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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA
CIVIL ACTION – LAW

Michael J. McQueary,

Plaintiff,

vs.

The Pennsylvania State University,

Defendant.

Docket No. 2012-1804

Type of Case:
Whistleblower

____ Medical Professional Liability Action (check if applicable)

Type of Pleading:
Memorandum of Law in Support of Preliminary Objections

Filed on Behalf of:
Defendant, The Pennsylvania State University

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MICHAEL J. MCQUEARY,	:	IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
Plaintiff,	:	
v.	:	
	:	CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE UNIVERSITY,	:	HON. THOMAS G. GAVIN
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF THE PENNSYLVANIA STATE UNIVERSITY'S PRELIMINARY OBJECTIONS TO PLAINTIFF'S COMPLAINT

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2013 FEB 21 AM 8 42
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ORIGINAL

TABLE OF CONTENTS

FILED FOR RECORD
2003 FEB 21 AM 8 42
DEBRA C. IMMEL
PROTHONOTARY
CENTRE COUNTY

ORIGINAL

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

ORIGINAL

MEMORANDUM OF LAW IN SUPPORT OF THE PENNSYLVANIA STATE UNIVERSITY'S PRELIMINARY OBJECTIONS TO PLAINTIFF'S COMPLAINT

Defendant, The Pennsylvania State University (hereinafter, the "University"), hereby submits this Memorandum of Law in support of its Preliminary Objections to Plaintiff's Complaint pursuant to this Court's February 1, 2013 Order. The University's Preliminary Objections should be sustained and Plaintiff's Complaint dismissed.

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2013 FEB 21 AM 8 4
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I. INTRODUCTION

Plaintiff, Michael J. McQueary ("Plaintiff") asserts three general claims against the University: (1) whistleblower; (2) defamation; and, (3) misrepresentation. See Complaint, attached to Preliminary Objections, at Exhibit "A." Four critical factual events lie at the heart of the Complaint: (1) Plaintiff witnessing misconduct by former Penn State Assistant Football Coach and Defensive Coordinator, Gerald A. Sandusky ("Sandusky") on February 9, 2001 in a University locker room; (2) Plaintiff's subsequent reporting of the incident to former Penn State Head Football Coach, Joseph Vincent Paterno ("Paterno"); (3) the alleged response to the incident by former University officials, including President Graham B. Spanier ("Spanier"), Senior Vice President Gary Schultz ("Schultz"), and Director of Intercollegiate Athletics Timothy Curley ("Curley");

and, (4) the end of Plaintiff's fixed-term employment with the University.[1] Plaintiff's claims fail for multiple reasons.

First and foremost, the defamation and misrepresentation claims are legally insufficient and should be dismissed with prejudice. The alleged statements that purportedly support the defamation claim neither reference Plaintiff nor support an innuendo against Plaintiff's reputation in any way. The statements lack defamatory meaning as a matter of law and the defamation claim should be dismissed with prejudice.

The misrepresentation claim also fails as a matter of law. Plaintiff supports this claim with an alleged statement made in 2001 by Curley and Schultz that appropriate action would be taken with regard to the incident. A mere breach of a future promise cannot form the basis of a misrepresentation claim as a matter of law. In any event, the decade-old alleged statement by Curley and Schultz is too remote to have proximately caused any of the damages claimed in this case.

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[1] Plaintiff alleges that the University "terminated" his employment. See Complaint, ¶¶ 44, 46. At the same time, Plaintiff attaches a document to the Complaint that establishes that Plaintiff was employed by the University under a "fixed-term contract" that was set to expire on June 30, 2012. See id., at Exhibit "C." The Court need not accept as true any averments in the pleading which conflict with exhibits that are properly attached to it. See Baravordeh v. Borough Council of Prospect Park, 699 A.2d 789, 791 (Pa. Super. 1997) (affirming dismissal of complaint on preliminary objections) (citing Jenkins v. County of Schuylkill, 658 A.2d 380, 383 (Pa. Super. 1995)).

In addition, to the extent the Complaint asserts a common law wrongful discharge cause of action under a "whistleblower" claim, the claim also fails as a matter of law. Claims for wrongful discharge extend to at-will employees who are not otherwise protected by contract or statute. The University employed Plaintiff under a "fixed-term contract" and Plaintiff theoretically is statutorily protected under the Pennsylvania Whistleblower Law, 43 Pa. C.S. § 1423. Under these circumstances, Plaintiff cannot assert a viable wrongful discharge claim.

Plaintiff alternatively fails to plead any claim with sufficient specificity. To this end, and based upon the facts averred within the Complaint, the University is uncertain whether Plaintiff is asserting a claim under the Pennsylvania Whistleblower Law or a common law cause of action for wrongful discharge. Similarly, the Complaint does not sufficiently plead a defamation claim because it contains no facts to demonstrate how verbal and written statements concerning Curley and Schultz apply in any way to Plaintiff. It is also unclear whether the Complaint asserts a negligent misrepresentation or intentional misrepresentation claim because the Complaint asserts facts that might relate to both types of claims but does not specify a legal theory. Under these circumstances, the Complaint does not provide the University sufficient notice of the claims that Plaintiff intends to prove at trial.

Finally, this Court should dismiss Plaintiff's request for punitive damages. The Complaint is devoid of any facts to show that the University acted with actual malice toward Plaintiff or any other facts to support imposition of punitive damages. For all the reasons addressed herein, the University's Preliminary Objections should be sustained.

II. PROCEDURAL HISTORY OF THE CASE

Plaintiff commenced this action on or about May 8, 2012, by filing a Praecipe to Issue Writ of Summons for a "Whistleblower" action against the University. On October 2, 2012, Plaintiff filed a three-count Complaint alleging Whistleblower (Count I), Defamation (Count II), and Misrepresentation (Count III) claims against the University (hereinafter "Complaint"). On December 20, 2012, this Court denied the University's Motion to Stay Proceedings and the University proceeded to file the instant Preliminary Objections. In accordance with the Court's February 1, 2013 Order, the University now files and serves this Memorandum of Law in Support of its Preliminary Objections.

III. STATEMENT OF FACTS

The relevant facts of this case are as follows.[2] In February 2001, Plaintiff worked as a Graduate Assistant Coach for the University's intercollegiate football

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[2] For purposes of its Preliminary Objections, the University accepts Plaintiff's factual allegations as true to the extent required by law. In re Estate of Bartol, 846 A.2d 209, 213 (Pa. Super. 2004). See also supra, fn. 1.

team. See Complaint, attached to Preliminary Objections, as Exhibit "A," ¶ 4. On or about February 9, 2001, Plaintiff alleges that he witnessed misconduct by Sandusky in the showers of a University locker room. Id., ¶ 10. The following day, Plaintiff reported the incident to Paterno. Id., ¶ 12.

Plaintiff subsequently met with Curley and Schultz about the incident. Id., ¶¶ 15-16. During that meeting, Plaintiff claims that Curley and Schultz told him that "they would see that [the reported incident] was properly investigated and that appropriate action would be taken." Id., ¶ 60. Plaintiff had no further involvement related to the incident until November 2010. See id, ¶¶ 20-22.

In November 2010, Plaintiff provided information to investigators from the Pennsylvania Attorney General's Office and the Pennsylvania State Police concerning the incident. Id., ¶ 22. On December 14, 2010, Plaintiff testified about the incident before a Statewide Investigating Grand Jury. Id., ¶ 23.

Following the filing of criminal charges against Curley and Schultz, and on November 5, 2011, Spanier issued the following statement on the University's web page, *Penn State Live*:

> The allegations about a former coach [(referring to Sandusky)] are troubling, and it is appropriate that they be investigated thoroughly. Protecting children requires the utmost vigilance.
>
> With regard to the other presentments, I wish to say that Tim Curley and Gary Schultz have my unconditional support. I have known and worked daily with Tim and

> Gary for more than 16 years. I have complete confidence in how they have handled the allegations about a former University employee.
>
> Tim Curley and Gary Schultz operate at the highest levels of honesty, integrity and compassion. I am confident the record will show that these charges are groundless and that they conducted themselves professionally and appropriately.

See Complaint, at Exhibit "B." According to the Complaint, on November 7, 2011, Spanier verbally reiterated his support for Curley and Schultz during a meeting with intercollegiate athletic staff members. Id., ¶ 29.

On November 10, 2011, the University's Administration directed Plaintiff, who had been promoted to Assistant Football Coach in 2004, to leave the State College, Pennsylvania, area for an upcoming weekend football game. See id., ¶¶ 20, 30-31. On November 13, 2011, the University placed Plaintiff on paid administrative leave and notified him that it was yet to be determined whether his fixed-term employment contract, which was set to end on June 30, 2012, would be renewed. Id., ¶ 33. See also id., at Exhibit "C." The University ultimately did not renew Plaintiff's employment contract. See id., ¶¶ 38, 40, 42-44. Plaintiff proceeded to file the instant Complaint.

IV. STATEMENT OF QUESTIONS INVOLVED

A. Whether the Defamation claim (Count II) is legally insufficient under Pa. R. Civ. P. 1028(a)(4) when the statements complained of do not reference Plaintiff and cannot be reasonably construed to mean that Plaintiff lied.

Suggested Response: Yes.

B. Whether the Misrepresentation claim (Count III) is legally insufficient under Pa. R. Civ. P. 1028(a)(4) when the alleged misrepresentation is a mere future promise and is too remote to have proximately caused any damages.

Suggested Response: Yes.

C. Whether the Preliminary Objection that Plaintiff's Complaint is pled with insufficient specificity should be sustained under Pa. R. Civ. P. 1028(a)(3) when:

1. the Whistleblower claim (Count I) avers facts that may relate to both a statutory whistleblower claim and a common law wrongful discharge claim[3] but the Complaint does not identify which legal theory Plaintiff intends to prove at trial;

2. the Defamation claim (Count II) neither asserts facts to support an innuendo that Plaintiff lied nor establishes a nexus between statements relating solely to Curley and Schultz and the harm allegedly suffered by Plaintiff; and

3. the Misrepresentation claim (Count III) asserts facts that may relate to both negligent misrepresentation and intentional misrepresentation claims but the Complaint does not identify which legal theory Plaintiff intends to prove at trial.

Suggested Response: Yes.

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[3] To the extent Plaintiff asserts a wrongful discharge claim, the claim fails because the University employed Plaintiff as a fixed-term contract employee. See infra, Section C.2.

D. Whether the Punitive Damage claims under Counts II and III should be dismissed with prejudice when the Complaint avers no facts to establish that the University acted with actual malice or reckless disregard in reference to this action.

Suggested Response: Yes.

V. ARGUMENT

A. The Defamation Claim (Count II) Fails Because Spanier's Statements Are Not Defamatory As A Matter Of Law.

Plaintiff's claim for defamation fails because the verbal and written statements upon which he bases his claim are neither defamatory *per se* nor defamatory by innuendo. Plaintiff's claim therefore fails two statutory elements required of it: the defamatory character of the communications and their application to Plaintiff. Under Pennsylvania law, it is the plaintiff's burden to establish a communication as defamatory. 42 Pa. C.S.A. § 8343(a); see also Thomas Merton Ctr. v. Rockwell Int'l Corp., 442 A.2d 213, 215 (Pa. 1981) (tasking plaintiff with burden of demonstrating defamatory character). Such a showing requires satisfaction of seven separate and independent elements:

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; and

7. Abuse of a conditionally privileged occasion.

42 Pa. C.S.A. § 8343(a). See also Garvey v. Dickinson Coll., 761 F. Supp. 1175, 1188 (M.D. Pa. 1991) ("Under Pennsylvania statutory law, a plaintiff must prove seven elements to establish a *prima facie* case of defamation."). Failure to plead adequately any of the above elements is a ground for dismissal. See Pa. R. Civ. P. 1028(a)(4).

Whether a statement is capable of defamatory meaning is a question of law to be decided by the court. See Baker v. Lafayette Coll., 532 A.2d 399, 402 (Pa. 1987). A statement may be deemed defamatory if it is "maliciously written or published" and tends "to blacken a person's reputation or expose him to public hatred, contempt, or ridicule, or to injure him in his business or profession." Id., at 402 (citation omitted). In assessing a statement, courts should consider "the effect the [statement] is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate." Id. (citation omitted). Mere embarrassment or annoyance is not

enough. Instead, a plaintiff must have suffered harm which has grievously fractured his standing in the community of a respectable society. Scott-Taylor, Inc. v. Stokes, 229 A.2d 733, 734 (Pa. 1967).

Pennsylvania law recognizes two types of libel: (1) "those which are libelous *per se*, that is, words which on their face and without the aid of extrinsic proof are recognized as injurious;" and, (2) "those which are libelous *per quod*, that is, words which are actionable" in light of "extrinsic facts showing circumstances under which they were said or the damages resulting to the libeled party therefrom." Duh v. Bethlehem's Globe Publ'g Co., 48 Pa. D.&.C.2d 274, 276 (Northampton County Cm. Pleas Ct. 1969). See also Tucker v. Fischbein, 2005 WL 67076, at 2 (E.D. Pa. 2005), attached hereto at Exhibit "A". Put another way, Pennsylvania courts generally recognize that a claim for defamation may exist where words are not themselves defamatory, but the context in which those words are used creates a defamatory implication, *i.e.*, defamation by innuendo.[4] See Duh. See also Bogash v. Elkins, 176 A.2d 677, 679 (Pa. 1962).

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[4] "In the law of defamation, an innuendo is the plaintiff's explanation of a statement's defamatory meaning when that meaning is not apparent from the statement's face." Black's Law Dictionary 360-61 (3d pocket ed. 2006).

1. Spanier's Statements Do Not Expressly Reference Or Relate To Plaintiff.

Plaintiff brings his defamation claim based upon two statements made by Spanier. The first statement was issued on *Penn State Live* on November 5, 2011 and provided:

> The allegations about a former coach [(referring to Sandusky)] are troubling, and it is appropriate that they be investigated thoroughly. Protecting children requires the utmost vigilance.
>
> With regard to the other presentments, I wish to say that Tim Curley and Gary Schultz have my unconditional support. I have known and worked daily with Tim and Gary for more than 16 years. I have complete confidence in how they have handled the allegations about a former University employee.
>
> Tim Curley and Gary Schultz operate at the highest levels of honesty, integrity, and compassion. I am confident the record will show that these charges are groundless and that they conducted themselves professionally and appropriately.

See Complaint, at Exhibit "B." The second statement was allegedly made two days later. In it, Plaintiff alleges that Spanier "reiterat[ed] his affirmation of the honesty and integrity of Athletics Director Curley and Senior Vice President Schultz . . . stating that the charges against them were groundless." Id., ¶ 29.

Neither statement makes any reference to Plaintiff or relates to Plaintiff in any way. Neither statement can, "on its face and without the aid of extrinsic proof," be "recognized as injurious" to Plaintiff. See Duh at 276. That is because unaided review of both statements makes clear that the only "effect [they are]

fairly calculated to produce" in their "audience" is an understanding of Spanier's: (1) commitment to vigilant protection of children; and, (2) faith in the character and job performance of Curley and Schultz. See Baker, 532 A.2d at 402. Because neither statement is facially defamatory, neither statement is defamatory *per se*. See id.

2. **Alternatively, Spanier's Statements Cannot Be Reasonably Construed to Defame Plaintiff by Innuendo.**

Seeming to recognize the futility of any claim for defamation *per se*, Plaintiff attempts to style his claim as one for defamation by innuendo. See Complaint, ¶¶ 50-51 (alleging that Spanier's statements "clearly suggest that the Plaintiff was lying"). But the statements of which Plaintiff complains are not defamatory under any fair—and reasonable—reading. As a result, they are no more defamatory by innuendo than they are *per se*.

The Pennsylvania Supreme Court has cabined the theory of defamation by innuendo to only those cases in which "the language used in the objectionable [statement] could fairly and reasonably be construed to have the meaning imputed in the innuendo." Sarkees v. Warner-West Corp., 37 A.2d 544, 546 (Pa. 1944) (emphasis added). "If the words are not susceptible of the meaning ascribed to them by the plaintiff and do not sustain the innuendo," then the statement "cannot be made [libelous] by an innuendo which puts an unfair and forced construction on

the interpretation" of the statement. Id. In those cases, "[i]t is the duty of the court" to ensure that the case is not sent to a jury. See id.

Of particular importance, an innuendo must be warranted, justified, and supported by the complained of communication. See Thomas Merton Ctr., at 216 (holding newspaper article that could "at most be read to mean that the [plaintiff] was the unknowing recipient of Soviet funds," not defamation by innuendo); see also Livingston v. Murray, 612 A.2d 443, 449 (Pa. Super. 1992) (holding university president's reference to plaintiff's termination in connection with "enthusiastic and favorable comments relating to" plaintiff's replacement did not "impl[y] that [plaintiff] lacks national respect" and "necessary qualifications to be . . . athletic director"); Cassell v. Mount Joy Mennonite Church, 1998 WL 1112617 (Lancaster County Cm. Pleas Ct. 1998) (holding church members' public expressions of opinion that plaintiff was manipulative and "unequally yoked" with a parishioner was not innuendo establishing that she "satanically manipulated all of the [congregation's] Mennonite ministers"), attached hereto at Exhibit "B". See also Baker, 532 A.2d at 399 (holding college's written performance report of professor, did not "portray [the plaintiff] in glowing terms," but "the substance of the report included frank opinion void of innuendo.").

In Plaintiff's view, Spanier's statement that Curley and Schultz would be absolved of the criminal charges brought against them for allegedly making

materially false statements to the Grand Jury necessarily "suggest[s] that Plaintiff was lying" and committing perjury in his own testimony. See Complaint, ¶¶ 50-51. This daunting analytical leap is illogical and insufficient as a matter of law. A reader must first take the statements concerning Curley and Schultz out of context. Cf. Merton, 442 A.2d. 213. An individual must then ascribe a meaning and usage of the words set forth in the statements which contravenes their ordinary meaning and usage; that is, ascribe the unreasonable meaning to the statements that Plaintiff lied to investigators and provided untruthful testimony before the Grand Jury. Cf. Sarkees, 37 A.2d at 546. On this basis alone, the defamation claim should be dismissed with prejudice.

In addition, Plaintiff alleges that Spanier published the statements "with actual malice and/or with reckless disregard for the truth . . . ." Complaint, ¶ 53 (emphasis added). Based upon this allegation, it appears as though Plaintiff is asserting a claim of defamation in a role as a public figure. See American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania, 923 A.2d 389, 401 (Pa. 2007) (to establish a viable defamation claim, public figures must establish more than a negligent publication; rather, a public figure must establish a malicious publication); Ertel v. Patriot-News Co., 674 A.2d 1038, 1041 (Pa. 1996) (if the plaintiff is a public figure, case law imposes the burden on the plaintiff to

prove both the falsity of the statement and actual malice as an element of his claim).

