

IN THE SUPREME COURT OF PENNSYLVANIA

NO.

PENLLYN GREENE ASSOCIATES, L.P. and THE NOLEN GROUP,
INC. and

v.

RANDALL A. CLOUSER, JOHN SCHWARZENBACH

LAURENCINE MAZZOLI

PETITION FOR ALLOWANCE OF APPEAL OF DEFENDANTS

PETITION FOR ALLOWANCE OF APPEAL FROM THE ORDER DATED
DECEMBER 28, 2005 OF THE COMMONWEALTH COURT, DOCKET NO. 223-
CD-2005, AFFIRMING THE ORDER DATED October 8, 2004, OF THE
COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, No. 03-05478,
DENYING RELIEF UNDER 27 P.C.S.A SECTION 8301.

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Dated: January 27, 2006

RELEVANT STATUTES

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LOWER COURT OPINIONS

The Opinion of the Commonwealth Court is attached as Appendix
A.

The Opinion of the Court of Common Pleas of Montgomery County
is attached as Appendix B.

ORDERS IN QUESTION

AND NOW, this 8th day of October, 2004, after hearing on Defendants' Motion to Determine Immunity, the Court Rules as follows:

1. Defendants presented no evidence that plaintiff's Complaint is based on any complaints made by Defendants to a governmental agency as defined in 27 Pa. C.S.A. Section 8307 [sic]; and

2. The Court finds that any statements made to persons on [sic] entities other than governmental agencies do not come under the purview of the Statute; and

3. Defendants are not entitled to immunity from the instant suit for damages brought against them.

BY THE COURT

_____/s/_____

HODGSON, J.

AND NOW, this 28th day of December, 2005, the order of the trial court in the above captioned case is hereby affirmed.

_____/s/_____

BERNARD L. MCGINLEY, Judge

QUESTIONS PRESENTED

1. Whether the Environmental Immunity Act, 27 P.C.S.A. Section 8301 et seq., and/or the Constitution protect advocacy by way of zoning appeals, which seek relief based on environmental concerns.

2. Whether statements to nongovernmental parties are within the scope of the First Amendment protection and/or the Environmental Immunity Act, when made in the course of governmental proceedings covered by the Act.

3. Whether the First Amendment immunities should be afforded protection by Pennsylvania Courts at the preliminary stage of litigation as they are in Federal Courts.

STATEMENT OF THE CASE

Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined. – Judge J. Nicholas Colabella (1992)

There is no value of greater importance in society than the constitutional right of citizens to exercise their right to petition government, including the right to discuss these matters publically. The U.S. Supreme Court and the lower federal courts (and many state courts) have held that the petition clause of the First Amendment of the U.S. Constitution provides immunity to citizens who speak out to influence the government. This immunity is known as Noerr-Pennington immunity, and is synonymous with First Amendment immunity and applies to petitioning and to claims outside the antitrust context.” Id. In NAACP v. Clairborne Hardware 458 U.S. 886 (1982).

These constitutional rights have been increasingly threatened by retaliatory litigation, “SLAPP suits.” As former President George H.W. Bush stated:

“No obstacle is more chilling than the fear of personal liability.. [T]he fear of lawsuits, which place an individual’s bank account and home at risk, has increasingly deterred volunteer activity.” SLAPPs: Getting Sued For Speaking Out, George W. Pring and Penelope Canan (1996)

“Americans by the thousands are being sued, simply

for exercising one of our most cherished rights: the right to communicate our views to our government officials, to 'speak out' on public issues." (Id.)

The overall effect of these decisions is to, as developers intend, terrorize citizens who file zoning appeals, or make comments to coworkers: that they will be subjected to years of litigation, contrary to the United States Constitution and the legislative enactment of the Pennsylvania anti-SLAPP Act. Despite this constitutional and statutory protection, the lower Courts refused to provide this essential EIA immunity or enforce the Constitution in this case. It is this stark and essential issue which the petitioners present to this Court.

Many states have created similar tests under the petition clauses of their own state constitutions, or have applied First Amendment petition-clause immunity to claims arising in their state courts. (Id.) (See, e.g., Protect Our Mountain Environment, Inc. v. District Court, 677 P.2d 1361 (Colo. 1984). The "sham" burden of proof has even been codified in some states' anti-SLAPP statutes. In Pennsylvania, as related to environmental advocacy and moved by these events, the Legislature specifically found it necessary to supplement the constitutional provisions by enacting what it called the "anti-SLAPP" Statute, the Environmental Immunity Act of 2000, 27 P.C.S.A. Sec. 8301-8305 (hereinafter "the EIA").

