

MEGAN YAUKEY, A MINOR, BY HER GUARDIAN, V. CHARLES R. YAUKEY, ET AL, C.P. Franklin County Branch, A.D. 1994-236

Action in Law-Preliminary objections to a complaint filed alleging that plaintiffs have failed to adequately plead a cause of action because 42 Pa.C.S.A. Section 4581 prohibits evidence of misuse of a child safety restraint system.

BOROUGH OF MERCERSBURG VS. ROY GOCHENAUER, ET AL., C.P. Franklin County Branch, No.A.D.1994-124

Civil Action-Preliminary Objections-Demurrer-Wrongful Use of Civil Proceedings- Abuse of Process

1. A preliminary objection in the nature of a demurer admits every well-pleaded fact and all inferences reasonably deducible therefrom.
2. A Demurrer tests the legal sufficiency of the challenged complaint and will be sustained only in cases where the pleader has clearly failed to state a claim for which relief may be granted.
3. If there is any doubt as to whether a claim for relief has been stated, the trial court should resolve it in favor of overruling the demurrer.
4. Section 8351 of the Judicial Code describes the conduct necessary to maintain a claim for wrongful use of civil proceedings. 42 Pa.C.S.A. 8351
5. A claim brought before an administrative agency is not a lawsuit.
6. Claims brought before administrative agencies are not lawsuits and the review process which follows are part of the administrative agency proceedings.
7. An Administrative agency proceeding and the review process that follows by way of appeal to either the Court of Common Pleas or the Commonwealth Court cannot be defined as a lawsuit and are therefore not within the meaning of the term "civil proceeding" as used in Section 8351- Wrongful Use of Civil Proceedings.
8. The tort of abuse of process is a separate and distinct cause of action from the statutory cause of action known as Wrongful Use of Civil Proceedings.
9. The tort of abuse of process involves the use of a legal process, civil or criminal, primarily to accomplish a purpose for which the process is not designed.
10. There is no support in the law to exclude administrative proceedings or a review process associated with those proceedings from the term legal process.

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The Honorable Ernest D. Preate, Jr., Esquire, Attorney
 General, Commonwealth of Pennsylvania, notified

OPINION AND ORDER OF COURT

HERMAN, J., November 23, 1994:

1. STATEMENT OF THE FACTS

The Court has before it preliminary objections filed by defendant, Kenneth W. Lee, in the nature of a demurrer on three separate grounds. The complaint, filed on March 29, 1994, alleges that the defendant Lee wrongfully used and/or initiated civil proceedings before the Pennsylvania Department of Community Affairs in a matter involving the Borough of Mercersburg. Specifically the complaint alleges that defendant Lee, by his conduct in assisting the other defendants as their attorney in prosecuting a complaint before the Department of Community Affairs and further by appealing the decision of the Department of Community Affairs on behalf of defendant Agronomy, Inc. to the Commonwealth Court, violated the provisions of the Judicial Code at 42 Pa.C.S.A. Section 8351 et seq. by wrongful use of civil proceedings.

The factual background indicates that in March of 1983 the Department of Environmental Resources determined that the Borough of Mercersburg should construct an irrigation sewage treatment and water reuse project in conjunction with Montgomery Township in order to eliminate pollutorial discharge from its current treatment plant. On August 2, 1993, the Borough of Mercersburg adopted an ordinance authorizing issuance of a note in the sum of \$900,000.00 for the purpose of financing the initial costs of constructing the sewage facility. On August 10, 1993, the Borough of Mercersburg submitted an application to the Pennsylvania Department of Community Affairs for approval of the note authorized by the Borough Ordinance on August 2, 1993. This application was filed under Section 441(a) of the Local Government Unit Debt Act, 53 P.S. Section 6780-161.

The defendants in this case, with the assistance of defendant Lee, filed a complaint before the Department of Community Affairs objecting to the Borough of Mercersburg's application for approval of the general obligation note.

The Department of Community Affairs dismissed the defendants' complaint by Order of the Deputy Secretary on September 21, 1993. Defendant Lee on behalf of one of the defendants, Agronomy Inc., filed an appeal from this Order to the Commonwealth Court on October 6, 1993. Defendant Agronomy, Inc. was the only party to this appeal. The Commonwealth Court upheld the dismissal of the defendant's complaint by the Department of Community Affairs by Order entered January 7, 1994. Specifically the Borough of Mercersburg has alleged in its complaint that defendants prosecuted the complaint before the Department of Community Affairs and the Commonwealth Court in a grossly negligent manner in that they failed to allege any grounds on which Department of Community Affairs could properly act to deny the Borough of Mercersburg's application and further that they failed to investigate the facts alleged and verified in the defendants' complaint before the Department of Community Affairs. The Local Government Unit Debt Act specifies the Department of Community Affairs' standards for reviewing applications of local Government units and limits review to the regularity of the proceedings, the validity of the papers representing obligations of the local government unit, and the legality of the purpose for which the approval is requested. The Borough claims that Lee failed to challenge Department of Community Affairs' review of the Borough's application pursuant to these standards. The Borough of Mercersburg also claims that the defendants' complaint was brought without probable cause.