A public figure is "an individual who 'voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.'" American Future Systems, Inc., at 401. A private individual who uses purposeful activity to thrust himself into a matter of public interest may become a public figure relevant to the statements at issue. Id. at 400, 401. See also Joseph v. Scranton Times L.P., 959 A.2d at 335, 339 (Pa. Super. 2008). An individual becomes a limited purpose public figure because he "invites and merits 'attention and comment'" or seeks to influence the resolution of a controversy. Joseph, 959 A.2d at 339 (citations omitted). By voluntarily injecting himself into the public discussion, the individual is deemed to assume the risk that he will be labeled a public figure. Id. It is the function of the court to determine whether the plaintiff is a public or private figure, and the determination of whether a public figure acted with actual malice is a mixed question of law and fact. Id.; Lewis v. Philadelphia Newspapers, Inc., 833 A.2d 185, 192 (Pa. Super. 2003). The court, therefore, is required to independently decide whether the public figure's claim of defamation is supported by clear and convincing allegations of actual malice. Id.

Under the actual malice standard applicable to public figures, actual malice is not judged by an objective standard. Joseph, 959 A.2d at 338. To the contrary,:

> '[A]ctual malice' (sometimes shortened to 'malice') is a term of art that refers to a speaker's knowledge that his statement is false, or his reckless disregard as to its truth or falsity. Thus, it implies at a minimum that the speaker "'entertained serious doubts about the truth of his publication,' ... or acted with a 'high degree of awareness of ... probable falsity.'

American Future Systems, 923 A.2d at 395 n.6 (citation omitted).

Applying those standards here, no fair, cogent reading of the statements suggests that Spanier was making statements by innuendo about Plaintiff that he knew were false or with reckless disregard for their falsity. Instead, the only logical reading and inference is that Spanier was trying to support Schultz and Curley by helping to restore their reputation, shield them from premature public judgment, and protect their professional livelihoods. To tear any *scienter* from the statements at issue requires precisely the "unfair and forced construction on the interpretation of the publication[s]" the Pennsylvania Supreme Court has held cannot be a basis for defamation by innuendo. Sarkees, 37 A.2d at 546. Therefore, the defamation claim should be dismissed with prejudice for this reason as well.

B. Plaintiff's Claim For Misrepresentation (Count III) Fails As A Matter Of Law Because It Is Based On A Non-Actionable Future Promise Too Remote To Be A Proximate Cause Of Any Alleged Damages.

1. The Alleged Misrepresentation Is A Mere Future Promise.

Plaintiff's claim for misrepresentation should be dismissed because it is based upon a non-actionable future promise. To state a claim for intentional/fraudulent misrepresentation, a plaintiff must plead with particularity: (1) a misrepresentation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and, (6) the resulting injury was proximately caused by the reliance. Bortz v. Noon, 729 A.2d 555, 561 (Pa. 1999).

Similarly, to state a claim for negligent misrepresentation, a plaintiff must plead: (1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and, (4) which results in injury to a party acting in justifiable reliance on the misrepresentation. Moreover, like any action in negligence, there must be an existence of a duty owed by one party to another. Id., 729 A.2d at 560.

Without regard to whether Plaintiff claims intentional or negligent misrepresentation,[5] he fails to adequately plead the first element of both causes of action: an actionable misrepresentation. Under Pennsylvania law, mere breaches of a promise to do something in the future cannot serve as sufficient support for a misrepresentation claim. See Huddleston v Infertility Ctr. of Am., 700 A.2d 453, 462 (Pa. Super. 1997); New Hope Books, Inc. v. Data Vision, Prologix, Inc., 2003 WL 21672991, *6 (Pa. Cm. Pleas Ct. 2003), attached hereto at Exhibit "C". Yet, in this action, Plaintiff alleges that Curley and Schultz "intentionally misrepresented to [] Plaintiff that they thought this was a serious matter, that they would see that it was properly investigated, and that appropriate action would be taken." See Complaint, ¶ 60 (emphasis added). Even if accepted as true, Curley's and Schultz's alleged unfulfilled future promises cannot serve as sufficient support for Plaintiff's misrepresentation claim as a matter of law. See Huddleston; New Hope Books.[6] Accordingly, whether Plaintiff brings a claim for intentional or

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[5] It is unclear from Plaintiff's Complaint whether his claim for misrepresentation is one for intentional misrepresentation or, instead, negligent misrepresentation. While Plaintiff alleges Curley and Schultz "intentionally misrepresented to Plaintiff that they thought this was a serious matter," the Complaint also avers facts that might relate to a negligent misrepresentation claim. Accordingly, the University preliminarily objects to this claim for lack of specificity. See Section C.3 of this Memorandum, infra.

[6] To the extent Plaintiff alleges that Curley and Schultz indicated that "they thought this was a serious matter," see Complaint, ¶ 60 (emphasis added), the statement constitutes a mere opinion and, therefore, is not actionable as a matter of

negligent misrepresentation, he fails to plead an actionable misrepresentation—the first element of either cause of action.

2. The Alleged Misrepresentation Is Too Remote To Have Proximately Caused Plaintiff's Alleged Damages.

Even assuming Plaintiff's misrepresentation claim states an actionable misrepresentation claim (and it does not), the claim still fails because the alleged misrepresentation is too remote to have proximately caused any of the damages claimed by Plaintiff. On this alternative basis, Count III of the Complaint should be dismissed with prejudice.

Proximate cause is an essential element of both intentional misrepresentation and negligent misrepresentation claims. Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429, 445 (3d Cir. 2000); see also Bortz, 729 A.2d at 560-61. It does not exist where the causal chain of events resulting in the plaintiff's injury is so remote as to appear highly extraordinary that the conduct could have brought about the harm. Commerce Bank v. First Union Nat'l Bank, 911 A.2d 133, 141 (Pa. Super. 2006). There must be "more th[an] a 'but for' causation in fact; it requires that the conduct in issue be a 'substantial factor' in bringing about the harm." Id. A substantial factor analysis considers:

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law. See Landis v. Mellinger, 175 A. 745, 746 (Pa. Super. 1934) (holding assertion is not actionable "because the assertion is a matter of opinion."). See also Alexson Supply, Inc. v. Tongue Brooks & Co., 1998 WL 98988, at 7 (E.D. Pa. 1998), attached hereto at Exhibit "D".

> the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it; whether the conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; and lapse of time.

Id. Critically, proximate cause must "be determined by the judge and it must be established before the question of actual cause is put to the jury." Brown v. Phila. Coll. of Osteopathic Med., 760 A.2d 863 (Pa. Super. 2000).

Here, Plaintiff alleges that by relying on Curley's and Schultz's February 2001 statements, he has recently come to be "labeled and branded as being part of a cover-up"—albeit over 10 years after Curley and Schultz's alleged statements. See Complaint, ¶ 63. Plaintiff further alleges that his reliance on Curley's and Schultz's statements has recently caused him "distress, anxiety, humiliation and embarrassment." Id. But any alleged act of nonfeasance—or misfeasance—by Schultz and Curley in 2001 is fatally attenuated from the harm Plaintiff allegedly suffered in 2011.

The Complaint simply avers no facts between the February 2001 statements and the November 2010 alleged harm. See Id., ¶¶ 16-22. The nearly decade-old alleged statement by Curley and Schultz is simply too remote to have played a "substantial factor" in any alleged harm occurring to Plaintiff. Accordingly, the misrepresentation claim should be dismissed.

C. Plaintiff's Complaint Should Be Dismissed Because No Claim Is Pled With Sufficient Specificity.

Plaintiff has failed to plead with specificity as required by Pa. R. Civ. P. 1019(a), 1028(a)(2), and 1028(a)(3). Pennsylvania is a fact pleading state. Smith v. Brown, 423 A.2d 743, 745 (Pa. 1980). Fact pleading requires that the complaint apprise the defendant of the nature and extent of the plaintiff's claims so that the defendant has notice of what the plaintiff intends to prove at trial and may prepare to meet such proof with his own evidence. Krajsa v. Keypunch, Inc., 622 A.2d 355, 357 (Pa. Super. 1993). "Under the Pennsylvania system of fact pleading, the pleader must define the issues; every act or performance essential to that end must be set forth in the complaint." Santiago v. Pa. Nat'l Mut. Cas. Ins. Co., 613 A.2d 1235, 1238 (Pa. Super. 1992). Consistent with this fact pleading system, Rule 1019(a) requires that "[t]he material facts upon which a cause of action or defense is based shall be stated in a concise and summary form." Pa. R. Civ. P. 1019(a).

As the Superior Court has stated, Rule 1019 requires that "the complaint not only apprise the defendant of the claim being asserted, but . . . also summarize the essential facts to support the claim." Krajsa, 622 A.2d at 357. This rule exists in part to "enable parties to ascertain, by utilizing their own professional discretion, the claims and defenses that are asserted in the case." Id. When a complaint does not satisfy this rule, Rule 1028(a)(2) provides for preliminary objections for failure to conform to law or rule of the court. Pa. R. Civ. P. 1028(a)(2). Rule 1028(a)(3),

furthermore, provides for preliminary objections raising insufficient specificity of pleading. Pa. R. Civ. P. 1028(a)(3).

1. **Based Upon The Facts Pled Under Count I Of The Complaint, The University Does Not Have Sufficient Notice As To Whether Plaintiff Asserts A Statutory Whistleblower Claim Or Common Law Wrongful Discharge Claim.**

Plaintiff's Whistleblower claim (Count I) should be dismissed because it is fatally unspecific. Pennsylvania law provides both a statutory whistleblower cause of action and a discrete common law cause of action for wrongful discharge. Plaintiff's Whistleblower claim avers facts that might relate to both causes of action and fails to identify which of these two causes of action he intends to prove at trial.

The Pennsylvania Whistleblower Law provides that an employer may not generally take adverse action against an employee for that employee's reporting of wrongdoing:

> No employer may discharge, threaten or otherwise discriminate or retaliate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee or a person acting on behalf of the employee makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.

43 P.S. § 1423(a). The law further provides that an employer may also not generally take adverse action against an employee for reason that the

employee is requested to participate in a governmental investigation or proceeding:

> No employer may discharge, threaten, or otherwise discriminate or retaliate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee is requested by an appropriate authority to participate in an investigation, hearing or inquiry held by an appropriate authority or in a court action.

43 P.S. § 1423(b).

Pennsylvania law also recognizes a common law cause of action for wrongful discharge when an employer discharges an at-will employee in violation of a clear mandate of public policy. See Hunger v. Grand Cent. Sanitation, 670 A.2d 173, 175 (Pa. Super. 1996) (citing Geary v. United States Steel Corp., 317 A.2d 174 (Pa. 1974)). For example, if an at-will employee is discharged for performing a function that he is required to perform by law, an action for wrongful discharge on public policy grounds may be allowed. Id.

In this case, Plaintiff alleges that the University "terminated"[7] his employment because he cooperated with investigators for the Pennsylvania Attorney General, provided truthful testimony to the Statewide Investigating Grand

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[7] As previously addressed above, Plaintiff attaches a document to the Complaint that establishes that he was employed by the University under a "fixed-term contract" that was set to end on June 30, 2012. See Complaint, at Exhibit "C." See also supra, fn. 1.

Jury, and testified truthfully at the Preliminary Hearing for Curley and Schultz. And, while he avers certain facts related to the investigation of the Pennsylvania Attorney General and Grand Jury proceedings, the Complaint makes no references to a wrongful discharge claim. Plaintiff's allegations are insufficient to establish whether Plaintiff asserts a Whistleblower claim, pursuant to statute, or a wrongful discharge claim, pursuant to the common law. See generally, Complaint. The Complaint fails to apprise Defendant of the nature and extent of the claim for the University to prepare its defense or provide sufficient notice of what Plaintiff intends to prove at trial. See Krajsa. Therefore, because the Complaint is insufficiently pled in not identifying the very nature of the Whistleblower (or wrongful discharge) claim, Plaintiff's claim in Count I of the Complaint should be dismissed.

2. To The Extent The Complaint Asserts A Common Law Wrongful Discharge Claim, The Claim Fails For Legal Insufficiency.

To the extent Count I of the Complaint asserts a wrongful discharge claim, the claim fails as a matter of law because Plaintiff cannot viably assert a wrongful discharge claim as a fixed-term contract employee. To the extent a wrongful discharge claim is asserted, the claim should be dismissed with prejudice.

As previously addressed, a wrongful discharge claim may exist when an employer discharges an at-will employee in violation of a clear mandate of public

policy. See Hunger, at 175. If an at-will employee is discharged for performing a function that he is required to perform by law, an action for wrongful discharge on public policy grounds may be allowed. Id. It is well-settled that actions for wrongful discharge do not extend "to employees who are otherwise protected by contract or statute." Phillips v. Babcock & Wilcox, 503 A.2d 36, 38 (Pa. Super. 1986). Instead, "the tort of wrongful discharge is available only when the employment relationship is at-will." Ross v. Montour R.R. Co., 516 A.2d 29, 32 (Pa. Super. 1986).

Here, a document attached to the Complaint establishes that Plaintiff was employed by the University under a "fixed-term contract." See Complaint, at Exhibit "C." See also supra, fn. 1. Under the circumstances of this case, Plaintiff has alleged that he is theoretically protected by both statute (Pennsylvania Whistleblower Law) and contract (the fixed-term contract). See Phillips. Plaintiff therefore falls outside the class protected by the wrongful discharge cause of action and lacks standing to bring that claim in this case. Accordingly, to the extent Plaintiff asserts a wrongful discharge claim under Count I of the Complaint, the claim should be dismissed with prejudice.

3. **The Defamation Claim (Count II) Alternatively Fails For Lack of Specificity Because The Complaint Asserts No Facts To Support An Innuendo That Plaintiff Lied Or That There is A Nexus Between Spanier's Statements and Plaintiff's Alleged Harm.**

Even if Plaintiff asserts a legally viable defamation claim, see Section A, supra, the claim alternatively fails because Plaintiff does not plead an explanation defining the defamatory meaning which he attaches to the statements. Plaintiff also does not explain how the words used in the statements have come to have a defamatory meaning or how the statements relate to him in any way.

When a plaintiff asserts a defamation by innuendo cause of action, he must adequately plead an explanation as to define the defamatory meaning which the plaintiff attaches to the words. He must then show how the words have come to have the allegedly defamatory meaning and how the words relate to him. See Duh, 48 Pa. D.&.C.2d at 277; see also Mumma v. Pomeroy's, Inc., 38 Pa. D.&C.2d 594, 598 (Dauphin County Cm. Pleas 1965) ("[t]he purpose of an innuendo is to define the defamatory meaning which plaintiff attaches to the words in the publication to show how they come to have that meaning and how they relate to plaintiff").

a. Defamatory Meaning

In this case, Plaintiff attempts to establish an innuendo in Paragraphs 50 and 51 of the Complaint. There, he alleges that Spanier's November 5 and 7, 2011, oral and written statements "clearly suggest that the Plaintiff had lied to law

enforcement officials and committed perjury to the Statewide Investigating Grand Jury when he stated and testified that he had reported the sexual misconduct he had witnessed on February 9, 2001 . . . ." Complaint, ¶ 51. This assertion is Plaintiff's only attempt to show an allegedly defamatory character of the statements at issue and link the statement to himself.

Plaintiff's attempt to define this innuendo fails to identify any material facts supporting an inference that Spanier's statements "clearly suggest" Plaintiff lied. He offers no explanation, grounded in fact, as to how and why this "suggestion" about his conduct flows from Spanier's comments. He only alleges that the Statewide Investigating Grand Jury found that Curley and Schultz made "materially false statement[s] to the Grand Jury concerning the Plaintiff's report of sexual misconduct to them." Id., ¶ 26. Without a factual basis to support the innuendo to Plaintiff, the words comprising the statements at issue are benign, not defamatory.

b. Nexus to Plaintiff

As drafted, the Complaint also does not aver any facts to establish a nexus between Plaintiff's allegedly truthful testimony vis-á-vis the allegedly untruthful testimony of Schultz and Curley. Instead, Plaintiff's pleading is silent as to the relationship between the testimony of Schultz and Curley and Plaintiff's own testimony. Absent factual support, Plaintiff's conclusion that the statements relate

to him can only be achieved through speculation and unreasonable inferences. Accordingly, because Plaintiff fails to establish both the defamatory nature of the statements as well as their connection to him, his claim for defamation by innuendo should be dismissed.

4. **Based Upon the Facts Pled Under Count III of the Complaint, The University Does Not Have Sufficient Notice As To Whether Plaintiff Asserts a Negligent Misrepresentation or Intentional Misrepresentation Claim.**

Plaintiff's claim for Misrepresentation (Count III) avers facts that may relate to both negligent and intentional misrepresentation claims and fails to identify the type of misrepresentation for which Plaintiff seeks relief. As a result, the Complaint does not fairly apprise the University of the nature and extent of Plaintiff's claim(s) so that the University can adequately prepare its defenses; nor does it give notice what Plaintiff intends to prove at trial. Accordingly, Plaintiff's misrepresentation claim should be dismissed for insufficient specificity.

Pennsylvania recognizes both intentional and negligent misrepresentation causes of action. See Bortz, 729 A.2d at 560. As explained in Section B.1, intentional misrepresentation and negligent misrepresentation are different causes of action comprised of different elements. Specifically, negligent misrepresentation differs from intentional misrepresentation in that to commit the former, the speaker need not know his or her words are untrue, but must have

failed to make reasonable investigation of the truth of those words. See Restatement (Second) of Torts § 552.

Here, Plaintiff alleges that Curley and Schultz "intentionally misrepresented to the Plaintiff that they thought this was a serious matter, that they would see that it was properly investigated and that appropriate action would be taken." See Complaint, ¶ 60. He further alleges that Curley and Schultz "intended that their misrepresentation induce the Plaintiff not to report the matter to any other law enforcement authority." Id., ¶ 61.

Based upon these allegations, it appears that Plaintiff is asserting a claim for intentional misrepresentation; however, it remains unclear whether Plaintiff is instead asserting a claim for negligent misrepresentation due to (1) the generic titling of Plaintiff's "Misrepresentation" claim and (2) the totality of allegations contained in the Complaint. See generally, Complaint. Under these circumstances, the University cannot determine whether it must defend against a claim for intentional misrepresentation, negligent misrepresentation, or both.

Accordingly, Plaintiff's misrepresentation claim should be dismissed for failure to give the University fair notice of the claim against it. See Coronado Condominium Assoc. v. Ironstone Coronado L.P., 2005 WL 3036541 (Cm. Pleas Ct. 2005) (dismissing misrepresentation claim for, among other things, failing to specify whether it was negligent or fraudulent misrepresentation), attached hereto

at Exhibit "E"; see also Yakubov v. GEICO Gen. Ins. Co., 2011 WL 5075080 (E.D. Pa. Oct. 24, 2011) (dismissing plaintiff's misrepresentation claim for, among other things, "failure to state a claim because Plaintiff has failed to plead misrepresentation" in not "specif[ying] whether the alleged misrepresentation was intentional/fraudulent, negligent, or innocent"), attached hereto at Exhibit "F".

D. Plaintiff's Claim For Punitive Damages Should Be Dismissed Because The Complaint Does Not Aver A Factual Basis to Establish That The University Acted With Actual Malice or Reckless Disregard.

Plaintiff's claims for punitive damages under Counts II and III of the Complaint should be dismissed with prejudice because the Complaint makes no reference to any facts to show actual malice or reckless disregard to the rights of others. Under Pennsylvania law, punitive damages may not be assessed against a defendant whose conduct constitutes ordinary negligence, such as inadvertence, mistake and errors of judgment. See Smith, 423 A.2d at 745. In seeking punitive damages, a plaintiff is obligated to plead facts amounting to outrageous conduct—*i.e.,* reckless indifference to the interests of others or evil motive on the part of defendant—to support such a claim. Id.

