NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

SYLVAN HEIGHTS REALTY PARTNERS, L.L.C. AND AMERICARE MANAGEMENT SERVICES, INC. Appellants v. FRANK LAGROTTA Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1201 WDA 2013

Appeal from the Judgment July 15, 2013
In the Court of Common Pleas of Lawrence County
Civil Division at No(s): 10844-05

BEFORE: GANTMAN, P.J., FORD ELLIOTT, P.J.E., and OLSON, J.

MEMORANDUM BY GANTMAN, P.J.: **FILED AUGUST 19, 2014**

Appellants, Sylvan Heights Realty Partners, L.L.C. ("Sylvan Heights") and Americare Management Services, Inc. ("Americare"), appeal from the summary judgment entered in the Lawrence County Court of Common Pleas in favor of Appellee, Frank LaGrotta, in this tort case. We affirm.

The trial court opinion sets forth the relevant facts of this case as follows:

> The action arises from Lawrence County's unsuccessful attempt to privatize and sell the County's nursing home, Hill View Manor ("Hill View"), to [Appellant Sylvan Heights] in 2003. In connection with the proposed sale, the County had entered into an Interim Management Agreement with [Appellant Americare]. [Appellants] initiated the instant suit, claiming that [Appellee] tortuously interfered with the contractual and prospective contractual relationship between Sylvan Heights and the County, and with the

existing management agreement between Americare and the County.

Hill View was owned by the County and was licensed by the Commonwealth's Department of Health [("DOH")] to operate as a nursing home. The [DOH] regulates nursing home management and operations, and Hill View's operations and management were subject to those regulations. Hill View participated in the Medicare and Medicaid programs, and, consequently, use of funds and eligibility for participation were monitored by the Federal government and the [DOH].

During the period of time relevant to the instant lawsuit, George B. Howley and John Hadgkiss were involved as principals of Sylvan Heights, and John Hadgkiss was also a principal in Americare.

On or about October 30, 2002, Sylvan Heights submitted to the County a letter of intent to purchase Hill View. On or about December 9, 2002, Sylvan submitted a revised letter of intent. On or about February 4, 2003, the County Board of Commissioners ("Commissioners") authorized the County to enter into an agreement for the sale of Hill View to Sylvan Heights. The existing management company at Hill View then gave notice that it was terminating its management agreement with the County. On or about February 6, 2003, the County entered into an Interim Management Agreement with Americare pursuant to which Americare would manage Hill View pending completion of the sale. On April 1, 2003, the County entered into an Agreement of Sale with Sylvan Heights. Closing was initially set for June 30 or July 1, 2003. However, issues arose over financing of the transaction that prevented closing by the originally scheduled deadline. After some restructuring of the transaction, closing was scheduled to occur no later than July 31, 2003.

The Interim Management Agreement with Americare provided, *inter alia*, that Americare would be responsible for management of Hill View from the termination date of the previous management agency to the date of closing of the sale of Hill View, and that Americare was to manage Hill View on an interim basis for an initial period of thirty

days, to be extended for additional thirty-day terms unless the Agreement was terminated by written notice from either party at least five business days prior to the end of the then current term.

At all relevant times, [Appellee] was a member of the Pennsylvania House of Representatives representing the Tenth Legislative District, which includes that part of Lawrence County where Hill View is located. In July 2003, [Appellee] became aware that concerns were being expressed about the sale and that doubts were being expressed about the propriety of certain aspects of the transaction. As a result, toward the end of July, [Appellee] talked with Attorney Susan Papa, a sister of [County] Controller [Mary Ann] Reiter and solicitor to the Controller's Office, and, according to [Appellee] and his staff, with Controller Reiter herself, to inquire about the issues that had been raised.[1] According to [Appellee], Controller Reiter told him of her concerns regarding the transaction, including suspicion that the money received by Hill View was not being processed properly, and doubts about the propriety of the interrelationship between the principals of Sylvan Heights and Americare. [Appellee] then telephoned Dr. Calvin Johnson, Acting Secretary of the [DOH], to advise the [DOH] of the concerns which had been expressed to him and to request an investigation.

