NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

JOHN J. KORESKO, V, Appellant v. KRAUT HARRIS, P.C., FIRST AMERICAN TITLE INSURANCE COMPANY, INC., CRAIG J. FLEISCHMANN, AND MARIA A. WHITE, Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1445 EDA 2012

Appeal from the Order March 2, 2012
In the Court of Common Pleas of Montgomery County
Civil Division at No.: 2011-17935

JOHN J. KORESKO, V, Appellant v. KRAUT HARRIS, P.C., FIRST AMERICAN TITLE INSURANCE COMPANY, INC., CRAIG J. FLEISCHMANN, AND MARIA A. WHITE, Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1446 EDA 2012

Appeal from the Order March 2, 2012
In the Court of Common Pleas of Montgomery County
Civil Division at No.: 2011-17935

BEFORE: MUNDY, J., OTT, J., and PLATT, J.*

---

* Retired Senior Judge assigned to the Superior Court.

MEMORANDUM BY PLATT, J. Filed: January 15, 2013

Appellant, John J. Koresko, Esquire, appeals *pro se* from the Order of March 2, 2012, which granted Appellees', Kraut Harris, P.C., First American Title Insurance Company, Inc., Craig J. Fleischmann, and Maria A. White, preliminary objections in the nature of a demurrer and dismissed Appellant's complaint with prejudice. We affirm.

The underlying facts and procedural history in this matter are taken from the trial court's May 31, 2012 opinion.

> [Appellant] instituted the instant action in Montgomery County Court of Common Pleas by way of filing a Complaint against the above-captioned Appellees on or about June 30, 2011. The Complaint asserts allegations of Defamation, Tortious Inference with Business Relations, violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law ["UTPCPL"], and Abuse of Process.
>
> [Appellant] alleges that the matter *sub judice* arises out of an incident related to a separate Montgomery County civil action docketed at 2008-05012 and entitled, "***Vagnoni, et al., v. Koresko, et al.***" (hereinafter: ***Vagnoni***). [Appellant] alleges that in the ***Vagnoni*** action, he was acting as counsel for Bonnie Jean Koresko and himself against Maria A. White when Craig Fleischmann, Esquire defamed him.
>
> More specifically, in the case *sub judice* [Appellant] alleges that Appellee, Craig J. Fleischmann, Esquire, (hereinafter: "Appellee(s)" or "Fleischmann") made defamatory statements about Appellant while working on the ***Vagnoni*** matter and as a Result[,] Appellant is entitled to damages in excess of $50,000.00. By way of pertinent background information, Appellee, Fleischmann, worked at Appellee, Kraut Harris, P.C., a law firm in Montgomery County, at all times material hereto. Fleischmann was/is licensed to practice law in the Commonwealth of Pennsylvania at all times material hereto as well. Appellant alleges that Appellees, Fleischmann and Kraut

Harris, P.C., served as legal counsel for Appellee, Maria A. White, in the ***Vagnoni*** case.

Additionally, Appellee, First American Title Insurance Company, Inc., (hereinafter "Appellee(s)" or "First American"), is the title insurance company which underwrites policies of title insurance issued to purchasers and lenders Appellee, First American, issued a policy to Appellee, Maria White, in connection with her purchase from the Koreskos of the property located at 1021 Woodland Avenue, East Norriston, Montgomery County (all relevant to the ***Vagnoni*** matter). A litigation ensued in that matter. First American appointed Fleischmann and Kraut Harris to represent Maria White in the aforementioned ***Vagnoni*** action.

The record indicates that at some point in time ***Vagnoni*** litigation became contentious. Appellees wanted to depose Margaret A. Lawson, an employee of Appellant in relation to the ***Vagnoni*** matter. Prior to the deposition however, an issue arose regarding the permissible scope and breadth of that particular deposition. On or about May 11, 2011, the Honorable Garrett D. Page, in accordance with an agreement by the parties, including [Appellant], entered an 'Agreed Order' in the ***Vagnoni*** matter allowing the deposition of Ms. Lawson to go forward, subject to some limitations regarding the scope of the deposition. Thereafter, Appellant asserts that on June 28, 2011, Appellant and Fleischmann attended the deposition of Ms. Lawson. The deposition concluded shortly before 12:05 p.m. Appellant claims that he stepped outside of the deposition room, just beyond the sight of Fleischmann. Appellee Fleischmann allegedly remained in the room along with the court reporter from Farrell Reporting and counsel for party, Norsco Credit Union, Ellen H. Kueny, Esquire. Appellant asserts that Appellee Fleischmann, stated "that man is incapable of telling the truth" and "the D.A. ought to be looking at this case." Appellant filed the instant action two days later. Appellant asserts that the statements made by Appellee, Fleischmann, were knowingly false, and uttered with the intention to harm [Appellant's] good name.

