

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

DEWEY HOMES AND INVESTMENT
PROPERTIES, LLC, MARK T. VINSON,
JOSEPH P. ELM, MARK GISENDANER,
BRADLEY KRESS, BRIAN KRESS,
ALBERT McKEE and CHARLOTTE
McKEE, husband and wife, RONALD
MOLINARO, JEAN UTZ, MATTHEW
VINSON, DEAN WEIGLE, and SHARON
WEIGLE, husband and wife,

Plaintiffs,

v.

DELAWARE RIVERKEEPER NETWORK,
CLEAN AIR COUNCIL, DAVID DENK,
JENNIFER CHOMICKI, ANTHONY
LAPINA, JOANN GROMAN, and AMY
NASSIF,

Defendants.

CIVIL DIVISION

No. 2015-10393

**BRIEF IN SUPPORT OF
PRELIMINARY OBJECTIONS OF
DEFENDANTS DELAWARE
RIVERKEEPER NETWORK, CLEAN AIR
COUNCIL, DAVID DENK, JENNIFER
CHOMICKI, ANTHONY LAPINA AND
JOANN GROMAN TO PLAINTIFFS'
COMPLAINT**

For the reasons set forth below and in the Preliminary Objections (“POs”), also filed on this date, Defendants respectfully submit that this Court should sustain the POs of the Defendants to Counts I, II and III of the Plaintiffs’ Complaint (the “Complaint”) and thereby strike the Plaintiffs’ claims for tortious interference with contracts (Count I), tortious interference with prospective contractual relations (Count II) and civil conspiracy (Count III) for failure to conform to law or rule of court pursuant to Pa.R.Civ.P. 1028(a)(2), for insufficient factual specificity pursuant to Pa.R.Civ.P. 1028(a)(3), and for legal insufficiency pursuant to Pa.R.Civ.P. 1028(a)(4).

I. STATEMENT OF QUESTION INVOLVED

Question 1: Should the Court strike and dismiss Counts I, II and III of the Complaint against all of the Defendants for failure to conform to rule of law or court and for insufficient specificity of a pleading pursuant to Pa. R. Civ. P. 1028(a)(2) and (3)?

Suggested Answer 1: Yes.

Question 2: Should Counts I, II and III of the Complaint be stricken for failure to conform to Pa. R. Civ. P. 1020(a), thus violating Pa. R. Civ. P. 1028(a)(2)?

Suggested Answer 2: Yes.

Question 3: Should the Court strike Counts I, II and III of the Complaint against all of the Defendants for legal insufficiency pursuant to Pa. R. Civ. P. 1028(a)(4), based upon the *Noerr-Pennington* Doctrine?

Suggested Answer 3: Yes.

Question 4: Should Counts I, II and III of the Complaint be stricken as against all of the Defendants pursuant to Pa.R.Civ.P. 1028(a)(4) because of Plaintiffs’ inability to satisfy an essential element of all three claims asserted against the Defendants?

Suggested Answer 4: Yes.

II. FACTS

Defendants incorporate by reference the “Statement of Facts” section from the Brief in Support of Defendant’s Preliminary Objections (the “Nassif Brief”) as if fully set forth herein. *See Nassif Brief at 1-3*. Although that section addresses only the deficiencies of Counts II and III of the Complaint, since those are the only two Counts asserted against defendant Nassif personally, the same deficiencies exist with respect to Count I of the Complaint which is asserted against the Defendants as well.

III. STANDARD OF REVIEW

When considering preliminary objections, all material facts set forth in the challenged pleadings are considered to be admitted as true, as well as all inferences reasonably deducible therefrom. *Haun v. Community Health Systems, Inc.*, 14 A.3d 120, 123 (Pa. Super. 2011) (citing *Hykes v. Hughes*, 835 A.2d 382, 383 (Pa. Super. 2003)). However, the court need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *Penn Title Ins. Co. v. Deshler*, 661 A.2d 481, 483 (Pa. Commw. 1995); *see also Feingold v. Hendrzak*, 15 A.3d 937, 942 (Pa. Super. 2011).