The EIA statute by its language and intent protects citizens against being sued in retaliation for seeking relief for

environmental problems, with various qualifications. Sham activities and independent torts are not protected.¹ In material part, the statute provides:

"Except as provided in subsection (b), a person that, pursuant to Federal or State law, files an action in the courts of this Commonwealth to enforce an environmental law or regulation or that makes an oral or written communication to a government agency relating to enforcement or implementation of an environmental law or regulation shall be immune from civil liability in any resulting legal proceeding for damages where the action or communication is aimed at procuring favorable government action." 27 P.C.S.A. Sec. 8302 (emphasis added)

Section 8301 defines "government agency" as:

"The Federal Government, the Commonwealth, and any of the Commonwealth's departments, commissions, boards, agencies, authorities, political subdivisions or their departments, commissions, boards, agencies, or authorities." (emphasis added)

Section 8301 defines "communication to the government" as:

"A written or oral statement or writing made:

(1) before a legislative, executive or judicial proceeding or any other official proceeding authorized by law;

(2) in connection with an issue under consideration or review by a legislative, executive or judicial body or any other official proceeding authorized by law; or

(3) to a government agency in connection with the implementation and enforcement of environmental law and regulations." (emphasis added)

The case tests the value of this statute. It is a retaliatory

¹Sham has not been alleged in this case; while independent torts of tortious interference and trespass have been asserted, they are inconsequential, and in any event no immunity has been asserted as to those claims.

suit arising from proceedings initially filed by the respondent land developer Penllyn and Nolen seeking conditional use zoning approval in late 2001 for a real estate development in Lower Gwynedd Township, Montgomery County, in an area locally known as Penllyn. Randall Clouser, his wife Lawrenceine Mazzoli, and their neighbor John Schwartzbach, abutting or close neighbors, appeared as protestant parties.

The land at issue had been the subject of long standing environmental danger from toxic industrial contamination. Petitioners were concerned, inter alia, that the construction activities at the site would cause release of contaminants of a very toxic nature, which would adversely affect their properties and their health. The Township and the Courts had previously denied development of the tract due to the environmental problems. (It later emerged and is in the record that in 2001 the owners had obtained a Site Clearance Certificate from DEP, although the Clousers and Schwartzbach did not know of it, and it was not publicly disclosed until long after this retaliatory action was filed.) (An Environmental Clearance Certificate does not negate contamination, but does establish that DEP has approved the site for development.)

The Board of Supervisors approved the conditional use, in February 2002, rejecting the Clouser-Schwartzbach protest. However, it did not give notice of its decision to them, although

they were parties. Several months later, they learned of the Board's action, and within 30 days thereafter, they filed a zoning appeal in the Montgomery County Court of Common Pleas in July 2002.

Several months later, when building permits were issued, they filed appeals from the building permits, seeking to raise the same zoning approval issue, but withdrew those appeals shortly before the hearing.

The development proceeded into construction and is now complete.

The zoning appeal was challenged as untimely. The question turned on whether the 30 day appeal period started to run before petitioners had notice of the Board's decision; and this in turn depended on the petitioners' right to notice. In that the applicable rules in general are derived the Zoning Board special exception proceedings (53 P.S. Section 908.10), petitioners believed that they were entitled to notice as in Zoning Board proceedings.² Moreover, Title IX of the state zoning statute, the Municipalities Planning Code, 53 P.S. Section 901 expressly states

²(Conditional use approval is an on the record procedure conducted before the Board of Supervisors or its designate pursuant generally to similar proceedings for "special exceptions" before Zoning Boards, where provided by Local Ordinance 53 P.S. 10913). It has been often stated that conditional use proceedings before Supervisors are identical to Zoning Board matters as to the procedures and legal standards, e.g., Bray v. Zoning Board of Adjustment, 410 A.2d 909 (Pa. Cmwlth. 1980) (See also Ryan's Pennsylvania Zoning (Supp) 5.1.5 (notice for conditional use similar to zoning board)).

that while the word "Board" generally means the Zoning Board, it excerpts cases where the context indicates otherwise. This supported the argument that the Section 908(10) requirement for notice applies in conditional use cases.