Reckless indifference to the rights of others, sometimes referred to as "wanton misconduct," has been defined to mean that "the actor has intentionally done an act of unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it

highly probable that harm would follow." Gaul v. Consol. Rail Corp., 556 A.2d 892, 898 (Pa. Super. 1989). See also Lewis v. Miller, 543 A.2d 590, 592 (Pa. Super. 1988) (noting that wanton misconduct, as required for imposition of punitive damages, requires state of mind in which tortfeasor realizes danger to plaintiff and disregards it to degree that "there is at least a willingness to inflict injury, a conscious indifference to the perpetration of a wrong."). Importantly, while recklessness may be averred generally, this standard does not dispense with Rule 1019's requirement that material facts constituting the alleged conduct also be pled. Kercsmar v. Pen Argyle Sch. Dist., 1 Pa. D.&C.3d 1, 4 (Pa. Com. Pl. 1976) (striking allegations of "willful and wanton" conduct because, although permissibly pled generally, no material facts were pled supporting the allegations) (citation omitted).

In this case, Plaintiff bases his request for punitive damages in Count II of the Complaint on an allegation based upon Plaintiff's belief that Spanier acted with actual malice and/or reckless disregard for the truth when he published a written statement on *Penn State Live* to assist in the exoneration of Curley and Schultz and to make Plaintiff a "scapegoat." See Complaint at ¶ 53. But, in direct violation of Pa. R. Civ. P. 1019's directive that a complaint state the material facts constituting the alleged conduct, Plaintiff avers no facts to support his allegation of Spanier's intent.

In addition, Count III of the Complaint is even less persuasive than Count II in this regard. In support of his request for punitive damages in this claim, Plaintiff makes no reference whatsoever to actual malice or reckless disregard to the rights of others, much less states the material facts comprising such conduct. See generally Complaint.

In short, Plaintiff's Complaint is devoid of sufficient facts to support a claim that the University acted with actual malice or in reckless indifference to the rights of others. It is equally devoid of sufficient facts to support a claim that Curley or Schultz acted with this mindset when they met with Plaintiff in February 2001. Plaintiff cannot, as a matter of law, sustain a cause of action against the University for punitive damages. Accordingly, the claims for punitive damages should be dismissed and any and all claims and/or allegations of recklessness, wanton and outrageous conduct, and reckless indifference to the rights of Plaintiff should be stricken from the Complaint.

VI. CONCLUSION

For all the foregoing reasons, the University respectfully requests that the Court sustain its Preliminary Objections and dismiss the Complaint.

Respectfully submitted,

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Dated: February 20, 2013

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Not Reported in F.Supp.2d, 2005 WL 67076 (E.D.Pa.), 33 Media L. Rep. 1193
(Cite as: 2005 WL 67076 (E.D.Pa.))

H

United States District Court,
E.D. Pennsylvania.
C. Delores TUCKER and William Tucker, Plaintiffs,
v.
Richard FISCHBEIN, Defendant.

No. Civ.A.97-6150.
Jan. 11, 2005.

Richard C. Angino, Angino & Rovner, P.C., Harrisburg, PA, for Plaintiffs.

Donald N. David, Dreyer and Traub, Beth W. Fischbein, Bruce N. Lederman, Kenneth G. Schwarz, Fischbein, Badillo, Wagner and Harding, New York, NY, Stephen J. Kastenberg, Alan J. Davis, Ballard Spahr Andrews & Ingersoll LLP, Daniel Segal, Edmond J. Ghisu, Hangley, Aronchick, Segal and Pudlin, Philadelphia, PA, Kathleen L. Jennings, Kevin T. Baine, Williams and Connolly, Washington, DC, for Defendants.

MEMORANDUM

BUCKWALTER, J.

***1** Presently before the Court is Defendant Richard Fischbein's Renewed Motion for Summary Judgment (Def. Renewed Mot. Summ. J.), Plaintiffs C. Delores Tucker's and William Tucker's Response thereto (collectively "Plaintiffs"), and Defendant's Reply to Plaintiffs' Response. For the reasons set forth below, Defendant's motion is granted.[FN1]

> FN1. Also currently pending before this Court is Defendant's Renewed Motion to Disqualify Richard C. Angino as Trial Counsel. Based on this Court's grant of summary judgment, the motion to disqualify Richard C. Angino is moot and, thus, this Court declines to rule on its merits.

I. BACKGROUND

The current cause of action is the third in a series of cases involving these parties. This is the second time the current case is before this Court. Plaintiff C. DeLores Tucker has been an activist against gangsta rap music since approximately 1993. In 1995, Interscope Records, Inc., brought a suit in the Central District of California against Mrs. Tucker alleging she induced a breach of contract between Death Row Records, Inc., and Interscope ("Tucker I"). Tucker I was voluntarily withdrawn by Interscope and Death Row Records.

In 1996, rap artist Tupac Shakur recorded and distributed songs in which he referred to Mrs. Tucker in an allegedly defamatory manner. In response, Plaintiffs filed a cause of action against Death Row Records, Inc., EMI Music, Estate of Tupac Shakur, Ted Field, Richard Fischbein, Interscope Records, Interscope, Inc., James Iovine, David Kenner, MCA, Inc., MTS, Inc., Priority Records, Inc., Seagram, Co., Afeni Shakur, Thorn EMI, and Time Warner (97 CV 4717 (E.D.Pa.))("Tucker II").

On October 1, 1997, Plaintiffs filed the instant cause of action ("Tucker III") claiming defamation against Time, Inc., Time Magazine reporter Belinda Luscombe, Newsweek Magazine, Newsweek Magazine reporter Johnnie Roberts, and Mr. Fischbein as a result of statements made by Defendant Fischbein regarding Tucker II, which were reported in Time and Newsweek magazines. On October 19, 1998, the defendants filed separate Motions for Summary Judgment. On February 9, 1999, this Court granted summary judgment in favor of all defendants. Relevant to the current matter, this Court granted summary judgment with regard to Defendant Fischbein holding that the statements were not defamatory as a matter of law. (*Tucker v. Fischbein, et. al.*, Civ.A.97-6150, 1999 WL 124355 (E.D.Pa. Feb.9, 1999)).

Plaintiffs took an appeal of this Court's grant of summary judgment to the United States Court of Appeals, Third Circuit. The Third Circuit affirmed

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this Court's grant of summary judgment as to Time, Inc., Belinda Luscombe, Newsweek Magazine, and Johnnie Roberts, but reversed in part as to Defendant Fischbein. *Tucker, et al. v. Fischbein, et. al.*, 237 F.3d 275, 288-89 (3d Cir.2001)("Tucker III Appeal"). The Third Circuit reversed the grant of summary judgment with regard to the statements made by Defendant Fischbein holding that the statements were, as a matter of law, capable of a defamatory meaning. *Id.* at 282-83. The Third Circuit further held that an issue of fact existed regarding whether Defendant Fischbein acted with actual malice due to their determination that a reasonable jury could find by clear and convincing evidence that Defendant Fischbein had actual knowledge that the statements made were false. *Id.* at 284-85.

*2 The case currently before this Court, as remanded by the Third Circuit, consists solely of a claim of defamation against Defendant Fischbein. Defendant filed the instant Renewed Motion for Summary Judgment Based on the Absence of Special Damages on October 15, 2004.

II. STANDARD OF REVIEW

A motion for summary judgment will be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Since a grant of summary judgment will deny a party its chance in court, all inferences must be drawn in the light most favorable to the party opposing the motion. *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962).

The ultimate question in determining whether a motion for summary judgment should be granted is "whether reasonable minds may differ as to the verdict." *Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120, 129 (3d Cir.1998). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248 .

III. DISCUSSION

Under Pennsylvania law, in a cause of action claiming defamation, the Plaintiff must establish "(1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) an understanding by the reader or listener of its defamatory meaning; (5) an understanding by the reader of listener of an intent by the defendant that the statement refers to the plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of a conditionally privileged position." *Pennoyer v. Marriott Hotel Services, Inc.*, 324 F.Supp.2d 614, 618 (E.D.Pa.2004) (citing *Celemente v. Espinosa*, 749 F.Supp. 672, 677 (E.D.Pa.1990)(citing 42 Pa.C.S. § 8343(a)(1988))).

Claims based on oral defamation are referred to as slander. Slander actions are divided into two classifications, slander *per quod* and slander *per se.* *Agriss v. Roadway Express, Inc.*, 334 Pa.Super. 295, 483 A.2d 456, 469-70 (Pa.Super.1984). There are four categories of slander *per se:* "words that impute (1) criminal offense, (2) loathsome disease, (3) business misconduct, or (4) serious sexual misconduct." *Pennoyer*, 324 F.Supp.2d at 618 (citations omitted). All other claims based on defamatory words are classified as slander *per quod. Id.*

As cited above, one of the elements of a defamation claim is a showing of "special harm" resulting from the publication of the alleged defamatory statement. *Id.* However, the Pennsylvania courts have carved out an exception when the defamatory statement constitutes slander *per se.* In a slander *per se* claim, the plaintiff may succeed in their claim without proof of special harm. *Id.* Both parties in the current matter before this Court concede that the oral statement in this matter is not slander *per se;* as such, Plaintiff is required to plead special harm resulting from the publication of the

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alleged defamatory statement.

*3 The courts have differentiated between "actual harm" and "special harm;" with "actual harm being a threshold hold requirement for all defamation causes of action and "special harm" being an additional requirement in causes of action based on slander *per quod.* "Actual harm" is not limited to a financial loss; rather, "the more customary types of actual harm inflicted by a defamatory falsehood include impairment of reputation and standing in the community, personal humiliation and mental anguish and suffering." *Agriss,* 483 A.2d at 467. In the alternative, "[s]pecial harm means harm of an economic or pecuniary nature; mere loss of reputation is not sufficient to prove special harm." *Bethel v. McAllister Bros., Inc.,* No. Civ.A.91-2032, 1993 U.S. Dist. LEXIS 4243, *25-26 (E.D.Pa. March 30, 1993)(citing Restatement (Second) Torts § 575, Comment b; *Agriss v. Roadway Express, Inc.,* 334 Pa.Super. 295, 483 A.2d 456 (Pa.Super.1984)); see also *Sprague v. Am. Bar Ass'n,* 276 F.Supp.2d 365, 368-69 (E.D.Pa.2003).

In the current matter before this Court, Plaintiffs have adequately pled "actual harm." However, a review of all of the evidence, with all inferences drawn in the light most favorable to Plaintiffs, reveals that Plaintiffs have failed to allege any "special harm" as a result of the publication of Defendant's alleged defamatory statement.

In their Complaint, Plaintiffs' assert that the actions of Defendant caused "mental pain and suffering, humiliation, and damage to their reputations...." (Compl.¶ 28.) In both Plaintiffs' answers to Defendant's first set of interrogatories and Plaintiffs' supplemental response to Defendant's interrogatories, Plaintiffs detail their suffering and humiliation but fail to claim any economic or pecuniary harm. (Def. Renewed Mot. Summ. J., Ex.4 & 5.) Furthermore, when questioned during a deposition Defendant Mr. Tucker agreed that he was only complaining about emotional distress and not seeking the recovery of any sum of money lost in business. (Def. Renewed Mot. Summ. J., Ex. 7.)

Plaintiffs' memorandum in opposition to the instant motion likewise fails to provide the Court with evidence of any "special harm." Plaintiffs' memorandum provides excerpts from their depositions discussing the emotional distress experienced as a result of the publication of the alleged defamatory statement but fails to set forth an economic or pecuniary harm. Furthermore, the only case law cited in Plaintiffs' memorandum is that defining "actual harm," which, as discussed above, is a distinct and separate necessary element from that of "special harm" in a defamation cause of action based on slander *per quod.*

Accordingly, this Court holds that Defendant is entitled to judgment as a matter of law due to Plaintiffs' failure to set forth any evidence showing "special harm" as a result of the publication of the alleged defamatory statement, a necessary element of a defamation cause of action based on slander *per quod.*

*4 An appropriate order follows.

ORDER

AND NOW, this 11th day of January, 2005, upon consideration of Defendant Richard Fischbein's Renewed Motion for Summary Judgment (Docket No. 100), Plaintiffs' Memorandum of Law in Opposition to Defendant's Renewed Motion for Summary Judgment (Docket No. 102), and Defendant's Reply Memorandum of Law in Further Support of his Renewed Motion for Summary Judgment (Docket No. 104), it is hereby ORDERED that Defendant's Renewed Motion for Summary Judgment is GRANTED.

Judgment is entered in favor of Defendant Richard Fischbein and against Plaintiffs C. Delores Tucker and William Tucker. This case is CLOSED.

E.D.Pa.,2005.
Tucker v. Fischbein
Not Reported in F.Supp.2d, 2005 WL 67076

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(E.D.Pa.), 33 Media L. Rep. 1193

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1998 WL 1112617, 40 Pa. D. & C.4th 470
(Cite as: 1998 WL 1112617 (Pa.Com.Pl.), 40 Pa. D. & C.4th 470)

H

Court of Common Pleas of Pennsylvania, Lancaster County.
Cassell
v.
Mount Joy Mennonite Church

No. 3824 of 1992.
April 9, 1998.

*471 *Maryfrances Cassell,* pro se, plaintiff.

Vivian B. Narehood, for defendants.

ALLISON, J.

This matter is before the court on defendants' motion for summary judgment. for the reasons set forth below, defendants' motion is granted.

The facts giving rise to this cause of action are as follows: plaintiff Maryfrances Cassell, a member of the Christian Science faith, moved to the Mount Joy area in 1948. At that time, plaintiff was a professional musician; she later became a public accountant and a real estate broker. In approximately 1962, plaintiff met defendants Florence Miller and Martha Ebersole, who invited plaintiff to attend a service at the Mount Joy Mennonite Church. While plaintiff accompanied these women to the church in order to learn about their religion, she remained a member of the Christian Science faith. Defendant Miller introduced plaintiff to Arlene Miller, her sister, who was a piano teacher. Eventually, Ms. Miller and plaintiff decided to establish a studio where they could collaborate as piano teacher and artistic director, respectively. However, Ms. Miller's family discouraged this intended collaboration, and hostility developed. Despite the family's resistance, the ministry team at the church persuaded plaintiff to resume the plan of establishing a professional relationship with Ms. Miller in approximately 1964. This decision resulted in a significant misunderstanding between the ministry team and the Miller family. Throughout the duration of this professional relationship, a hostile faction in *472 the church was encouraging Ms. Miller to disband the professional relationship with plaintiff and sought to cut off communication between them. The relationship ultimately ended in 1980, and numerous lawsuits followed.

Defendant Ervin Stutzman became minister of the church in 1983. On August 18, 1991, the church held a regular Sunday morning service. The service included a scripture reading and a sermon delivered by defendant Stutzman, which dealt with how any person, and particularly church leaders, may be drawn into patterns of misunderstanding or wrongdoing through the pull of temptation and human weakness. Plaintiff was not mentioned or referenced in the scripture and sermon portions of the service. Following the sermon, there was a time of open sharing. Defendant Stutzman referenced the past relationship between plaintiff and Ms. Miller, acknowledged that the church ministry team betrayed the Miller family and others, and stated that they had tried to make right any wrongs that were committed against plaintiff, who had also felt betrayed. When the congregation was given an opportunity to respond, Ms. Miller, defendant Robert Garber and defendant Florence Miller spoke on this topic.

Plaintiff filed a praecipe for writ of summons on August 17, 1992 against the above-named defendants. On October 10, 1995, plaintiff filed a complaint which alleged that defendants slandered her during the August 18, 1991 church service. Plaintiff then filed an amended complaint on December 6, 1996, which added a breach of contract claim. Defendants filed the instant motion for summary judgment on August 8, 1997. The court heard oral argument on the motion on January 27, 1998.

The standard used in reviewing a motion for summary judgment is well established:

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*473 "After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

"(1) 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, or

"(2) 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." Pa.R.C.P. 1035.2 (1996).

Furthermore, summary judgment is proper "where the pleadings, depositions, answers to interrogatories, admissions of record and affidavits on file support the court's conclusion no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Goldberg v. Delta Tau Delta,* 418 Pa. Super. 207, 211, 613 A.2d 1250, 1252 (1992). The record is reviewed 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. *Ertel v. Patriot-News Co.,* 544 Pa. 93, 98-99, 674 A.2d 1038, 1041 (1996) (citing *Pennsylvania State University v. County of Centre,* 532 Pa. 142, 144-45, 615 A.2d 303, 304 (1992)).

Plaintiff's amended complaint contains counts sounding in defamation and in breach of contract. In the defamation count, plaintiff alleges that defendant Stutzman, as an agent for the church and as the representative of the other defendants, engaged in a "prearranged combined utterance of untrue and defamatory *474 statements . . . knowing the same to be false, to the general public." Amended complaint, at paragraph 11. In an action for defamation, plaintiff has the burden of proving: (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; and (7) abuse of a conditionally privileged occasion. 42 Pa.C.S. §8343(a) (West 1982). Whether challenged communications are capable of a defamatory meaning is a question of law which the court must determine in the first instance. *Thomas Merton Center v. Rockwell International Corp.,* 497 Pa. 460, 464, 442 A.2d 213, 215 (1981). If the court determines that the challenged communication is not capable of a defamatory meaning, there is no basis on which to proceed to trial. *Id.* at 464-65, 442 A.2d at 215-16 (citing Restatement (Second) of Torts §614(1) (1977)).

Under Pennsylvania law, a communication is defamatory if it tends to deter third persons from associating with the subject of the communication or to harm the subject's reputation by lowering the subject in the estimation of the community. *Parano v. O'Connor,* 433 Pa. Super. 570, 574, 641 A.2d 607, 609 (1994). Injury to reputation is judged by the reaction of other persons in the community; it is not judged by the party's self-estimation. *Rybas v. Wapner,* 311 Pa. Super. 50, 56, 457 A.2d 108, 110 (1983). Rather, the court must consider "the effect the [communication] is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate." *Dougherty v. Boyertown Times,* 377 Pa. Super. 462, 472, 547 A.2d 778, 783 (1988).

*475 In the instant case, plaintiff alleges that the essence of the statements made during the August 18, 1991 church service was that she had satanically manipulated all of the Mennonite ministers for the evil purpose of entrapping Ms. Miller in order to abuse her mentally, physically and financially. Amended complaint, at paragraph 13. Specifically, plaintiff alleges that the following defamatory statements were made: Christian Science is of the devil; plaintiff, a Christian Scientist, is there-

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fore dangerous; plaintiff has sinister and ulterior motives and is not to be trusted; plaintiff is "unequally yoked," the evil one to be "shunned" and ostracized; plaintiff had wrongly influenced Henry F. Garber to act unilaterally to allow her to lead Ms. Miller astray; plaintiff had satanically manipulated all of the Mennonite officials for an evil purpose; plaintiff had satanically manipulated and entrapped Ms. Miller; and plaintiff had caused Ms. Miller to sin. *Id.* at paragraph 15.[FN1]

> FN1. In addition, plaintiff alleges that defendant Stutzman made defamatory statements about her in a May 7, 1992 letter to Solomon Yoder and that defendant Sherer made defamatory statements about her in an April 13, 1992 letter to Solomon Yoder. The court has reviewed the letters and finds that they are not capable of defamatory meaning.