IV. ARGUMENT

- A. This Honorable Court should strike and dismiss Counts I, II and III of the Complaint against all of the Defendants for failure to conform to rule of law or court and for insufficient specificity of a pleading pursuant to Pa. R. Civ.P. 1028(a)(2) and (3).**

The Defendants incorporate by reference the arguments and authorities set forth in the Nassif Brief at 5-10 as if fully set forth herein. Ms. Nassif advanced those arguments and authorities with respect to Counts II and III of the Complaint, which are the only Counts directed against her. The Defendants extend such arguments and authorities on their own behalf against all Counts in the Complaint directed against them – namely, Counts I, II and III.

B. This Honorable Court should strike and dismiss Counts I, II and III of the Complaint against all of the Defendants for failure to conform to Pa. R. Civ. P. 1020(a), pursuant to Pa. R. Civ. P. 1028(a)(2).

The Defendants incorporate by reference the arguments and authorities set forth in the Nassif Brief at 10-11, as if fully set forth herein. Ms. Nassif advanced those arguments and authorities with respect to Counts II and III of the Complaint. The Defendants extend such arguments and authorities on their own behalf against all Counts in the Complaint directed against them – namely, Counts I, II and III.

C. This Honorable Court should strike and dismiss Counts I, II and III of the Complaint against all of the Defendants pursuant to Pa. R. Civ.P. 1028(a)(4) because the allegations against the Defendants, although vague, relate to activities for which the defendants are protected from liability as a matter of law by the *Noerr-Pennington Doctrine*.

Plaintiffs' failure in the Complaint to identify any specific tortious conduct, and reliance merely on conclusory allegations and inflammatory rhetoric, likely masks a recognition that people cannot be sued for engaging in constitutionally protected political and legal activities. All of Defendants' actions in this matter involve core expressive and petitioning activities, which are safeguarded by the First Amendment to the U.S. Constitution and by Article I, Section 7 of the Pennsylvania Constitution.

The U.S. Supreme Court has described the First Amendment right to petition — “to freely inform the government” of our wishes — as one of “the most precious of the liberties safeguarded by the Bill of Rights.”¹ In the Court's words:

[T]he whole concept of representation depends upon the ability of the people to make their wishes known to their representative. To hold that government retains the power to act in this representative capacity and yet hold, at the same time, that

¹ *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961); *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967).

people cannot freely inform the government of their wishes would ... be particularly unjustified.²

In order to safeguard the fundamental right to petition, the U.S. Supreme Court has developed an immunity for political and legal petitioning activity, commonly referred to as the *Noerr-Pennington Doctrine*.³ First developed in the anti-trust context, Pennsylvania and other courts have extended the immunity to other areas, including, importantly for this case, immunity from state tort actions.⁴ The immunity “protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes...”,⁵ and includes petitioning to “all types of government entities – legislatures, administrative agencies, and courts...”⁶

² *Noerr*, 365 U.S. at 137. Indeed, the right to petition has deep historical roots:

The importance of the right to petition has been long recognized. *** During our colonial period, the right to petition was widely used. The importance of this right was fundamental-it guaranteed not merely expression but the preservation of democracy. “The very idea of government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.”

A.D. Bedell Wholesale Company, Inc. v. Philip Morris, Inc., 263 F.3d 239, 252 (3d Cir. 2001) (citation omitted).

³ *Noerr, supra.*; *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

⁴ See, e.g., *Penlynn Greene Associates, L.P., v. Clouser*, 890 A.2d 424, 429 n.5 (Pa. Cmwlth. 2005) (“Over the years, courts have extended this immunity doctrine, referred to as the *Noerr-Pennington Doctrine*, to protect political activity against tort claims.”), citing *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886 (1982) (First Amendment protected against a civil conspiracy claim by white merchants whose businesses were being boycotted); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155 (3d Cir.1988) (defendants were immune from conspiracy liability for damages resulting from inducing official action to decertify a nursing home). See also, *Wawa, Inc., v. Alexander J. Litwornia & Assoc.*, 817 A.2d 543, 546 (Pa. Super. 2003) (“The principles of the *Noerr-Pennington* doctrine have been extended to provide defendants immunity from liability for civil conspiracy pursuant to the First Amendment.”), citing *Claiborne Hardware* and *Brownsville Nursing, supra*.

⁵ *Borough of Duryea v. Guarnieri*, ___ U.S. ___, ___, 131 S. Ct. 2488, 2492 (2011).

