

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dr. Helicopters, LLC. :
Principle, Michael B. Selig, :
Appellant :
v. :
South Whitehall Township : No. 1218 C.D. 2012
Submitted: November 2, 2012

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: January 30, 2013

Dr. Helicopters, LLC. Principle, Michael B. Selig (Selig) appeals, *pro se*, from the order of the Court of Common Pleas of Lehigh County (trial court) which granted the Motion for Sanctions filed by South Whitehall Township (Township) and awarded counsel fees in the amount of \$20,000 to the Township and against Selig.

Factual Background

Selig and his wife, Gail Selig (Mrs. Selig) were owners¹ of a 7.5 acre parcel located at **2880** Orefield Road, Allentown, Pennsylvania. Selig was sole owner of an adjoining property which consisted of 2.5 acres, and a residence, located at **2816** Orefield Road. Both 2880 and 2816 Orefield Road were originally located in an “Industrial” zoning district.

¹ As tenants in the entireties.

In 2000, Selig sought, and obtained, approval to change the zoning of one of his parcels, **2880** Orefield Road, from “Industrial” to “Rural Holding.”

At some point in 2006, Mrs. Selig instituted divorce proceedings which included a request for distribution of the marital property located at **2880** Orefield Road.

Selig’s Special Exception for Heliport Reversed

In 2006, Selig filed an application for zoning relief with the Zoning Hearing Board (ZHB) seeking a special exception and dimensional variance to operate a private heliport on the **2880** Orefield Road property. On July 31, 2006, the ZHB granted Selig a special exception approval to operate a private, non-commercial, heliport on the **2880** Orefield Road property.

On December 12, 2006, Mrs. Selig filed a *nunc pro tunc* appeal from the grant of the special exception on the ground that she, as joint-owner, opposed use of the **2880** Orefield Road property for a private heliport. She claimed her estranged husband had obtained the special exception without her consent or approval.

Selig was notified of the hearing on Mrs. Selig’s *nunc pro tunc* appeal, but he did not appear or intervene. After hearing evidence, Judge Alan M. Black (Judge Black) reversed the ZHB’s grant of the special exception on April 11, 2007. Although Selig never intervened in the matter, he attempted to appeal from the April 11, 2007, order to this Court. This Court quashed his appeal on June 11, 2007, for lack of standing.

Ordinance Amended – No Heliports in Residential Zoning District

After Selig's appeal was quashed, Selig's neighboring landowner, the Jeras Corporation, sought an amendment to the Township Zoning Ordinance to remove private heliports as special exception uses in the "Rural Holding" and "Rural Residential" zoning districts. On July 11, 2007, the Township Board of Commissioners enacted "Ordinance 861" which prohibited heliport uses in any residential district. Heliports were only permitted as a special exception uses in "Industrial" zoning districts.

Selig's Petition to Reinstate Special Exception that was Reversed

On June 30, 2010, Selig filed an "Amended Request and Appeal for Reinstatement of the Heliport at 2880 Orefield Road." Selig sought to reinstate the ZHB's grant of the special exception. He also sought, in the alternative, permission to operate a private heliport as a prior existing non-conforming use, and to invalidate "Ordinance 861." After a public hearing, the ZHB denied Selig's requested relief. The trial court affirmed. This Court affirmed in a Memorandum Decision filed on December 9, 2011, at Michael B. Selig, MD FACC v. South Whitehall Township Zoning Hearing Board and South Whitehall Township, (Pa. Cmwlth. No. 244 C.D. 2011, filed December 9, 2011). Selig filed a Request for Reconsideration which was denied on January 20, 2012. Selig filed a petition for allowance of appeal to the Pennsylvania Supreme Court which was denied on June 20, 2012.

What occurred next is the subject of this appeal.