[1] Although the deposition testimony of Controller Reiter is contradictory, the record is to be viewed in the light most favorable to the non-moving party. ***Toy v. Metropolitan Life Ins. Co.***, 593 Pa. 20, 33-34, 928 A.2d 186, 194-95 (2007).

In addition, an issue had been raised that the County had not given the required notice to the union representing Hill View's employees, informing it of the impending sale, causing concern for the contracting parties that, if consummated, the sale might be nullified.

According to the Amended Complaint, on June 20, 2003, the [DOH] had approved the transfer of Hill View's nursing home license to Sylvan Heights, contingent upon completion of the sale. However, on July 30, 2003, subsequent to the telephone conversation between

> [Appellee] and Acting Secretary Johnson, the [DOH] transmitted a letter to the administrator of Hill View, revoking its approval of the license transfer. Closing did not occur. On July 31, 2003, the County terminated Americare's management services agreement. By letter of August 1, 2003, Americare notified the County that it wished to terminate the management agreement immediately.
>
> [Appellee] issued several press releases and made statements to the media informing the public about the failed transaction, the [DOH's] rescission of its approval of the license transfer, [Appellee's] role in causing the Department's action, and other details regarding the requested investigations.
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> In August 2003, [Appellee] communicated with the Pennsylvania State Police and requested an investigation regarding possible mishandling of County funds. No criminal action was taken as a result of the State Police investigation.

(Trial Court Opinion, filed July 15, 2013, at 1-4) (internal citations to the record omitted). Procedurally, Appellants filed their original complaint against Appellee on October 24, 2005. On December 5, 2005, Appellants filed an amended complaint, alleging two (2) counts of tortious interference with contract and one (1) count of tortious interference with prospective contractual relations. On December 27, 2005, Appellee filed preliminary objections to the amended complaint, which the court overruled on May 19, 2006. Appellee filed a notice of appeal with the Commonwealth Court, which dismissed the appeal as interlocutory. Appellee then filed an answer to the amended complaint with new matter on July 17, 2006. Appellee filed a motion for judgment on the pleadings on September 15, 2006, which the

court denied on February 16, 2007. Appellee filed a notice of appeal with the Commonwealth Court from the February 16, 2007 order. The Commonwealth Court granted Appellants' motion to quash the appeal as premature on April 2, 2007. On January 2, 2008, following reargument, the Commonwealth Court granted Appellants' motion to quash the appeal and remanded the matter to the trial court. Appellee filed an amended answer with new matter on March 4, 2009. On December 3, 2012, Appellee filed a motion for summary judgment. The court granted Appellee's summary judgment motion on July 15, 2013.

On July 26, 2013, Appellants timely filed a notice of appeal.[1] The court did not order Appellants to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Appellants filed none.

Appellants raise the following issues for our review:

> DID THE TRIAL COURT ERR IN CONCLUDING THAT CERTAIN OF [APPELLEE'S] CHALLENGED CONDUCT WAS PROTECTED UNDER THE PENNSYLVANIA CONSTITUTION

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[1] Although Appellee was a member of the Pennsylvania House of Representatives at the time Appellants filed their complaint, neither party objects to this Court's exercise of jurisdiction over the appeal. Thus, appellate jurisdiction is perfected. ***See*** 42 Pa.C.S.A. § 704 (stating: "The failure of an appellee to file an objection to the jurisdiction of an appellate court within such time as may be specified by general rule, shall, unless the appellate court otherwise orders, operate to perfect the appellate jurisdiction of such appellate court, notwithstanding any provision of this title…vesting jurisdiction of such appeal in another appellate court"); ***Benner v. Silvis***, 950 A.2d 990 (Pa.Super. 2008).