⁶ *Trustees of University of Pennsylvania v St. Jude Children’s Research Hospital*, 940 F. Supp. 2d 233, 240-41 (E.D. Pa. 2013), citing *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

The immunity applies “regardless of the defendants’ motivations” in waging their campaign, because the right of individuals to petition the government “cannot properly be made to depend on their intent in doing so.”⁷ Even if the parties’ “political motives are selfish [that] is irrelevant.... *Noerr* shields from [tort liability] a concerted effort to influence public officials regardless of intent or purpose.”⁸ Accordingly, *Noerr-Pennington* immunity applies even if Defendants’ political opposition to the drilling approvals was motivated by a purely selfish economic interest in maintaining their home property values against a perceived depreciation caused by nearby fracking.

It also is immaterial that Plaintiffs may have suffered “direct injury as an incidental effect” of the petitioning speech.⁹ “[P]arties may petition the government for official action favorable to their interests without fear of suit, even if the result of the petition, if granted, might harm the interests of others.”¹⁰ Even political or legal activity intended to compel government action that will result in harm to others is shielded from liability. Indeed, in almost all cases where courts apply *Noerr-Pennington* to immunize political activity a person, persons or business are harmed by political or legal activity with a goal to force government action that would produce the harm. In the U.S. Supreme Court’s words, “[i]f *Noerr* teaches anything it is that an intent to restrain trade (in an anti-trust context) as a result of the government action

⁷ *Noerr*, 365 U.S. at 139. *Accord City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 380 (1991); *Professional Real Estate Investors, Inc. v. Columbia Pictures, Industries, Inc.*, 508 U.S. 49, 58-59 (1993); *Firetree, Ltd v. Fairchild*, 920 A.2d 913, 919 (Pa. Commw. 2007) (“Indeed, the Supreme Court has explained the doctrine as extending protection to an absolute right that does not depend on whether the speaker has a proper motive or intent.”); *Wawa, Inc.* 817 A.2d at 546.

⁸ *Omni Outdoor Advertising*, 499 U.S. at 380 (citation omitted).

⁹ *See e.g., N.A.A.C.P. v. Claiborne Hardware, Co.*, 458 U.S. 886, 914 (1982) (finding N.A.A.C.P. immune even though store owners suffered direct injury as a result of group’s boycott activity).

¹⁰ *Tarpley v. Keistler*, 188 F.3d 788, 794 (7th Cir. 1999) (citations omitted).

sought ... does not foreclose protection,”¹¹ and the same is true for political and legal activism seeking to deny a necessary government license, such as decertifying a nursing home, which results in the nursing home owner losing profit.¹²

“The sole exception to the *Noerr-Pennington* Doctrine is the ‘sham exception’ under which a defendant will not be protected if he or she is simply using the petition process as a means of harassment.”¹³ The Court explained it as follows:

The “sham” exception to *Noerr* encompasses situations in which persons use the governmental process — as opposed to the outcome of that process — as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay... A “sham” situation involves a defendant whose activities are “not genuinely aimed at procuring favorable government action” at all, ... not one “who ‘genuinely seeks to achieve his governmental result, but does so through improper means.’”¹⁴

Since it is plain that Defendants actually intended and fought very hard to convince Middlesex Township to not enact the new zoning ordinance and to disapprove the permits needed for the unconventional natural gas development at the Geyer wellsite, their political and legal activities are immune.

A two-part conjunctive test is used to determine whether the sham exception bars *Noerr-Pennington* immunity.¹⁵ In response to a motion to dismiss or a motion for summary judgment under the *Noerr-Pennington* Doctrine, plaintiffs have the burden to show two things, and to do so in this order. First, plaintiffs must show that the defendants’ petitioning activity was “objectively baseless in the sense that no reasonable [petitioner] could realistically expect

¹¹ *Omni Outdoor Advertising*, 499 U.S. at 381 (citations omitted).

¹² *Brownsville Golden Age Nursing Home*, 839 F.2d 155 (defendants immune from conspiracy liability for damages resulting from inducing official action to decertify nursing home).

¹³ *Penllyn Greene Assoc.*, 890 A.2d at 429 n.5.

¹⁴ *Omni Outdoor Advertising*, 499 U.S. at 380 (citations omitted).

