IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Timothy L. Barr, John J. Battaglia, Mark Brown, Chris Ferragonio, Craig P. Fraser, Matt Fraser, Ivan Glenz, Justin Haffey, Steve Hall, Dustin Huff, Joseph A. Kanai, Michael Keally, Stephen E. Kusma IV, William J. Latuszewski, John Kurt Leitschaft, Bob Masilon, Michael Matzie, Alexis M. Miller, Joseph A. Musser, Timothy Poland, Brian A. Sales, Matthew J. Temple, Torie Tyson, Jared Unen, Dale A. Valenson, Mark C. Williams and Amy M. Zimmel	:	No. 1142 C.D. 2008 Argued: April 6, 2011
v.	:	
Community College of Beaver County, Appellant	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: October 27, 2011**

This second of two related interlocutory appeals by permission returns to us after our Supreme Court vacated our prior decision in Meyer v. Community College of Beaver County, 965 A.2d 406 (Pa. Cmwlth. 2009) (*en banc*) and remanded the case to us. In doing so, the Supreme Court determined that the part

of the Judicial Code commonly known as the Political Subdivision Tort Claims Act (Tort Claims Act)[1] does not grant immunity to a local agency from *all* statutory causes of action. See Meyer v. Cmty. Coll. of Beaver County, ___ Pa. ___, 2 A.3d 499 (2010) (Meyer II). The Court instructed us to consider: 1) whether the Community College is a "person" as defined in the Unfair Trade Practices and Consumer Protection Law (CPL)[2] and therefore subject to suit under that statute; and, 2) whether the Community College is immune under the Tort Claims Act because the CPL claims raised against it sound in tort.

Generally, the Community College appeals an interlocutory order of the Court of Common Pleas of Beaver County (trial court) denying its motion for partial summary judgment. A group of former students (Plaintiffs)[3] enrolled in the Community College's police technology program (the Academy) during the 2001-02 academic year, brought a civil action after the program lost its school certification under the Municipal Police Officers Education and Training Act (Training Act), 53 Pa. C.S. §§2161-70, informally known as "Act 120." In their

[1] 42 Pa. C.S. §§8541-42.

[2] Act of December 16, 1968, P.L. 1224, as amended, 73 P.S. §§201.1—201-9.3.

[3] Plaintiffs are Timothy L. Barr, John J. Battaglia, Mark Brown, Chris Ferragonio, Craig P. Fraser, Matt Fraser, Ivan Glenz, Justin Haffey, Steve Hall, Dustin Huff, Joseph A. Kanai, Michael Keally, Stephen E. Kusma IV, William J. Latuszewski, John Kurt Leitschaft, Bob Masilon, Michael Matzie, Alexis M. Miller, Joseph A. Musser, Timothy Poland, Brian A. Sales, Matthew J. Temple, Torie Tyson, Jared Unen, Dale A. Valenson, Mark C. Williams and Amy M. Zimmel. This appeal was argued seriately with Meyer v. Community College of Beaver County, ___ A.3d. ___, (Pa. Cmwlth., No. 1141 C.D. 2008, filed October 27, 2011). The only significant difference between the two cases is that Plaintiffs here virtually completed their entire course of study. The Meyer plaintiffs completed approximately one half of their course of study.

complaints, Plaintiffs allege breach of contract and breach of warranty, and various unfair or deceptive acts as defined in the CPL.

I. Pleadings

In May 2002, before Plaintiffs completed the Academy's course of study, the Pennsylvania Municipal Police Officers' Education and Training Commission (Training Commission) suspended the Academy's Act 120 certification. The Training Commission based the suspension on numerous violations. The Training Commission officially revoked the Academy's Act 120 certification in August 2002.

Thereafter, Plaintiffs filed a complaint against the Community College that alleged as follows. In its 2000-01[4] course catalog, the College expressly represented the Academy to be a Training Commission certified course of study. These express representations were made to induce, and did induce, Plaintiffs to enroll in the Academy. Plaintiffs paid tuition, attended the required courses and took examinations. Plaintiffs raised causes of action for breach of contract, breach of warranty, violations of the CPL, and violations of other statutes.

The Community College filed preliminary objections, only some of which are relevant now. In addition to issues regarding whether it is subject to

[4] Although Plaintiffs attended the Academy during the 2001-02 school year, the College provided them with 2000-01 catalogs. The College did not receive its 2001-02 catalogs until October 2001. See App. to the College's Br. in Supp. of Mot. for Summ. J., Tab 26 (Dep. of Harriet Ann Wallace at 3).

liability under the CPL and whether it is immune from statutory-based claims, the Community College challenged the sufficiency of averments of fraud.