**Selig’s “Notice of Application” for Permit For a
Private Heliport on the Industrially-Zoned
2816 Orefield Road Property**

On August 27, 2010, Selig submitted to the Township a “Zoning Hearing Board Notice of Application” in which he requested a permit for a private heliport on his property located at **2816** Orefield Road which zoned “Industrial.” Notice of Application, August 27, 2010, at 5; Reproduced Record (R.R.) at 25a. The zoning officer did not respond to the application or provide a reason for rejecting it.

Selig’s Application to Rezone the 2880 Orefield Road Property

On October 20, 2010, Selig submitted to the Township a “Subdivision Review Application” in which he sought to rezone the **2880** Orefield Road property from “Residential Holding” back to “Industrial.” Subdivision Review Application, October 20, 2010, at 1; R.R. at 1a.

On November 19, 2010, Gerald Harbison (Harbison), the Township’s Assistant Director of the Community Development, stated that Selig’s Application to rezone **2880** Orefield Road property from Rural Holding to Industrial “would not be placed on the Board of Commissioner’s agenda” because the “property [2880 Orefield Road] is involved in litigation between you and the Township.” Harbison informed Selig that Board of Commissioners’ meetings were “open to the public” and that he was free to “bring forth non-agenda related matters to the Board under courtesy of the floor.” Letter to Selig from Harbison, November 19, 2010, at 1; Supplemental Reproduced Record (S.R.R.) at 101b.

On June 29, 2011, Selig sent Harbison an email request to provide him with the specific Township Ordinance or Municipalities Planning Code² provision which supported Harbison's response. Email from Selig to Harbison, June 29, 2011, at 1; S.R.R. at 102b.

**Selig's "Petition for More Definite Statement –
Delays in Rezoning"**

When Harbison did not respond, Selig commenced an action *pro se* against the Township and the ZHB on July 22, 2011, in the Court of Common Pleas of Lehigh County at 2011-CA-2643, entitled "Petition For More Definite Statement – Delays in Rezoning."

Selig sought an order to compel the Township to provide him with "formal documentation and references supporting Mr. Harbisons (sic) statement that no rezoning request for the property located at 2880 Orefield Road can be processed until pending litigation is no longer withstanding" or to "proceed with the rezoning request." Petition for More Definite Statement, July 22, 2011, at 1-2, 8; S.R.R. at 93b-94b, 100b.

**Selig's "Petition for Special Relief" – Relocation of
Heliport on 2816 Orefield Road**

On August 3, 2011, Selig filed *pro se* a "Petition for Special Relief - Relocation of Helipad on 2816-Restrictive Zoning" also at 2011-CA-2643. Selig alleged that he made an inquiry to the Township "concerning moving the heliport landing zone to the industrial property of 2816" and that the Township ignored his

² Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§10101-11202.

request. Selig requested that the trial court either: (1) reinstate the previously granted special exception heliport permit; (2) order the Township to proceed with reasonable alternate available remedies; (3) award him litigation costs and lost income in excess of \$100,000; or (4) order the Township to purchase the properties for \$2.5 million. Petition for Special Relief, August 3, 2011, at 9-10; S.R.R. at 111b-112b.³

On September 1, 2011, the Township's counsel mailed Selig a letter which advised him that unless he withdrew his "Petition for More Definite Statement" and "Petition for Special Relief"⁴ the Township, ZHB and Attorney Mullane would seek sanctions pursuant to Pa. R.C.P. No. 1023.1(c)⁵ and 42 Pa.C.S. §2503(7) and (9).⁶

³ The Township filed Preliminary Objections to Selig's "Petition for More Definite Statement" and "Petition for Special Relief" citing a number of procedural defects in the petitions.

