IN THE SUPREME COURT OF PENNSYLVANIA

No.

Tullytown Borough,
Petitioner-Defendant
v.
Edward Armstrong, Robert Campanaro,
Edward Czyzyk, and George Fox,
Respondents-Plaintiffs

Petition for Allowance of Appeal

Petition for Allowance of Appeal from the Order by the Commonwealth Court of Pennsylvania, 239 CD 2015, Affirming the Order of the Bucks County Court of Common Pleas, Docket No. 2014-5675

Lavery Law

Frank J. Lavery, Jr., Esquire
Pennsylvania Bar No. 42370
Josh Autry, Esquire
Pennsylvania Bar No. 208459
225 Market Street, Suite 304
P.O. Box 1245
Harrisburg, PA 17108-1245
(717) 233-6633 (phone)
(717) 233-7003 (fax)
flavery@laverylaw.com
jautry@laverylaw.com
Attorneys for Petitioner-Defendant Tullytown Borough

Dated: February 15, 2016

Table of Contents

Table of Authorities

Cases

Rules

I. Reference to official and unofficial reports of opinions in courts below and whether reported.:

On May 15, 2015, Judge McMaster submitted an unpublished Opinion pursuant to Pa.R.A.P. 1925. A copy of the Opinion is appended as Exhibit 2. On December 11, 2015, Senior Judge Friedman, writing for a panel majority, affirmed in a reported opinion. A copy of the Opinion is appended as Exhibit 3. Both opinions are also available at *Tullytown Borough v. Armstrong*, No. 239 C.D. 2015, --- A.3d ----, 2015 WL 8539915 (Pa. Commw. Dec. 11, 2015), because the Commonwealth Court attached Judge McMaster's opinion to its decision.

II. Text of order in question and date of entry in appellate court:

The Order states:

"AND NOW, this 11th day of December, 2015, we hereby affirm the January 15, 2015, order of the Court of Common Pleas of Bucks County based on the opinion of the Honorable James M. McMaster in *Armstrong v. Tullytown Borough*, (Bucks Co., No. 2014-05675, Ct. Com. Pl. Bucks Co. Civil Div., filed May 15,2015).

Jurisdiction relinquished."

III. Questions presented for review:

A. The Commonwealth Court violates the clear obligation under Pennsylvania Rule of Civil Procedure 4003.8 to balance the needs for pre-complaint discovery against the burden imposed.

B. The Commonwealth Court announced an unworkable standard in a precedential decision that permits limitless pre-complaint discovery in violation of the clear mandate of Rule 4003.8 unless defendants conduct the very discovery they oppose.

C. The Commonwealth Court ruling conflicts with this Court's holding in *McNeil v. Jordan*, 894 A.2d 1260 (Pa. 2006), that a plaintiff cannot simply assert that pre-complaint discovery is necessary.

D. The Commonwealth Court ruling conflicts with its holding in *Pelzer v. Wrestle*, 49 A.3d 926 (Pa. Commw. 2012), that a plaintiff must explain how the pre-complaint discovery is necessary to draft a complaint.

E. The Commonwealth Court ruling conflicts with the Superior Court holding in *McNeil v. Jordan*, 934 A.2d 739 (Pa. Super. 2007), which prevents pre-complaint discovery when the plaintiff only makes vague assertions of fact.

F. The Commonwealth Court ruling conflicts with the Superior Court holdings in *AmerisourceBergen v. Does*, 81 A.3d 921 (Pa. Super. 2013), and *Cooper v. Frankford Health Care Sys.*, 960 A.2d 134 (Pa. Super. 2008), which prevent pre-complaint discovery unless the plaintiff can show an ability to plead a valid cause of action after the discovery.

G. The Commonwealth Court assumes that legal conclusions are facts and, in doing so, conflicts with its holdings in *Appeal of Puricelli*, 709 A.2d 1003 (Pa. Commw. 1998), and *Plank v. Monroe Cnty. Tax Claim Bureau*, 735 A.2d 178 (Pa. Commw. 1999), and the Superior Court holdings in *Cross v. 50th Ward Cmty. Ambulance*, 528 A.2d 1369 (Pa. Super. 1987), and *Corson v. Corson's*, 434 A.2d 1269 (Pa. Super. 1981), on the difference between facts and legal conclusions.

IV. Concise statement of case containing facts material to consideration of questions presented:

Plaintiffs have filed a summons but not a complaint. Plaintiffs plan to depose four police officers, two former police officers, the current Chief of Police, the former Chief of Police, and a Councilman. R. 9a-10a. On October 30, 2014, Tullytown filed a motion for protective order, arguing that Plaintiffs' request for expansive pre-complaint discovery comes without any justification. R. 3a-36a.

Tullytown informed the trial court that it feared abusive litigation practices, in part, because Plaintiffs are very litigious and have a history of lawsuits, including against each other. R. 5a-6a, 14a-32a, 52a-53a. Given that many of these lawsuits were dismissed for failure to prosecute, Tullytown feared a pattern showing that Plaintiffs file frivolous lawsuits (even against each other) to gain discovery or to make a political point. R. 5a-6a, 14a-32a, 52a-53a.

In response, Plaintiffs claimed in response that two persons (who Plaintiffs do not identify) claim that police officers (who Plaintiffs do not identify) followed them on dates (that Plaintiffs do not specify) during the 2013 election cycle. R. 42a. The Honorable Judge James M. McMaster of

the Bucks County Court of Common Pleas denied the motion on January 15, 2015. R. 56a.

