

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA**

**ROBERT M. OWSIANY and
EDWARD F. WISNESKI**

Plaintiffs,

v.

THE CITY OF GREENSBURG,

Defendant.

Case No.:

VERIFIED COMPLAINT

INTRODUCTION

Plaintiff Edward F. Wisneski filed a federal civil rights lawsuit against the City of Greensburg and four of its police officers after he was struck with a Taser, punched in the face, and forcibly removed from his vehicle during the course of an arrest. Although he did not challenge the arrest itself, he claimed that the officers used excessive force against him in violation of his Fourth Amendment rights. Plaintiff Robert M. Owsiany represented Mr. Wisneski in the civil rights case. The civil rights case was dismissed by this Court on summary judgment. Instead of seeking attorney's fees and costs in the federal court action – as provided for by 42 U.S.C. § 1988 – the City of Greensburg filed an action against both Mr. Wisneski and Mr. Owsiany in the Court of Common Pleas for Westmoreland County for wrongful use of civil proceedings and abuse of process seeking damages for the attorney fees and costs it incurred in the civil-rights case. That lawsuit, which is pending, violates the First Amendment because it was filed in retaliation for Mr. Wisneski and Mr. Owsiany's exercise of their right to petition the government for redress of grievances and because it was intended to chill the petition rights of

the plaintiffs as well as any other individuals who may have a civil rights claim against the City of Greensburg. Plaintiffs seek injunctive relief, both preliminarily and permanently, prohibiting the City of Greensburg from pursuing the state-court action against them as well as compensatory damages for the harm they have suffered as a result of having to defend themselves against the City's unconstitutional acts.

PARTIES

1. Plaintiff Robert M. Owsiany is an adult individual and a licensed attorney with an office at 535 Smithfield Street, Pittsburgh, Pennsylvania 15222. Mr. Owsiany has been practicing law for thirty-four years, currently as a solo practitioner. He has successfully handled a number of cases, including actions arising under 42 U.S.C. § 1983.

2. Plaintiff Edward Wisneski is an adult individual who resides in Greensburg, Pennsylvania.

3. Defendant City of Greensburg (the "City" or "Greensburg") is a municipality as defined and constituted under the constitution and laws of the Commonwealth of Pennsylvania, and maintains an office at 416 Main Street, Greensburg, Pennsylvania 15601.

JURISDICTION AND VENUE

4. This Court has jurisdiction under 28 U.S.C. § § 1331 and 1343(a)(3).

5. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391, in that a significant portion of the events which form the basis for this Complaint arose in the geographical area which is contained within the Western District of Pennsylvania.

FACTUAL BACKGROUND

The Civil Rights Action

6. On July 4, 2010, Mr. Wisneski was arrested by four police officers employed by the City.

7. During the course of the arrest, police officers struck Mr. Wisneski with a Taser, punched him, and forcefully removed him from his vehicle.

8. Mr. Wisneski was charged with escape, fleeing or attempting to elude an officer, driving under the influence, recklessly endangering another person and resisting arrest.

9. On or about September 29, 2011, Mr. Wisneski was convicted of those offenses.

10. Mr. Wisneski believed his constitutional right to be free from excessive force was violated during this arrest, and he therefore retained Mr. Owsiany to represent him in a civil rights lawsuit against the City.

11. On June 25, 2012, Mr. Owsiany filed a lawsuit on Mr. Wisneski's behalf in the Western District of Pennsylvania, *Wisneski v. Denning*, Civil Action No.: 12-864 (W.D. Pa.) (the "Civil Rights Action").

12. The Civil Rights Action, brought pursuant to 42 U.S.C. § 1983 and against the City and the four police officers involved in the arrest (collectively, the "Civil Rights Defendants"), alleged claims of excessive use of force in violation of the Fourth and Fourteenth Amendments against the four officers and a *Monell* failure to train claim against the City and two high-ranking police officials. Specifically, Mr. Wisneski alleged that the police officers punched his face, Tasered him, and used unnecessary force to remove him from his car.

13. During the Civil Rights Action the Civil Rights Defendants were represented by insurance counsel.

14. On September 14, 2012, the Civil Rights Defendants filed an Answer to the Complaint.

15. On January 30, 2013, the Civil Rights Defendants filed an Amended Answer.

16. At no point did the Civil Rights Defendants file a Motion to Dismiss or a Motion for Judgment on the Pleadings.

17. Accordingly, the Civil Rights Action proceeded through the discovery process.

18. During discovery, Plaintiffs deposed the four arresting officers and the Chief of Police, and the Civil Rights Defendants deposed Mr. Wisneski.

19. Also during discovery, Plaintiffs produced photographs of Mr. Wisneski, taken the day after his arrest, which showed significant bruising to Mr. Wisneski's ribs and back.

20. On April 3, 2013, during the pendency of the Civil Rights Action, Mr. Wisneski's convictions were upheld by the Superior Court, and the Supreme Court did not grant allocatur.