Subsequently, in that appeal, the Montgomery County Court and the Commonwealth Court held that no notice to protestants is required in conditional use cases, and this Court denied the Clouser-Schwartzbach Petition for Allowance of Appeal at this Court's No. 817 MAL, on December 28, 2005. (The Petition to file a Reply Brief to address respondents' new contentions was denied.) However, there was no prior case which had established this rule. Moreover, the decision by the Commonwealth Court is at variance with the decision of this Court in Schadler v. ZHB of Weisenberg Tp., 850 A.2d 619 (Pa. 2004). It is directly inconsistent with Luke v. Cataldi, 883 A.2d 1114 (Pa. Cmwlth. 2005), which the Commonwealth Court decided after oral argument in the zoning appeal. (In those cases, this Court and the Commonwealth Court, respectively, held that the time for challenging zoning actions did not run because notice was not given.)

Penllyn-Nolen filed this action against Mr. Clouser and Schwartzbach, and later an action against Mrs. Clouser-Mazzoli, which was consolidated in the Montgomery County Court of Common Pleas, alleging abuse of process, trespass and tortious interference. While the zoning appeal was pending, and construction

was ongoing, Preliminary objections based on the constitutional immunity of the First Amendment were overruled.

However, when discovery commenced and respondents demanded information from the Clousers and Schwartzbach as to why they had opposed the project, this made it clear their abuse of process claim undercut the constitutionally and statutorily protected rights as which were the basis of petitioners' opposition, the environmental contamination concerns.

The petitioner-defendants then sought relief under the provisions of the Environmental Immunity Act and the First Amendment, by filing a motion.

The lower Court scheduled the hearing required by the statute, 27 P.C.S.A. Section 8303. However, it refused to hear evidence as to the environmental contamination, the petitioners' good faith, and their motivations. It did allow a detailed offer of proof. This showed the existence of the highly toxic environmental contamination, the concerns expressed by the Clousers and Schwartzbach over many years, the prior refusal of development approval by the Township due to the contamination, and the affirmance of that determination by the Montgomery County Court and the Commonwealth Court. In addition, the Court of Common Pleas received an offer of proof as to this being petitioners' motivation. There was no challenge to the fact that the issue of entitlement to notice of the conditional use action was an open

legal issue, then in the Commonwealth Court, i.e., not frivolous.

The Court of Common Pleas held that the statute did not apply, on the basis that the statute did not apply to zoning appeals, and that statements at issue were not made to the government, and refused to readdress the First Amendment protection issue.

The Commonwealth Court panel affirmed on slightly different grounds. It held that the EIA would apply to some statements made to nongovernmental recipients, but limited to those "relating" to the governmental petition. However, the Commonwealth Court panel held that zoning matters per se do not come within the scope of the EIA. Based on the fact that the Department of Environmental Protection has jurisdiction to regulate environment. Surprisingly, the panel held that simply because zoning is governed by the Municipalities Planning Code, it is not environmental, and zoning actions are not covered by the Immunity Statute. The panel did not reconcile its view with the that the EIA defined "subdivisions" and their Boards as governmental bodies.

The Commonwealth Court refused to address the First Amendment Noerr-Pennington immunity, holding that the appeal was interlocutory (the EIA provides for interlocutory approval) and that issue had not been certified, and that in any event the Superior Court has sole jurisdiction of such matters. In a footnote, it also issued dictum that statements made to third parties were not protected by the First Amendment. (The statement

supporting the tortious interference claim involved an inquiry by a coworker of Schwartzbach in his real estate brokerage business as to whether the coworker should know of any problems of the units, and Schwartzbach's honest answer to him as to his concerns.)

Although the Commonwealth Court panel Opinion contains factual material unsupported by the record and/or erroneous, these matters do not affect the critical need for review on the fundamental legal issues attendant to the Immunity Statute and the First Amendment. This Court's action is required to establish and protect the rights of citizens under the First Amendment as implemented and expanded by the Environmental Immunity Statute. As such, the jurisdiction of this Court is invoked both by way of this Petition for Allowance of Appeal, and in the alternative, to the extent not otherwise before the Court, pursuant to the Court's Kings Bench power, consistent with the Legislature's express provision for interlocutory review under the Immunity Act.