On February 9th, Tullytown filed motions for reconsideration and to certify the order for immediate appeal, R. 57a-75a, but the trial court denied the motions on February 11th. R. 76a-77a.Tullytown filed a petition for review on February 27th, which the Commonwealth Court granted on March 30th. A copy of the Order is appended as Exhibit 1. On May 15th, the trial court submitted an opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925. A copy of the Opinion is appended as Exhibit 2.

On December 11, 2015, Senior Judge Friedman, writing for a panel majority, affirmed in a reported opinion. A copy of the Opinion is appended as Exhibit 3. The decision is also available at *Tullytown Borough v. Armstrong*, No. 239 C.D. 2015, --- A.3d ----, 2015 WL 8539915 (Pa. Commw. Dec. 11, 2015). Judge Simpson joined the opinion, but President Judge Pellegrini concurred in the result only.

On December 28th, Tullytown timely filed an application for reargument.[1] On January 14, 2016, the Commonwealth Court denied an application for reargument en banc. A copy of the Order is appended as Exhibit 4. Tullytown timely files this petition on February 15th.[2]

[1] Because December 25, 2015, was a Friday and holiday, the deadline fell on the following Monday, December 28, 2015.
[2] Because February 13th was a Saturday, the deadline fell on the following Monday, February 15th.

V. Concise statement of reasons for allowance of appeal:

A. The Commonwealth Court violates its clear obligation in Pennsylvania Rule of Civil Procedure 4003.8 to balance the needs for pre-complaint discovery against the burden imposed by that discovery

The Commonwealth Court never considered whether any of the nine depositions are actually necessary to form a complaint. Instead, the Court relied upon a local rule to skirt the standard, holding that Tullytown Borough somehow conceded the necessity of the depositions. Unfortunately, the Court chose to bypass review of the discovery issue at hand and did so in a published decision.

As will be explained below in more detail, the Commonwealth Court's conclusion that Tullytown conceded the need for the depositions is just plain wrong as a matter of law. But initially, it is necessary to highlight the Court's obligation to consider the discovery sought and failure to do so.

Rule of Civil Procedure 4003(a) bars pre-complaint discovery unless the discovery 1) "is material and necessary to the filing of the complaint," and 2) "will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party." Although the first sentence in 4003.8(b) says the court "may" require plaintiffs to provide

specific reasons for discovery, the second sentence is mandatory: "the court shall weigh the importance of the discovery request against the burdens imposed on any person or party from whom the discovery is sought."

The trial court and Commonwealth Court never weighed the importance of any of the nine depositions against the burden imposed on the Borough. In a published decision, the Commonwealth Court held that the court didn't have to simply because Plaintiffs asserted that they need the depositions and the depositions won't burden Tullytown, which the Court held Tullytown conceded–a blatantly erroneous conclusion as explained below.

The Court had to—but chose not to—consider whether any of the depositions are, in fact, necessary on the one hand, or overly burdensome to Tullytown on the other. Without a complaint, the Commonwealth Court permits Plaintiffs to depose four police officers, two former officers, the current Chief of Police, the former Chief of Police, and a Councilman. R. 9a-10a.

The Commonwealth Court ignores the trial court's obligation to weigh the importance of these nine depositions to draft the complaint

against the burden on the Borough and witnesses. To date, Plaintiffs have never explained why they need to depose any of these people, much less all of them; indeed, Plaintiffs claim they already have two witnesses. Plaintiffs claim that two persons (who Plaintiffs do not identify) say that police officers (who Plaintiffs do not identify) followed Plaintiffs on dates (that Plaintiffs do not specify) during the 2013 election cycle. R. 42a. Plaintiffs either are acting on pure speculation or hiding the ball.

Without considering the trial court's duty to weigh the burden on Tullytown, the Commonwealth Court subjects Tullytown to wasteful depositions that it cannot prepare for. Tullytown has no idea which officers are being accused of wrongdoing or when the alleged actions took place other than a general reference to the 2013 election cycle. These depositions require Tullytown to defend vague allegations while guessing at what Plaintiffs would allege in a complaint. The precedential decision permits plaintiffs to put defendants at a tactical disadvantage in every single case by deposing the defendants before they can prepare and violates the clear limits in Rule 4003.8.

In short, the Commonwealth Court granted permission to appeal and stay discovery for a reason: to consider whether the trial court

abused its discretion when it did not weigh the need for pre-complaint discovery against the burden by that discovery. Yet the Commonwealth Court opted not to do that. This appeal would ultimately have been a wasted effort for the Courts and parties were it not for the fact that the Commonwealth Court—in a published decision no less—announced a dangerous rule that permits abusive discovery in every case to come.

B. This appeal is important: the Commonwealth Court in a published decision announced a standard that eviscerates the limitations on pre-complaint discovery in our rules.

On a motion to prevent unnecessary pre-complaint discovery, the Commonwealth Court held in a published decision that, by failing to conduct its own unnecessary pre-complaint discovery, Tullytown somehow conceded that pre-complaint discovery is necessary. But "the Supreme Court does not intend a result that is absurd, impossible of execution or unreasonable…" Pa.R.C.P. 128(a). Notably, Plaintiffs did not even advance this argument below or on appeal.