⁴ Selig also filed at 2011-CA-2643 a "Complaint for Defamation" against the Township, the ZHB and Attorney Maria Mullane (Attorney Mullane), the Solicitor for the ZHB, seeking compensatory and punitive damages, counsel fees and costs incurred in these proceedings and in the divorce action filed against him by Mrs. Selig. Selig alleged that Attorney Mullane defamed him in a Brief she submitted in a 2010 zoning appeal by stating that Selig had never advised his wife that he had obtained approval from the ZHB for the operation of the heliport and had never obtained his wife's consent for that approval. The Township, ZHB and Attorney Mullane filed preliminary objections, including demurrers.

In response to counsel's September 1, 2011, sanctions letter, Selig withdrew his original Complaint for Defamation ***but*** he filed a new Complaint for Defamation at a different docket number, 2011-CD-3383. That Complaint was dismissed by the trial court on February 15, 2012. This Court affirmed by memorandum decision filed on October 25, 2012 at Michael B. Selig, M.D, FACC and Dr. Helicopter, LLC v. South Whitehall Township and Maria Mullane, (Pa. Cmwlth. No. 1053 C.D. 2012, filed October 25, 2012). Selig filed a Petition for Reconsideration which was denied December 21, 2012.

⁵ Rule 1023.1(c) provides in pertinent part:

The signature of an attorney or *pro se* party constitutes a certificate that the signatory has read the pleadings, motions or other paper.

(Footnote continued on next page...)

Counsel pointed out a number of procedural defects in the petitions. For example, the “purported complaint” was defective and there was no

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By signing, filing, submitting or later advocating such a document, the attorney or *pro se* party certifies that, to the best of that person’s knowledge, information and belief, formed after an inquiry reasonable under the circumstances,

- 1) It is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,
- 2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification or reversal of existing law of the establishment of new law,
- 3) The factual allegations have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery....

⁶ The statutory provisions at 42 Pa.C.S. §2503(7) and (9) permit a court to award reasonable counsel fees to a litigant when the litigant’s opponent initiates an action arbitrarily, vexatiously or in bad faith and where a litigant’s opponent engages in dilatory, obdurate or vexatious conduct during the pendency of a matter. “Obdurate” is defined as unyielding or stubborn. In re Padezanin, 937 A.2d 475, 484 (Pa. Super. 2007). “Vexatious” conduct under §2503(7) has been defined as “that which is instituted without sufficient grounds and serving only to cause annoyance.” Richland School District v. Richland Education Association, 556 A.2d 531, 532-33 (Pa. Cmwlth. 1989). As to the purpose of 42 Pa.C.S. §2503(7) and (9),

The intent of the rule permitting the recovery of counsel fees is not to punish all of those who initiate actions which ultimately fail, as such a course of action would have a chilling effect upon the right to raise a claim. Rather, the aim of the rule is to sanction those who knowingly raise, in bad faith, frivolous claims which have no reasonable possibility of success, for the purpose of harassing, obstructing or delaying the opposing party.

In re Estate of Liscio, 638 A.2d 1019, 1022 (Pa. Super.), *appeal denied*, 539 Pa. 679, 652 A.2d 1324 (1994).

verification; the “defendants” named in the caption were not the same “defendants” mentioned in the body; and no civil action may be commenced by “Petition for More Definite Statement.” In addition, counsel stated:

[T]his suit represents your third attempt to relitigate Judge Black’s decision of April 11, 2007. The previous two cases were dismissed by the Lehigh County Court and are now the subject of appeals in the Commonwealth Court and Supreme Court. This action with its multiple filings and your unwarranted and factually unsupported attacks on Attorney Mullane’s character suggest an improper purpose to harass the Township and needlessly increase the costs of litigation in order to compel the Township to grant your request to rezone your property or to “reinstate” the Zoning Hearing Board’s decision which was reversed by Judge Black’s decision. (emphasis added).

Letter to Michael Selig, M.D. from Donald Wieand, Jr., Esquire, September 1, 2011, at 1; S.R.R. at 153b.