The present appeals arose after the [trial court] sustained the preliminary objections filed by First American Title Insurance Company, Inc., and Maria White, as well as, those filed by Craig Fleischmann and Kraut Harris, P.C., on or about March 1, 2012. The Complaint was dismissed in its entirety. The Appellant filed

> the instant appeals (which have been consolidated for the purposes of this Opinion) in a timely manner.[1]

(Trial Court Opinion, 5/31/12, at 1-3) (footnote omitted).

On appeal, Appellant raises the following issues for our review.

> 1. Was it error for [the trial court] to sustain the preliminary objections of Appellees when the statements at issue were intended to impair [Appellant's] reputation for honesty, injure his professional reputation, and deter third persons from dealing with him; and such statements were therefore defamatory *per se*?
>
> 2. Was it error for [the trial court] to sustain the preliminary objections of Appellees Craig J. Fleischmann and Kraut Harris, P.C., and conclude that there was absolute judicial privilege [or other privileges warranting dismissal] as to the defamatory statements made by Appellee Fleischmann, because such statements were made after the conclusion of a judicial proceeding, there was no need for such statements as part of a judicial proceedings they were made in the presence of at least one non-lawyer third party, and such comments were defamatory *per se*?
>
> 3. Was it error for [the trial court] to sustain the preliminary objections of Appellees, as it appears the [c]ourt did not apply the proper standard of review; to wit, all statements of fact set forth in the Complaint had to be considered as true, and dismissal on preliminary objections, without leave to amend, should not be granted except in the clearest cases?

(Appellant's Brief, at 2-3).

Appellant challenges the trial court's grant of preliminary objections in the nature of a demurrer. Our scope and standard of review are as follows:

---

[1] Appellant filed a timely concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b); the trial court issued an opinion.

> When reviewing an order granting preliminary objections in the nature of a demurrer, an appellate court applies the same standard employed by the trial court: all material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true for the purposes of review. We need not consider the pleader's legal conclusions, unwarranted inferences from facts, opinions, or argumentative allegations. The question presented by a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where affirmance of the trial court's order sustaining preliminary objections would result in the dismissal of an action, we may do so only when the case is clear and free from doubt. To be clear and free from doubt that dismissal is appropriate, it must appear with certainty that the law would not permit recovery by the plaintiff upon the facts averred. Any doubt should be resolved by a refusal to sustain the objections. We review the trial court's decision for an abuse of discretion or an error of law.

DeSanctis v. Pritchard, 803 A.2d 230, 232 (Pa. 2002), *appeal denied*, 818 A.2d 504 (Pa. 2003) (citation omitted).

In his first two claims, Appellant argues that the trial court erred in finding that Appellee Fleischmann's statements did not constitute defamation *per se* and that the statements were protected by judicial privilege. (***See*** Appellant's Brief, at 6-12). Because we find that the statements were protected by judicial privilege, we need not address Appellant's claim that the statements constituted defamation *per se*.

In order to state a claim of defamation, Pennsylvania law provides:

> **(a) Burden of plaintiff.**—In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:
>
> (1) The defamatory character of the communication.
>
> (2) Its publication by the defendant.

> (3) Its application to the plaintiff.
>
> (4) The understanding by the recipient of its defamatory meaning.
>
> (5) The understanding by the recipient of it as intended to be applied to the plaintiff.
>
> (6) Special harm resulting to the plaintiff from its publication.
>
> (7) Abuse of a conditionally privileged occasion.
>
> **(b) Burden of defendant.**—In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:
>
> (1) The truth of the defamatory communication.
>
> (2) The privileged character of the occasion on which it was published.
>
> (3) The character of the subject matter of defamatory comment as of public concern.