This ruling—now binding precedent on all future Commonwealth Court panels and our lower courts—creates an absurd result that prevents defendants from ever opposing unnecessary pre-complaint discovery as the Commonwealth Court bizarrely requires defendants to

conduct pre-complaint discovery to do so. The effect of the ruling can be summed up in a tongue-twister: to oppose unnecessary pre-complaint discovery, defendants must necessarily conduct unnecessary pre-complaint discovery to prove that the discovery is unnecessary.

Rule 4003.8 restricts pre-complaint discovery and establishes procedure for motions to prevent pre-complaint discovery. Instead of Rule 4003.8, the Commonwealth Court erroneously relies upon a local rule that, in turn, cites the clearly inapposite Pennsylvania Rule of Civil Procedure 206.7(c)—a rule for substantive petitions, not discovery motions.

Rule 206.7(c) states:

> If an answer is filed raising disputed issues of material fact, the petitioner may take depositions on those issues, or such other discovery as the court allows, within the time set forth in the order of the court. If the petitioner does not do so, the petition shall be decided on petition and answer and all averments of fact responsive to the petition and properly pleaded in the answer shall be deemed admitted for the purpose of this subdivision.

The Commonwealth Court's interpretation of Rule 206.7(c), a rule for substantive petitions, renders Rule 4003.8, the rule for pre-complaint discovery, a dead letter. Because Rule 4003.8 is specific to pre-complaint

discovery, it controls. Pa.R.C.P. 132. Under the Commonwealth Court's published opinion, defendants must conduct unnecessary pre-complaint discovery or else concede the necessity of that discovery. This newly announced, unworkable standard creates an absurd result where plaintiffs can take any pre-complaint discovery they want without limit or judicial review unless the defendants take their own unnecessary discovery to oppose the unnecessary discovery.

C. The Commonwealth Court precedential decision conflicts with this Court's rejection of the exact standard announced by the Commonwealth Court.

In the seminal case of *McNeil v. Jordan*, 894 A.2d 1260, 1274 (Pa. 2006), this Court "recognize[d] the dangers of unconfined pre-complaint discovery" and emphasized "the risks of implementing discovery standards that are too permissive." This Court rejected the more "permissive" discovery standard in Connecticut, which is effectively the standard adopted by the Commonwealth Court:

> We do not find, in Connecticut's law, an unequivocal requirement that such discovery will be granted only where a litigant has averred that absent such discovery his suit will not be able to proceed.

Id. at 1277 (emphasis added).

Under the Commonwealth Court's reported opinion, the Connecticut standard carries the day in Pennsylvania with one worthless caveat: a defendant can oppose pre-complaint discovery by taking pre-complaint discovery. The result violates everything that *McNeil* stands for. This Court in *McNeil* emphasized: "Under no circumstance should a plaintiff be allowed to embark upon a 'fishing expedition'…" *Id.* at 1278. The Commonwealth Court now allows a fishing expedition under any circumstance.

D. The Commonwealth Court decision conflicts with an earlier Commonwealth Court decision that prevents pre-complaint discovery unless the plaintiff explains *how* the discovery is necessary to draft a complaint.

In *Pelzer v. Wrestle*, 49 A.3d 926 (Pa. Commw. 2012), the Commonwealth Court rejected pre-complaint discovery because the plaintiff failed to explain how the discovery was necessary to draft the complaint:

> Mr. Pelzer contends in his brief to this Court that the trial court should not have dismissed his Discovery Requests because the information he requested is material and necessary for the filing of his complaint and would not cause unreasonable annoyance or embarrassment to the Defendants. Mr. Pelzer did not provide any explanation for his pre-complaint Discovery Requests to the trial court. Mr. Pelzer did not explain in any of the

> documents he filed with the trial court why the requested information, which included, inter alia, the home addresses and Social Security numbers of the Defendants, was material and necessary to the filing of a complaint or that his request would "not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party" as required by Rule 4003.8. Indeed, we can think of no situation where an inmate's discovery request for such personal and sensitive information of superintendents, corrections officers, and other SCI staff would be appropriate and necessary for the formulation of a civil complaint, and we understand why the trial court dismissed such inappropriate requests. These Discovery Requests are in the nature of the "fishing expedition" prohibited by McNeil. Mr. Pelzer's failure to comply with the requirements of Section 4003.8 is fatal to his Discovery Requests and, therefore, the trial court did not err or abuse its discretion in dismissing the Discovery Requests.

Id. at 931.

The *Pelzer* Court rejected—as *McNeil* did—a plaintiff's bald assertions that discovery is necessary and not burdensome. In this case, contrary to *Pelzer*, the reported Commonwealth Court opinion permits plaintiffs to simply assert that they need discovery without explanation. In *Pelzer*, however, the Commonwealth Court rejected discovery attempts because the plaintiff did not explain <u>how</u> any of the discovery was necessary to draft a complaint. *Id.*

For this reason, *Pelzer* affirmed the denial of any pre-complaint discovery, not just the request for sensitive information. *Id.* The Commonwealth Court affirmed the denial of discovery as well about "Mr. Pelzer's disciplinary record, information related to Mr. Pelzer being classified a gang member, and the rationale for transferring him between SCIs." *Id.* at 929.

The Commonwealth Court's published decision in this case effectively repudiates its earlier and correct holding in *Pelzer*. Trial courts are left with contradictory binding precedent as to whether plaintiffs must explain why they need discovery to draft a complaint.