Selig withdrew his Complaint for Defamation, but he did not withdraw his “Petition for More Definite Statement” or “Petition for Special Relief.^[7]”

Township’s Motion for Sanctions

On September 29, 2011, the Township filed a Motion for Sanctions. It contended that Selig’s commencement of the action 2011-CA-2643 (which included Selig’s “Petition for More Definite Statement” and “Petition for Special

⁷ The trial court ultimately granted the Township’s preliminary objections and dismissed the petitions with prejudice on December 23, 2011. That order is the subject of Selig’s appeal to this Court which is now pending at 1154 C.D. 2012.

Relief”) violated Pa. R.C.P. No. 1023.1. Additionally, the Township sought sanctions pursuant to 42 Pa.C.S. §2503(7) and (9).

A hearing was held on the Motion for Sanctions on March 14, 2012. The Township presented the testimony of Keith Zehner (Zehner), the Township Zoning Officer, and Attorney Mullane. Donald Wieand, Esquire, (Attorney Wieand), counsel for the Township, testified as to the time and costs incurred in defending the 2011-CA-2643 action and pursuing the Motion for Sanctions.

Zehner testified that on a number of occasions during his dealings with Selig, Selig “spoke about his desire to have the heliport” and that “if not there would always be litigation and that would create costs for the taxpayers.” Hearing on Motion for Sanctions (H.T.), March 14, 2012, at 20; S.R.R. at 23b. Zehner identified an email he received from Selig on June 1, 2011, in which Selig wrote:

I understand the frustration that the township has with me as a result of my wife’s ... litigation against the township concerning the heliport and the 2 pending appeals I have at the commonwealth court due to action taken against this protected marital asset...**I suspect that this litigation will go to the Supreme Court of Pa by the time we are done as those briefs are already drafted. This would add significant township costs to an already compromised budget. There perhaps are 2 other cases that will be added to the legal agenda.** (Emphasis added).

H.T. at 19; S.R.R. at 22b; Defendant’s Exhibit 23.

The Township presented evidence that it incurred attorneys’ fees in the amount of \$81,316 to defend the action docketed at 2011-CA-2643.

On May 30, 2012, the trial court granted the Motion for Sanctions. The trial court accepted, as credible, Zehner’s testimony that Selig threatened, in his communications with Zehner, to sue and force the Township to incur significant attorneys’ fees if the Township refused to grant him permission for the heliport. Specifically, the trial court found that the action at 2011-CA-2643 was “repetitive of the previous failed litigation efforts to get the heliport.” Trial Court Opinion, May 30, 2012, at 1-2. The trial court concluded that Selig “was inappropriately using the present case [2011-CA-2643] to collaterally attack the 2007 decision on the heliport by Judge Black.” *Id.* at 5. The trial court further concluded that Selig “brought the present case to re-litigate case 2006-CA-4147 and circumvent Judge Black’s April 11, 2007, which effectively denied plaintiff [Selig] his heliport.” *Id.* at 7. The trial court concluded that Selig’s “stubborn pursuit of meritless claims without regard for the costs for and toll on those who were sued was obdurate and vexatious.” Trial Court Opinion, May 30, 2012, at 9. There were no findings made regarding the procedural defects of applications and petitions as a basis for the award of sanctions.

The trial court awarded attorneys’ fees in the amount of \$20,000 to the Township payable by Selig within 60 days. Selig filed a timely Notice of Appeal on June 27, 2012, and a Motion for Reconsideration which the common pleas court denied on June 20, 2012.

Selig’s Appeal

On appeal, Selig argues that sanctions were not warranted.⁸ Selig

⁸ Selig lists eight issues in his “Statement of Questions Involved.” Only four concern the trial court’s award of sanctions. Of those four, three have been combined and will be addressed **(Footnote continued on next page...)**

argues that the trial court erroneously concluded that his “Petition for More Definite Statement” and “Petition for Special Relief” were attempts to “relitigate” his prior unsuccessful efforts to locate a heliport on the **2880** Orefield Road property. He claims that he merely sought to require the Township to perform its ministerial duty to process “two basic zoning applications:” (1) to rezone 2880 Orefield Road from “Residential Holding” back to “Industrial,” so that he may seek a special exception to locate the heliport there, without the proscriptions of “Ordinance 861” or, in the alternative, (2) to locate the heliport on **2816** Orefield Road, which was never the subject of prior litigation or court order and which was already zoned “Industrial.”