> RIGHT TO PETITION AND INFORM AND/OR THE ***NOERR PENNINGTON***[2] DOCTRINE?
>
> DID THE TRIAL COURT ERR IN CONCLUDING THAT [APPELLEE] WAS OTHERWISE ENTITLED TO SUMMARY JUDGMENT ON [APPELLANTS'] CONTRACTUAL INTERFERENCE CLAIMS ON THE ISSUE OF CAUSATION AND DESPITE THE PRESENCE OF DISPUTED ISSUES OF MATERIAL FACT?

(Appellants' Brief at 4).

In their first issue, Appellants aver that Appellee knowingly or recklessly disseminated false information to government officials regarding Appellants' handling of funds at Hill View and improper associations between the principals of Sylvan Heights and Americare. Appellants claim that Appellee's conduct was not protected by the right of petition under the Pennsylvania Constitution or the ***Noerr-Pennington*** doctrine. Appellants argue the "sham" exception to the ***Noerr-Pennington*** doctrine strips Appellee of immunity from liability because Appellee knowingly or recklessly communicated objectively baseless information. Appellants contend Appellee made no effort to investigate or confirm the truth of the allegations against Appellants. Appellants further assert that, when Appellee disseminated the information, he was not acting in his capacity as a state

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[2] The ***Noerr-Pennington*** doctrine is based on the First Amendment right to petition the government and originated with the United States Supreme Court's decisions in ***Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.***, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and ***United Mine Workers v. Pennington***, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).

representative. According to Appellants, there is conflicting evidence as to whether Appellee acted in response to concerns raised by his constituents. Likewise, during the period in question, Appellee was not serving on any legislative committee concerning nursing homes or promoting any legislation related to regulation of nursing homes. In any case, Appellants argue it is not necessary to prove Appellee acted with malice or outside of his role as an elected representative because Appellee's statements were objectively baseless. Appellants conclude the trial court erred by granting Appellee summary judgment on the ground that Appellee's conduct was an exercise of his constitutional right to petition, and protected under the ***Noerr-Pennington*** doctrine. We disagree.

Our standard of review of a grant of summary judgment requires us to determine whether the trial court abused its discretion or committed an error of law. ***Mee v. Safeco Ins. Co. of Am.***, 908 A.2d 344, 347 (Pa.Super. 2006).

> Judicial discretion requires action in conformity with law on facts and circumstances before the trial court after hearing and consideration. Consequently, the court abuses its discretion if, in resolving the issue for decision, it misapplies the law or exercises its discretion in a manner lacking reason. Similarly, the trial court abuses its discretion if it does not follow legal procedure.

Miller v. Sacred Heart Hosp., 753 A.2d 829, 832 (Pa.Super. 2000) (internal citations omitted). Our scope of review is plenary. ***Pappas v. Asbel***, 564 Pa. 407, 418, 768 A.2d 1089, 1095 (2001), *cert. denied*, 536

U.S. 938, 122 S.Ct. 2618, 153 L.Ed.2d 802 (2002). In reviewing a trial court's grant of summary judgment:

> [W]e apply the same standard as the trial court, reviewing all the evidence of record to determine whether there exists a genuine issue of material fact. We view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law will summary judgment be entered. All doubts as to the existence of a genuine issue of a material fact must be resolved against the moving party.
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> Motions for summary judgment necessarily and directly implicate the plaintiff's proof of the elements of [a] cause of action. Summary judgment is proper if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. In other words, whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense, which could be established by additional discovery or expert report and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Thus, a record that supports summary judgment either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a *prima facie* cause of action or defense.
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> Upon appellate review, we are not bound by the trial court's conclusions of law, but may reach our own conclusions.

Chenot v. A.P. Green Services, Inc., 895 A.2d 55, 61 (Pa.Super. 2006) (internal citations and quotation marks omitted).

> Where the nonmoving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment. Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law.