As pertinent to the current discussion, the trial court allowed CPL claims sounding in contract to proceed; however, the trial court sustained objections to all claims sounding in fraud, including CPL claims, because the averments did not establish scienter on the part of the Community College.

Plaintiffs filed an amended complaint. They repeated their previous claims for breach of contract and breach of warranty. As to claims under the CPL, they removed averments of fraudulent conduct, but they retained averments that conduct was unfair and deceptive. This pleading will be discussed below. Plaintiffs alleged substantial economic losses as a result of the Community College's violations of the CPL. They also sought treble damages and an award of costs and attorney fees under Section 9.2 of the CPL.[5]

A second round of preliminary objections was filed. Relevant now, the Community College challenged Plaintiffs' pleading of misrepresentations, asserting the averments reintroduced CPL claims sounding in fraud, contrary to the trial court's ruling on the first set of preliminary objections. Accepting Plaintiffs' arguments that the language sought to bolster breach of contract and warranty

[5] Section 9.2 of the CPL was added by the Act of November 24, 1976, P.L. 1166, as amended, 73 P.S. §201-9.2.

claims and not to plead a cause of action in fraud, the trial court overruled the objections.[6]

II. Partial Summary Judgment

After the close of pleadings and discovery, the Community College filed a motion for partial summary judgment. Relevant to this appeal, the Community College argued the CPL does not apply to community colleges and, as a local agency, a community college is immune from CPL claims under 42 Pa. C.S. §8541, part of the Tort Claims Act.

Ultimately, the trial court denied the Community College's motion for partial summary judgment. The trial court rejected the assertion the CPL does not apply to community colleges. It further rejected the immunity defense on the basis that some of Plaintiffs' CPL claims sound in contract, not in tort. In denying the motion for partial summary judgment, the trial court reasoned (with emphasis added):

> The party opposing a motion for summary judgment must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact, but rather to determine whether any such issues exist.
>
> Our courts have been reluctant to recognize claims of educational malpractice in the academic environment but they have recognized that a contract exists between a

[6] Thereafter, the Community College filed an answer and new matter denying Plaintiffs' allegations. In its new matter, the Community College asserted various claims and defenses including failure to state a cause of action, immunity, and statute of limitations.

> student and a college. The courts have held that in general, the basic legal relationship between a student and a private university or college is contractual in nature. The catalogs, bulletins, circulars, and regulations of the institution made available to the matriculant become part of the contract. Questions of discipline, academic matters, and tuition and scholarship disputes have been addressed by courts and resolved on contract principles. At the same time, however, courts have been reluctant to apply strict contract concepts to the unique relationship that exists between students and universities or colleges.

Trial Ct. Slip Op., 5/12/08, at 5, Reproduced Record (R.R.) at 258.

In response to the denial of its motion, the Community College filed a motion to amend the order to certify for an interlocutory appeal of the following two issues: whether the Community College is a "person" as defined in Section 2(2) of the CPL, 73 P.S. §201-2(2); and, whether the Community College is immune to prosecution because the CPL sounds in tort and the Community College is immune to tort actions under the Tort Claims Act. The trial court granted the Community College's motion. This Court allowed the appeal.

III. Meyer II

After argument, an *en banc* panel of this Court reversed the trial court, holding that regardless of whether the Community College was a "person" under the CPL, it was immune from claims for statutory damages under the Tort Claims Act. The Supreme Court, however, permitted a discretionary appeal. Ultimately, it reversed and remanded, with direction.

The majority opinion was authored by Mr. Justice Saylor. The majority concluded that our application of the Tort Claims Act to statutory damages was not sustainable. The majority emphasized the main policy considerations historically underlying tort law, centered on injury to a person or property. See Meyer II, ___ Pa. at ___, 2 A.3d at 502. This was contrasted with the central focus of contract law, the protection of bargained-for expectations. Id. The Torts Claims Act was intended to apply to the former, not the latter. Id. Consequently, the Supreme Court held that governmental immunity does not extend to all statutory causes of action, regardless of whether they sound in tort or contract. See id. at ___, 2 A.3d at 503.

In a lengthy note responding to the concurring opinion, the majority presumed the first order of business on remand would be for this Court to undertake the threshold determination of whether the Legislature intended for the government to be subject to private actions under Section 9.2 of the CPL. Id. at ___, 2 A.3d at 503 n.6. The majority highlighted the Plaintiffs' argument referencing Commonwealth Court opinions holding that the Legislature did not intend to include governmental entities within a listing of persons and entities which might technically encompass them where it did not include the governmental entity expressly. See, e.g., Huffman v. Borough of Millvale, 591 A.2d 1137 (Pa. Cmwlth. 1991); see also Leonard v. Masterson, 70 A.D.3d 697, 869 N.Y.S.2d 358 (N.Y. App. Div. 2010).