The court reviewed an official transcript of the church service which was prepared from an audiotape of the service.[FN2] This review revealed that only statements regarding an "unequal yoke" and an apparent "manipulation" were made. First, defendant Stutzman stated: *476 "Now, we now understand that these two women [plaintiff and Ms. Miller] were unequally yoked together. Christian Science beliefs and our Mennonite Christian beliefs diverge at some significant points." Transcript of service, page 13. The court finds that the average church member in attendance would not have found that this statement was made to disparage plaintiff; rather, as defendant Stutzman went on to explain, these two religions are simply grounded on different theologies. Second, the only mention of manipulation is Ms. Miller's statement that: "[M]y determination to have my own way, the anxiety of my family and what appears to me as a manipulation of many by Maryfrances was a potent breeding ground for the unGodly confusion that was present." Transcript of service, page 15. At most, this statement is an opinion given by Ms. Miller, who is not a defendant in the instant case. The court finds that neither of these statements would tend to harm plaintiff's reputation by lowering her in the estimation of the community. See *Parano,* 433 Pa. Super. at 574, 641 A.2d at 609. Thus, neither of these statements is capable of a defamatory meaning.

> FN2. Because of the length of the church service, the text of the service was not made part of this opinion. Furthermore, pursuant to Judge Allison's order of July 11, 1997, plaintiff was precluded from denying that the transcript attached to defendants' answer and new matter constituted the entirety of all relevant communication at the church service at issue.

The heart of plaintiff's claim for defamation relies upon a theory of defamation by innuendo. The Supreme Court has stated: "[t]he purpose of an innuendo . . . is to define the defamatory meaning which the plaintiff attaches to the words; to show how they come to have that meaning and how they relate to the plaintiff[.] But it cannot be used to introduce new matter, or to enlarge the natural meaning of the words, and thereby give to the language a construction which it will not bear[.] . . . If the words are not susceptible of the meaning ascribed to them by the plaintiff and do not sustain the innuendo, the case should not be sent to a jury . . . ." *477*Livingston v. Murray,* 417 Pa. Super. 202, 214-15, 612 A.2d 443, 449 (1992) (quoting *Sarkees v. Warner-West Corp.,* 349 Pa. 365, 368-69, 37 A.2d 544, 546 (1944)).

Alleged defamatory statements cannot be rendered slanderous "by an innuendo which puts an unfair and forced construction on the interpretation" of the communication. *Thomas Merton Center,* 497 Pa. at 467, 442 A.2d at 217 (quoting *Sarkees,* 349 Pa. at 369, 37 A.2d at 546). Rather, an innuendo must be warranted, justified and supported by the communication. *Id.* at 467 (citing *Bogash v. Elkins,* 405 Pa. 437, 176 A.2d 677 (1962)).

During the August 18, 1991 service, defendant Stutzman read the account of the serpent in the

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third chapter of Genesis and the story of the prodigal son. Plaintiff argues that there is a strong inference that defendants were actually calling her the "serpent," as there were references to her "manipulating" people and to the ministry team "unwittingly" taking certain actions. Plaintiff claims that the Mennonite congregation was aware of the defamatory meaning of the scriptures, sermon and responses, and that the name "Maryfrances" is so ingrained in the Mennonite vocabulary as the "evil one" that the very mention of her name in this community has become inflammatory. Finally, plaintiff asserts that the scripture and sermon were selected to apply to Ms. Miller as the "prodigal" returning from the evil influence of plaintiff. While this court's critical determination is the effect of the communication in the mind of the average member of the community among whom it is intended to circulate, plaintiff has failed to offer an affidavit or the deposition testimony of any person who was in attendance at the August 18, 1991 church service. Plaintiff's interpretation is supported only by her written analysis of the service and her own affidavit.

***478** Defendants' construction of the service is that Defendant Stutzman read the biblical accounts of the serpent and of the prodigal son. He then discussed how any person, and particularly church leaders, may be drawn into patterns of misunderstanding and wrongdoing through the pull of temptation and human weakness. After the sermon, defendant Stutzman shared that he and others in the ministry team had misunderstood the concerns of the Miller family concerning Ms. Miller's relationship with the plaintiff, and had at times betrayed the Miller family. Defendant Stutzman recognized that part of the misunderstanding resulted from differences in plaintiff's Christian Science beliefs and Ms. Miller's Mennonite Christian beliefs. Defendant Stutzman further acknowledged that plaintiff had also felt betrayed at times. He and the church leadership took the blame for the problems resulting from the multiple litigation and apologized to the congregation for becoming involved in the relationship between plaintiff and Ms. Miller. Defendant Stutzman then invited congregation members to share. Defendant Robert Garber asked for forgiveness from the Miller family on behalf of his deceased father. Defendant Florence Miller thanked God for being with her family over the past years of problems and hardships.

Reading the transcript of the church service on the whole, the court finds that plaintiff's interpretation is not justified by the communications at the church service.[FN3] Defendant Stutzman stated in his affidavit that the sermon was intended for teaching and counsel for daily living, and that the average church member in attendance ***479** would have understood that the application of the sermon dealt with the ministers and the Miller family, and not with plaintiff. While it is clear that plaintiff was mentioned during the service, reading the transcript in its entirety reveals that the intent was not to lower plaintiff in the estimation of the community. Plaintiff's contention that defendants actually were referring to her when discussing the "serpent," for instance, simply enlarges the meaning beyond what it can bear. These statements are not capable of defamatory meaning by innuendo, even by a Mennonite congregation who was aware of the prior professional relationship between Ms. Miller and plaintiff and of the prior litigation initiated by plaintiff. Therefore, plaintiff cannot sustain a cause of action for defamation.[FN4]

> FN3. Plaintiff makes much of the fact that some of the comments made at the August 18, 1991 service were "pre-planned." The court does not find this to be relevant to whether or not these statements were defamatory in nature.
>
> FN4. Even if the statements at issue were capable of defamatory meaning, plaintiff has failed to establish that any actual harm was caused by the defamatory statements. Although plaintiff claims that the alleged defamation so ruined her reputation that it rendered it impossible for her participate in

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> her music studio, accounting practice, or real estate business, and that she lost the means to generate gross average annual income of $25,000, the court finds that there is no evidence to support these damages. The court reviewed plaintiff's federal income tax returns from 1986 through 1995. Plaintiff's income was substantially lower than $25,000 in 1986, five years before the alleged defamation took place. Plaintiff's highest income was in 1990, with approximately $17,000 in adjusted gross income, while the average adjusted gross income of the 1986-1990 period was substantially lower than $25,000. In fact, plaintiff's adjusted gross income was approximately $18,500 in 1995, four years after the alleged defamation.
>
> Furthermore, pursuant to Judge Allison's order of July 11, 1997 which imposed sanctions for failure to comply with a discovery order, plaintiff is precluded from presenting any evidence of actual or anticipated loss of income as a result of any alleged actions by the defendants.

***480** Next, in her breach of contract count, plaintiff asserts that the alleged defamatory language uttered in the August 18, 1991 church service constituted a breach of an oral contract between plaintiff and defendant Stutzman. This alleged contract, which, among other things, stated that defendants would retract slanderous statements against plaintiff, Ms. Miller and the Christian Science faith, was evidenced by a document entitled "Statement of Retractions." This document was signed by defendant Stutzman and witnessed by plaintiff on October 1, 1988.

Before the court will recognize a cause of action for breach of contract, all of the essential elements of the contract must be in existence. *PennDOT v. First Pennsylvania Bank N.A.*, 77 Pa. Commw. 551, 553, 466 A.2d 753, 754 (1983). The Superior Court has determined that contracts are enforceable where the parties have manifested an intent to be bound by the terms of the agreement, the terms are sufficiently definite, and the agreement is supported by consideration. *Johnston the Florist Inc. v. Tedco Construction Corp.*, 441 Pa. Super. 281, 291, 657 A.2d 511, 516 (1995). It is plaintiff's burden to prove by a preponderance of the evidence that a contract exists. *Viso v. Werner*, 471 Pa. 42, 46, 369 A.2d 1185, 1187 (1977). (citations omitted)

This court finds that plaintiff has not sustained this burden. A complaint similar to the one at issue was filed by plaintiff in Lancaster County in 1994; this complaint included a breach of contract count based upon the 1988 "Statement of Retractions" document and proceeded before this court. Sustaining a demurrer to the breach of contract count, the court stated: "[a]lthough the documents do reveal a dispute and some effort to resolve it, the allegation that there was in ***481** fact a contract in place between the parties is inartfully drawn.... plaintiff has failed to sufficiently demonstrate the material elements of the existence of a contract." *Maryfrances Cassell v. Lancaster Mennonite Conference*, no. 2220 of 1989, memorandum opinion at 3 (C.P. Lancaster August 3, 1995), Allison, J. The Superior Court affirmed this decision, concluding that with respect to the "Statement of Retractions," plaintiff failed to plead the required elements to show the existence of a contract. *Maryfrances Cassell v. Lancaster Mennonite Conference*, 454 Pa. Super. 675, 685 A.2d 205 (1996). Therefore, under the doctrine of collateral estoppel, plaintiff is prevented from relitigating the issue of whether a contract exists. See *Day v. Volkswagenwerk Aktiengesellschaft*, 318 Pa. Super. 225, 236, 464 A.2d 1313, 1318 (1983) (stating that collateral estoppel "operates to prevent a question of law or an issue of fact which has once been litigated and adjudicated finally in a court of competent jurisdiction from being relitigated in a subsequent suit"); *Thompson v. Karastan Rug Mills*, 228 Pa. Super. 260, 265, 323 A.2d 341, 344 (1974) (stating that collateral estoppel does not require an identity of parties, "as long

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as the party against whom the defense is invoked is the same").

Furthermore, plaintiff filed a similar lawsuit in York County against the Lancaster Mennonite Conference. Included in her complaint was a count for breach of contract which was based upon an alleged oral agreement entered into by the parties, and was later renewed through further oral agreement and the "Statement of Retractions" document in 1988. In sustaining preliminary objections to plaintiff's amended complaint, the York County court concluded:

"[W]e find the 'Statement of retractions' put forth by plaintiff to be binding between the parties to be *482 lacking any of the elements of a contract. This document is no more than an alleged acknowledgment of certain transgressions against plaintiff and an apology on the part of the Mount Joy Mennonite Church. There are no definite terms, and there is certainly no consideration to be construed from plaintiff to the Mennonite Church." Opinion, no. 93-SU-00696-01 (C.P. York April 22, 1996), Dorney, J. (affirmed by Superior Court without opinion on July 9, 1997, no. 00427 Harrisburg 1996).

Therefore, it is clear that this issue has been previously litigated and a final judgment on the merits has been entered. Moreover, the "Statement of retractions" reads at the bottom: "This paper is freely submitted as a basis for healing of our relationship. We understand that nothing within this document will be considered admissible as evidence in a court of law." From a review of the pleadings and the exhibits attached thereto, the court concludes that any discussions and the resulting "Statement of Retractions" document were merely preliminary negotiations in an effort to settle this dispute. The intent of the parties in creating this document must be honored. Consequently, plaintiff cannot sustain a cause of action for breach of contract.

Therefore, even when the record is viewed in the light most favorable to the plaintiff, the court finds that no genuine issue of material fact exists as to the defamation claim and to the breach of contract claim. Defendants are entitled to judgment as a matter of law.[FN5]

FN5. Although she did not include counts for false light invasion of privacy and for shunning in her amended complaint, plaintiff argues that the pleadings and documents support such claims. Plaintiff primarily relies upon a document entitled "To whom it may concern" which was signed by defendant Stutzman on October 28, 1988, and which was drafted as an apology to plaintiff. Plaintiff apparently argues that the statements made in the August 18, 1991 church service were made with a "reckless disregard" as to their falsity and placed plaintiff in a false light that would be "highly offensive" to a reasonable person. See *Curran v. Children's Service Center,* 396 Pa. Super. 29, 38-39, 578 A.2d 8, 12-13 (1990). In addition, plaintiff relies upon the "To whom it may concern" document to support her claim that what was meant at the church service was that church members should have shunned her from the outset and should not have welcomed her into their homes. The court finds both of these claims to be without merit.

*483 Accordingly, we enter the following:

ORDER

And now, April 9, 1998, after reviewing the briefs submitted by the parties and after hearing oral argument, it is hereby ordered that defendants' motion for summary judgment is granted. Plaintiff's amended complaint is dismissed with prejudice.

Editor's Note: Affirmed by Superior Court March 16, 1999. No. 787, Harrisburg 1998.

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1998 WL 1112617, 40 Pa. D. & C.4th 470
(Cite as: 1998 WL 1112617 (Pa.Com.Pl.), 40 Pa. D. & C.4th 470)

Pa.Com.Pl. 1998.
Cassell v. Mount Joy Mennonite Church
1998 WL 1112617, 40 Pa. D. & C.4th 470

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Westlaw.

Not Reported in A.2d, 2003 WL 21672991 (Pa.Com.Pl.)
(Cite as: 2003 WL 21672991 (Pa.Com.Pl.))

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Only the Westlaw citation is currently available.

Pennsylvania Court of Common Pleas.
NEW HOPE BOOKS, INC., and Frederick Schofield,
Plaintiff,
v.
DATAVISION PROLOGIX, INC. Defendant.

No. 01741 JULY.TERM 2001, CONTROL020101.
June 24, 2003.

MEMORANDUM OPINION

COHEN, J.

***1** Before the Court is the motion for summary judgment (the "Motion") of Defendant Datavision Prologix, Inc. ("Datavision"). For the reasons set forth more fully below, the Motion is granted in part and denied in part.

I. *BACKGROUND*

A. *The Plaintiffs*

The Plaintiffs in this action are New Hope Publishing, Inc. ("New Hope") and Frederick Schofield ("Schofield")(jointly referred to as the "Plaintiffs"). Schofield is the author of three fictional novels, *Boardwalkers, A Run to Hell* and *Megasino: the 13th Casino.* He began writing in or around 1995 having had no prior experience as an author or in publishing. Two of his novels, *A Run to Hell* and *Megasino: the 13th Casino* (jointly the "Novels"), were self-published through New Hope, which was incorporated by Schofield for the sole purpose of publishing his novels. He is the sole shareholder, director and officer of the company.

As a self-published author, Schofield feared that he and/or New Hope would not be taken seriously by the book industry. To address this concern, Schofield decided to give New Hope the appearance of a fully staffed publishing house by creating a roster of various fictional employees. When needed, Schofield would use different aliases to assume the positions of New Hope's publisher, bookkeeper, shipper and chief of marketing. New Hope never had any payrolled employees.

B. *The UPC Labels and Datavision.*

In order to sell the Novels through certain retailers, Plaintiffs were told by a distributor that the Novels needed UPC bar codes. With a UPC bar code, retailers such as supermarkets, grocery stores and news stands are able to scan the price of the Novels at the register. Because the Novels already contained ISBN bar codes on the back cover, the Plaintiffs decided to affix self-sticking UPC bar code labels over the ISBN bar codes. Plaintiffs researched several companies that produced such labels and chose Datavision, after viewing its website and talking to a sales representative.

In keeping with the facade of a fully staffed company, Schofield used the name of New Hope's fictitious chief of marketing, Tom Butler, during his negotiations with Datavision.[FN1] During all negotiations and when placing orders, Schofield acted under the "Tom Butler" persona. In fact, Schofield admits that during this period he *never* (1) identified himself as Frederick Schofield or (2) informed Datavision he was acting in the interest of Frederick Schofield.[FN2] Maintaining character, Schofield signed correspondence to Datavision as Tom Butler.[FN3]

FN1. Plaintiffs' Memorandum of Law In Opposition to Defendant's Motion Seeking Summary Judgment, Exhibit 9, Deposition of Frederick Schofield, pp. 56, 155-157.

FN2. *Id.*

FN3. Motion for Summary Judgment of Datavision, Exhibit 7.

Between August and January 2001, New Hope placed several orders with Datavision for self-sticking UPC bar code labels (the "Labels"). The only documents evidencing these transactions are correspondence between the parties and invoices issued by Datavision. During discovery, Datavision produced invoices containing written disclaimers on the reverse side.[FN4] Plaintiffs deny receiving copies of those invoices;

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however, Plaintiffs do assert that they received several statements from Datavision indicating that its payments were received.

FN4. In the Motion, Datavision does not raise the issue of the disclaimers.

C. *The Alleged Defects*

*2 In January of 2001 or shortly thereafter, Plaintiffs allegedly began receiving reports the Labels were not working properly. After conducting an investigation, Plaintiffs claim to have discovered evidence that the Labels did not scan at the point of sale. Plaintiffs also allege to have personally witnessed this failure to scan. Because of the scanning failures, Plaintiffs argue that the sales records of the Novels were rendered wholly inaccurate and, as a result, distributors were returning books and choosing not to place reorders. At this time, Schofield unmasked himself and revealed his true identity to Datavision. Plaintiffs advised Datavision of the alleged problems and sought compensation for their damages. Datavision refused Plaintiffs' demand for compensation, believing there was no problem with the Labels.

Subsequently, Plaintiffs commenced this action by filing a civil action complaint asserting four counts of liability against Datavision. Plaintiffs allege they suffered a litany of damages, the majority of which concern future lost revenue. Datavision filed an answer with new matter and a counterclaim. [FN5] After extensive discovery, Datavision filed the present Motion.

FN5. Datavision's counterclaim was withdrawn by stipulation.

II. *SUMMARY JUDGMENT*

In accordance with Rule 1035.2 of the Pennsylvania Rules of Civil Procedure, this Court may grant Summary Judgment where the evidentiary record shows either that the material facts are undisputed, or the facts are insufficient to make out a *prima facie* cause of action or defense. *McCarthy v. Dan Lepore & Sons Co., Inc.*, 724 A.2d 938, 940 (Pa.Super.Ct.1998). To succeed, a defendant moving for summary judgment must make a showing that the plaintiff is unable to satisfy an element in his cause of action. *Basile v. H & R Block*, 777 A.2d 95, 100 (Pa.Super.Ct.2001).

To avoid summary judgment, the plaintiff, as the non-moving party, must adduce sufficient evidence on the issues essential to its case and on which it bears the burden of proof such that a reasonable jury could find in favor of the Plaintiff. *McCarthy*, 724 A.2d at 940. In addressing the issue, this Court is bound to review the facts in a 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. *Manzetti v. Mercy Hospital of Pittsburgh*, 565 Pa. 471, 776 A.2d 938, 945 (2001). The plaintiff, must be given the benefit of all reasonable inferences. *Samarin v. GAF Corp.*, 391 Pa.Super. 340, 350, 571 A.2d 398, 403 (1989).

IV. *DISCUSSION*

Plaintiffs assert four counts of liability against Datavision: (1) negligence, (2) strict liability, (3) breach of warranties and (4) fraudulent misrepresentation. Datavision denies all liability and seeks the dismissal of the Complaint. In the alternative, if the case is to proceed on some or all of the counts, Datavision seeks the dismissal of the claims alleged by Schofield arguing he lacks standing to sue.