**REASONS WHY THE COURT SHOULD GRANT THE APPEAL
AND HEAR THE CASE**

The problem of retaliatory litigation against citizens for opposing development detrimental to the environment has been a major source of tension between developers and the communities. Developers evolved SLAPP suits (SLAPP stands for Strategic Lawsuits Against Public Participation) for obvious business reasons, but also obviously in violation of the letter and spirit of the First Amendment.

The federal courts developed the Noerr-Pennington Doctrine from its anti-trust origins to a shield against

environmental petitioning. In a string of cases in the federal courts starting with Barnes v. Lower Merion Township, 927 F.Supp. 874 (E.D. Pa. 1996) and continuing into We, Inc. v. City of Philadelphia, 17 F.3d 322 (3rd Cir. 1999) and King v. Tp. of East Lampeter, 17 F.Supp.2d 394 (E.D. Pa. 1998), the Federal Courts have sustained motions to dismiss (i.e., preliminary objections) so as to relieve the victims from debilitating economic and social impacts of being subjected to lengthy litigation in retaliation for raising issues of any kind relating to zoning and land development. The Noerr-Pennington Doctrine, as thus elaborated, clearly provides a First Amendment protection against retaliation for petitioning government in environmental matters. Moreover, in Brownsville Golden Age Nursing Home, Inc. v. Wells, 839 F.2d 155 (3rd Cir. 1988), the Federal Court of Appeals for this area held that the protection extends to statements made to third persons concerning those issues.

In the Commonwealth, the federal law evolution occurred contemporaneously with a series of SLAPP suits in the Commonwealth. Yet there was not as clear a pattern of protection. The Legislature therefore enacted the Environmental Immunity Statute, also actually titled the anti-SLAPP act, 27 P.C.S.A. 8201-8203, for the express purpose of ensuring that activities which were directed toward environmental protection would be insulated from SLAPP suits.

The lower courts narrow and hostile reading of the immunity

statute is inconsistent with the legislative purpose, and the constitutional context. Addressing the statute without consideration of the First Amendment origins and context strikes at the heart of the constitutional protections which are at the foundation of our government and society: free speech and petitioning government.

A. THE STATUTE SHOULD BE INTERPRETED TO INCLUDE ENVIRONMENTAL PROTECTION ACTIVITIES UNDER VARIOUS STATUTES, INCLUDING ZONING

It is at variance with the common sense meaning of words in zoning ordinances to exclude lands use proceedings from "environment". Zoning has its foundation in protection of the environment, going back to the earliest days of zoning. The origin of zoning lay in the need to insulate residential areas from industrial activities, as they were blatantly adverse, in the 1920's. In 2005, and 2006, the relationship between industrial contamination and human health is infinitely more complex, and is only one aspect of the environment which zoning protects. In its decision in the Appeal of Dolington Group, 839 A.2d 1021 in 2003, and in such other litigation as C&M Developers, Inc. v. Bedminster, 820 A.2d 143 (Pa. 2002) this Court has made it clear beyond doubt that the environmental protection afforded by land use laws and enforcement is critical to the protection of the human and natural environment. As stated in Dolington,

"We anticipate that zoning boards and governing bodies,

in the exercise of their special expertise in zoning matters, will develop and consider any number of factors...These include but are not limited to an increased awareness of the environmental sensitivity and public value of undisturbed wetlands, floodplains, slopes, and woodlands; the growing national and statewide awareness of the true costs of sprawl and of the need to implement contrary land use policies; and the growing recognition of the importance of agricultural lands and activities and of prime agricultural soils." Id. at 1032.

The Court has had occasion to apply environmental considerations to zoning enforcement repeatedly.

Nothing could be more destructive to the environment than to exclude, without justification, the zoning environment forum from the protection of the statute, and at the same time, deny an opportunity for preliminary determination and termination of SLAPP suits brought in retaliation for zoning advocacy.

Clearly the intervention of this Court is required to determine these essential constitutional and statutory matters.

B. COMMUNICATIONS TO THIRD PARTIES CONCERNING GOVERNMENTAL PETITIONING ARE PROTECTED UNDER THE CONSTITUTION AND THE STATUTE

The First Amendment constitutional protection pursuant to Noerr-Pennington has been authoritatively held to extend beyond the communications to the government, but logically and necessarily, to include communications with other private parties in relation to those matters. In such instances, as here, citizens engaging in petitioning activities would be hamstrung by a gag on their communications to their fellow citizens.