II. DISCUSSION OF THE QUESTIONS PRESENTED

A. Defendant Lee's demurrer for failure to state a claim upon which relief may be granted pursuant to the language of the statute.

The standard for reviewing a demurrer is well-established under Pennsylvania law:

A preliminary objection in the nature of a demurrer admits every well-pleaded fact and all inferences reasonably deducible therefrom. *McGaha v. Matter*, 365 Pa. Super. 6, 8, 528 A.2d 988, 989 (1987); *Pike*

County Hotels, Corp. v. Kiefer, 262 Pa. Super. 126, 133, 396 A.2d 677, 681 (1978). It tests the legal sufficiency of the challenged complaint and will be sustained only in cases where the pleader has clearly failed to state a claim for which relief may be granted. *Mudd v. Hoffman Homes for Youths, Inc.*, 374 Pa. Super. 522, 524, 543 A.2d 1092, 1093 (1988). If there is any doubt as to whether a claim for relief has been stated, the trial court should resolve it in favor of overruling the demurrer. *Mull v. Kerstetter*, 373 Pa. Super. 228, 229-230, 540 A.2d 951, 951 (1988).

Kelly-Springfield Tire Co. v. D'Ambro, 408 Pa. Super. 301, 596 A.2d 867, 868 (1991), quoting *Creeger Brick v. Mid-State Bank*, 385 Pa. Super. 30, 32-33, 560 A.2d 151, 152 (1989).

The language of Section 8351 of the Judicial Code describes the conduct necessary to maintain a claim for wrongful use of civil proceedings [42 Pa.C.S.A. 8351]. Specifically, Section 8351 indicates that this conduct must take place in the context of a civil proceeding. The defendant's first demurrer argues that actions brought before an administrative agency such as the Department of Community Affairs does not fall within the meaning of the term "civil proceeding" as used in Section 8351. In essence, the defendant has asked the court to hold that as a matter of law actions before the state's administrative agencies and appeals therefrom to the Commonwealth Court are not civil proceedings within the meaning of Section 8351 of the Judicial Code 42 Pa.C.S.A. 8351.

In support of this argument the defendant cites the definitional section of Title 42 which defines the terms of "Proceeding", "The Court" and the term "Action". [42 Pa.C.S.A. Section 102]. The defendant argues that the term "Proceeding" as used in the definitions section of Title 42 should be narrowly construed to exclude administrative proceedings. The defendant cites no case law in support of this position. It is noted that Section 102 does specifically exclude the terms "Action" and "Appeal" from the meaning of the term "Proceeding". However, the same section defines action as any action at law or in equity. To accept this reasoning would require us to conclude that the term "civil proceeding" as used in Section 8351 also excludes any action at

law or equity. This interpretation would obliterate the meaning of the term "civil proceedings" used in Section 8351. We also note that Section 102 of Title 42 specifically instructs that these definitions are controlling only in so far as they give meaning to and do not conflict with the entire context of the statute in which they are used. Specifically, Section 102 states in part: "...the following words and phrases when used in this title shall have, unless the context clearly indicates otherwise, the meanings given to them in this section: . . .". The definition of the term "proceeding" under Section 102 does not resolve the issue of whether or not Section 8351 applies to proceedings before state administrative agencies.

Defendant Lee also states that Section 102 requires the court to grant a demurrer for failure to state a cause of action because the general definitions section of Title 42 defines the word "court" to exclude actions brought before an administrative agency such as the Department of Community Affairs. The defendant does not argue in support of this conclusion nor does he cite any case law which supports this position. The definition of the term "court" under Section 102 includes, ". . . any one or more of the judges of the court *who are authorized* by general rule or rule of court, *or by law* or usage, to exercise the powers of the court in the name of the court." Administrative agencies such as the Department of Community Affairs are creatures of the legislature. It can easily be said that they are vested with their powers by law. So, at least to that extent, they would fulfill the definition of a court. We find the defendant's argument in support of his demurrer to be singularly unhelpful in analyzing the issues raised by that demurrer.

The plaintiff points out, other states have held that a claim initiated before administrative agencies are civil in nature and consequently a claim for wrongful use of civil proceedings could arise from the wrongful commencement and/or continuation of an administrative complaint.