*3 For the reasons set forth more fully below, the Court finds that Schofield lacks the requisite standing to sue and, therefore, all counts as to Schofield are dismissed. The Court also finds in favor of Datavision on the negligence, strict liability and fraudulent misrepresentation counts. Lastly, New Hope's claims for punitive damages and future damages are dismissed. The remainder of the Motion is denied and the case will proceed to trial on Count III, breach of warranties.[FN6]

FN6. The Court finds that there is a genuine dispute as to an issue of material fact concerning Count III, breach of warranties. "In passing upon motion for summary judgment, trial court must not decide issues of fact; only whether there are issues of fact to be tried." *Mylett v. Adamsky*, 139 Pa.Cmwlth. 637, 642, 591 A.2d 341, 344 (1991). The "quantum of evidentiary

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> facts which must be adduced to preclude summary judgment is not the same as that required at trial." *Watkins v. Hospital of the University of Pennsylvania,* 737 A.2d 263, 268 (Pa.Super.Ct.1999)(citing 6 Standard Pennsylvania Practice § 32.99).

A. *Schofield Does Not Have The Requisite Standing To Sue.*

Plaintiffs' assertions that both New Hope and Schofield are in direct contractual privity with Datavision are without merit. Schofield's misrepresentations as to his identity and his failure to timely disclose his true identity bars him from being a direct party to the transactions. Furthermore, under Pennsylvania law, Schofield fails to satisfy the necessary criteria to be considered an intended third party beneficiary. Therefore, Schofield does not have standing to maintain claims against Datavision.

1. *Schofield is not a direct party to the contract.*

New Hope is arguably the only party that has direct contractual privity with Datavision. Plaintiffs rest their argument on the fact he was the "person" who dealt with Datavision. In other words, because his body and voice were used during the transactions, he is a party to the contract. Plaintiffs argument is superficial and made without regard to the fact that Schofield admittedly was acting as an employee and representative of New Hope. Under the circumstances of this case, holding in favor of the Plaintiffs would sanction a type of contract by ambush.

The question is not so much who was dealing with Datavision but in what capacity said person was acting. This is not a case where Schofield was conducting business on his own behalf under a fictitious name. For example, Schofield did not represent to Datavision he was an author named "Tom Butler" looking to purchase labels for his books. Instead, Schofield represented himself to be the chief of marketing of an existing corporation, New Hope. Schofield never identified himself or intimated that Schofield, the author, was in involved when the orders were placed. Therefore, Schofield was not acting as an individual but on New Hope's behalf.

There is also a fundamental question of fairness raised by Schofield's actions. Schofield was fully aware that he was inducing Datavision to enter into a contract with New Hope based upon his representations that he was New Hope's chief of marketing. He admittedly withheld his true identity from Datavision in order to perpetuate the illusion that New Hope was a fully staffed company. Now, Schofield seeks to impose his personal damages as the author on Datavision in addition to the liability for New Hope's alleged damages. This additional liability is to a party that Datavision had no idea was involved in the transaction, until it was too late.[FN7]

> FN7. The difference in liability is clearly demonstrated by Schofield seeking damages over a million dollars in excess of New Hope's damages claim.

2. *Schofield is not a third party beneficiary under Pennsylvania law.*

*4 Schofield's argument that he is an intended third party beneficiary is also without merit. In order to be considered a third party beneficiary under Pennsylvania law, a party must satisfy a strict two part test. *Cardenas v. Schober,* 783 A.2d 317 (Pa.Super.Ct.2001). This test, as articulated by the Pennsylvania Superior Court, is as follows:

> (1) [T]he recognition of the beneficiary's right must be "appropriate to effectuate the intention of the parties," and (2) ... the performance must "satisfy an obligation of the promisee to pay money to the beneficiary" or "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."

Id. at 322 (citing *Guy v. Liederbach,* 501 Pa. 47, 459 A.2d. 744 (1983)). The Superior Court also clearly stated that "the fact that the obligor knows that his services will benefit a third person is not alone sufficient to vest in such third person the rights of a third person beneficiary. *Id.*

Plaintiffs allege that Schofield was an intended third party beneficiary because (1) he was present at all

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times when dealing with Datavision and (2) he is the author of the Novels. The Court fails to see how Schofield's presence when negotiating and ordering the Labels evidences he was an intended third party beneficiary. If he failed to reveal his true identity, and never discussed his or New Hope's connection to Schofield, how could Datavision possibly divine Schofield was an intended beneficiary by his presence as Tom Butler? Nevertheless, the Court will address the issue in the context of the test articulated in *Cardenas.*

It is clear Schofield fails the first prong. The recognition of Schofield's right is not appropriate to effectuate the intention of the parties. The underlying contract is between New Hope and Datavision, not Schofield. Nowhere is Schofield in his individual capacity made a part of transaction or conferred any rights therefrom. It is New Hope, the direct party to the contract, that has the right to sue to enforce the contract and/or seek damages for a breach. Therefore, the recognition of Schofield's right is not appropriate to effectuate the intention of New Hope.

It is equally clear that Schofield fails the second prong of the *Cardenas* test. First, the performance of the contract in this case does not satisfy an obligation of New Hope to pay Schofield. Performance of the contract required Datavision to produce Labels for New Hope's use, nothing more. The record does not reveal any agreement with Datavision that its delivery of the Labels satisfied a debt owed to Schofield by New Hope.

Second, the circumstances of the transactions do not indicate that New Hope intended to give Schofield any benefit. Schofield admits that as Tom Butler he *never* discussed or talked about Schofield during the time the orders were placed. The fact that Schofield's name was printed on the sample Novels given to Datavision is not sufficient evidence to put Datavision on notice he was an intended third party beneficiary. At most, assuming that Datavision even took notice of Schofield's name on the Novels, Datavision may have deduced that Schofield could benefit from its services. Under Pennsylvania law, the fact that a party may know his services could benefit another is not enough to confer the status of an intended third party beneficiary.

*5 Therefore, summary judgment is grated in favor of Datavision on all counts as they pertain to Frederick Schofield.

B. *The Negligence and Strict Liability Counts Are Barred By Pennsylvania's Gist of the Action and Economic Loss Doctrines*

Pennsylvania's doctrines of gist of the action and economic loss bar Plaintiffs' counts of negligence and strict liability. The gist if the action doctrine bars tort claims that: (1) arise solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; and (4) where the tort essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of the contract. *Etoll, Inc. v. Elias/Savion Advertising, Inc.*, 811 A.2d 10, 19 (Pa.Super.2002). The economic loss doctrine bars the recovery of economic damages for torts when the only harm is to the product itself and not to other property. *See Werwinski v. Ford Motor Company,* 286 F.3d 661 (3d. Cir.2002). If the only damages from the alleged tort are economic, the tort claims cannot stand. *Id.*

The heart of the Plaintiffs' negligence and strict liability counts is Datavision's alleged failure to design and produce labels that worked. All of the damages allegedly suffered by the Plaintiffs are purely economic in nature, allegedly resulting from Datavision's workmanship. These claims are exactly the types of tort claims that the doctrines of gist of the action and economic loss are designed to prevent. Therefore, summary judgment is granted in favor of Datavision on the counts of negligence and strict liability.

C. *Plaintiffs' Fraudulent Misrepresentation Claim Fails As A Matter of Law.*

Plaintiffs allege that Datavision made numerous fraudulent misrepresentations, both before and after the orders for the Labels were placed. Datavision counters that the Plaintiffs' fraudulent misrepresentation claim is barred by the gist of the action and/or the economic loss doctrines. In the alternative, Datavision alleges that the Plaintiffs failed to satisfy the elements necessary to succeed under a fraud claim. The Court finds that the gist

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of the action doctrine bars any claim of fraud based upon alleged misrepresentations made after the orders were placed. As to the allegations of fraud occurring prior to the placement of the orders, the Court holds the Plaintiffs' claim fails as a matter of law.

1. *Fraud in the performance is barred by the gist of the action.*

The portion of Plaintiffs' claim that is based upon misrepresentations after the placement of the orders is barred by the gist of the action doctrine. These allegations center on representations made by Datavision on the testing it performed and the assurances it made after the orders were placed. Therefore, the representations were made when Datavision was in the process of performing its part of the transaction with New Hope. The Pennsylvania Superior Court in *Etoll, Inc. v. Elias/Savion Advertising, Inc.* specifically held that claims of fraud in the performance of the contract are barred by the gist of the action doctrine. 811 A.2d 10, 20 (Pa.Super.2002)("Thus, we conclude that ... the gist of the action doctrine should apply to all claims for fraud in the performance of a contract."). Given this clear precedent, the Court holds that the portion of the Plaintiffs' fraud claim base upon misrepresentations made by Datavision in the performance of the contract is barred.

2. *Plaintiffs' allegations of fraud in the inducement are dismissed as a matter of law.*

*6 The remaining portion of the Plaintiffs' fraud claim, based upon alleged misrepresentations made in the inducement of the contract, fails as a matter of law. [FN8] Plaintiffs' fraud in the inducement allegations concern representations made on Datavision's website and statements made by a Datavision sales representative promoting the company. In order to proceed on a fraud count a plaintiff must allege and prove the following:

> FN8. Regarding Datavision's economic loss doctrine argument, this Court has held that a claim of fraud is not barred by this doctrine. *SeeTeledyne Technologies, Inc., v. Freedom Force Corporation,* 2002 WL 748898 (Pa.Comm.Pl.2002). As to the gist of the action argument, the *Etoll* court limited its holding to fraud in the performance and did not address whether fraud in the inducement is barred. 811 A.2d at 19. Whether gist of the action bars fraud in the inducement need not be addressed in this case because the Court finds the fraud claim fails on other grounds.

a. a representation was made;

b. that is material to the transaction;

c. made falsely, with knowledge of falsity or with recklessness regarding its truth or falsity;

d. with the intent leading another to rely on it;

e. which is justifiably relief upon; and,

f. the resulting injury was proximately caused by the reliance.

Bortz v. Noon, 556 Pa. 486, 499, 729 A.2d 555, 559 (Pa.1999).

In addition to the aforementioned required elements, Pennsylvania courts have held that puffing is not actionable in fraud. "Puffery is an exaggeration or overstatement in broad, vague and commendatory language." *Castrol, Inc. v. Pennzoil Company,* 987 F.2d 939 (3d. Cir.1993). When reviewing claims of fraud, "misrepresentation must be distinguished from mere 'puffing.' " *Berkebile v. Brantly Helicopter Corporation,* 462 Pa. 83, 103, 337 A.2d 893, 903 (1975). *See also Huddleston v. Infertility Center of America,* 700 A.2d 453 (Pa.Super.Ct.1997)(holding that representation that defendant's clinic was the "premier" surrogacy program in the country amounted to mere puffing.)

Furthermore, mere breaches of a promise to do something in the future have been held not actionable under fraud. "The breach of a promise to do something in the future is not fraud." *Bash, D.D.S. v. Bell Telephone Company of Pennsylvania,* 411 Pa.Super. 347, 601 A.2d 825 (1992)(citing *Edelstein v. Carole House Apartments, Inc.,* 220 Pa.Super. 253, 286 A.2d 658, 661 (1971)). "Moreover, 'an unperformed promise does not give rise to a presumption that the promisor did not intend to perform when the promise was made.' " *Id.*

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(citing *Fidurski v. Hammill,* 328 Pa. 1, 3, 195 A. 3, 4 (1937).

The Court finds that the Plaintiffs' allegations as to the representations on the website and of the salesperson constitute nothing more than puffing and/or alleged breaches of promises to do something in the future. Therefore, summary judgment on the fraudulent misrepresentation claim is granted in favor of Datavision.

D. *New Hope's Claim for Punitive Damages Is Dismissed.*

Under Pennsylvania law, punitive damages are not awardable for breach of contract. *See The Flynn Company v. Peerless Door & Glass, Inc.,* 2002 WL 1018937, *3 (Pa.Com.Pl.(2002); *Johnson v.. Hyundai Motor America,* 698 A.2d 631, 639 (1997). Because of the dismissal of counts I, II and IV, the only count remaining against Datavision is count III, breach of warranties and, therefore, the claim for punitive damages is dismissed.[FN9]

> FN9. Even assuming Plaintiffs' fraud claim was not dismissed, a claim for punitive damages is not automatic. "Under Pennsylvania law, in an action based on fraud, the measure of damages is "actual loss". *Kaufman v. Mellon National Bank & Trust Co.,* 366 F.2d 326 (3rd Cir.1966) . The plaintiff may also recover punitive damages where there are aggravated circumstances. *Long v. McAllister,* 275 Pa. 34, 118 A. 506 (1922).
>
> > However, it is fraud which is the basis for the recovery of compensatory damages, and the same fraud is not alone a sufficient basis upon which to premise an award of punitive damages. If the rule were otherwise, punitive damages could be awarded in all fraud cases. This is not the law. The rule, rather, is that for punitive damages to be awarded there must be acts of malice, vindictiveness and a wholly wanton disregard of the rights of others. (citations omitted)
>
> *Smith v. Renaut,* 387 Pa.Super. 299, 309, 564 A.2d 188, 193 (1989). The allegations contained in the Complaint do not state a basis for punitive damages, even assuming the fraud count remained.

E. *New Hope's Claim For Future Damages Fails As A Matter Of Law*

*7 New Hope's claim for damages of lost profits is entirely based upon speculation and, therefore, not recoverable under Pennsylvania law. In order to recover damages for breach of contract, a causal connection must be shown between the breach and the loss. *Logan v. Mirror Printing Company of Altoona,* PA., 410 Pa.Super. 446, 600 A .2d 225 (1991); *See also Northeastern Vending Company v. P.D.O., Inc.,* 414 Pa.Super. 200, 206, 606 A.2d 936, 939 (1992)(stating affirmative evidence that the damages are from the breach of contract must be produced.) The Pennsylvania Superior Court succinctly set for the test for lost profits as follows:

> The general rule of law applicable for loss of profits in both contract and tort actions allows such damages where (1) there is evidence to establish them with reasonable certainty, (2) there is evidence to show that they were the proximate consequence of the wrong; and, in the contract actions, that they were reasonably foreseeable.

Delahanty v. First Pennsylvania Bank, N.A., 381 Pa.Super. 90, 120, 464 A.2d 1243, 1258 (1983)(citing *R.I. Lampus Co. v. Neville Cement Products Corp.,* 474 Pa. 199, 378 A.2d 288 (1977), *Frank B. Bozzo, Inc. v. Electric Weld Division,* 283 Pa.Super. 35, 423 A.2d 702 (1980), Restatement, 2d, Contracts § 351)).

New Hope has the "burden to establish by proper testimony the damages ... sustained." *Gordon v. Trovato,* 234 Pa.Super. 279, 282, 338 A.2d 653, 654 (1975)(citing *Link v. Highway Express Lines, Inc.,* 444 Pa. 447, 282 A.2d 727 (1971). Failure to meet this burden prevents the issue from being submitted to the jury. *Id.* New Hope has failed to meet its burden.

1. *Plaintiffs' Damages Memo*

Plaintiffs prepared and submitted a Final Damages

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Memo (the "Memo") setting forth the damages allegedly suffered. New Hope claims damages in the amount of $413,793, broken down as follow: [FN10]

FN10. Plaintiffs' Memorandum of Law In Opposition to Defendant's Motion Seeking Summary Judgment, Exhibit 24, Page 9.

1.	Losses in Capitalization and Sales Revenue:	$110,533
2.	First Printing Losses:	$21,110
3.	Second Printing Losses:	$94,050
4.	Third Printing Losses:	$188,100
	Total:	$413,793

The portion of New Hope's damages attributed to future damages is based upon projected sales for future printings. The dollar amount of such damages is $282,150 (the "Future Damages Claim").

New Hope planned to run a second printing of 50,000 books (the "Second Printing"), evenly divided between the Novels. New Hope calculated the quantity of the Second Printing using past distributor orders and market experience for the calculation of new orders. New Hope identifies various Anderson News locations and News Group as existing distribution centers to receive the Second Printing. New Hope also planned to use new distributors, identified as Levi Home Entertainment, Harrisburg News, Hudson Valley News, Sher Distributing Company, Atlas News and Koen Pacific.

Presumably after the Second Printing sold out, New Hope planned on running a third printing (the "Third Printing"). The Third Printing was to "blanket the country" by covering all markets through existing and new distributors. [FN11] New Hope asserts a single order from Anderson News, which services large chains such as K-Mart, could be as large as 100,000 books. Therefore, New Hope believes the sales losses for the Third Printing should be based upon an order of no less than 1000,000 copies.[FN12]

FN11. Plaintiffs' Memorandum of Law In Opposition to Defendant's Motion Seeking Summary Judgment, Exhibit 24, Page 8.

FN12. New Hope does not state whether this is for both Novels or just one.

2. *New Hope Does Not Satisfy Its Burden To Prove Causation.*

***8** New Hope does not offer sufficient evidence to establish a causal link between the alleged scanning problems and the distributors' failure to place additional orders. For example, New Hope states when discussing the Second Printing that because of strong sales "Anderson News distribution centers across the country were prepared to pick up the titles if they sold well in Florida." [FN13] Yet, not a single document to or from Anderson is produced to support this statement and/or evidence Anderson canceled orders because of faulty labels. The same is true for any of the other distributors cited by New Hope as not reordering because the scanning problems.

FN13. Plaintiffs' Memorandum of Law In Opposition to Defendant's Motion Seeking Summary Judgment, Exhibit 24, Page 4.

It is even clearer that New Hope's claim for damages based upon the Third Printing is also based upon speculation. New Hope does not offer sufficient evidence that any distributor was interested in reordering the Novels for a second printing, let alone a third printing. New Hope's Third Printing Damages claim is based upon a chain of unsupported assumptions, starting with the unsubstantiated assumption that the Second Printing was going to be a successful. Even the wording of the Memo invites speculation. "For instance, Anderson

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News services large chains, such as K-Mart, where single orders *can be* 100,000 books." FN14

FN14. *Id.* (emphasis added).

New Hope has the burden to prove causation between Datavision's alleged conduct and the lack of any reorders from distributors. It is clear under Pennsylvania law that there must be affirmative evidence that the losses resulted from the breach of the contract. *See Northeastern Vending Company v. P.D.O., Inc.*, 414 Pa.Super. 200, 206, 606 A.2d 936, 939 (1992). New Hope fails to adduce such evidence.

3. *New Hope Fails To Allege Sufficient Evidence To Establish Its Future Damages Claim With Reasonable Certainty*

In addition to assuming there would be reorders, New Hope asserts that the sales rate for the Novels over a two year period would be 90%. This is based upon New Hope's sales record for initial orders sold through Casino Distributors. New Hope asserts Casino Distributors initially placed two orders for both Novels that totaled 784 copies and proceeded to sell 92% of the ordres. Therefore, New Hope asserts that regardless of using new distributors, larger printings and selling in an expanded market, New Hope would still sell a minimum of 90% of all orders.

New Hope presents insufficient evidence to support this extraordinary sales rate. Casino Distributors' sales were confined to a limited market, the South Jersey and Atlantic City area. New Hope's planned marketing expansion would go well beyond the original limited geographic area, with the Third Printing to be national. New Hope proffers no analysis or evidence that both of his Novels would maintain such an admittedly high sales level in greater markets over a two year period.