42 Pa.C.S.A. § 8343; ***see also***, ***Richmond v. McHale***, 35 A.3d 779, 783-84 (Pa. Super. 2012). Pennsylvania law has long held that "[a]ll communications pertinent to any stage of a judicial proceeding are accorded an absolute privilege which cannot be destroyed by abuse." ***Smith v. Griffiths***, 476 A.2d 22, 24 (Pa. Super. 1984) (citations omitted). This Court has clearly stated that this "privilege extends not only to communications made in open court, but also encompasses pleadings and even less formal communications such as preliminary conferences and correspondence between counsel in furtherance of the client's interest." ***Pawlowski v.***

Smorto, 588 A.2d 36, 41 (Pa. Super. 1991) (citations omitted). We have explained:

> The reasons for the absolute privilege are well recognized. A judge must be free to administer the law without fear of consequences. This independence would be impaired were he to be in daily apprehension of defamation suits. The privilege is also extended to parties to afford freedom of access to the courts, to witnesses to encourage their complete and unintimidated testimony in court, and to counsel to enable him to best represent his client's interests. Likewise, the privilege exists because the courts have other internal sanctions against defamatory statements, such as perjury or contempt proceedings.

Id. (citation omitted). Further, the privilege is not dependent upon the motive of the individual making the statement. ***See Richmond***, ***supra*** at 784. Nonetheless, the privilege is not limitless; the Pennsylvania Supreme Court has held that the "protected realm" is restricted to "those communications which are issued **in the regular course of judicial proceedings** and which are **pertinent and material to the redress or relief sought.**" ***Post v. Mendel***, 507 A.2d 351, 355 (Pa. 1986) (emphasis in original; citations omitted). However, "all doubt as to whether the alleged defamatory communication was indeed pertinent and material to the relief or redress sought is to be resolved in favor of pertinency and materiality." ***Richmond***, ***supra*** at 785 (citation omitted).

In its recent decision in ***Richmond***, this Court reiterated the importance of this privilege. In ***Richmond***, counsel in a civil matter were engaged in a discovery conference when the counsel for defendants accused

counsel for plaintiff of trying to extort money from defendants and stated he would not allow counsel to "get away with it." ***Id.*** at 781. In holding that the statements were covered by privilege, this Court noted the importance of the broad application of the privilege "even if the statements are made falsely or maliciously without reasonable or probable cause." ***Id.*** at 786 (citation and internal quotation marks omitted). This Court went on to state that because the allegedly defamatory comments were related to the underlying litigation, were made in response to activity in the underlying action, and made during a judicial proceeding (*i.e.* a conference between counsel), the trial court did not abuse its discretion or commit an error of law in finding that the statements were privileged. ***See id.***

We agree with the trial court in the instant matter, that any differences between ***Richmond*** and the present case are immaterial. (***See*** Trial Ct. Op., 5/31/12, at 5-8). The comments in the instant matter were made between counsel at the close of a deposition in the underlying matter. (***See id.*** at 2). The comments were made in response to what occurred during the deposition. (***See id.***). While Appellant appears to argue that the presence of a layperson, namely the court reporter defeated the privilege, (***see*** Appellant's Brief, at 5), we disagree. Appellant does not point to any legal support for his conclusion. (***See id.***). Further, given that the privilege applies to statements made in open court, where laypersons may be present, and to correspondence which is likely opened and read by a

secretary or paralegal prior to being given to an attorney, such a restriction would gut the privilege. Thus, for the reasons discussed above, we find that the trial court did not abuse its discretion or commit an error of law in holding that the statements were privileged and accordingly granting the preliminary objections in the nature of a demurrer and dismissing with prejudice Appellant's defamation claim.

In his final claim, Appellant alleges that the trial court erred in granting the preliminary objections and dismissing with prejudice his Tortious Inference with Business Relations, UTPCPL, and abuse of process claims. (***See id.*** at 14-16). We disagree.

The elements for a claim for tortious interference with business relations are as follows:

> (1) the existence of a contractual relationship between the plaintiff and a third party;
>
> (2) purposeful action on the part of the defendant intended to harm the relationship;
>
> (3) the absence of privilege or justification on the part of the defendant; and
>
> (4) actual damages resulting from the defendant's conduct.

Hillis Adjustment Agency, Inc. v. Graham Co., 911 A.2d 1008, 1012 (Pa. Super. 2006), *appeal denied*, 934 A.2d 1278 (Pa. 2007) (citations omitted). In the instant matter, Appellant alleges that the deposition of former employee Margaret Lawson violated a confidentiality agreement she had signed, and, thus, Appellees tortiously interfered with the contract.