Selig argues that Judge Black’s April 11, 2007, order did not bar him from ever seeking a permit for a heliport. In Selig’s view, his requests to rezone **2880** Orefield Road and/or locate the heliport on **2816** Orefield Road were not tantamount to asking the trial court to reinstate Judge Black’s April 11, 2007, order. According to Selig, after his special exception was reversed on April 11, 2007, he attempted to find “other reasonable, available, amicable remedies to the problem.” H.T. at 52. He attempted to gain approval for the heliport through other

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collectively. The following two issues will not be addressed because they have already been finally decided against Selig in previous litigation: (1) Did Appellant [Selig] falsely represent to the Board [ZHB] that he was sole owner of the property upon which he wanted to operate the heliport; and (2) Did Wife’s Petition for Permission to Appeal *Nunc Pro Tunc* depart from accepted judicial practices. The following remaining issues will not be addressed because they do not concern the award of sanctions: (3) Did Appellant [Selig] rightfully sue in Lehigh County, Cases 2010-CA-5402 and 2010-CA-5431 in an effort to appeal Judge Black’s decision in 2006-CA-4147; and (4) Can the Township hide behind Absolute Immunity?

avenues, namely, by rezoning **2880** Orefield Road to “Industrial” or relocating it to **2816** Orefield Road.

The relevant standard of review governing this Court’s review of an award of counsel fees by a trial court has been stated by our Supreme Court:

Appellate review of a trial court’s award of attorney’s fees to a litigant is limited solely to determining whether the trial court palpably abused its discretion in making the fee award. If the record supports a trial court’s finding of fact that a litigant violated the conduct provision of the relevant statute providing for the award of attorney’s fees, such award should not be disturbed on appeal.

Thunburg v. Strause, 545 Pa. 607, 614-615; 682 A.2d 295, 299 (1996) (citations omitted).

It is the burden of the party seeking counsel fees under 42 Pa.C.S. §2503(7) and (9) to prove the existence of one of the statutory conditions. Berg v. Georgetown Builders, Inc., 822 A.2d 810 (Pa. Super. 2003).

This Court has thoroughly read the transcript in its entirety⁹ and reviewed the two original applications Selig submitted to the ZHB, and his “petitions” filed at 2011-CA-2643. Having done so, this Court is unable to conclude that the Township met its burden to establish that Selig’s purpose in commencing the action at 2011-CA-2643 was to harass the Township, needlessly

⁹ Pages 27-64 of the Hearing Transcript were not included in the Township’s Supplemental Reproduced Record. Therefore, this Court must cite directly to pages of the original transcript which was found in the certified record.

increase the costs of litigation or to “relitigate” or reverse Judge Black’s April 11, 2007, order.

It is true that Selig referenced future litigation if he did not get his heliport. It is also true that both petitions were replete with the same litany of accusations against the Township and Attorney Mullane that appeared in prior unsuccessful pleadings, and that the prayer for relief in one of the petitions did, in fact, ask the trial court, as one of the alternative forms of relief, to reinstate the previously granted special exception heliport permit.¹⁰ However, this Court does not believe that this was sufficient to establish a violation of the conduct provisions of 42 Pa.C.S. §2503(7), (9).