The Legislature also recognized this in the Environmental

Immunity Statute, by including in the definition of petitioning government, communications about those matters, as a separate subsection definition.

The Commonwealth Court ruling recognized this principle. However, it truncated the principle by creating a highly limiting test, by which the Court is to determine after the fact, in litigation such as this, whether the communication is sufficiently "about" the petition to qualify. This must be reviewed and corrected.

C. NOERR-PENNINGTON DEFENSES SHOULD BE PROVIDED AT THE PRELIMINARY OBJECTION STAGE

The Noerr-Pennington Doctrine implements the First Amendment and protects free speech in petitioning government. Its fundamental policy is as important a production as any other afforded by the law.

It "has its roots in a line of antitrust cases that hold that efforts to influence public officials through lobbying, publicity, and other contact are protected by the petition clause (and are not a violation of antitrust law) even when the petitioning activity is undertaken for a disfavored motive, such as eliminating competition. (See United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 875 (1961))"

Two recent Supreme Court decisions in antitrust litigation, Professional Real Estate Investors v. Columbia Pictures, 508 U.S.

49 (1993) and Columbia v. Omni Outdoor Advertising 499 U.S. 365 (1991), applied petition-clause analysis and clarified the burden faced by a plaintiff challenging petitioning activity.

"When it appears that a plaintiff's claims are lodged in response to a defendant's legitimate use of government processes, a court must apply heightened scrutiny to those claims and dismiss them unless they can clear a high barrier."

Under the test set out in Omni, a defendant is entitled to immunity unless a plaintiff can demonstrate that defendant's petitioning was "a sham." (Omni at 380-81)

Professional Real Estate Investors set forth a two-prong definition of the term "sham." The first prong requires a plaintiff to show that a citizen's communications with government agencies were "objectively baseless." The second prong, which this Court need not consider if the plaintiff cannot satisfy the first, is the test articulated in Omni: whether the defendant's communications were not genuinely aimed at procuring favorable government action. The SLAPPer bears the burden of proof on both prongs, and must meet that burden at the motion to dismiss or summary judgment stage of the case.

This Court should view this policy in a manner consistent with the protections afforded public officials under qualified immunity, and the governmental immunity provided by the legislature against torts. It is equally important that Pennsylvania apply Noerr-

Pennington First Amendment privilege doctrine at the preliminary objection stage.

The rules presently provide for interlocutory appeal from such decisions only by certification or by extraordinary determination of abusive discretion petition, where certification is denied. (R.A.P. Rules 311-341)

Thus, declaration by this Court providing for immunity at the preliminary stage is essential. Several courts have already implemented such a rule under their motions to dismiss, the equivalent of preliminary objections. E.g., Barnes v. Lower Merion Township, 927 F.Supp. 874 (E.D. Pa. 1996), and reaffirmed by the Third Circuit in We, Inc. v. City of Philadelphia, 17 F.3d 322 (3rd Cir. 1999).

This First Amendment federal constitutional protection is as important, to avoid dragging ordinary citizens through the process of litigation only to be sustained in the end, as are the rights of local government to be free from tort immunity, or public officials to have qualified immunity in search and seizure or police abuse cases, especially given the lesser resources available to ordinary citizens, and the consequent interrorem impacts of draining litigation such as that which has occurred here.

To the extent that other issues like trespass or tortious interference with contract may be involved, and such have been asserted in this case, the courts can discern the extent to which

such other issues must be left to be litigated, or, conversely, are, as in this case, so trivial and inconsequential as not to interfere with the overarching importance of the protection of free speech by determination on preliminary objections.

The Court of Common Pleas in this case did not give any reasons for overruling preliminary objections based on Noerr-Pennington; it did not explain whether it was because of the facts alleged, or because the doctrine was not available as a preliminary objection.

Likewise, the Commonwealth Court, in holding that it had no interlocutory jurisdiction either allied to the environmental immunity statute, or otherwise, created a or perpetuated a procedural morass by which the First Amendment protections are justice delayed, and thereby justice denied.

CONCLUSION

This Court's intervention is critical, and the Petition should be granted.

Respectfully Submitted,

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