E. The Commonwealth Court decision conflicts with Superior Court precedent that prevents pre-complaint discovery when the plaintiff only makes vague assertions of fact.

After remand in *McNeil*, the Superior Court held that the plaintiffs' vague assertions of fact did not support their request for discovery: "These assertions… are vague and amorphous. Individuals are not identified; times are uncertain. It is not clear what was said." *McNeil v. Jordan*, 934 A.2d 739, 743 (Pa. Super. 2007). Equally here, Plaintiffs vaguely claim that police officers (who Plaintiffs do not identify) followed

Plaintiffs on dates (that Plaintiffs do not specify) during the 2013 election cycle. R. 42a.

Plaintiffs want to depose nine people who will not know the scope of the case, the alleged wrongdoers, or the dates of the alleged wrongdoing. This is an attempt to catch the Borough off-guard by only giving vague hints at Plaintiffs' allegations before the depositions. However, the Commonwealth Court did not consider the Superior Court's precedent that Plaintiffs must provide some context to take discovery.

F. The Commonwealth Court decision conflicts with Superior Court precedent that prevents pre-complaint discovery unless the plaintiff can show an ability to plead a valid cause of action after the discovery.

This case is also like *AmerisourceBergen v. Does*, 81 A.3d 921, 926 (Pa. Super. 2013), and *Cooper v. Frankford Health Care Sys.*, 960 A.2d 134, 143 (Pa. Super. 2008), where the Superior Court held that plaintiffs must show the ability to plead a valid cause of action after pre-complaint discovery. The Superior Court explained:

> Equally self-evidently, the trial court should not grant such discovery unless it concludes that, upon the completion of discovery, the claimant will likely be able to make out one or more causes of action...

AmerisourceBergen, 81 A.3d at 926. The Commonwealth Court ignored the Superior Court's "self-evident" conclusion, leaving trial courts with contradictory binding decisions by the appellate courts in this Commonwealth.

Plaintiffs simply claim that police officers followed them around. Plaintiffs do not show how being "followed" could possibly arise to the level of a constitutional violation. Plaintiffs neither give any reason to believe that they will be able to make out any cause of action; nor do Plaintiffs explain how the depositions will get them to that point.

Plaintiffs simply want to take nine depositions to evaluate the factual merit of their allegations. That is not a basis for pre-complaint discovery. That is what happens in post-complaint discovery in every case: the parties take depositions to evaluate the factual merit of the complaint.

G. The Commonwealth Court assumes that legal conclusions are facts and, in doing so, conflicts with earlier Superior and Commonwealth Court precedent.

The Commonwealth Court held that Tullytown—by failing to take depositions itself—conceded the "facts" that Plaintiffs need discovery to

draft the complaint, and the discovery will not burden Tullytown. These are obviously legal conclusions, not facts.

The Commonwealth Court has previously rejected such a broad reading of admitted "facts" under Rule 206.7. *See Appeal of Puricelli*, 709 A.2d 1003, 1007 (Pa. Commw. 1998) ("However, the Township's averments that Puricelli lacked standing because he no longer owned the property and that his appeal was vexatious, arbitrary and in bad faith were legal conclusions."); *Plank v. Monroe Cnty. Tax Claim Bureau*, 735 A.2d 178, 185 (Pa. Commw. 1999) ("The lack of a responsive pleading, where required, to a rule to show cause results only in the admission of factual averments, not legal conclusions.").

The Superior Court has reached the same conclusion: "Although depositions may have aided the court, appellee's decision not to take them cannot be viewed here as being fatal to its position, since the Rule gives the choice of either taking depositions or of ordering the cause for argument on the pleadings alone." *Corson v. Corson's*, 434 A.2d 1269, 1272 (Pa. Super. 1981). *See also Cross v. 50th Ward Cmty. Ambulance*, 528 A.2d 1369, 1372 (Pa. Super. 1987) (denial that "service was properly made" is legal conclusion). The Commonwealth Court—in a published

decision—completely ignored Superior and Commonwealth Court precedent, effectively repudiating these decisions without reference.

VI. Conclusion

For these reasons, this Court should grant allowance of appeal.

Respectfully submitted,

Lavery Law

s/ Josh Autry
Frank J. Lavery, Jr., Esquire
Pennsylvania Bar No. 42370
Josh Autry, Esquire
Pennsylvania Bar No. 208459
225 Market Street, Suite 304
P.O. Box 1245
Harrisburg, PA 17108-1245
(717) 233-6633 (phone)
(717) 233-7003 (fax)
flavery@laverylaw.com
jautry@laverylaw.com
Attorneys for Petitioner-Defendant Tullytown Borough

Dated: February 15, 2016

Certificate of Word Count

I certify that this petition does not exceed 9,000 words, exclusive of the cover, pages containing the table of contents, table of citations, proof of service, signature block and anything appended to the petition under Pa.R.A.P. 1115, subparagraphs (a)(6) and (a)(7). This certificate is based on the word count of the word processing system used to prepare the petition.

s/ Josh Autry

Dated: February 15, 2016

Certificate of Service

I certify that on this date, I served a true and correct copy of this filing by this Court's electronic filing system and by United States, First Class Mail, addressed as follows:

Lawrence M. Otter, Esquire
PO Box 575
Silverdale, PA 18962
(Counsel for Appellees)

Michael T. Sellers, Esquire
234 South State Street
PO Box 702
Newtown, Pa 18940
(Co-Counsel for Appellant)

s/ Amyra W. Wagner
Legal Assistant for Josh Autry

Dated: February 15, 2016

EXHIBIT

1

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tullytown Borough, Appellant	:	
v.	:	
Edward Armstrong, Robert Campanaro, Edward Czyzyk, and George Fox	:	Trial Court Dkt. No. 2014-07518
	:	No. 239 C.D. 2015

ORDER

NOW, March 30, 2015, upon consideration of the petition for review filed pursuant to the Note to Pa. R.A.P. 1311 by Tullytown Borough of the January 15, 2015 order of the Court of Common Pleas of Bucks County, to which no response has been filed, the petition is granted. An appeal is allowed from the January 15, 2015 order entered by the Court of Common Pleas of Bucks County at Docket No. 2014-07518.