Shepard v. Temple University, 948 A.2d 852, 856 (Pa.Super. 2008) (quoting ***Murphy v. Duquesne University***, 565 Pa. 571, 590, 777 A.2d 418, 429 (2001)).

The elements of tortious interference with an existing contract are as follows:

> (1) the existence of a contractual relationship between the complainant and a third party;
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> (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship;
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> (3) the absence of privilege or justification on the part of the defendant; and
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> (4) the occasioning of actual damage as a result of defendant's conduct.

Phillips v. Selig, 959 A.2d 420, 429 (Pa.Super. 2008), *appeal denied*, 600 Pa. 764, 967 A.2d 960 (2009) (quoting Restatement (Second) of Torts § 766 (1979)). The elements of interference with prospective contractual relations differ slightly and include:

> (1) a prospective contractual relationship;
>
> (2) the purpose or intent to harm the plaintiff by preventing the relation from occurring;

> (3) the absence of privilege or justification on the part of the defendant; and
>
> (4) the occasioning of actual damage resulting from the defendant's conduct.

Id. at 428. The plaintiff bears the burden of pleading and proving each element. ***International Diamond Importers, Ltd. v. Singularity Clark, L.P.***, 40 A.3d 1261 (Pa.Super. 2012).

The First Amendment to the United States Constitution guarantees "the right of the people…to petition the Government for a redress of grievances." U.S. Const. amend. I. The Pennsylvania Constitution similarly protects the citizens' right "to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance." Pa. Const. art. I, § 20. Under the ***Noerr-Pennington*** doctrine, an individual generally is immune from liability for exercising his First Amendment right to petition the government. ***Pennington, supra*** at 669-70, 85 S.Ct. at 1593, 14 L.Ed.2d at ___; ***Noerr, supra*** at 137-38, 81 S.Ct. at 529-30, 5 L.Ed.2d at ___. This immunity "extends to persons who petition all types of government entities—legislatures, administrative agencies, and courts." ***Cheminor Drugs, Ltd. v. Ethyl Corp.***, 168 F.3d 119, 122 (3d Cir. 1999), *cert. denied*, 528 U.S. 871, 120 S.Ct. 173, 145 L.Ed.2d 146 (1999). Under ***Noerr-Pennington***, "[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot

properly be made to depend upon their intent in doing so." ***Noerr, supra*** at 139, 81 S.Ct. at 530, 5 L.Ed.2d at ___.

Nevertheless, there is a "sham" exception to ***Noerr-Pennington***, where immunity will not apply when the challenged conduct is "not genuinely aimed at procuring favorable government action at all." ***City of Columbia v. Omni Outdoor Advertising, Inc.***, 499 U.S. 365, 380, 111 S.Ct. 1344, 1354, 133 L.Ed.2d 382, ___ (1991).

> A sham situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result, but does so through improper means. Therefore, under the sham exception, an individual will be liable if he use[s] the governmental process—as opposed to the outcome of that process—as [a]…weapon.

Penllyn Greene Associates, L.P. v. Clouser, 890 A.2d 424, 429 n.5 (Pa.Cmwlth. 2005), *appeal denied*, 591 Pa. 719, 919 A.2d 960 (2007) (internal citations and quotation marks omitted). ***See also Armstrong Surgical Center, Inc. v. Armstrong County Memorial Hosp.***, 185 F.3d 154, 158 (3d Cir. 1999), *cert. denied*, 530 U.S. 1261, 120 S.Ct. 2716, 147 L.Ed.2d 982 (2000) (holding sham exception did not apply "where the plaintiff has not alleged that the petitioning conduct was for any purpose other than obtaining favorable government action" even though defendants' petitioning effort allegedly involved submission of false information to state agency); ***Wawa, Inc. v. Alexander J. Litwornia & Associates***, 817 A.2d 543, 548 (Pa.Super. 2003) (applying sham exception where defendants

"proliferated false information aimed at interfering directly with the business relationships of a competitor").