To begin, the initial applications before the ZHB, on their face, sought: (1) to rezone the **2880** Orefield Road property from “Residential Holding” to “Industrial”; or alternatively, (2) to locate the heliport on a totally separate parcel, the **2816** Orefield Road property, which was already zoned “Industrial.”¹¹

¹⁰ In the only direct reference to the two petitions at issue during the hearing, Attorney Mullane pointed out the one place in Selig’s “Petition for Special Relief” that mentioned reinstatement of the previously granted special exception heliport permit. On page 140 of the Hearing Transcript, the trial court noted:

THE COURT: I do note that the witness [Attorney Mullane] is correct, that case number 2643 does ask that the court revisit the heliport issue. Just for example here, wherefore clause, the first paragraph reads the relief sought, reinstatement of the previously granted special exception heliport permit or, and you go on to other remedies.

H.T. at 140.

¹¹ This was not a case where the Township did not understand the nature of the applications. In Harbison’s November 19, 2010, letter, he specifically referred to Selig’s October 20, 2010, Application as an “application to rezone **2880** Orefield Road from rural holding to Industrial.” Letter to Selig from Harbison, November 19, 2010, at 1; S.R.R. at 101b. **(Footnote continued on next page...)**

Neither application, if granted, would have any bearing on Judge Black's April 11, 2007, order.

The Township's failure to act upon his "application to rezone" was the subject of the action commenced in the trial court at 2011-CA-2643, beginning with Selig's "Petition for More Definite Statement." Selig asked the trial court to order the Township to proceed with the rezoning of **2880** Orefield Road. In absence of any assertions by the parties to the contrary, Selig is apparently the sole owner of 2880 Orefield Road. He sought to rezone the parcel from "Residential" to "Industrial." When the Township failed to act upon his application to rezone, he commenced an action, in the nature of an action in mandamus¹², to compel the Township to process his application.¹³ Again, from the face of the "Petition for More Definite Statement" it is not at all clear to this Court whether this was anything other than a *bona fide* attempt to get the Township to act on his request to

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The Township also seemingly understood the nature of Selig's August 27, 2010, "Notice of Application" as an application to locate the heliport on the Industrially-zoned **2816** Orefield Road property. See Township's Brief at 27.

¹² The Township argues that Selig's application to rezone was properly dismissed where mandamus was not an available remedy because a court may not force a municipality to perform a purely discretionary act, such as to rezone. Township's Brief at 24. However, the propriety of mandamus was the subject of the preliminary objections and that issue is not before this Court on appeal from the award of sanctions.

¹³ This Court stresses that it, *in no way*, condones Selig's use of a self-styled "Petition for a More Definite Statement" to commence an action. Nor does this Court pass on its substantive merit, or lack thereof, as this was a matter for preliminary objections. The only issue before this Court is whether that action was used by Selig to harass the Township, force the Township to permit the heliport or relitigate Judge Black's April 11, 2007, order. Fortunately for Selig, the "Complaint for Defamation," originally filed at 2011-CA-2643, was withdrawn by Selig in response to counsel's "sanctions letter" and is not before this Court (nor was it before the trial court) for consideration in context of an award of sanctions.

rezone the **2880** Orefield Road property from “Residential Holding” to “Industrial.”

This Court reaches the same conclusion with regard to Selig’s “Application to Relocate the heliport to 2816” and corresponding “Petition for Special Relief.” The “Petition for Special Relief,” filed at 2011-CA-2643 was, despite all the rhetoric, a request to compel¹⁴ the Township to process the underlying “Application to Relocate the heliport.”¹⁵ Despite its procedural and technical infirmities, the application appeared to be a genuine request to locate a

¹⁴ The Township does not appear to challenge Selig’s use of mandamus in this instance because mandamus will lie when a zoning officer rejects an application for a permit without justifiable reason. Rich v. Yardley Borough, 24 Bucks Co. Rpt. 258 (1973).