(***See*** Appellant's Brief, at 14-16; Complaint, 6/30/11, Count II, at 6-8). Here, as the trial court found, (***see*** Trial Ct. Op., 5/31/12, at 8), Appellant did not allege the existence of a contractual relationship between himself and Lawson, but rather the existence of a contractual relationship between a non-party, Koresko & Associates, P.C., and Lawson. (***See*** Complaint, Count II, at 7). Thus, Appellant failed to allege the first element of the claim and, moreover, failed to demonstrate any actual damages from the alleged tortuous interference with a contract to which he was not a party. Further, Appellees' action in seeking to depose Lawson was privileged. This Court has held that:

> an actor is privileged to interfere with another's performance of a contract when: (1) the actor has a legally protected interest; (2) he acts or threatens to act to protect the interest; and (3) the threat is to protect it by proper means.

Ruffing v. 84 Lumber Co., 600 A.2d 545, 548 (Pa. Super. 1991), *appeal denied*, 610 A.2d 46 (Pa. 1992) (citation omitted). Here, Appellees sought legitimate discovery from a third-party witness. Appellees sought to do so by "proper means," the deposition was conducted in accordance with the Rules of Civil Procedure in a pending civil action, and approval for the deposition was given by the trial court. (***See*** N.T. Preliminary Injunction Hearing, 5/11/11, at 24-28; N.T. Emergency Petition Hearing, 6/28/11, at

13-14, 20-24; Order, 9/27/11, at unnumbered pages 1-2).[2] This Court has long held that communications and actions taken in connection with pending litigation are privileged. ***See Pelagatti v. Cohen***, 536 A.2d 1337, 1343-44 (Pa. Super. 1987), *appeal denied*, 548 A.2d 256 (Pa. 1988) (affirming dismissal of tortious interference claim where the alleged interference concerned communications involved in judicial proceedings). Thus, we find that the trial court neither abused its discretion nor committed an error of law in granting the preliminary objections and dismissing with prejudice Appellant's tortious interference with business practices claims.

Appellant also claims that the trial court erred in dismissing his UTPCPL and abuse of process claims. We find these issues waived. As amended in 2007, Pennsylvania Rule of Appellate Procedure 1925 provides that issues that are not included in the Rule 1925(b) statement or raised in accordance with Rule 1925(b)(4) are waived. ***See*** Pa.R.A.P. 1925(b)(4)(vii); ***see also Commonwealth v. Lord***, 719 A.2d 306, 308 (Pa. 1998), *superseded by rule on other grounds as stated in* ***Commonwealth v. Burton***, 973 A.2d 428, 431 (Pa. Super. 2009). Further, new legal theories cannot be raised for the first time on appeal. ***See also*** Pa.R.A.P. 302(a) ("Issues not raised in

---

[2] We note that, in the Order of September 27, 2011, the trial court specifically found that the subject matter of the deposition was relevant to the underlying civil action, was not privileged, and was a proper subject for discovery. (***See*** Order, 9/27/11, at unnumbered page 1). Appellant did not appeal that order.

the lower court are waived and cannot be raised for the first time on appeal.").[3] Moreover, Appellant has not developed these issues in his brief. (***See*** Appellant's Brief, at 14-16). Appellant's brief does not contain any argument regarding the dismissal of his abuse of process claim and his brief argument regarding his UTPCPL claim is unsupported by any citation to relevant legal authority. It is long-settled that failure to argue and to cite any authority supporting the argument constitutes a waiver of the issue on appeal. ***See Jones v. Jones***, 878 A.2d 86, 90 (Pa. Super. 2005); ***see also*** Pa.R.A.P. 2119(a),(b). Accordingly, we find these issues waived for this reason as well.

In any event, our review of Appellant's complaint demonstrates that he failed to set forth the elements of either a UTPCPL or abuse of process claim. (***See*** Complaint, 6/30/11, Counts III and IV, at 8-10); ***see also*** 73 P.S. § 201-9.2(a) (limiting the right of individuals to pursue a private cause of action under the UTPCPL to those who purchase or lease goods and services primarily for personal, family or household purposes); ***Sabella v. Estate of Milides***, 992 A.2d 180, 188-89 (Pa. Super. 2010), *appeal denied*, 9 A.3d 631 (Pa. 2010) (discussing the elements of an abuse of process claim). Thus, the trial court neither abused its discretion nor committed an

---

[3] We note, in fact, that because the claims were not raised in the Rule 1925(b) statement, the trial court did not address them in its opinion. (***See*** Trial Ct. Op., 5/31/12, at 6-8).

error of law in granting the preliminary objections and dismissing with prejudice Appellant's UTPCPL and abuse of process claims.

Order affirmed. Jurisdiction relinquished.