Noerr-Pennington immunity is available to both private and public actors. ***Mariana v. Fisher***, 338 F.3d 189 (3d Cir. 2003), *cert. denied*, 540 U.S. 1179, 124 S.Ct. 1413, 158 L.Ed.2d 80 (2004). Although the ***Noerr-Pennington*** doctrine arose in the federal antitrust context, its principles have been extended to cases involving tort claims brought under state law. ***See, e.g., Cheminor Drugs, supra*** (applying ***Noerr-Pennington*** immunity to New Jersey tort claims); ***Brownsville Golden Age Nursing Home, Inc. v. Wells***, 839 F.2d 155 (3d Cir. 1988) (holding ***Noerr-Pennington*** doctrine protected individuals from liability for civil conspiracy and interference with contractual relations for their actions in petitioning government to shut down nursing home that was operating in violation of applicable regulations).

Instantly, Americare operated as the interim management company at Hill View pending the sale of the facility to Sylvan Heights. Sometime during July 2003, Appellee became aware of concerns regarding Appellants' conduct and the pending transaction, which included possible mishandling of funds in one of the Hill View accounts and doubts concerning the relationship between Sylvan Heights and Americare. The certified record is replete with evidence that certain Lawrence County officials, including Controller Reiter, were concerned about these alleged improprieties in the months leading up

to the closing date for the sale of Hill View. Appellee contacted the Acting Secretary of the DOH to discuss these issues. Following that conversation, the DOH revoked its approval of the change of ownership. Appellee lawfully exercised his right to petition the government when he relayed to the DOH concerns expressed to him regarding the County's pending sale of Hill View to Sylvan Heights. Accordingly, Appellee was entitled to ***Noerr-Pennington*** immunity for his communications with the DOH. ***See Cheminor Drugs, supra***; ***Brownsville Golden Age Nursing Home, supra***. The protection afforded Appellee under ***Noerr-Pennington*** does not depend on whether he was acting as a concerned private individual or in his role as an elected official. ***See Mariana, supra***.

Moreover, with respect to Appellants' argument that Appellee's petitioning activity fell under the "sham" exception to ***Noerr-Pennington***, Appellants bore the burden of presenting evidence for every element of their claims of interference with existing and prospective contractual relations, including the "absence of privilege or justification on the part of the defendant." ***See Phillips, supra***; ***Shepard, supra***. Although Appellants argue the sham exception applies and satisfies this element because the allegations relayed by Appellee were "objectively baseless" and "knowingly or recklessly false," Appellants failed to adduce evidence that Appellee knowingly transmitted false information, or did anything more than relay concerns to a state agency and request an investigation. Appellee's

communication of allegedly false information cannot constitute sham petitioning without further evidence of Appellee's motive or state of mind. Appellants offered no evidence that Appellee's communications with government officials were disingenuous. ***See Cheminor Drugs***; ***Armstrong Surgical Center, supra***.

Additionally, Appellants cite no law in support of their contention that Appellee's actions should lose ***Noerr-Pennington*** immunity because Appellee failed to conduct his own investigation of the allegations against Appellants before contacting the DOH. Appellants indicate inconsistencies in the deposition testimony of Appellee, Controller Reiter, and Appellee's former staffer, with respect to how Appellee learned of the allegations and who, if anyone, prompted Appellee to contact the DOH. Nevertheless, these inconsistencies do not raise a **material** issue of fact. ***See Chenot, supra***. The record shows Appellee, an elected state representative, became aware of concerns raised by county officials that Appellants were engaging in illegal or unethical conduct, conveyed this information to an appropriate state agency, and requested the agency to investigate or intervene. Under ***Noerr-Pennington***, Appellee was immune from liability for his communications with government officials. Thus, Appellants' first issue merits no relief.