For example, New Hope presents no market studies, no comparisons to book sales of the same genre in the same proposed sale regions, no comparisons to other successful newly self-published authors and no comparisons to other books marketed in the same fashion that New Hope planned. The trier of fact is given only the optimism of a new author and publishing company to make its finding. "[L]ost profits may not be awarded where the evidence leaves the trier of fact without any guidance except for speculation. *Birth Center v. St. Paul Companies, Inc.*, 727 A.2d 1144 (Pa.Super.1999). New Hope's foundation for the Future Damages Claim is based upon unsupported conjecture and does not allow a trier of fact to find for it on Future Damages with reasonable certainty.

4. *Plaintiffs' Expert Reports Have The Same Failings As New Hope's Memo*

*9 Plaintiffs retained two experts to assist in the their calculation of lost sales. The first report was prepared by Bob Ederman ("Ederman"), a Publishing Consultant. The second report was prepared by John A. Morris ("Morris") of Execs Inc. Both reports give an expanded background of the mass market paperback industry and the importance of the UPC bar code in sales. However, the reports do not assist New Hope in satisfying its evidentiary burden in proving causation and in laying a foundation for damages to be awarded with reasonable certainty. Both reports rely on New Hope's unsubstantiated assumptions and do not contain sufficient analysis or evidence to take the Future Damages Claim out of the realm of speculation.

For example, neither of the reports independently discusses New Hope's projected orders, sales or the methodology used to reach such figures. Instead, each report merely adopts what is set forth the Memo. Regarding sales, neither of the reports discuss or address on what basis the Novels success with Casino Distributors, in a relatively small market such as South Jersey would, or could, translate into national sales of one hundred thousand copies or more . FN15

FN15. Surprisingly, the reports also do not address the quality of the actual product being sold, the Novels. Ederman discusses the covers and interior for appearance, but there is no discussion of whether either of the Novels are well written and likely to sell in the numbers and in the markets New Hope predicted. The actual quality of the writing and story is apparently irrelevant in book sales.

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Ederman, did attach to his report several charts and graphs concerning historical mass market sales, purchase motivation and consumer purchasing. However, these charts give only the most generalized overview. For example, none of the charts breakdown sales figures between authors who self-publish and authors who use established publishing houses. The charts also do not breakdown sales among new authors, new self-published authors and established authors with national name recognition.[FN16] The trier of fact is left to guess the significance of the gross numbers set forth in the charts and how the numbers apply to New Hope's circumstances.

> FN16. The report of Morris is even more lacking in detail than Ederman's report. Other than to confirm that UPC bar codes are still used, the report contains no discussion of the Novels, New Hope, or the alleged facts of the case.

Therefore, New Hope has failed to put forth sufficient evidence to establish a causal relationship between the alleged failure of the Labels to scan and its Future Damages Claim. Furthermore, New Hope has failed to present evidence to establish its Future Damages with reasonable certainty. As a result, New Hope's Future Damages Claim is dismissed.

IV. *CONCLUSION*

For the reasons set forth above, summary judgment is granted to Datavision on (1) all claims of Plaintiff Frederick Schofield, (2) Counts I, II and IV and (3) the claims for punitive damages and future damages. The case will proceed to trial on Count III, breach of warranties.

ORDER and MEMORANDUM

AND NOW, this 24TH day of June, 2003, upon consideration of the Motion for Summary Judgment (the "Motion") of Datavision Prologix, Inc., all responses in opposition thereto, all matters of record and in accord with the contemporaneous Opinion in further support of this Order, it is hereby

ORDERED and DECREED, that the Motion is GRANTED in part and DENIED in part, it is further

ORDERED and DECREED that all claims of Plaintiff Frederick Schofield are hereby DISMISSED, it is further

*10 ORDERED and DECREED that counts I, II and IV of the complaint are DISMISSED, it is further

ORDERED and DECREED that New Hope Publishing Corporation, Inc.'s claims for punitive damages and future damages are DISMISSED, it is further

ORDERED and DECREED that the remainder of the Motion is DENIED and the case will proceed to trial on Count III, Breach of Warranties.

Pa.Com.Pl.,2003.
New Hope Books, Inc. v. Datavision Prologix, Inc.
Not Reported in A.2d, 2003 WL 21672991 (Pa.Com.Pl.)

END OF DOCUMENT

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D

Westlaw.

Not Reported in F.Supp., 1998 WL 98988 (E.D.Pa.)
(Cite as: 1998 WL 98988 (E.D.Pa.))

H
Only the Westlaw citation is currently available.

United States District Court, E.D. Pennsylvania.
ALEXSON SUPPLY, INC.,
v.
TONGUE, BROOKS & CO., INC., et al.

No. CIV. A. 93–3450.
March 5, 1998.

MEMORANDUM

ONEILL.

***1** This breach of contract and fraudulent misrepresentation action concerns two insurance policies issued to plaintiff Alexson Supply, Inc. by defendant Maryland Casualty Insurance Company through Alexson's broker, defendant Tongue, Brooks & Company. Plaintiff alleges that defendants conspired to defraud it by concealing the availability of cheaper insurance and charging grossly excessive premiums. In addition, plaintiff alleges that both parties breached their contracts and that Maryland Casualty breached a statutory duty of good faith. Defendants move for summary judgment contending that the record does not support any of plaintiff's claims.

I. Factual Background

Alexson sells and rents construction supplies and equipment to contractors and, during the time period relevant to this case, was owned and operated by various members of the McGough family. From 1977 until January, 1992, it obtained all of its insurance from Maryland Casualty through its insurance broker, Tongue Brooks. The coverage included a general business liability package and a commercial automobile package.[FN1] At issue here are the business and automobile policies issued to Alexson for the policy years July 1, 1990—June 30, 1991 ("July 1990 policy") and July 1, 1991—June 30, 1992 ("July 1991 policy").

FN1. A third policy issued by Maryland Casualty to Alexson covered workers' compensation. This policy is not at issue.

On April 12, 1990 Maryland Casualty informed Alexson through Tongue Brooks that it intended to cancel both the business and automobile policies. Maryland Casualty stated that it was canceling the automobile policy because of a poor loss history. It is undisputed that Alexson had a poor loss history for its automobiles. Automobile insurance premiums are based in large part on the insured's "auto loss ratio" which compares losses to premiums. In 1987, 1988 and 1989 Alexson's auto loss ratios were 411%, 154% and 202% respectively.

Maryland Casualty stated in its April 12, 1990 notification that it was canceling the business coverage because of Alexson's failure to implement loss control recommendations. The record contains three different letters recommending certain loss control procedures, and it is unclear from the record whether Alexson implemented all of these recommendations.

On behalf of Alexson, Mr. Raymond Brooks, Alexson's contact at Tongue Brooks, discussed the renewal of both insurance packages directly with Maryland Casualty. After these discussions, he stated in a letter to Mr. Dennis McGough of Alexson dated April 27, 1990 that Maryland Casualty would be willing to renew the automobile and business packages if it received Alexson's full cooperation in establishing a Drivers and Maintenance Safety Program. Also in that letter, Mr. Brooks stated that "since I spoke to you in a recent meeting, I have been in touch with no less that 12 insurers in the marketplace and there is not one that it willing to look at your Business Automobile Policy and prefer not to look at your account in general because of the horrible Business Automobile experience and the property losses that occurred in 1988." According to Mr. McGough, Mr. Brooks also stated in various conversations in 1990 and 1991 that Alexson could not go anywhere else to obtain in-

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surance and that Alexson had to get its insurance from Maryland Casualty no matter what it charged.

*2 Also in that April 27, 1990 letter, Mr. Brooks suggested that Alexson not deal with Liberty Mutual Insurance Company. He stated that "their financial stability might well be questioned in that they have now, during this year of 1990, lost an additional 1/2 % point on their Bests financial rating. I believe that this is not a company that you want to be involved with at this time nor in the near future."

On May 30, 1990 Maryland Casualty notified Alexson of an increase in the premium for the automobile policy from Maryland Casualty to $46,361, which was later reduced to $41,750, from the previous year's premium of $20,671. This quotation was based on Alexson's auto loss ratio for 1987, 1988 and 1989 which caused Alexson to no longer be considered a "preferred customer" eligible for lower rates offered by Maryland Casualty subsidiary, Northern Insurance Company. The coverage was thus offered by Maryland Casualty rather than Northern.

Maryland Casualty also offered to renew the business insurance package at a significantly higher premium of $48,750 as compared to the $21,911 premium for the previous year. According to Maryland Casualty, this increase was due to Alexson's loss history and new classifications of general liability risks instituted by the Pennsylvania Insurance Services Office.

On the advice of Mr. Brooks, Mr. McGough wrote two letters to the Insurance Department of the Pennsylvania complaining about the increased premiums. Nonetheless, after Mr. Brooks gave up half of his agency commission, Alexson agreed to be insured by Maryland Casualty for the July 1990 policy year. Alexson paid the premiums and Maryland Casualty provided the insurance as agreed. Alexson had no losses in either its automobile or business packages for the July 1990 policy year.

Alexson claims that its willingness to pay the greatly increased premium amount was due in large part to Mr. Brooks' representations that no other carrier would insure Alexson. In addition, it did not seek to place its insurance with Liberty Mutual because of Mr. Brooks' concerns about Liberty Mutual's financially stability. In fact, according to plaintiff's insurance expert, Jay Frank, "Liberty Mutual was then [1990–1991] and still is one of the leading underwriters of property casualty insurance in the USA." Plaintiff, however, produced no evidence that Mr. Brooks' statement about the reduction in Liberty Mutual's Bests rating was false or that the lowered rating was not a reasonable cause for concern.

In setting the premium for the July 1990 business liability policy, Maryland Casualty misclassified Alexson's revenue. The business liability coverage is based in part on the source of Alexson's revenue. From Alexson's point of view, the more revenue classified as sales as opposed to rentals the better because the sales category has a lower premium rate. It is estimated that between 70–85% of Alexson's revenues are sales and between 30–15% is rental. While performing an audit of the July 1990 policy year, an auditor at Maryland Casualty discovered that all Alexson's revenue had been classified as rental revenue. The misclassification led to an overcharge of approximately $12,000.

*3 Maryland Casualty corrected this classification error for the July 1991 policy year, but did not refund the $12,000 and did not inform Alexson of the previous year's misclassification. For the July 1991 policy year, Maryland Casualty quoted Alexson a premium of $75,067 for both the automobile and business packages as compared to the previous year's total of $90,500. While Alexson was again dissatisfied with the premium amount, it nonetheless agreed to place its insurance coverage with Maryland Casualty. Again, Alexson contends that it placed its insurance with Maryland Casualty in reliance on Mr. Brooks' oral representations that no insurance carrier other than Maryland Casualty would

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be willing to provide it with coverage.

In December 1991, Alexson began to look for insurance coverage from other carriers and found that at least two companies, Liberty Mutual and Zurich American Insurance Company, were willing to insure Alexson for premiums lower than what Maryland Casualty had charged for the July 1990 and July 1991 policy years. In January 1992, Alexson canceled its policy with Maryland Casualty, obtained coverage from Liberty Mutual, and soon thereafter initiated this suit. [FN2]

FN2. From July 1991 to January 1992 Alexson had no losses on either its automobile or business policies.

II. Summary Judgment Standard

In reviewing a motion for summary judgment, I must consider whether the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show there is no genuine issue as to any material fact, and whether the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). To determine whether there is a genuine issue of material fact, I must ask whether a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). I must draw all reasonable inferences in favor of the nonmovant. *Id.* at 256. Where, as here, the nonmoving party bears the burden of proof at trial, the moving party bears the initial burden of showing an absence of factual issues. Once this burden is met, the nonmoving party must then establish sufficient evidence for each element of its case. *J.F. Feeser, Inc. v. Serv–a–Portion, Inc.,* 909 F.2d 1524, 1531 (3d Cir.1990) (citing *Celotex Corp. V. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

III. Discussion

Plaintiff's complaint enumerates three difference counts, but each count is based on the same alleged course of conduct—that defendants conspired to charge plaintiff excessive premiums by intentionally misclassifying revenue and by concealing the availability of cheaper insurance. Therefore, before listing the counts and the elements plaintiff must prove to prevail on those counts, I examine the evidence in the record in support of plaintiff's allegations that the misclassification and Mr. Brooks' representations were part of a conspiracy to extract excessive premiums from plaintiff. I then review the individuals counts in light of this evidence and the parties' arguments for and against summary judgment.

*4 Plaintiff contends that the misclassification was intentional and part of defendants' conspiracy to defraud. In support of this contention plaintiff points to the testimony of Ms. Gibbons, the Maryland Casualty underwriter who was involved in pricing the business package policy for the July 1991 policy year. She testified that whenever premiums increased by more than 20%, as the premiums did here, the company was supposed to check to see if it made a mistake. One of the things that they would check was whether the insured's revenues were properly classified. An auditor for Maryland Casualty wrote a report dated September 5, 1991 concerning the July 1990 policy year, which included a review of the revenue classification. The audit showed rental receipts of $316,072 and sales receipts of $1,992,957, but the auditor classified all of the receipts as rental (# 11208), the category with the higher premium rate. The report also stated that classification of the receipts as rental was "requested" by an unnamed person at Maryland Casualty. After receiving this information from its auditor, Maryland Casualty issued a premium notice to Alexson reporting receipts of $2,309,029 all categorized as rental, # 11208. From this evidence a reasonable juror could conclude that not only did Maryland Casualty know about the classification error, but that someone at Maryland Casualty directed that all the receipts be classified in the rental category, the one with the higher premium rate, to maximize profits.

Plaintiff also contends that Mr. Brooks was

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aware of the misclassification and did not inform plaintiff. The record, however, does not support such a conclusion. Plaintiff points to a letter that Mr. Brooks sent the insurance commissioner where he failed to make any mention of Maryland Casualty's misclassification error. This letter provides no support for plaintiff's contention that Mr. Brooks was aware of the misclassification. In support of its argument that Mr. Brooks was aware of the misclassification, plaintiff also refers me to the testimony of Anjanette Owen, a district manager for Liberty Mutual, and Theresa M. Adriani, who testified as a designee for defendant Maryland Casualty. Ms. Owen and Ms. Adriani testified that normally the sales representative provides the classification information to the insurer. In addition, plaintiff points to two letters: the first is a letter to an underwriter for Maryland Casualty from Ms. Ann L. Fingles, an employee of Tongue Brooks, stating that only 15% of that Alexson's receipts should be classified as rentals; and the second was written by Mr. Brooks to Dennis McGough and conveyed the importance of separating sales revenue from rental revenue on the financial records.

This evidence does not support an inference that Mr. Brooks was aware of the misclassification. On the contrary, this evidence establishes that Mr. Brooks knew the importance of the classifications, told Alexson to classify its revenue on their financial records, and informed Maryland Casualty that only 15% of Alexson revenues should be classified as rentals. In addition, Mr. Brooks denied knowing about the misclassification and cut his commission in half to appease Alexson. Therefore, while plaintiff produced evidence from which a reasonable juror could conclude that Maryland Casualty intentionally misclassified its receipts, it failed to produce any evidence that Mr. Brooks knew that Maryland Casualty misclassified the revenues, much less participated in a conspiracy to conceal the misclassification.

*5 Plaintiff also alleges that Mr. Brooks and Maryland Casualty conspired to conceal the availability of cheaper insurance. Plaintiff alleges that Mr. Brooks lied to plaintiff by telling it that no other insurance carrier would insure it and that it had to accept Maryland Casualty's price no matter what it charged. In addition, it contends that Mr. Brooks' statement about Liberty Mutual's financial instability was part of defendants' plan to conceal the availability of cheaper insurance.

In conversations with various members of the McGough family, Mr. Brooks represented that no one other than Maryland Casualty would be willing to insure plaintiff and that Alexson had to get its insurance from Maryland Casualty whatever it charged. Plaintiff, however, was able to get insurance from Liberty Mutual in January 1992 and also received a quote from Zurich–American Insurance Company in December 1991. Alexson eventually selected Liberty Mutual because it offered cheaper coverage.

As discussed below, it is unclear from the evidence in the record whether Mr. Brooks' statements about the unavailability of insurance from other carriers was incorrect. *See infra* note 4. The evidence, however, even after allowing for all reasonable inference in plaintiff's favor, is insufficient to support a reasonable finding that Mr. Brooks' representations were factual as opposed to opinion, that Alexson justifiably relied on Mr. Brooks' statements, or that Mr. Brooks either knew about the falsity of the statement or was reckless with regard to its truth. In addition, there is no evidence from which a reasonably juror could infer the existence of an agreement between Maryland Casualty and Tongue Brooks to conceal the availability of cheaper insurance or charge Alexson excessive premiums. In short, plaintiff has made broad allegations of conspiracy, fraud and a course of bad faith conduct, but with the exception of the misclassification by Maryland Casualty, it failed to present sufficient evidence in support of these allegations to warrant their submission to a jury.

C. *Count I—Breach of Statutory Duty of Good Faith—Maryland Casualty*

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In Count I plaintiff alleges a "bad faith" action against Maryland Casualty pursuant to 42 Pa.C.S.A. § 8371, which provides:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
>
> (2) Award punitive damages against the in- surer.
>
> (3) Assess court costs and attorney fees against the insurer.

Actions arising under this statute have usually arisen where an insurer failed to pay insurance proceeds, but by its plain language, § 8371 is sufficiently broad to encompass claims based on fraudulent pricing practices. *Rosengarten, Richmond & Hevnor, P.C. v. United States Fire Ins. Co.,* 1996 WL 75891, *3 (E.D.Pa.1996) (citing *Turner Constr. Co. v. First Indem. of Am. Ins. Co.,* 829 F.Supp. 752, 763 (E.D.Pa.1993), *aff'd,* 22 F.3d 303 (3d Cir.1994)).[FN3]

> FN3. Defendants correctly argue that the statute has no retroactive effect and therefore does not provide relief for conduct prior to its effective date of July 1, 1990. *See Boyce v. Nationwide Mut. Ins. Co.,* 842 F.Supp. 822, 825 (E.D.Pa.1994) (collecting authority). Therefore, unless there is evidence of bad faith conduct by defendants occurring after July 1, 1990, 42 Pa.C.S.A. § 8371 provides no relief. It is not the contract date, however, that is critical. The critical date is when the insurer is alleged to have committed the bad-faith conduct. *Colantuno v. Aetna Ins. Co.,* 980 F.2d 908, 910 (3d Cir.1992). As discussed above, the evidence of bad faith, including the September 5, 1990 audit report, is after July 1, 1990, and thus defendants' argument that because § 8371 has no retroactive effect it cannot be the basis for relief is unavailing.

***6** Section 8371 does not define bad faith, but the Pennsylvania Superior Court adopted Black's Law Dictionary definition of bad faith:

> "Bad faith" on part of insurer imports a dishonest purpose and means a breach of a known duty (i.e., good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith.

Polselli v. Nationwide Mut. Fire Ins. Co., 23 F.3d 747, 751 (3d Cir.1994) (citing *Black's Law Dictionary,* 139 6th ed.1990)); *Romano v. Nationwide Mut. Fire Ins. Co.,* 435 Pa.Super. 545, 646 A.2d 1228, 1232 (Pa.Super.Ct.1994) (same); *Hyde Athletic Industries, Inc. v. Continental Cas. Co.,* 969 F.Supp. 289, 306 (E.D.Pa.1997) (same); *see also Reading Tube Corp. v. Employers Ins. of Wausau,* 944 F.Supp. 398 (E.D.Pa.1996); *Younis Bros. & Co., Inc. v. Cigna Worldwide Ins. Co.,* 882 F.Supp. 1468 (E.D.Pa.1994).