In her concurring opinion, Madame Justice Orie Melvin expressed her preference for directing this Court "to examine the pleadings on remand to

determine whether the [Plaintiffs'] claims satisfy the [CPL]. If sufficient facts have been pled, the Commonwealth Court should then ascertain whether the claims sound in tort or in contract and dispose of the matter accordingly." ___ Pa. at ___, 2 A.3d at 505. With these directives in mind, we analyze the issues.[7]

IV. Issues

In its first argument, the Community College advances several reasons it is not included in the CPL's definition of "person" in Section 2(2) of the CPL, 73 P.S. §2-201(2), which provides (with emphasis added):

> **"Person"** means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities.

The Community College therefore asserts it is not subject to prosecution under the CPL.

In the companion case of Meyer v. Community College of Beaver County, ___ A.3d ___, (Pa. Cmwlth, No. 1141 C.D. 2008, filed October 27, 2011) (Meyer III), we addressed the issue of whether a government agency is a "person" as defined in Section 2(2) of the CPL and as used in Section 9.2 of the CPL. After an extensive analysis of the language and structure of the CPL, we rejected the Community College's position on this issue. For the reasons fully set forth in Meyer III, we reach the same conclusion here.

[7] Our scope of review of a trial court's order granting or denying summary judgment is plenary, and our standard of review is clear: the trial court's order will be reversed only where it is established that the court committed an error of law or abused its discretion. Kincel v. Dep't of Transp., 867 A.2d 758 (Pa. Cmwlth. 2005).

In its second argument, the Community College advances several reasons why the trial court erred in concluding that claims under the CPL may sound either in tort or in contract and that the Community College is subject to prosecution under the contract branch of the CPL regardless of tort immunity afforded a local agency under 42 Pa. C.S. §8541.

In Meyer III, we addressed the identical arguments on this issue. We concluded that Plaintiffs aver sufficient facts to satisfy the CPL, and that the averments sound in contract rather than tort. As a consequence of these conclusions, we held that immunity under the Tort Claims Act does not apply to Plaintiffs' private action CPL claims. Therefore, we discerned no error in the trial court's ruling on this issue.

V. Conclusion

For all the reasons discussed at length in Meyer III, we affirm the trial court's denial of the Community College's motion for partial summary judgment.

ROBERT SIMPSON, Judge

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v.	:	
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O R D E R

AND NOW, this 27th day of October, 2011, the order of the Court of Common Pleas of Beaver County denying the Motion for Partial Summary Judgment is **AFFIRMED**.

ROBERT SIMPSON, Judge

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v.	:	No. 1142 C.D. 2008
	:	Argued: April 6, 2011
Community College of Beaver County, Appellant	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE PELLEGRINI FILED: October 27, 2011

For the same reasons set forth in my dissenting opinion in *Meyer, et al v. Community College of Beaver County*, (No. 1141 CD 2008, filed October 27, 2011), I respectfully dissent.

_____
DAN PELLEGRINI, JUDGE

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HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE LEAVITT

FILED: October 27, 2011

For all of the reasons discussed in my dissenting opinion in *Meyer v. Community College of Beaver County*, ___ A.3d ___ (Pa. Cmwlth., No. 1141 C.D.

2008, filed October 27, 2011), I respectfully dissent and would, instead, reverse the trial court in this case.

_____

MARY HANNAH LEAVITT, Judge

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HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE BROBSON **FILED:** October 27, 2011

For all of the reasons discussed in my dissenting opinion in *Meyer v. Community College of Beaver County*, No. 1141 C.D. 2008, ___ A.3d ___ (Pa. Cmwlth., October 27, 2011), I respectfully dissent and would, instead, reverse the trial court in this case.

_____
P. KEVIN BROBSON, Judge

Judge Leavitt joins.

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HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

CONCURRING OPINION
BY JUDGE McCULLOUGH FILED: October 27, 2011

I concur in the result reached by the Majority. Specifically, I agree that the Community College of Beaver County (College), as a legal entity, falls within the definition of "person" set forth at section 2(2) of the Unfair Trade Practices and

Consumer Protection Law (CPL)[1] and is subject to private actions brought under section 9.2 of the CPL.[2] I also agree with the Majority's conclusion that the claims set forth in the complaint sound in contract, rather than tort. However, I respectfully diverge from the focus of the Majority's analysis, based on the reasoning set forth in my concurring opinion in Meyer v. Community College of Beaver County, ___ A.3d ___, (Pa. Cmwlth., No. 1141 C.D. 2008, filed October 27, 2011).

PATRICIA A. McCULLOUGH, Judge

[1] Act of December 16, 1968, P.L. 1224, as amended, 73 P.S. §201-2.

[2] Added by the Act of November 24, 1976, P.L. 1166, 73 P.S. §201-9.2.