¹⁵ The Township argues in its Brief that “to the extent that Selig was seeking court approval for moving the proposed heliport from the property at 2880 Orefield Road to his residential property at 2816 Orefield Road, Selig was required first to pursue a statutory zoning appeal under the Municipalities Planning Act, rather than seek direct court intervention.” Township’s Brief at 27. However, Selig’s point was that the Township did not act on his applications. So, technically, there was no “decision” of the zoning officer which gave rise to his right to appeal to the ZHB. Presumably, this is the reason Selig filed the action in the nature of mandamus to compel the Township to act on his applications. Nevertheless, as previously stated, the irregularity of Selig’s underlying application is not before this Court because the trial court’s order did not recite that as a basis for the award.

That being said, this Court cautions Selig that if, in the future, he wishes to act as his own counsel, he ***must*** adhere to the Township’s application requirements and fees and familiarize himself with the procedures outlined in the Municipality Planning Code. It seems to this Court that many of Selig’s problems and frustrations were his own doing and caused by his misunderstanding of the zoning process and misguided perception that he could request any relief, in any fashion, and in any way, he pleased. He is further forewarned that the inclusion of scandalous, impertinent and unintelligible matter is not acceptable and only serves to cloud the issues. Selig has been exposed to a number of briefs by the Township and ZHB which serve as examples of professional and proficient legal writing. A *pro se* litigant is entitled to some latitude. However, under no circumstances is it acceptable for a *pro se* litigant to substitute his own version of the law for established procedures governing zoning disputes. If, in the future, Selig continues to flout these warnings, then he will risk facing sanctions.

heliport on **2816** Orefield Road, a totally different parcel than the one subject to Judge Black's April 11, 2007, order.

Turning to the Township's burden of proof, at the Sanctions Hearing, no evidence was presented to support the trial court's conclusion that Selig "inappropriately used" 2011-CA-2643 "to collaterally attack the 2007 decision on the heliport by Judge Black" or that he brought 2011-CA-2643 "to re-litigate case 2006-CA-4147 and circumvent Judge Black's April 11, 2007, which effectively denied plaintiff [Selig] his heliport." Trial Court Opinion at 5.

The Township's case was focused on demonstrating that Selig had previously filed several unsuccessful, repetitive, lawsuits and appeals which attempted to overturn Judge Black's April 11, 2007, order. But, there was no evidence that the action commenced at 2011-CA-2643, if successful, would have resulted in a reversal of Judge Black's April 11, 2007, order. The Township did not address the fact that the underlying applications were never before presented to the ZHB or that these were new and different applications based on new conditions or circumstances, and/or involved a separate parcel.¹⁶

¹⁶ Selig, on the other hand, repeatedly attempted to make this point:

Q. Can you explain to me in your own words what you believe that particular application [request for a heliport on 2816] and subsequent petition [for special relief] really meant, what it was asking for? [H.T. at 26-27].

Q. [D]o you ...recall that ... the application for a heliport had nothing to do with the rural agricultural property? [H.T. at 28].

Q. Now, the 2816 property. What ... zoning category is that? [H.T. 31-32].

A. (By Mr. Zehner): I believe 2816 with the house is in

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the industrial zoning district.

Q. Exactly. That's the subject of these sanction hearings. Now...Mr. Wieand [Township's counsel] made a statement that all this litigation in 2643 was to reverse Judge Black's decision in 2007. Is that your understanding? [H.T. at 32].

Q. Mr. Wieand in his pleadings stated that all the issues, the rezoning request and the heliport on 2816 was purely to reverse the decision of Judge Black's of 2007....Is that your understanding? [H.T. at 32].

Q. Now, is a heliport currently an available listed use on industrial property? [H.T. at 32].

Q. So the understanding is really incorrect that I was not (sic) trying to reverse Judge Black's decision of 2007, but it was a start from scratch procedure to try to get a heliport according to the ordinance on a property according to the regulations that are now [?] [H.T. at 33].

Q. So the question still remains, does that ordinance, 861, have anything to do with the application for the heliport on the 2816 Orefield Road property that's industrial property? [H.T. at 34].