Under this statute, plaintiff must prove that insurer acted in bad faith by clear and convincing evidence. *Hofkin v. Provident Life & Acc. Ins. Co.,* 81 F.3d 365, 375 (3d Cir.1996). Under *Anderson v. Liberty Lobby,* 477 U.S. at 252, a summary judgment determination must be made in light of the evidentiary standard to be applied at trial. *See also Fort Washington Resources, Inc. v. Tannen,* 858 F.Supp. 455, 459 (E.D.Pa.1994). Therefore, I must decide, after allowing all reasonable inferences in plaintiff's favor, whether plaintiff presented sufficient evidence from which a reasonable juror could conclude by clear and convincing evidence, that Maryland Casualty acted in bad faith.

As discussed above, plaintiff presented evidence from which a reasonable jury could conclude

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that Maryland Casualty intentionally misclassified Alexson's revenue into the higher premium category for the purpose of maximizing profits. A reasonable juror could conclude that this evidence supports an inference that Maryland Casualty acted in bad faith in violation of § 8371 and defendant's motion for summary judgment on Count I is therefore denied.

D. *Count III—Fraudulent Misrepresentation—Both Defendants*

In Count III Alexson alleges a fraudulent misrepresentation claim against Tongue Brooks and Maryland Casualty based on Ray Brooks' alleged representations to Alexson that no insurance from other carriers was available during the 1990 and 1991 policy years. Under Pennsylvania law, fraudulent misrepresentation requires proof by a standard higher than the preponderance of the evidence standard usually applied to civil cases. *Step–Saver Data Systems, Inc. v. WYSE Technology,* 752 F.Supp. 181, 189 (E.D.Pa.1990). The Supreme Court of Pennsylvania has held that fraud must be proven by "evidence that is clear, precise and convincing." *Shell v. State Examining Bd.,* 490 Pa. 277, 416 A.2d 468, 470 (Pa.1980). Like the § 8371 claim, the summary judgment determination must be made in light of this evidentiary standard to be applied at trial. *See Anderson v. Liberty Lobby,* 477 U.S. at 252; *Tannen,* 858 F.Supp. at 459. Thus, I must decide whether plaintiff's evidence is sufficiently clear, precise and convincing for a reasonable jury to find for plaintiff. *Bearshall v. Minuteman Press Int'l, Inc.,* 664 F.2d 23, 26 (3d Cir.1981); *Tannen,* 858 F.Supp. at 459.

*7 Under Pennsylvania law, plaintiff must prove the following elements to maintain a cause of action for fraudulent misrepresentation: 1) defendant made a false representation of fact; 2) materiality of the statement; 3) defendant had either actual knowledge of the falsity of the representation or acted with reckless indifference to the truth; 4) plaintiff's justifiable reliance on the misrepresentation; and 5) plaintiff suffered damages proximately resulting from the misrepresentation. *Wittekamp v. Gulf & Western, Inc.,* 991 F.2d 1137, 1141 (3d Cir.1993) (citations omitted). Even after allowing plaintiff all reasonable inferences, Alexson failed to present clear, precise and convincing evidence of the existence of several of these five elements.

The parties have spent considerable efforts arguing about whether plaintiff produced evidence that Brooks' statement that no other insurance carriers would cover plaintiff, if taken literally as a factual statement and without regard to its context, was false.[FN4] A jury, however, would view Mr. Brooks' statements in context, and that context includes Mr. Brooks' June 6, 1990 letter to Alexson, in which he stated that, "there is no company that I have researched since I last met you that is willing to even look at your account because of those automobile losses and secondarily the theft losses of property that were sustained during that 1988 period as well." The context also includes the April 27, 1990 letter to Alexson in which Mr. Brooks stated that, "I have been in touch with no less than 12 insurers in the market place and there is no one that is willing to look at your Business Automobile Policy and prefer not to look at the account in general because of the horrible Business Automobile experience and the property losses that occurred in 1988." Plaintiff failed to present any evidence that Mr. Brooks' statements in these letters were false. Rather, Mr. Brooks testified that he performed the investigation by contacting the other carriers, but none of them were willing to insure plaintiff.

> FN4. The only evidence that plaintiff presented to establish the falsity of representation was that it was able to obtain insurance in January 1992 from Liberty Mutual, and it received an additional quote from Zurich–American in late 1991. Defendants contend that this evidence is insufficient because plaintiff's account was much less appealing to a potential insurer in 1990 and early 1991 then in late 1991 and early 1992. As of July 1990 plaintiff

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> had suffered three consecutive years where the losses exceeded the premiums on the automobile policy by a significant margin and it had just received a nonrenewal notice. By late 1991 and early 1992, plaintiff had gone approximately a year and a half without any losses on either its automobile or business insurance packages, and many of the Maryland Casualty's loss control had been implemented. Therefore, defendants argue that the situations when Mr. Brooks allegedly made the representations about the unavailability of insurance from other carriers are simply not comparable to the situation in late 1991 and early 1992. Defendants also point to plaintiff's failure to present evidence from an insurance expert concluding that plaintiff could have gotten insurance from other carriers or testimony from a representative of Liberty Mutual or Zurich American concluding that it would have insured plaintiff for the July 1990 and July 1991 policy years. Plaintiff counters by arguing that two of the four insurance carriers that plaintiff contacted were willing to insure plaintiff in late 1991 and early 1992 and that the temporal proximity of the other carrier's willingness to insure plaintiff supports an inference that Mr. Brook's alleged representations were false.
>
> Because I conclude that plaintiff failed to present sufficient evidence on several of the other elements to its fraudulent misrepresentation claim, I need not decide whether it presented sufficient evidence of the falsity of Mr. Brooks' representations.

In light of this context, a jury could not reasonably conclude either that Mr. Brooks' statements were assertions of fact or that plaintiff justifiably relied on them as such. A seller of a product may give subjective opinions as to a product without making a factual representation if the representation involve individual judgment that, "even though made absolutely, the hearer must know that they can be based only on the speaker's opinion." 12 Williston § 1491 p. 349 (3d Ed.1970); *see also Berkenbile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893, 903 (Pa.1975); *Step–Saver*, 752 F.Supp. at 190. Plaintiff would not be justified in believing that Mr. Brooks researched all insurance carriers before expressing this conclusion; only that he researched other carriers and none of those carriers were willing to insure plaintiff. Plaintiff thus could reasonably conclude only that Mr. Brooks was expressing his opinion that no other carriers would insure plaintiff. All of the evidence submitted by the parties suggests that Mr. Brooks' statements were his opinion of the insurance market at the time based on his research. In addition, as discussed above, there is significant evidence in the record suggesting that Mr. Brooks' opinion about the unavailability of alternative insurance may have been correct because of the negative response from the insurance carriers he contacted, the extensive loss history, and Maryland Casualty's issuance of a nonrenewal notice. *See supra* note 4. I thus conclude that none of the alleged representations were factual, and therefore plaintiff cannot sustain his fraudulent misrepresentation claim against Tongue Brooks.[FN5]

> FN5. Plaintiff also claims that the following statement by Mr. Brooks contained in an April 27, 1990 letter to Alexson were also a misrepresentation:
>
> > Liberty Mutual['s] ... financial stability might well be questioned in that they have now, during the year of 1990, lost an additional 1/2 % point on their Best financial rating. I believe that this is not a company that you want to be involved with at this time nor in the near future.
> >
> > The above quoted statement contains mainly Mr. Brooks' opinions. The only factual representation is that Liberty Mutual lost an additional 1/2 % point on the

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> Best financial rating. Plaintiff presented no evidence of the falsity of that representation, and therefore plaintiff cannot base its fraud claim on the above-quoted statement.

*8 Relatedly, plaintiff failed to present evidence from which a reasonable juror could conclude that plaintiff justifiably relied on these representations by Mr. Brooks. As defendants correctly argue, it defies logic that an insurance broker would research every possible insurance carrier before concluding that no other carrier would insure plaintiff. Rather, a reasonable person would view Mr. Brooks' representations not literally but as hyperbole, used to make the point that Alexson's insurance options were limited. Plaintiff would be justified in concluding only that Mr. Brooks' research did not reveal any other insurance carriers willing to insure plaintiff and that in his opinion, no other insurance carrier would. By all accounts Mr. Brooks' performed that investigation to no avail and came to the conclusion that no other insurance carrier would be willing to insure plaintiff because of the significant loss history and the nonrenewal notice. In addition, plaintiff would not be justified to expect Mr. Brooks' research to include Liberty Mutual because, as plaintiff was aware, Liberty Mutual is a direct marketer of insurance and does not use insurance brokers like Mr. Brooks.

Finally, plaintiff has also failed to present sufficient evidence which would allow a reasonable juror to conclude by clear and convincing evidence that Mr. Brooks had either actual knowledge or reckless indifference to the truth of his alleged statement about the unavailability of other insurance carriers. Plaintiff points to the fact that Mr. Brooks had a financial interest in maintaining Alexson's insurance with Maryland Casualty, and claims that he engaged in a "bad faith course of conduct" with Maryland Casualty to conceal the availability of cheaper insurance and charge Alexson exorbitant premiums. As previously discussed, however, plaintiff has failed to present evidence from which a reasonable juror could conclude that Mr. Brooks participated in any bad faith course of conduct. There is insufficient evidence to establish that Mr. Brooks was aware of Maryland Casualty's misclassification of Alexson's revenues into the rental category, and no evidence from which any agreement between Maryland Casualty and Tongue Brooks could be inferred. In fact, in correspondence with Alexson, Mr. Brooks suggested that Alexson file complaints against Maryland Casualty with the Pennsylvania Insurance Commissioner because of the claimed excessive premiums. Mr. Brooks also cut his own commission in half to appease Alexson, which undercuts plaintiff's allegation that he conspired with Maryland Casualty for his own financial benefit. I therefore conclude that plaintiff failed to present sufficient evidence from which a reasonable juror could conclude that Mr. Brooks had either actual knowledge of the falsity of his representation or reckless indifference to the truth of his representation. As plaintiff failed to present sufficient evidence of a fraudulent misrepresentation claim, Tongue Brooks' motion for summary judgment on Count III is granted.

*9 Plaintiff's fraud claim against Maryland Casualty is based on the same claimed misrepresentation by Mr. Brooks about the unavailability of other insurance carriers willing to insure plaintiff. *See* Complt. para. 27–33. Plaintiff contends that Mr. Brooks was acting as an agent for Maryland Casualty when he made those misrepresentations. Because this claim is wholly derivative of plaintiff's claim against Tongue Brooks, and because I granted Tongue Brooks' motion for summary judgment above, Maryland Casualty's motion for summary judgment on Count III is also granted.[FN6]

> FN6. Plaintiff did not allege a claim of fraud against Maryland Casualty based on the misclassification of its revenues.

E. *Count II—Breach of Contract—Tongue Brooks*

In Count II plaintiff alleges that Tongue Brooks violated its contractual duties to plaintiff by failing to obtain insurance coverage at a fair and

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reasonable price. Plaintiff does not contend that Tongue Brooks failed to notify plaintiff about the premium. Rather, plaintiff contends that Tongue Brooks conspired with Maryland Casualty to charge excessive premiums and conceal the availability of cheaper insurance. Assuming *arguendo* that Tongue Brooks had a contractual duty to obtain insurance for Alexson at a fair and reasonable price,[FN7] as discussed above, plaintiff failed to present sufficient evidence to support an inference that Tongue Brooks conspired with Maryland Casualty to either charge excessive rates or to conceal the availability of cheaper insurance. Plaintiff therefore failed to present sufficient evidence from which a juror could conclude that Tongue Brooks violated that contractual duty, and Tongue Brooks' motion for summary judgment on Count II is therefore granted.

FN7. The parties did not have a written agreement which so provided.

ORDER

AND NOW this day of March, 1998, upon consideration of defendants' motions for summary judgment, Maryland Casualty's motion for payment of expenses, Maryland Casualty's motion to adopt by reference portions of the motion for summary judgment of defendant Tongue Brooks and the parties' filings related thereto, it is hereby ORDERED that:

1. Maryland Casualty's motion to adopt by reference portions of the motion for summary judgment of defendant Tongue Brooks is GRANTED.

2. Defendants' motions for summary judgment is GRANTED as to Counts II and III and DENIED as to Count I; and

3. Maryland Casualty's motion for payment of expenses is DENIED as withdrawn.

E.D.Pa.,1998.
Alexson Supply, Inc. v. Tongue, Brooks & Co., Inc.
Not Reported in F.Supp., 1998 WL 98988 (E.D.Pa.)

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Not Reported in A.2d, 2005 WL 3036541 (Pa.Com.Pl.)
(Cite as: 2005 WL 3036541 (Pa.Com.Pl.))

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Only the Westlaw citation is currently available.SLIP COPY

Court of Common Pleas of Pennsylvania, Philadelphia County.
CORONADO CONDOMINIUM ASSOCIATION, INC., Plaintiff,
v.
IRON STONE CORONADO, L.P., Iron Stone Coronado G.P. Corp., Iron Stone Management, Andrew Eisenstein, Matthew Canno, Joel Wachs and Prudential Fox & Roach, Defendants.

No. 2691 DEC,TERM 2004.
Nov. 7, 2005.

OPINION

JONES, J.

***1** The instant action arises from the sale of condominium units to individual unit owners. Plaintiff Coronado Condominium Association, Inc. (hereinafter "Association" or "Plaintiff") instituted suit against Prudential Fox & Roach and Iron Stone Coronado, L.P., Iron Stone Coronado, G.P. Corp, Iron Stone Management, Andrew Eisenstein, Matthew Canno and Joel Wachs alleging claims for breach of contract (count I), breach of fiduciary duty (count II), fraud and misrepresentation (count III), violations of the Unfair Trade Practices Consumer Protection Law (count IV), violations of the Real Estate Seller Disclosure Act (count V) and negligence (count VI). Presently before the court are the respective Preliminary Objections of Defendant Prudential Fox & Roach and Iron Stone Coronado, L.P., Iron Stone Coronado, G.P. Corp, Iron Stone Management, Andrew Eisenstein, Matthew Canno and Joel Wachs to Plaintiff's complaint. For the reasons discussed below, Defendants' preliminary objections are sustained in part and overruled in part.

DISCUSSION

I. Defendants' Preliminary Objection to Count IV (UTPCPL) is Sustained.

Count IV of the complaint purports to state a claim under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. § 201-1 et. seq. Defendants maintain that the Association lacks standing to assert such a claim since the Association is not a purchaser as required by the statute. The court agrees.

The UTPCPL provides in pertinent part as follows:

> Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, may bring a private action to recover actual damages or one hundred dollars ($100.00) whichever is greater.

73 Pa.C.S. § 201-9.2(a). According to the plain and unambiguous terms of the statute, only parties who have made purchases or leased goods and services may sue.

Here, the complaint fails to allege that the Association is a purchaser as intended by the UTPCPL. Although the Uniform Condominium Act permits an association to institute litigation in its own name on behalf of itself or two or more unit owners on matters affecting the condominium, the UTPCPL was intended to enhance the protection of consumers against deceptive or unfair trade practices. As such, the language found in the UTPCPL requires that the persons who can bring a claim be a "purchaser." Here, the claim arising under the UTPCPL did not affect the condominium but affected the purchaser of the condominium unit. Since the Association is not a purchaser it is statutorily precluded from bringing a private cause of action under the UTPCPL. *See Greencourt Condominum*

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Ass'n v. Greencourt Partners, et. al. 2004 Phila. Ct. Com. Pl. Lexis 58, 2004 WL 3051336 (2004)(*citing Balderston v. Medtronic Sofamor Danek, Inc.*, 285 F.3d 238, 241 (3rd.Cir.2002); *cf. Valley Forge Towers South Condominium v. Ron-Ike Foam Insulation, Inc.*, 393 Pa.Super. 339, 574 A.2d 641 (Pa.Super.1990)(holding that a condominium association could proceed under the UTPCPL based on the condominium associations purchase of roofing material from the defendant)). Accordingly, Count IV is dismissed.

II. Count III is dismissed for Failure to Conform to a Rule of Court.

*2 Pennsylvania Rule of Civil Procedure 1020 requires each cause of action and any special damage related thereto to be stated in separate counts containing a demand for relief. *See* Pa. R. Civ. P. 1020. Count III of the complaint purports to state a claim for fraud and misrepresentation. Pennsylvania recognizes three different types of misrepresentation, intentional misrepresentation, negligent misrepresentation and innocent misrepresentation. *See Bortz v. Noon,* 556 Pa. 489, 729 A.2d 555, 560 (Pa.1999). Count III fails to identify the type of representation for which it seeks relief against moving Defendants and fails to separate the fraud claim from the misrepresentation claim as required by Pa. R. Civ. P. 1020. Accordingly, Defendants' Preliminary Objections are sustained. Plaintiff is granted leave to amend Count III to conform with Pa. R. Civ. P. 1020 within twenty (20) days from the date of this order.[FN1]

> FN1. Despite plaintiff's failure to separate the fraud claim from the misrepresentation claim as required by Pa. R. Civ. P. 1020 the allegations contained within Count III are sufficient at this stage in the litigation to state a claim for fraud against defend- ants.

II. Count V is dismissed for failing to state a claim.

Count V of plaintiff's complaint purports to state a claim for violations of the Real Estate Seller Disclosure Act, 68 Pa.C.S. § 7301 *et. seq.* Defendants maintain that Plaintiff's claim is legally insufficient and should be dismissed since the act does not require disclosures relating to common elements by a seller of the condominium unit. The court agrees.

Section 7302 (b) of the Real Estate Seller Disclosure Law provides:

> (b) Limitations in the case of condominiums or cooperatives.-Any seller of a unit in a condominium created under Subpart B of Part II (relating to condominiums or a similar provision of prior law or a cooperative as defined in section 4103 (relating to definitions) *shall be obligated to make disclosures under this chapter only with respect to the seller's own unit and shall not be obligated by this chapter to make any disclosure with respect to any common elements or common facilities of the condominium or cooperative.* The provisions of section 3407 (relating to resales of units) shall control disclosures a seller is required to make concerning common elements in a condominium, and section 4409 (relating to resales of cooperative interests) shall control disclosures a seller is required to make concerning common elements in a cooperative. (Emphasis added.).

Here, in count V of the complaint, plaintiff alleges as follows:

> 97. Iron Stone Coronado, L.P. breached the foregoing duties by failing to accurately and fully complete the Seller's Property Disclosure Statement mandated in Section 1025 of the Seller's Disclosure Act.
>
> 98. Moreover, Iron Stone Coronado, L.P. breached the foregoing duties by providing Seller Disclosure Statements to Association members which contained errors, inaccuracies and omissions regarding materially defective Common Elements within The Coronado, the existence of which Iron Stone Coronado, L.P. knew, or should have known.

Because plaintiff's allegations relate to the

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common elements of the condominium, the Real Estate Seller Disclosure Law does not apply. Accordingly, Count V is dismissed.

CONCLUSION

*3 For the foregoing reasons, Defendants' Preliminary Objections are Sustained in part as follows: Count IV (UTPCPL) is dismissed for lack of capacity to sue, Count III (fraud and misrepresentation) is dismissed for failure to conform to a rule of court and Count V (violations of the Real Estate Seller Disclosure Law) is dismissed. Plaintiff is granted leave to amend Count III to conform with Pa. R. Civ. P. 1020 within twenty (20) days from the date of this order. All other preliminary objections are overruled. [FN2]

> FN2. The court makes no finding as to the future viability of the remaining counts and this order is entered without prejudice so that Defendants may later file a motion challenging same if warranted.

