the resolution of preliminary objections in the nature of demurrer, on the basis of which the trial court dismissed the complaint. *Id* . at 815, 818–19. While the trial court in this case dismissed Fullman's Complaint on the bases of judicial immunity, quasi-judicial immunity, and collateral estoppel rather than failure to state a claim, this case is similar to *Luckett* in that discovery would not have aided Fullman in his attempt to assert his claims. Discovery is appropriate to unearth facts necessary to prove a claim, not to conduct "a 'fishing expedition' to determine whether a cause of action exists." *Id.* at 818. The defenses of judicial immunity, quasi-judicial immunity, and collateral estoppel focus on the identity of the parties and the subject matter of prior litigation. Additional facts beyond those pleaded in the Complaint and Ms. Gresko's Answer and New Matter would not have affected the applicability of those defenses. Therefore, the trial court neither abused its discretion nor denied Fullman due process in dismissing Fullman's Complaint without allowing him discovery.[6]

With regard to Fullman's assertion that the trial court abused its discretion in dismissing his claims against Ms. McNeal, we note that it was Fullman himself who moved to remove Ms. McNeal as a defendant. (Motion to Remove Defendant, August 9, 2010.) Therefore, we hold that the trial court did not abuse its discretion in dismissing those claims.

Finally, we address Ms. Gresko's request for a sanction against Fullman to "prevent any further frivolous litigation arising out of these matters." (Gresko's Br. at 4.) Rule 2744 of the Pennsylvania Rules of Appellate Procedure provides for reasonable counsel fees and delay damages where this Court determines that "an appeal is frivolous or taken solely for delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious." Pa. R.A.P. 2744. We believe the current appeal is frivolous, particularly against Ms. Gresko, because it seeks to relitigate matters that have already been resolved in two other appeals. Moreover, in *Fullman II,* this Court specifically cautioned that "should Fullman file any further meritless appeal in this matter, found to be frivolous or vexatious in any manner or

respect, this Court will not hesitate to impose the full weight of awards for damages, fees, costs, and/or any other sanctions found applicable to such pursuit on Fullman's part." *Fullman II,* slip op. at 11. Therefore, we award a sanction in the amount of $500.00 against Fullman in favor of Ms. Gresko as further costs in this matter. *See Nahas v. Zoning Hearing Board of Schuylkill County,* 823 A.2d 237, 239 (Pa.Cmwlth.2003) (awarding $500.00 in further costs against appellants pursuant to Rule 2744 as a sanction for a frivolous appeal).

*5 For these reasons, this Court affirms the Orders of the trial court.

ORDER

NOW, February 7, 2013, the Orders of the Court of Common Pleas of Huntingdon County entered in the above-captioned matter are hereby **AFFIRMED.** Further, in addition to any costs taxable as of right pursuant to Pa. R.A.P. 2741–43, further costs in the amount of $500.00 are taxed against Andrew Fullman and in favor of Kimberly K. Gresko, pursuant to Pa. R.A.P. 2744.

All Citations

Not Reported in A.3d, 2013 WL 3948873

Footnotes

1 Ms. Gresko's last name is now Windish, (Gresko's Br. at 4); however, for sake of consistency with the record, we will use Gresko throughout this opinion.

2 The fourth defendant, Sandra McNeal, was removed as a party in this matter upon a motion by Fullman and an order of the trial court dated August 9, 2010.

3 This Court's "review of a trial court's order sustaining preliminary objections and dismissing a complaint is limited to determining whether the trial court abused its discretion or committed an error of law." *Podolak v. Tobyhanna Township Board of Supervisors,* 37 A.3d 1283, 1287–88 (Pa.Cmwlth.2012). In reviewing preliminary objections, all well pleaded relevant and material facts are to be considered as true, and preliminary objections shall only be sustained when they are free and clear from doubt. *Id.* at 1288.

"A petition to open judgment is an appeal to the equitable powers of the court. Therefore, this Court's standard of review is limited to determining whether the trial court abused its discretion or committed an error of law." *Horner v.C.S. Myers & Sons, Inc.,* 721 A.2d 394, 396 n. 4 (Pa.Cmwlth.1998).

4 We note that, while the trial court dismissed Ms. McNeal as a defendant, it sustained Ms. Higgins' Preliminary Objections and dismissed Fullman's claims against her with prejudice.

5 The remainder of Fullman's arguments essentially ask this Court to reopen his medical malpractice case, either because the Defendants in the current matter conspired against him or because he believes he has discovered new evidence that would support his medical malpractice claim. Fullman's medical malpractice claim has been decided, as discussed above. As this Court explained in *Fullman II,* these claims cannot now be relitigated. *Fullman II,* slip op. at 6.

6 As far as this Court can discern, Fullman's brief does not argue that the trial court erred in applying the doctrines of judicial immunity or quasi-judicial immunity to his claims against the Judicial Defendants, or the doctrine of collateral estoppel to the claims against Ms. Gresko.

End of Document

© 2026 Thomson Reuters. No claim to original U.S. Government Works.