The Supreme Court of New York, Appellate Division, offered the following explanation:

In *Melvin v. Pence* (130 F.2d 423), the court found no reason to distinguish between judicial proceedings before a court or a judge and administrative proceedings in determining whether a cause of action

for malicious prosecution is stated. The court stated (citation omitted): "Much of the jurisdiction formerly residing in the courts has been transferred to administrative tribunals, and much new jurisdiction involving private rights and penal consequences has been vested in them. In a broad sense their creation involves the emergence of a new system of courts, not less significant than the evolution of chancery. The same harmful consequences may flow from the groundless and malicious institution of proceedings in time as does from Judicial proceedings similarly begun. When one's livelihood depends upon a public license, it makes little difference to him whether it is taken away by a court or by an administrative body or official. Nor should his right to redress the injury depend upon the technical form of the proceeding by which it is inflicted. The administrative process is also a legal process, and its abuse in the same way with the same injury should receive the same penalty." Other states have permitted administrative proceedings, particularly disciplinary ones, to form the basis for malicious prosecution actions (See *Hardy v. Vial*, 48 Ca.2d 577; *Cassidy v. Cain*, 145 Ind. App. 581; *Ahring v. White*, 156 Kan. 60; *Kaufman v. Robins Co.*, 223 Tenn. 515).

In our opinion, administrative proceedings which require a hearing and trial of the issues on evidence and testimony under oath, with the right of cross-examination, have sufficient attributes of judicial proceedings to be considered judicial proceedings for the purposes of a cause of action for malicious prosecution.

Groat v. Town Board of Glenville, 73 A.D.2d 426, 426 N.Y.S.2d 339 (1980).

While this position is persuasive and not without merit, it does not appear to be the law of the Commonwealth. The Pennsylvania Commonwealth Court's decision in *Human Development of Erie, Inc. v. The Zoning Hearing Board of Millcreek Township*, 143 Pa. Commw. 675, 600 A.2d 658 (1991) notes with approval the United States Supreme Court decision of *North Carolina Department of Transportation v. Crest Street*, 479 U.S. 6, 107 S. Ct. 336, 93 L.Ed. 188 (1986) holding that a claim brought before an administrative

agency was not a lawsuit. In *Human Development of Erie, Inc. v. The Zoning Hearing Board of Millcreek Township*, the plaintiff challenged the validity of an amendment to a zoning ordinance before the Township Zoning Hearing Board. The Township Zoning Hearing Board rejected the challenge of the plaintiffs and the plaintiffs appealed the decision to the Court of Common Pleas. The initial challenge and the appeal to the Court of Common Pleas were all pursuant to the Municipality's Planning Code. The plaintiffs prevailed in the Court of Common Pleas and the amendment to the zoning ordinance was found to be violative of federal housing legislation. Plaintiffs also requested attorney's fees and costs incurred in instituting the challenge to the amended zoning ordinance. Subsequently the township appealed the trial court's decision to the Commonwealth Court and prior to a decision on the appeal, the township withdrew its appeal on the issue of the validity of the amendment to the ordinance. The Commonwealth Court was left to decide whether or not the plaintiffs were entitled to attorney's fees and costs incurred in challenging the amended ordinance. The Commonwealth framed the issue as whether or not a notice of appeal to the Court of Common Pleas from an adverse decision of a zoning hearing board is a lawsuit. The Commonwealth Court found that a notice of appeal, including one from the zoning hearing board, is not filed pursuant to the Pennsylvania Rules of Civil Procedure because these rules are inapplicable to statutory appeals. The court further held that the appellate process in that context is not a lawsuit in that an appeal does not permit the judge to engage in fact finding, empanel a jury, award damages, authorize discovery or enter judgments or grant injunctions.

Further the Commonwealth Court approved of the United States Supreme Court's holding in *Crest Street* which held that claims brought before administrative agencies were not lawsuits and that the review process which followed was part of the administrative agency proceeding.

We agree with the plaintiff, Borough of Mercersburg, in principle that the protection offered by the statutory action of wrongful use of civil proceedings should not depend on the forum in which the underlying proceedings are brought. However, we believe the Commonwealth Court's holding in *Human Development of Erie, Inc. v. The Zoning Hearing Board of Millcreek Township*, 143 Pa. Commw.

675, 600 A.2d 658 (1991) requires us to conclude that administrative agency proceedings and the review process that follows by way of appeal to either the Court of Common Pleas or the Commonwealth Court cannot be defined as a lawsuit and are therefore not within the meaning of the term "civil proceeding" as used in Section 8351 - Wrongful Use of Civil Proceedings. Therefore the defendant's demurrer to the plaintiff's complaint will be sustained to the extent that the plaintiff has failed to state a cause of action pursuant to Section 8351 et seq. of the Judicial Code, Wrongful Use of Civil Proceedings. In view of this holding, it will be unnecessary to decide the issues raised by the defendant's demurrer as to whether or not the proceedings before the Department of Community Affairs were terminated in favor of the Borough of Mercersburg and whether or not Section 8351 is unconstitutional when applied to an attorney.