In their second issue, Appellants claim Appellee's unprivileged statements to the press contributed to the derailment of the sales

agreement between Sylvan Heights and Lawrence County. Specifically, Appellants argue that genuine issues of material fact exist as to whether Appellee's July 30, 2003 press release preceded the DOH's notice of revocation of its approval of the license transfer for Hill View. Appellants assert that even if the press release followed the notice of revocation, the content of the press release, as well as a memorandum generated by an investigating police officer who interviewed Appellee, indicated that Appellee's previous communications with the DOH caused the Department to rescind its approval of the license transfer. Appellants further contend the DOH's notice of revocation was not necessarily final because the notice indicated that the DOH planned to investigate further the newly received information. Likewise, Appellee admitted in his July 30, 2003 press release that the sale of Hill View was merely delayed pending a complete investigation. Appellants conclude the trial court erred in determining that Appellee's statements to the press, although not entitled to ***Noerr-Pennington*** immunity, could not satisfy the element of causation for Appellants' claims of tortious interference with existing and prospective contractual relations. We disagree.

Instantly, the trial court determined that Appellee's statements to the press did not cause termination of the sale:

> Leaving aside consideration of the obstacles to closing posed by the concerns expressed by Controller Reiter and County Commissioner Fosnaught, the failure to notify the Union of the proposed sale, and the statements and

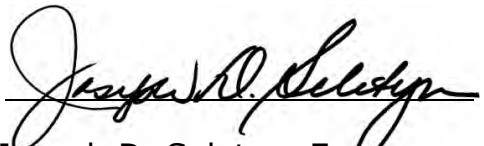
> correspondence authored by County Commissioner DeCarbo, the Union's counsel and counsel for Sylvan Heights, the fact that the press releases and statements to the press were published after the [DOH] had rescinded its approval of the license transfer (and in the case of the second press release referred to in the Amended Complaint, not until the spring of 2004), precludes a finding that the statements to the press themselves somehow stopped culmination of the sale. Consequently, for this reason alone, the fourth element of the tort cannot be satisfied. In addition, the descriptive content of the releases, taking into account the fact that the second release of which [Appellants] complain in their Amended Complaint did not occur until the spring of 2004, could not serve as the basis for a finding of the requisite causation.

(Trial Court Opinion at 20). We agree. On July 30, 2003, Appellee issued a press release, entitled "Hill View Manor Sale Put on Hold by PA Health Department," evidently in response to the DOH's decision to rescind its approval of the transfer of Hill View's operating license. Appellee issued the press release the same day the DOH issued notice of its decision. The sale could not proceed without DOH approval. The press release stated in part: "[Appellee] was notified of the department's decision by Dr. Calvin Johnson, who serves as Acting Secretary of the Department of Health. [Appellee] had contacted Secretary Johnson about allegations and questions surrounding the proposed sale, and asked the department to intervene." (Plaintiffs' Response in Opposition to Defendant's Motion for Summary Judgment, Exhibit 2, filed 3/12/13; R.R. at 526a). Appellee's petitioning activity referenced in the press release and other documents was protected; and Appellants adduced no evidence that issuance of the press release somehow

caused the DOH to withdraw its approval of the license transfer. The DOH letter to Hill View stated that the Department was "investigating this matter further and will contact you pending completion of our review." (Defendant's Motion for Summary Judgment, Brief in Support and Proposed Order, Exhibit L, filed 12/3/12; R.R. at 358a). Nevertheless, the County terminated its management services agreement with Americare the following day. With respect to Sylvan Heights, Appellants produced no evidence in support of their speculative contention that, after the DOH withdrew its approval, publication of news articles quoting Appellee or Appellee's act of issuing a press release had a "continuing effect" on any subsequent DOH investigation or decision. Therefore, the record contains insufficient evidence of causation required for Appellant to make out a *prima facie* case of interference with existing or prospective contractual relations with respect to any of Appellee's statements to the press. ***See Phillips, supra***; ***Shepard, supra***; ***Chenot, supra***. Based on the foregoing, we affirm the summary judgment in Appellee's favor.

Judgment affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/19/2014