¹⁵ *Professional Real Estate Investors*, 508 U.S. at 60-61.

success on the merits.”¹⁶ If the defendants had “probable cause” to file the objected-to litigation, which is no more than a “reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication,” then the legal action is not a sham.¹⁷ Only if the plaintiffs show that the defendants’ activity was objectively baseless may the court consider the second prong, which requires plaintiffs to show that the “defendant’s activity is subjectively motivated by bad faith.”¹⁸ Under this second part, “the court should focus on whether the baseless lawsuit conceals ‘an attempt to interfere directly with the business relationships of a competitor,’ ... through the ‘use [of] the governmental process — as opposed to the outcome of that process — as an anticompetitive weapon.’”¹⁹ “This two-tiered process requires the plaintiff to disprove the challenged lawsuit’s legal viability before the court will entertain evidence of the suit’s economic viability.”²⁰

The *Noerr-Pennington* doctrine has been applied in both Pennsylvania federal and state courts to shield people using legal and political channels to challenge commercial interests, precisely as defendants have done here. The U.S. Court of Appeals for the Third Circuit has found, as “a matter of law,” that when individuals “call[] ... attention” to a business’s violations of law by petitioning government authorities and “eliciting public interest,” their actions “cannot serve as a basis for tort liability.”²¹ *Brownsville* involved citizen complaints about the conditions of a local nursing home, which resulted in the eventual loss of the home’s operating license.

¹⁶ *Id.*

¹⁷ *Id.* at 62-63 (citations omitted).

¹⁸ *Id.* at 60 (citations omitted).

¹⁹ *Id.* at 60-61 (citations omitted).

²⁰ *Id.* at 61.

²¹ *Brownsville Golden Age Nursing Home*, 839 F.2d at 160.

Similarly, a court dismissed state tort claims against private hotel owners who engaged in political and petitioning activity to oppose the construction of a new hotel.²²

The Philadelphia Court of Common Pleas sustained preliminary objections on *Noerr-Pennington* grounds where a civic association and neighbors campaigned against a developer's plans to build houses in forested land abutting a Philadelphia park: "Here, plaintiffs seek to recover damages against these defendants for actions they have taken to influence public bodies concerning their opposition to Bethany Builders' development plans, conduct which clearly is protected under both the First Amendment and *Noerr-Pennington*."²³

Plaintiffs cannot credibly argue here that the Defendants' actions were "objectively baseless." The arguments advanced by Defendants were virtually identical to those that were expressly accepted by the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court in *Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth*.²⁴ Thus, the melodramatic references in the Complaint to alleged "scorched earth campaign(s)," "purposefully inflammatory language" and "incendiary actions" on the part of Defendants are not only false but also irrelevant. *See, e.g.*, Complaint at ¶¶79(a),(c),(f). The Complaint not only fails to state a claim upon which relief may be granted as a matter of law, but Defendants' are immune from liability stemming from the legal and political opposition to the Geyer wellsite across from the school.

²² *VIM, Inc. v. Somerset Hotel, Ass'n*, 19 F.Supp.2d 422, 426-28 (W.D.Pa. 1998).

²³ *Bethany Bldg., Inc. v. Dungan Civic Ass'n*, March Term 2001, No. 2043, 2003 WL 1847603 (Phila. C.P. Mar. 13, 2003).

²⁴ 52 A.3d 463, 484-85 (Pa. Commw. Ct. 2012), *aff'd in part, rev'd in part by Robinson Twp., Delaware Riverkeeper Network, et al. v. Com.*, 83 A.3d 901, 980 (Pa. 2013).

D. This Honorable Court should strike and dismiss Counts I, II and III of the Complaint against all of the Defendants pursuant to Pa. R. Civ. P. 1028(a)(4) because Plaintiffs have not articulated and cannot establish an essential element of all three claims asserted against the Defendants.

Count I of the Complaint claims that the Defendants as a collective group should be found liable to the Plaintiffs for a tortious interference with contracts; Count II claims the Defendants also should be found liable for tortiously interfering with prospective contractual relations; and Count III of the Complaint claims that the Defendants engaged in a “civil conspiracy.”