21. The Civil Rights Defendants moved for summary judgment in the Civil Rights Action, and that motion was fully briefed as of March 24, 2014.

22. On April 30, 2014, the Court granted the Civil Rights Defendants' motion for summary judgment. *See Wisneski v. Denning*, No. 12-864, 2014 BL 121122 (W.D. Pa. April 30, 2014).

23. The Civil Rights Defendants did not move for attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

24. At no point during the course of the Civil Rights Action did the Civil Rights Defendants or their counsel notify plaintiffs that they intended to seek sanctions under Rule 11 of the Federal Rules of Civil Procedure.

25. The Civil Rights Defendants did not move for sanctions under Rule 11 of the Federal Rules of Civil Procedure.

26. Plaintiffs did not file an appeal.

27. Plaintiffs filed and pursued the Civil Rights Action in good faith.

28. The Civil Rights Action was not frivolous, unreasonable, or groundless.

29. Mr. Wisneski reasonably believed in the existence of the facts upon which his civil rights claims were based and reasonably believed that under those facts, his claims may be valid under existing or developing law.

30. Mr. Owsiany, as Mr. Wisneski's attorney of record, believed in good faith that his procurement, initiation, and continuation of the Civil Rights Action on behalf of Mr. Wisneski was not intended to merely harass or maliciously injure the Civil Rights Defendants.

31. Plaintiffs did not institute the federal Civil Rights Action for an improper cause.

32. Plaintiffs instituted the federal Civil Rights Action to seek redress for harm Mr. Wisneski suffered at the hands of the Civil Rights Defendants and not for any other reason or purpose.

The City's Retaliatory Countersuit

33. Mr. Wisneski's time to appeal the dismissal of the Civil Rights Action expired on May 30, 2014.

34. Little more than a month later, Susan S. Trout ("Trout"), City Administrator, verified a Complaint on behalf of the "City of Greensburg, a municipal corporation," against Plaintiffs alleging abuse of process, malicious use of process, and civil conspiracy. *See* Complaint and Verification signed by Trout on July 10, 2014, attached hereto as **Exhibit A**.

35. On August 29, 2014, the City, through City Solicitor Bernard T. McArdle, filed the Complaint and initiated the Countersuit.

36. The Countersuit was filed in response to the Plaintiffs' filing and pursuit of the Civil Rights Action.

37. The Countersuit claims that Plaintiffs engaged in wrongful use of civil proceedings, abuse of process, and civil conspiracy.

38. Wrongful use of civil proceedings is a cause of action created by statute in Pennsylvania. 42 Pa. Cons. Stat. § 8351 *et seq.* This statute is often referred to as the Dragonetti Act.

39. To establish wrongful use of civil proceedings, a plaintiff must prove that (1) the underlying proceedings were terminated in the plaintiff's favor; (2) the defendant caused the proceeding to be instituted without probable cause; and (3) the proceedings were instituted primarily for an improper cause.

40. Greensburg does not allege any facts in its Countersuit, nor could it allege any such facts, showing that Plaintiffs caused the Civil Rights Action to be instituted without probable cause.

41. Greensburg does not allege any facts in its Countersuit, nor could it allege any such facts, showing that Plaintiffs instituted the Civil Rights Action primarily for an improper cause.

42. Abuse of process is a tort under Pennsylvania common law.

43. To establish abuse of process, a plaintiff must prove that the defendant (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed, and (3) harm has been caused to the plaintiff.

44. Greensburg does not allege any facts in its Countersuit, nor could it allege any such facts, showing that Plaintiffs used the Civil Rights Action to accomplish any purpose other than to seek redress for the harm caused to Mr. Wisneski by the Civil Rights Defendants.

45. The Dragonetti Act allows successful plaintiffs to recover damages for any harm to reputation by any defamatory matter alleged as part of the proceedings; the expense, including any reasonable attorney fees that the plaintiff has reasonably incurred in defending itself against the proceedings; any specific pecuniary loss that has resulted from the proceedings; any emotional distress that is caused by the proceedings; and punitive damages according to law in appropriate cases.

46. Successful plaintiffs in abuse-of-process actions can recover damages for losses stemming from the damage flowing from the abuse, including emotional distress.

47. As a municipal entity, Greensburg cannot recover damages for harm to reputation or for emotional distress.

48. The only damages the City identifies in its complaint are \$51,459.05 in attorneys' fees and costs associated with defending the Civil Rights Action.

49. The City has not identified any reason why it filed the Countersuit instead of seeking fees and costs in the Civil Rights Action.

50. The City is also seeking an additional, as-yet-undetermined amount of punitive damages.

51. Plaintiffs filed a Notice of Removal to remove the Countersuit to federal court on October 3, 2014. *City of Greensburg v. Wisneski*, 2:14-cv-1345 (W.D. Pa.) (Docket No. 1).

52. Greensburg filed a Motion to Remand the case to state court on October 22, 2014. *City of Greensburg v. Wisneski*, 2:14-cv-1345 (W.D. Pa.) (Docket No. 8).