The Court will consider the following issue:

> Did the trial court err by allowing pre-complaint discovery where the court did not require the party seeking discovery to demonstrate that the information sought is material and necessary to the filing of the complaint and that discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party?

All proceedings in this matter before the Court of Common Pleas of Bucks County are stayed pending resolution of this appeal.

The prothonotary of the Court of Common Pleas of Bucks County shall certify the record in this matter on or before April 29, 2015.

Appellant shall file and serve its brief (4 copies) and reproduced record (4 copies) on or before May 29, 2015. Appellees shall file and serve their brief(s) (4 copies) thirty days after service of appellant's brief. Any reply brief (4 copies) shall be filed and served no later than 14 days after service of appellees' brief(s).

The Chief Clerk is directed to list oral argument on the merits of this matter on the appropriate argument list.

In addition to sending copies of this Order to counsel of record, the Chief Clerk shall send a copy of this Order to the Honorable James M. McMaster of the Court of Common Pleas of Bucks County and to the prothonotary of that court.

James Gardner Colins, Senior Judge

Certified from the Record

MAR 31 2015

And Order Exit

EXHIBIT

2

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA
CIVIL DIVISION

Edward Armstrong, Robert Campanaro, Edward Czyzyk, & George Fox	:	**NO.: 2014-05675**
v.	:	
Tullytown Borough	:	

OPINION

This is an appeal of an Order, dated January 15, 2015, which denied Tullytown Borough ("Defendant")'s Motion for a Protective Order. Defendant thereafter filed a Motion to Reconsider on February 9, 2015, which this Court denied. Also on February 9, 2015, Defendant filed a Motion to Certify Order for Appeal, which was similarly denied by this Court. The Commonwealth Court entered its Order allowing an appeal on March 30, 2015.

BACKGROUND

Edward Armstrong, Robert Campanaro, Edward Czyzyk, and George Fox (collectively "Plaintiffs") filed their praecipe for writ of summons on August 14, 2014. Plaintiffs allege a 42 U.S.C. § 1983 cause of action against Defendants. On October 30, 2014, Defendant filed a Motion for a Protective Order. Defendant requested this Court to prohibit Plaintiffs from taking pre-complaint discovery. Specifically, Defendant alleges that Plaintiffs wish to take the depositions of nine individuals, including police officers and a councilman. See Motion for Protective Order at 1. After considering Defendant's Motion and Plaintiff's written response, this Court denied Defendant's Motion on January 15, 2015.

STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

In its Order, the Commonwealth Court notes the following issue for review on appeal, which is printed *verbatim*:

> Did the trial court err by allowing pre-complaint discovery where the court did not require the party seeking discovery to demonstrate that the information sought is material and necessary to the filing of the complaint and that discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party?

STANDARD OF REVIEW

"Discovery matters are within the discretion of the trial court[,] and the appellate court employs an abuse of discretion standard of review." Luckett v. Blaine, 850 A.2d 811, 818 (Cmwlth. Ct. 2004) (citing Luszczynski v. Bradley, 729 A.2d 83, 87 (Pa. Super. 1999)). When a trial court's evidentiary ruling pertains to a question of law, an appellate court's review is plenary. Dodson v. Deleo, 872 A.2d 1237, 1241 (Pa. Super. 2005) (quoting Zieber v. Bogert, 773 A.2d 758 (2001)).

DISCUSSION

The first issue before the Commonwealth Court is whether Defendant has admitted to all issues of fact stated by Plaintiffs in their Reply to Defendant's Motion for Protective Order. Defendant requested that we decide its Motion for Protective Order under Bucks County Rule 208.3(b). Rule 208.3(b)(2) states, in part, that "[s]ubject to the requirements of Pa.R.C.P. No. 206.7, when the matter is at issue and ready for decision, the moving party on the application shall, by praecipe, order the same to be submitted for disposition pursuant to this rule." Bucks County R.C.P. 208.3(b)(2). Pa.R.C.P. 206.7(c) states as follows:

> If an answer is filed raising disputed issues of material fact, the petitioner may take depositions on those issues, or such other discovery as the court allows, within the time set forth in the order of the court. If the petitioner does not do so, the petition shall be decided on petition and answer and all averments of fact responsive to the petition and properly pleaded in the answer shall be deemed admitted for the purpose of this subdivision.