An order contemporaneous with this Opinion will be filed of record.

ORDER and OPINION

AND NOW, this 7th day of November 2005, upon consideration of the Preliminary Objections of Defendant Prudential Fox & Roach to Plaintiff's complaint (cn 052061) and the Preliminary Objections of Defendants Iron Stone Coronado, L.P., Iron Stone Coronado, G.P. Corp ., Iron Stone Management, Andrew Eisenstein, Matthew Canno and Joel Wachs (cn 070293), Plaintiff's responses in opposition, Memoranda, all matters of record and in accord with the Memorandum Opinion to be filed of record, it hereby is ORDERED and DECREED that Defendants' Preliminary Objections are Sustained in part as follows:

1. Count IV (UTPCPL) is dismissed for lack of capacity to sue.

2. Count III (fraud and misrepresentation) is dismissed for failure to conform to a rule of court. Plaintiff is granted leave to amend Count III to conform with Pa. R. Civ. P. 1020 within twenty (20) days from the date of this order.

3. Count V (violations of the Real Estate Seller Disclosure Act) is dismissed for failure to state a claim.

All other preliminary objections are overruled.

Pa.Com.Pl.,2005.
Coronado Condominium Ass'n, Inc. v. Iron Stone Coronado, L.P.
Not Reported in A.2d, 2005 WL 3036541 (Pa.Com.Pl.)

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Not Reported in F.Supp.2d, 2011 WL 5075080 (E.D.Pa.)
(Cite as: 2011 WL 5075080 (E.D.Pa.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Pennsylvania.
German YAKUBOV, Plaintiff,
v.
GEICO GENERAL INSURANCE CO., Defendant.

Civil Action No. 11–3082.
Oct. 24, 2011.

Bart Benoff, Edward Benoff & Associates, Trevose, PA, for Plaintiff.

Stephan A. Cornell, White & Williams LLP, Center Valley, PA, for Defendant.

MEMORANDUM OPINION AND ORDER
RUFE, District Judge.

***1** Plaintiff German Yakubov brings this action against his insurer, Defendant GEICO General Insurance Company ("GEICO"), to obtain uninsured motorist and income loss benefits under an automobile liability insurance policy issued by GEICO. Presently before the Court is GEICO's Motion to Dismiss Claims for Punitive Damages and Misrepresentation From the Amended Complaint. [FN1] For reasons that follow, the Motion will be granted in part and denied in part.

FN1. Doc. No. 7.

I. FACTUAL AND PROCEDURAL BACKGROUND

On April 24, 2009, at approximately 1:30 p.m., Plaintiff was seriously injured in a motor vehicle accident involving his own vehicle and a vehicle driven by an uninsured motorist.[FN2] Plaintiff alleges that the uninsured motorist was factually and legally responsible for causing the accident.[FN3] At the time of the accident, Plaintiff was insured under an automobile liability insurance policy (the "Policy") issued by GEICO.[FN4] Plaintiff submitted a claim to GEICO for Uninsured Motorist ("UM") benefits and income loss benefits under the Personal Injury Protection ("PIP") coverage of the Policy.[FN5] Beginning in May 2009, Plaintiff received income loss payments from GEICO in the amount of $2,500 per month.[FN6] These payments continued for seven months, but then stopped without notice in December 2009.[FN7] By letter dated November 3, 2010, GEICO issued a denial of further income loss benefits to Plaintiff.[FN8] In addition, GEICO has refused to pay Plaintiff the $300,000 UM benefits to which Plaintiff claims he is entitled.[FN9]

FN2. Am. Compl. ¶ 10.

FN3. Am. Compl. ¶ 11.

FN4. Am. Compl. ¶ 6.

FN5. Am. Compl. ¶¶ 22, 34.

FN6. Am. Compl. ¶ 38.

FN7. Am. Compl. ¶¶ 38, 40.

FN8. Am. Compl. ¶ 41.

FN9. Am. Compl. ¶¶ 20–24.

This action was originally filed by Plaintiff in the Court of Common Pleas of Philadelphia County. On May 10, 2011, GEICO filed a timely Notice of Removal with this Court,[FN10] followed by a Motion to Dismiss Punitive Damages Claims from the Complaint.[FN11] On June 1, 2011, Plaintiff filed an Amended Complaint, thereby rendering the first Motion to Dismiss moot. [FN12] GEICO then timely filed the Motion to Dismiss The Amended Complaint.

FN10. Doc. No. 1.

FN11. Doc. No. 4.

FN12. Doc. No. 6.

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The Amended Complaint contains five Counts: a claim for UM benefits (Count I); a claim for income loss benefits (Count II); a claim alleging a violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL") (Count III); [FN13] a claim of bad faith (Count IV); and a claim alleging intentional misrepresentation (Count V). GEICO moves to dismiss Count V, arguing that the claim is not plead with the particularity required by Federal Rule of Civil Procedure 9(b) and that it is barred by the "gist of the action" doctrine. In addition, GEICO seeks dismissal of the claim for punitive damages contained in Count III, asserting that UTPCPL does not provide for an award of punitive damages.

FN13. 73 Pa. Stat. Ann. §§ 201–1 to 205–10.

II. STANDARD OF REVIEW

Dismissal of a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted is appropriate where a plaintiff's "plain statement" does not possess enough substance to show that plaintiff is entitled to relief.[FN14] In determining whether a motion to dismiss should be granted, the court must consider only those facts alleged in the complaint, accepting the allegations as true and drawing all logical inferences in favor of the non-moving party. [FN15] Courts are not, however, bound to accept as true legal conclusions couched as factual allegations.[FN16] Something more than a mere *possibility* of a claim must be alleged; plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." [FN17] The complaint must set forth "direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory." [FN18] The court has no duty to "conjure up unpleaded facts that might turn a frivolous ... action into a substantial one." [FN19]

FN14. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 557, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

FN15. *ALA, Inc. v. CCAIR, Inc.,* 29 F.3d 855, 859 (3d Cir.1994); *Fay v. Muhlenberg Coll.,* No. 07–4516, 2008 WL 205227, at *2 (E.D.Pa. Jan.24, 2008).

FN16. *Twombly,* 550 U.S. at 555, 564.

FN17. *Id.* at 570.

FN18. *Id.* at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.,* 745 F.2d 1101, 1106 (7th Cir.1984)).

FN19. *Id.* at 562 (citing *McGregor v. Industrial Excess Landfill, Inc.,* 856 F.2d 39, 42–43 (6th Cir.1988)).

III. DISCUSSION

A. *Intentional Misrepresentation (Count V)*[FN20]

FN20. Am. Compl. ¶¶ 73–78. The Amended Complaint does not specify whether the alleged misrepresentation was fraudulent/intentional, negligent, or innocent. However, the Amended Complaint describes intentional conduct and, in response to GEICO's Motion to Dismiss, Plaintiff asserts that the Amended Complaint alleges intentional misrepresenta- tion.

*2 Plaintiff alleges that GEICO represented to him that his Policy provided income loss coverage and charged a premium for income loss coverage, but that GEICO's promise to pay income loss benefits was "wholly illusory" and GEICO never intended to pay income loss benefits.[FN21] GEICO argues that Plaintiff is attempting to recast his breach of contract claim as a tort claim and is precluded from doing so by the gist of the action doctrine. The Court agrees.

FN21. Am. Compl. ¶ 74.

Under Pennsylvania law, the gist of the action doctrine prevents a plaintiff from recasting an ordinary breach of contract claim as a tort claim.

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FN22 The doctrine forecloses tort claims: "1) arising solely from the contractual relationship between the parties; 2) when the alleged duties breached were grounded in the contract itself; 3) where any liability stems from the contract; and 4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim." FN23 "Where the alleged misrepresentation or fraud concerns the performance of contractual duties, 'then the alleged fraud is generally held to be merely collateral to a contract claim for breach of those duties.' " FN24

FN22. *Greenspan v. ADT Sec. Servs. Inc.*, No. 10–2901, 2011 WL 4361530, at *4 (3d Cir. Sept.20, 2011).

FN23. *Smith v. Lincoln Ben. Life Co.*, 395 F. App'x 821, 823 (3d Cir.2010) (citing *Hart v. Arnold*, 884 A.2d 316, 340 (Pa.Super.Ct.2005)).

FN24. *Id.* (quoting *eToll, Inc. v. Elias/Savion Adver., Inc.*, 811 A.2d 10, 19 (Pa.Super.Ct.2002)).

In *Smith v. Lincoln Benefit Life Co.*,FN25 the Third Circuit affirmed a district court's dismissal of two negligent misrepresentation claims based on the gist of the action doctrine. The Third Circuit explained:

FN25. 395 F. App'x 821 (3d Cir.2010).

> Applying the gist doctrine here with respect to the Notice Claim, it is evident that the parties' relationship and duties were framed by the insurance policy. [The Insurer's] alleged misrepresentations and subsequent failure to pay death benefits arose from the insurance contract between the parties and revolved around the provisions for payment, grace period, and lapse. Indeed, this case is "really about" the policy provisions of the contract, and the claims and liability cannot be determined without looking to the terms of the contract. The alleged misrepresentations were directly related to the underlying contractual rights and obligations, and the District Court correctly concluded that the gist of the action sounded in contract and barred [plaintiff's] notice claim.FN26

FN26. *Id.* at 823 (citation omitted).

Similarly, here, the relationship and duties of the parties arise under the Policy. Any failure to pay the income loss benefits to which Plaintiff claims he is entitled would be a breach of the PIP provisions of the Policy. The success of Plaintiff's claims depend upon those provisions of the Policy, and Plaintiff's misrepresentation claim is duplicative of and collateral to his contract claims. Based on the foregoing, it is evident that Plaintiff's "misrepresentation" claim is "really about" GEICO's alleged breach of its obligations under the Policy and is therefore barred by the gist of the action doctrine.

Further, even if the Court found that the gist of the action doctrine did not bar Plaintiff's misrepresentation claim, it would nonetheless dismiss Count V for failure to state a claim because Plaintiff has failed to plead misrepresentation with sufficient specificity. Pennsylvania recognizes three types of misrepresentation: fraudulent or intentional misrepresentation, negligent misrepresentation, and innocent misrepresentation.FN27 While the Complaint does not specify whether the alleged misrepresentation was fraudulent/intentional, negligent, or innocent, in response to GEICO's Motion to Dismiss, Plaintiff characterizes the Amended Complaint as alleging intentional misrepresentation. Further, the Amended Complaint describes intentional conduct. FN28 Accordingly, the Court will construe Count V as a intentional misrepresentation claim.

FN27. *Square D Co. v. Scott Elec. Co.*, No. 06–459, 2008 WL 2096890, at *2 (W.D.Pa. May 16, 2008) (citing *Bortz v. Noon*, 556 Pa. 489, 729 A.2d 555, 560 (Pa.1999)).

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FN28. Am. Compl. ¶ 74(d) ("Defendant made material misrepresentations to Plaitniff including but not limited to the following: ... Representing that Plaitniff had automobile insurance coverage when in fact, Defendant had no intention to issue or pay such benefits.")

*3 Under Pennsylvania law, the elements of intentional misrepresentation are: "(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or with recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) injury resulting [from] and proximately caused by the reliance." [FN29] *Bortz,* 729 A.2d at 560. These elements are equivalent to those of fraud and, as such, the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) apply.[FN30]

FN29. *Square D Co.,* 2008 WL 2096890, at *2.

FN30. *Id.*

Rule 9(b) requires that a party alleging fraud "state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Pursuant to Rule 9(b), Plaintiff is required to allege with particularity the "who, what, when, where, and how" of the alleged intentional misrepresentation. [FN31] Plaintiff has failed to do so here.

FN31. *Kanter v. Barella,* 489 F.3d 170, 175 (3d Cir.2007).

Plaintiff alleges that GEICO made the following material misrepresentations:

(a) Representing that Plaintiff had purchased automobile insurance coverage, including income loss coverage, when in fact Defendant's promise to pay such benefits was wholly illusory; (b) Purporting to offer automobile insurance coverage, including income loss coverage when in fact, Defendant had no intention of providing such benefits; (c) Charging a premium based upon automobile insurance coverage, including income loss coverage when in fact, Defendant would use any excuse, justified or not, to avoid fulfilling its contract with Plaintiff; (d) Representing that Plaintiff had automobile insurance coverage, including income loss coverage when in fact, Defendant had no intention to issue or pay such benefits; (e) Representing that Plaintiff had automobile insurance coverage, including income loss benefits when in fact, Defendant without reasonable justification or basis, refuses to pay said benefits; and (f) Misrepresenting pertinent facts or policy or contract provisions relating to coverages at issue. [FN32]

FN32. Am. Compl. ¶ 74.

These allegations are general and conclusory, and do not meet the pleading requirements of Rule 9(b). Plaintiff does not allege with specificity who made the statements, when or where the statements were made, what the statements were, or even how the statements were communicated. The only communication specifically identified by Plaintiff is a November 3, 2010 letter from a representative of GEICO denying Plaintiff's claim for income loss benefits.[FN33] However, Plaintiff does not allege that this letter contained material misrepresentations upon which Plaintiff relied to his detriment. Instead, the letter is cited in support of Plaintiff's claim that GEICO breached the terms of the Policy in denying him continued income loss payments. Finally, Plaintiff's claim that GEICO misrepresented its intent to provide Plaintiff income loss benefits under the terms of the Policy is seriously undermined by Plaintiff's allegation that he actually received $17,500 in income loss payments over a period of seven months.

FN33. Am. Compl. ¶ 41.

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*4 For the additional reason that Plaintiff has failed to state a claim for intentional misrepresentation, the Court will dismiss Count V from the Amended Complaint.

B. *Punitive Damages (Count III)*[FN34]

FN34. Plaintiff also seeks punitive damages in Count IV (bad faith). GEICO does not move to dismiss this claim for damages. Consequently, Plaintiff may proceed with the punitive damage claim contained in Count IV. *See Smith v. Cont'l Cas. Co.*, 347 F. App'x 812, 814–15 (3d Cir.2009) (citing 42 Pa. Cons.Stat. § 8371) ("By statute, Pennsylvania provides for interests, costs, attorneys' fees and punitive damages for a bad faith denial of insurance coverage.").

In Count III, Plaintiff seeks, *inter alia,* treble and punitive damages for a violation of Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL").[FN35] GEICO moves to dismiss the claim for punitive damage, arguing that the UTPCPL does not permit an award of punitive damages. Plaintiff responds that, although the statute does not expressly provide for punitive damages, it provides that a court may award "such additional relief as it deems necessary or proper," and several courts have held that punitive damages may be awarded in appropriate circumstances.

FN35. 73 Pa. Stat. Ann. §§ 201–1 to 205–10.

Under the UTPCPL, a court may, at its discretion, award treble damages and "such additional relief as it deems necessary or proper." [FN36] The Pennsylvania Supreme Court has held that treble damages under the UTPCPL, although punitive in nature, are not constrained by the common-law requirements associated with an award of punitive damages.[FN37] The Pennsylvania Supreme Court has *not,* however, determined whether punitive damages are permitted under the UTPCPL as "additional relief." Thus, in deciding whether punitive damages may be awarded here, this Court "must predict how the Pennsylvania Supreme Court, if faced with the identical issue, would construe the statute." [FN38] In predicting how the Pennsylvania Supreme Court would rule, the Court may give "due regard, but not conclusive effect, to the decisional law of lower state courts," and may consider analogous decisions of other federal district courts.[FN39]

FN36. 73 Pa. Stat. Ann. § 201–9.2(a).

FN37. *Schwartz v. Rockey,* 593 Pa. 536, 932 A.2d 885, 898 (Pa.2007).

FN38. *Combs v. Homer–Ctr. Sch. Dist.,* 540 F.3d 231, 255 (3d Cir.2008).

FN39. *See Nationwide Mut. Ins. Co. v. Buffetta,* 230 F.3d 634, 637 (3d Cir.2000) ("In predicting how the highest court of the state would resolve the issue, we must consider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.") (internal quotation and citation omitted).

Few state courts have addressed the issue presented in this case, but several federal district courts have. Of those courts that have addressed the issue, there is a split as to whether punitive damages are available as "additional relief" under the UTPCPL.[FN40] While some courts have held that punitive damages are not available,[FN41] others have concluded that although not expressly provided in the statute, punitive damages are available where the violation of the UTPCPL is extreme. [FN42]

FN40. *Nabal v. BJ's Wholesale Club, Inc.,* No. 02–2604, 2002 WL 32349137, at *3 n. 5 (E.D.Pa. Aug.2, 2002).

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FN41. *See, e.g., Smith v. Bristol–Myers Squibb Co.*, No. 06–6053, 2009 WL 5216982, at *7 (D.N.J. Dec.30, 2009) ("[P]unitive damages are unavailable under the UTPCPL."); *Hockenberry v. Diversified Ventures, Inc.*, No. 04–1062, 2005 WL 1458768, at *5 (M.D.Pa. June 20, 2005) (dismissing the claim for punitive damages under UTPCPL).

FN42. *See Werwinski v. Ford Motor Co.*, No. 00–943, 2000 WL 375260, at *4 (E.D.Pa. Apr.11, 2000) (citing *Aronson v. Creditrust Corp.*, 7 F.Supp.2d 589, 593 (E.D.Pa.1998)) ("The UTPCPL allows a court discretionary authority to award punitive damages in addition to actual and treble damages in cases where the court finds such additional relief to be 'necessary or proper.' "), *aff'd*, 286 F.3d 661 (3d Cir.2002); *Adams v. General Motors Corp.*, No. 89–7653, 1990 WL 18850, at *2 (E.D.Pa. Feb.26, 1990) ("Although there is little caselaw on the availability of punitive damages under the UTPCPL, what law there is suggests that punitive damages are appropriate where violations are repeated or extreme.").

Whether punitive damages are available under the UTPCPL is an issue that the Court will reserve pending resolution of Plaintiff's substantive UTPCPL claim. Accordingly, the Motion to Dismiss the Punitive Damage Claim will be denied without prejudice as premature and may be renewed by GEICO at a later time, if appropriate.

IV. CONCLUSION

The misrepresentation claim contained in Count V is barred by the gist of the action doctrine and will be dismissed. The Court will not dismiss the punitive damages claim contained in Count III at this time.

An appropriate Order follows.

E.D.Pa.,2011.
Yakubov v. GEICO General Ins. Co.
Not Reported in F.Supp.2d, 2011 WL 5075080 (E.D.Pa.)

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MICHAEL J. MCQUEARY,	: IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
Plaintiff,	:
v.	:
	: CIVIL ACTION NO. 2012-1804
THE PENNSYLVANIA STATE UNIVERSITY,	: HON. THOMAS G. GAVIN
Defendant.	:

CERTIFICATE OF SERVICE

I, Nancy Conrad, Esquire, hereby certify that on this 20th day of February, 2013, a true and correct copy of the foregoing Memorandum of Law In Support of The Pennsylvania State University's Preliminary Objections to Plaintiff's Complaint was served upon the following persons via first class, United States mail, postage prepaid:

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