Under Pennsylvania law, the requisite elements of a cause of action for tortious interference with contracts or tortious interference with prospective contractual relations are: (1) an existing or prospective contractual relationship between complainant and third party; (2) purposeful action intended to harm existing contractual relation or to prevent a prospective one; (3) absence of privilege or justification; (4) actual occurrence of harm or damage; and (5) for prospective contracts, a reasonable likelihood that the relationship would have occurred but for the defendant’s interference.²⁵

The third element of both types of “tortious interference” claims – the requirement that there be an “absence of privilege or justification” – is critical and indispensable to the claims. “[W]here an individual acts legally to advance his own legitimate business interests and did not act solely to intentionally injure the interests of another, a claim for tortious interference with a prospective business relationship must fail.”²⁶ It is plaintiff’s affirmative obligation to plead and prove all necessary elements of its claims. Plaintiffs have failed to do so, as there simply are no

²⁵ *Accumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199, 212 (3d Cir. 2009) (quoting *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 530 (3d Cir. 1998)).

²⁶ *Yurcho v. Hazelton Area School Distr.*, No. 1430 C.D. 2011, 2012 WL 8683308 (Commw. Ct. 2012) (citing *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 412 A.2d 466 (Pa. 1979)).

facts which would establish or even suggest an “absence of privilege or justification” on the part of these Defendants.

A plaintiff bringing a civil conspiracy claim is required to allege (1) the persons combined with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose²⁷, (2) an overt act in furtherance of the common purpose has occurred; and (3) the plaintiff has incurred actual legal damage.²⁸

“Proof of malice, i.e., an intent to injure, is essential in proof of a conspiracy.”²⁹ The element of malice requires a showing that “the sole purpose of the conspiracy is to cause harm to the party who has been injured.”³⁰ Where the facts show that a person acted to advance his or her own business interests, those facts constitute justification and negate any alleged intent to injure.³¹

Here, to the extent any of Defendants’ alleged actions are decipherable from the generically-worded Complaint, those actions necessarily would have been undertaken in furtherance of Defendants’ own interests as property owners, as parents, and as advocates for public health, safety and a clean and healthy environment. The Complaint fails to plead or identify any facts to establish that the Defendants’ alleged actions are unjustified, unlawful, undertaken through unlawful means or for unlawful purposes, or undertaken *solely* with the intention of harming the Plaintiffs, rather than to advance Defendants’ own interests.

²⁷ The Complaint does not even attempt to demonstrate how the Defendants’ petitioning activities in opposition to a specific Township Ordinance through established judicial procedures could constitute an “unlawful act” or a “lawful act by unlawful means or for an unlawful purpose.” On that basis alone, Count III of the Complaint should be stricken.

²⁸ *Weaver v. Franklin County*, 918 A.2d 194, 202 (Pa. Commw. Ct. 2007).

²⁹ *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 412 A.2d 466, 472 (Pa. 1979).

³⁰ *Becker v. Chicago Title Ins. Co.*, No. 03-2292, 2004 WL 228672 at *13 (E.D. Pa. 2004).

³¹ *Thompson Coal Co.*, *supra*, 412 A.2d at 472; *WM High Yield Fund v. O’Hanlon*, No. 04-3423, 2005 WL 6788446 (E.D. Pa. 2005) (granting motion to dismiss civil conspiracy claim).

The Complaint fails to allege any factual basis upon which to support an essential element of the three claims against the Defendants. Accordingly, Defendants respectfully request that this Honorable Court strike and dismiss Counts I, II and III of the Complaint as against all of the Defendants pursuant to Pa. R. Civ. P. 1028(a)(4).

V. CONCLUSION

For all the foregoing reasons, Defendants Delaware Riverkeeper Network, Clean Air Council, David Denk, Jennifer Chomicki, Anthony Lapina and Joann Groman respectfully request that this Honorable Court sustain their Preliminary Objections to the Complaint and enter the Proposed Order attached hereto.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served upon counsel listed below a true and correct copy of the **BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS OF DEFENDANTS DELAWARE RIVERKEEPER NETWORK, CLEAN AIR COUNCIL, DAVID DENK, JENNIFER CHOMICKI, ANTHONY LAPINA AND JOANN GROMAN TO PLAINTIFFS' COMPLAINT** in the above-captioned matter this 15th day of July, 2015, by electronic mail and U.S. First Class Mail:

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