In the present case, Defendant filed its Motion for Protective Order on October 30, 2014. Plaintiffs filed their Reply to Defendant's Motion for Protective

Order, which raised disputed issues of material fact, on November 14, 2014. On December 8, 2014, without taking depositions, requesting a hearing or otherwise responding to Plaintiff's Reply, Defendant filed its praecipe under Bucks County Rule 208.3(b). Accordingly, Defendant has admitted all factual averments contained in Plaintiffs' Reply, and this Court was then tasked with deciding the Motion based upon the pleadings, including the admissions of Defendant. See Bucks County R.C.P. 208.3(b); Pa.R.C.P. 206.7(c). Based on the facts before it, this Court determined that the Motion for Protective Order should be denied.

Those facts included that Plaintiffs sought to depose certain current and former police officers and a Councilman of Defendant to obtain information regarding the alleged violation of Plaintiffs' civil and constitutional rights based upon police surveillance of Plaintiffs as candidates for borough office in the 2013 elections and that Plaintiffs needed the depositions to establish the material and necessary facts to plead a cause of action. The facts that Defendant admitted also included that there was illegal and unconstitutional police surveillance of political candidates in Tullytown in 2013. The admitted facts also included that the depositions requested would not be annoying, oppressive, burdensome or expensive

Contrary to Defendant's position to the Commonwealth Court, we did in effect require Plaintiffs to demonstrate that the information sought is material and necessary to filing of the complaint and that the requested discovery would not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party. Defendant admitted that by the procedure they chose.

The second issue for the Commonwealth Court to consider is whether this Court validly denied Defendant's Motion for a Protective Order. The Pennsylvania Supreme Court considered the boundaries of pre-complaint discovery in McNeil v. Jordan, 586 Pa. 413, 894 A.2d 1260 (2006). In McNeil, the Court created a standard for courts in this Commonwealth to use when confronted with a pre-complaint discovery issue. Ultimately, the Court

determined that a probable cause standard would be the correct standard for courts to apply. In so deciding, the Court stated:

> to obtain pre-complaint discovery a litigant should be required to demonstrate his good faith as well as probable cause that the information sought is both material and necessary to the filing of a complaint in a pending action. A plaintiff should describe with reasonable detail the materials sought, and state with particularity probable cause for believing the information will materially advance his pleading, as well as averring that, but for the discovery request, he will be unable to formulate a legally sufficient pleading.

McNeil, 586 Pa. at 443-44.

Pennsylvania Rule of Civil Procedure ("Pa.R.C.P.") 4003.8, titled "Pre-Complaint Discovery," was drafted after the Supreme Court decided the McNeil case and is the relevant rule to consider when determining if pre-complaint discovery is permissible. In full, the Rule states:

> (a) A plaintiff may obtain pre-complaint discovery where the information sought is material and necessary to the filing of the complaint and the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party.
> (b) Upon a motion for protective order or other objection to a plaintiff's pre-complaint discovery, the court may require the plaintiff to state with particularity how the discovery will materially advance the preparation of the complaint. In deciding the motion or other objection, the court shall weigh the importance of the discovery request against the burdens imposed on any person or party from whom the discovery is sought.

Pa.R.C.P. 4003.8. The Comment to this Rule notes that part (a) establishes "a two-prong test for pre-complaint discovery: (1) the information sought must be material and necessary to the filing of the complaint and (2) 'the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party.'" Pa.R.C.P. 4003.8, Comment. Notably, the Comment to the Rule explains that the Supreme Court's requirement that the court find "probable cause" was excluded from the Rule. Pa.R.C.P. 4003.8, Comment. Instead, the Rule only requires that the court determine that the

information sought through pre-trial discovery is reasonable and necessary to the filing of the complaint. Pa.R.C.P. 4003.8, Comment.

Here, Plaintiffs have alleged that they were subject to police surveillance while Plaintiffs were candidates for borough office in the 2013 elections. See Reply to Defendant's Motion for Protective Order at 1. Plaintiffs may not be capable of knowing when said surveillance occurred or who specifically surveyed them, but the Plaintiffs have narrowed their claim to a specific time period—the time in which the Plaintiffs were candidates for borough office in 2013. Further, Plaintiffs have specifically listed the individuals that they would like to depose in pre-trial discovery. See Reply to Defendant's Motion for Protective Order at 2. Given this, it is clear to this Court that the depositions of these individuals are material and necessary to the filing of their complaint. Plaintiffs otherwise have no way of ascertaining the details of the alleged police surveillance. Through these depositions, Plaintiffs will be able to determine whether there is a sufficient factual basis to file a complaint against Defendant, which is ultimately the purpose of pre-trial discovery.

Defendant asserts that Plaintiffs are using pre-complaint discovery as a "fishing expedition." See Motion for Reconsideration at 4. According to Defendant, Plaintiffs have not shown how the depositions are necessary for Plaintiffs to then file their complaint. We disagree. Plaintiffs have made it clear to this Court that they believe, and have witnesses who attest, that Plaintiffs were subject to police surveillance in 2013. Plaintiffs have alleged that Plaintiffs are unable to file a complaint without further details of the surveillance, and Plaintiffs believe that they will be able to gather more information about the alleged surveillance through the requested depositions. These depositions are therefore material and necessary to Plaintiffs to file their complaint. Accordingly, the first prong of the Pa.R.C.P. 4003.8 test is met. As indicated in the first section of this Opinion, Defendants have admitted the facts that Plaintiffs have pled.