53. The Motion to Remand was granted by this Court on January 8, 2015. *City of Greensburg v. Wisneski*, 2:14-cv-1345 (Docket No. 16).

54. Plaintiffs then filed preliminary objections to the complaint on January 26, 2015.

55. The preliminary objections, which claimed that the Countersuit was preempted by federal law, were denied by the Court of Common Pleas on March 26, 2015.

56. The parties in the Countersuit are currently in the discovery process.

57. On January 28, 2015, the City served interrogatories and requests for production on Mr. Owsiany. These are the only discovery requests that have been exchanged to date.

58. The City's discovery requests do not relate to the legal or factual issues raised in the Countersuit whatsoever.

59. Instead, the discovery focuses solely on Mr. Owsiany's malpractice insurance coverage. *See* the City's Interrogatories and Requests for Production, attached as **Exhibit B**.

60. The Countersuit has burdened Plaintiffs' First Amendment rights.

61. The Countersuit has placed a significant monetary strain on Mr. Owsiany, whose malpractice insurance declined to cover the claims asserted against him by the City. Therefore, he is defending himself.

62. Mr. Owsiany has expended at least 75 hours preparing and responding to the Countersuit. The significant investment of time and resources, coupled with claimed damages of over \$50,000 (a judgment that he, as a solo practitioner, can ill afford to pay), has discouraged Mr. Owsiany from representing other potential plaintiffs under Section 1983.

63. Mr. Owsiany has suffered and continues to suffer significant emotional distress as a result of having to defend himself against the Countersuit.

64. Mr. Wisneski is also defending himself *pro se* in the Countersuit and has suffered and continues to suffer significant emotional distress as a result of having to defend himself.

***The City's Plan to File More Retaliatory Countersuits Against Citizens who
Petition the City for Redress of Grievances***

65. Based upon statements made by both McArdle and Trout, the City intends to pursue the tactic of retaliatory lawsuits in other cases.

66. For example, McArdle threatened to file a similar countersuit against another attorney if he pursued a civil rights action on behalf of his client. *See* Goldman Declaration, attached as **Exhibit C**.

67. Additionally, Trout told the press, "Countersuits could become a more common tactic to combat any future cases city leaders think are frivolous." *See* Jacob Tierney, *Lawsuits a growing problem for Greensburg*, TRIBLIVE, December 14, 2014, attached as **Exhibit D**.

COUNT I

The Countersuit Violates the First Amendment Right to Petition

68. Plaintiffs repeat and re-allege the allegations set forth in paragraphs 1 through 67 above as if fully set forth herein.

69. The Petition Clause of the First Amendment to the United States Constitution protects the right to petition the government for redress of grievances, which includes filing a civil rights lawsuit against a governmental entity.

70. The Dragonetti Act, codified at 42 Pa. Cons. Stat. § 8351 *et seq.*, allows prevailing defendants to recover damages stemming from the wrongful use of court proceedings.

71. The abuse of process tort allows individuals to recover damages stemming from the wrongful use of a legitimate process of the court.

72. Such wrongful use of civil process and abuse of process actions violate the Petition Clause when brought by governmental entities against those who have unsuccessfully sued them for civil rights violations because such actions are likely to chill individuals from exercising their First Amendment right to file lawsuits against governmental entities.

73. Accordingly, Greensburg's Countersuit is barred by the First Amendment.

COUNT II

The Countersuit Violates Plaintiffs' First Amendment Right to Be Free from Retaliation for Petitioning the Government for Redress of Grievances

74. Plaintiffs repeat and re-allege the allegations set forth in paragraphs 1 through 67 above as if fully set forth herein.

75. The Petition Clause of the First Amendment to the United States Constitution protects the right to petition the government for redress of grievances, which includes filing a civil rights lawsuit against a governmental entity.

76. Plaintiffs exercised their First Amendment right to petition when they filed suit against Defendant City of Greensburg for civil rights violations.

77. The Countersuit filed by Greensburg is an adverse action that would deter a person of ordinary firmness from exercising his or her constitutional rights.

78. Plaintiffs' exercise of their First Amendment right to petition caused Defendant to file the Countersuit.

79. Greensburg's Countersuit thus violates plaintiffs' First Amendment rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and grant them the following relief:

1. A declaratory judgment that the City's Countersuit is unlawful retaliation in violation of the First Amendment;
2. A preliminary injunction enjoining Defendant and its employees, agents, assigns and all those acting in concert with it, from pursuing the Countersuit against Plaintiffs;
3. An injunction permanently enjoining Defendant and its employees, agents, assigns and all those acting in concert with it, from pursuing the Countersuit against Plaintiffs;
4. Award Plaintiffs compensatory damages;
5. Award Plaintiffs the costs incurred in this litigation, including attorneys' fees pursuant to 42 U.S.C. § 1988;
6. And such other relief as the Court deems just and proper.

Respectfully submitted,

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* Ms. Hansel's application to appear before this Court *pro hac vice* will be submitted upon the filing of the Complaint and in accordance with Local Civil Rule 83.2.

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