Q. [T]his formal request was given to the Township to try to get this very simple matter - - to get the property rezoned? [H.T. at 41].

Q. All right, so let me get back to the reversal of the April 11th hearings of Judge Black. So do you agree that this is a completely independent issue that just has to do with a simple rezoning of trying to get a property back to the way it was in 2000? [H.T. at 45].

Q. Now, let me get back to the 2816 property. So you agree that zoning 861 has nothing to do with my application for a heliport on industrial property. Can you confirm that? [H.T. at 46].

The Township apparently believed that any attempt by Selig to locate a heliport on **2880** Orefield Road or **2816** Orefield Road, was a repetition of his prior unsuccessful litigation attempts and was futile in light of the April 11, 2007, order. The Township basically took the position that Judge Black's order forever barred Selig, under *res judicata*, from ever applying, even by seemingly legitimate alternative means, for a permit for a heliport on any property he owns.

But, the fact is that the doctrine of *res judicata* is inapplicable in zoning matters, where the second application is based on a different theory under different provisions of the ordinance. Harrington v. Zoning Hearing Board of East Vincent Township, 543 A.2d 226 (Pa. Cmwlth. 1988). The landowner in Harrington pursued different paths in his two separate zoning actions, requesting a special exception in his first application, and in the second action, requesting a variance in addition to the special exception request. This Court held *res judicata* did not apply to bar the second action.

Here, Judge Black's April 11, 2007, order reversed the special exception for a heliport on the **2880** Orefield Road property, which at the time was residentially-zoned and owned jointly. The Order does not prohibit Selig altogether from applying for a heliport. As there does not appear that there was ever a decision involving Selig's property at **2816** Orefield Road, Selig would not be forbidden, in a form acceptable to the Township and with necessary fees, to seek, by a petition for special exception, to locate the heliport there. The ZHB may then hold the appropriate hearings and decide in its discretion, if Selig is entitled to relief. Similarly, there was never an application to rezone the **2880** Orefield Road

property to “Industrial” where heliports are permitted by special exception.¹⁷ The litigation at 2011-CA-2643 concerned two new applications for different relief.

In sum, this Court finds that the trial court erred when it found that the Township met its burden of proof. There was no evidence that Selig commenced the action filed at 2011-CA-2643 to relitigate Judge Black’s April 11, 2007, order, or to harass the Township. Rather, the applications and petitions, on their face, show that they were a *bona fide* attempt by a *pro se* litigant to obtain permission for the heliport through other legitimate avenues, namely, by rezoning **2880** Orefield Road to “Industrial” or relocating it to **2816** Orefield Road. While the filings were procedurally defective, that did not amount to conduct which would justify sanctions in these circumstances.¹⁸

The order of the trial court is reversed.

BERNARD L. MCGINLEY, Judge

¹⁷ To the extent that the Township believes Selig is forever barred from having his heliport under any circumstances on any parcel he owns as a penalty for having “falsely represented” that he was sole owner before the ZHB in 2006, the Township did not raise that theory below and it has presented this Court with no legal support for its position. Clearly, a zoning officer has no authority for rejecting an application on this basis.

¹⁸ Because this Court reverses the award of sanctions it is unnecessary to address Selig’s issue regarding his inability to pay the award.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dr. Helicopters, LLC. :
Principle, Michael B. Selig, :
Appellant :
 :
v. :
 : No. 1218 C.D. 2012
South Whitehall Township :

ORDER

AND NOW, this 30th day of January, 2013, the order of the Court of Common Pleas of Lehigh County in the above-captioned matter is hereby **reversed**. South Whitehall's Application to Strike portions of the reproduced record filed by Dr. Helicopters, LLC, Principle, Michael B. Selig is **denied**. The Application to strike portions of South Whitehall Township's Supplemental Reproduced Record filed by Dr. Helicopters, LLC, Principle, Michael Selig is **denied**.

BERNARD L. MCGINLEY, Judge