We believe that the second prong of the Pa.R.C.P. 4003.8 test is met as well. While the taking of nine depositions will undoubtedly impose some burden

on the Defendant and on the individuals being deposed, this imposition is not unreasonable, which is the standard of the Rule. Further, Defendant has admitted that the imposition is not unreasonable, as discussed previously. There are no other means for the Plaintiffs to ascertain the information that they need in order to file their complaint, and the allegations made by Plaintiffs are sufficiently serious that we believe it is reasonable for the Plaintiffs to conduct a number of pre-complaint depositions. While Defendant and the individuals being deposed may not wish to participate in the requested depositions, this Court does not believe that the depositions are unreasonable in this case. Therefore, the second prong of the Pa.R.C.P. 4003.8 test is also met.

Part (b) of Pa.R.C.P. 4003.8 states that "the court *may* require the plaintiff to state with particularity how the discovery will materially advance the preparation of the complaint." Pa.R.C.P. 4003.8(b) (emphasis added). There is no requirement in the Rule that the trial court *must* require the plaintiff to state specifically how the discovery will advance the preparation of the complaint; instead, it is the trial court's discretion to decide if such information is necessary. Here, we did require Plaintiffs to establish how the depositions would materially advance the preparation of the complaint, since we were satisfied that Defendant's admission of the facts contained in Plaintiffs' Reply to Defendant's Motion for Protective Order established that such depositions would materially advance the preparation of the complaint, as previously discussed.

Part (b) of the Rule also requires that "[i]n deciding the motion or other objection, the court shall weigh the importance of the discovery request against the burdens imposed on any person or party from whom the discovery is sought." Pa.R.C.P. 4003.8(b). Here, we did just that. In making its decision, we considered the importance of the depositions and the information that may, or may not, be gleaned from them. We then weighed this against the burden on Defendant and the individuals Plaintiffs wish to depose. In considering this, we determined that the burden on Defendant is reasonable in this case, and we believe that the value of the pre-complaint discovery outweighs the burden on the Defendant. Accordingly, we complied with this part of the Rule as well.

CONCLUSION

This Court did not err in denying Defendant's Motion for Protective Order. Plaintiffs' interest in conducting the pre-complaint discovery—specifically the nine requested depositions—meets the requirements of the two-prong test set forth in Pa.R.C.P. 4003.8. Therefore, this Court was within its discretion to deny the Motion.

BY THE COURT

5-15-15
DATE

JAMES M. MCMASTER J.

Copies Sent To:

N.B. It is your responsibility to notify all interested parties of the above action.

Lawrence M. Otter, Esq.
P.O. Box 575
Silverdale, PA 18962

Attorney for Plaintiffs

Frank J. Lavery, Jr., Esq.
Joshua M. Autry, Esq.
Lavery Faherty
225 Market Street, Suite 304
P.O. Box 1245
Harrisburg, PA 17108

Attorney for Defendant

EXHIBIT

3

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tullytown Borough, Appellant	:	No. 239 C.D. 2015
	:	Argued: October 6, 2015
v.	:	
Edward Armstrong, Robert Campanaro, Edward Czyzyk, and George Fox	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION
BY SENIOR JUDGE FRIEDMAN

FILED: December 11, 2015

Tullytown Borough (Borough) appeals from the January 15, 2015, order of the Court of Common Pleas of Bucks County (trial court) denying the Borough's motion for a protective order.[1] We affirm based on the trial court's opinion.

Edward Armstrong, Robert Campanaro, Edward Czyzyk, and George Fox (Appellees) filed a writ of summons commencing a civil rights action pursuant to 42 U.S.C. §1983 against the Borough. Thereafter, by letter dated September 30,

[1] The Borough filed a motion to certify this interlocutory order for appeal by permission, but the trial court denied it pursuant to section 702(b) of the Judicial Code, 42 Pa. C.S. §702(b). By order dated March 30, 2015, this court granted the Borough's petition for review of the interlocutory order pursuant to Pa. R.A.P. 1311, Note.

2014, Appellees sought to depose nine Borough employees.[2] The letter identified the individuals but failed to indicate the reasons for the depositions.

On October 30, 2014, the Borough filed a motion for a protective order, arguing that Appellees' request for pre-complaint discovery, i.e., the letter asking to depose the nine witnesses, is expansive and without justification. The Borough stated that Appellees failed to explain how the depositions are material and necessary to the filing of a complaint and pointed out Appellees' history of abusive litigation. According to the Borough, Appellees' lawsuit is frivolous and a "fishing expedition" to gain information for use in the upcoming election. (Borough's Mot., 10/30/14, at 1-3.)

Appellees responded that they requested pre-complaint discovery, pursuant to Pa. R.C.P. No. 4003.8, to obtain material and necessary facts to plead a violation of Appellees' civil and constitutional rights. (Appellees' Reply, 11/14/14, at 1-3.) In their memorandum of law in support of their pre-complaint discovery request, Appellees contended that they "have reason to believe that [Borough] Police Officers were spying on campaign meetings of [Appellees], who were candidates for [B]orough Council positions, at various locations within [the Borough]." (Appellees' Mem., 11/14/14, at 4.) Appellees further argued that they "were advised by certain individuals that [Borough] Police Officers were ordered to follow the activities of the [Appellees] as candidates for office in 2013." (*Id.* at 6.)

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[2] Appellees requested the deposition testimony of four police officers, John Finby, Philip Kulan, Andrew Bunda, and Ryan Bunda; two former police officers, Shawn McLister and James Reichel; the current Chief of Police, Daniel Doyle; the former Chief of Police, Patrick Priore; and Chairman of the Police Committee, Councilman Matthew Pirolli.

In its brief in support of its motion for a protective order, the Borough stated that there are no facts of record:

> The only thing close to a factual allegation comes from [Appellees'] brief that '[Appellees] were advised by certain individuals that [Borough] Police Officers were ordered to follow the activities of the [Appellees] as candidates for office in 2013.' Notably, [Appellees] do not seek to depose there (sic) 'certain individuals.' Instead, they want to depose the entire police department.

(Borough's Br. at 2 (citation omitted).)

On November 20, 2014, the trial court issued a rule to show cause why the Borough's motion for a protective order should not be granted. On December 8, 2014, the Borough filed a praecipe under Bucks County Rule of Civil Procedure (Bucks County Rule) No. 208.3(b), requesting disposition of the motion.[3]

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[3] Bucks County Rule No. 208.3(a)(2) provides that when the trial court issues a rule to show cause and a response is filed, the motion shall be submitted to, and decided by, the trial court pursuant to Bucks County Rule No. 208.3(b). Bucks County Rule No. 208.3(b)(2) provides that "[s]ubject to the requirements of Pa. R.C.P. No. 206.7, when the matter is at issue and ready for decision, the moving party on the application shall, by praecipe, order the same to be submitted for disposition pursuant to this rule." Pa. R.C.P. No. 206.7(c) sets forth the following procedure after the issuance of a rule to show cause:

> (c) If an answer is filed raising disputed issues of material fact, the petitioner may take depositions on those issues, or such other discovery as the court allows, within the time set forth in the order of the court. If the petitioner does not do so, *the petition shall be decided on petition and answer and all averments of fact responsive to the petition and properly pleaded in the answer shall be deemed admitted* for the purpose of this subdivision.

(Emphasis added).

On January 15, 2015, the trial court denied the Borough's motion for a protective order. The Borough requested reconsideration and certification of the order for interlocutory appeal. The trial court denied both requests on February 11, 2015. The Borough petitioned this court for review.

By order dated March 30, 2015, this court granted the Borough's petition for review of the interlocutory order and agreed to consider the following issue on appeal:

> Did the trial court err by allowing pre-complaint discovery where the [trial] court did not require the party seeking discovery to demonstrate that the information sought is material and necessary to the filing of the complaint and that discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party.

(Cmwlth. Ct. Order, 3/30/15, at 1.)

Before this court, the Borough argues that the trial court erred in determining that Appellees demonstrated that the nine requested depositions were material and necessary to draft a complaint. We disagree.

Initially, we observe that

> [d]iscovery matters, including pre-complaint discovery requests, are within the discretion of the trial court, and we will not reverse absent an abuse of discretion. An abuse of discretion occurs where "in reaching a conclusion, the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will."

Pelzer v. Wrestle, 49 A.3d 926, 929 (Pa. Cmwlth. 2012) (citations omitted).

Pa. R.C.P. No. 4003.8 restricts pre-complaint discovery as follows:

> (a) A plaintiff may obtain pre-complaint discovery where the information sought is material and necessary to the filing of the complaint and the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party.
>
> (b) Upon a motion for protective order or other objection to a plaintiff's pre-complaint discovery, the court may require the plaintiff to state with particularity how the discovery will materially advance the preparation of the complaint. In deciding the motion or other objection, the court shall weigh the importance of the discovery request against the burdens imposed on any person or party from whom the discovery is sought.

Thus, a trial court may, but is not required to, direct a party to state how discovery will advance preparation of the complaint.

Pursuant to Pa. R.C.P. No. 206.7, the trial court, in reviewing the rule to show cause and the Borough's motion, assumed the facts in Appellees' reply and memorandum of law to be true. The trial court determined that the Borough admitted that: (1) Appellees needed the depositions to establish the material and necessary facts to plead a cause of action; (2) there was police surveillance of political candidates in the Borough in 2013; and (3) the depositions would not be annoying, oppressive, burdensome, or expensive. (Trial Ct. Op. at 3.)

Here, after review of the record, we conclude that the trial court did not abuse its discretion in denying the Borough's motion for protective order. The trial court thoroughly addressed the Borough's issue in its opinion.

Accordingly, we affirm based on the well-reasoned opinion of the Honorable James M. McMaster.

ROCHELLE S. FRIEDMAN, Senior Judge

President Judge Pellegrini concurs in the result only.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tullytown Borough,	:	
	:	No. 239 C.D. 2015
Appellant	:	
	:	
v.	:	
	:	
Edward Armstrong, Robert Campanaro, Edward Czyzyk, and George Fox	:	
	:	

ORDER

AND NOW, this 11th day of December, 2015, we hereby affirm the January 15, 2015, order of the Court of Common Pleas of Bucks County based on the opinion of the Honorable James M. McMaster in *Armstrong v. Tullytown Borough,* (Bucks Co., No. 2014-05675, Ct. Com. Pl. Bucks Co. Civil Div., filed May 15, 2015).

Jurisdiction relinquished.

Rochelle S. Friedman

ROCHELLE S. FRIEDMAN, Senior Judge

EXHIBIT

4

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tullytown Borough,	:	
Appellant	:	
	:	
v.	:	
	:	
Edward Armstrong, Robert Campanaro,	:	
Edward Czyzyk, and George Fox	:	No. 239 C.D. 2015

PER CURIAM **O R D E R**

NOW, January 14, 2016, having considered appellant's application for reargument and appellees' response thereto, the application is denied.