B. Demurrer for failure to state a cause of action -- the plaintiff has failed to state a cause of action for the tort of abuse of process.

The plaintiff in meeting the defendant's demurrer that he has failed to state a cause of action under Section 8351 of the Judicial Code has asserted that the complaint also states a cause of action for the tort of abuse of process. Since we have granted the defendant's demurrer to Section 8351, the court is obliged to review the complaint to determine if it states a cause of action for the tort of abuse of process. *Shaffer v. Stewart*, 326 Pa. Super. 135, 473 A.2d 1017 (1984). In reviewing the complaint we are required to accept as true all well-pleaded facts in the complaint, as well as any inferences reasonably drawn therefrom. The defendant although he did not brief this issue as a basis for a demurrer specifically claimed at oral argument that paragraphs 34 and 41 of the plaintiff's complaint stated no allegations of abuse of process and was merely a verbatim reproduction of the language of Section 8351 of the Judicial Code. In the case of *Burnside v. Abbott Laboratories*, 351 Pa. Super. 264, 505 A.2d 973 (1985) the Superior Court of Pennsylvania stated that it is not necessary that the complaint identify a specific legal theory upon which relief is requested. It is the court's obligation to review the facts alleged in the complaint and state the cause of action therein. The complaint must, however, set forth the facts upon which the cause of action is based. Plaintiff contends that paragraphs 34 and 41 of the

complaint set forth the basis for a cause of action for the tort of abuse of process. The tort of abuse of process is a separate and distinct cause of action from the statutory cause of action known as Wrongful Use of Civil Proceedings. *In re: Larsen*, 532 Pa. 326, 439, 616 A.2d 529 (1991). The tort of abuse of process involves the use by the defendant of a legal process, civil or criminal, primarily to accomplish a purpose for which the process is not designed. The elements of that tort are as follows:

- a) The defendant used the legal process to seek an objective for which the process was not authorized, in an action otherwise properly commenced;
- b) The defendant did so intentionally and for a wrongful purpose; and
- c) The plaintiff suffered a specific harm as a result.

In paragraphs 34 and 41 the plaintiff specifically pleads that defendant Lee initiated action before the Department of Community Affairs for the purpose of delaying the Borough's application for financing, to delay, or otherwise frustrate the Borough's proposed project in its revised 537 Plan, and to seek strategic advantage for defendant Lee's clients in the Environmental Hearing Board proceedings. These same reasons are alleged as the primary purpose for defendant Lee's continuation of the proceedings by an appeal to the Commonwealth Court from the decision of the Department of Community Affairs. We believe that the plaintiff has pleaded a cause of action for the tort of abuse of process in all respects with the exception of the same issue that was raised by the defendant's demurrer to the cause of action under Section 8351. The question becomes whether the more general term "legal process" used in defining the elements of the tort is synonymous with the terms "civil proceeding" as used in Section 8351- Wrongful Use of Civil Proceedings. Again we note the parties' briefs are notably deficient in identifying and arguing this issue.

The only guidance we can find on this issue is the general discussion of the term "legal process" found in the context of cases resolving other issues. For example, *McGee v. Feege*, 517 Pa. 247, 535 A.2d 1020 (1991) in citing the Restatement (Second) of Torts, Section 682(2) defining abuse of process "refers to the term legal

process, civil or criminal". In qualifying the term legal process as civil or criminal the suggestion is made that it is limited to actions at law in the same fashion we interpreted the term civil proceedings. However, we believe this is not a sufficient basis to restrict the meaning of the term legal process. According to Professor Prosser, the usual reasons for not extending the protection of the tort of abuse of process are of questionable validity. These reasons are that a successful litigant is fully compensated in civil litigation for costs; that extending the tort protection would discourage honest litigants from seeking justice for fear of an action in return; and third, that it would encourage endless counter-suing. Professor Prosser points out, however, that the heavy burden of proof on the plaintiff in an action for abuse of process should be sufficient protection to potential litigants so as not to discourage honest lawsuits. He also notes that successful civil litigants are rarely ever fully compensated for the cost of their litigation, particularly regarding attorney's fees. W. Prosser, *Handbook of the Law of Torts*, Section 119 (1971). As noted earlier, we agree that the remedies to be afforded by the tort of abuse of process should not depend on the forum in which the underlying action is initiated. We also believe that the term legal process is a much more comprehensive term than the term civil proceeding used in Section 8351 of the Judicial Code. We, therefore, conclude that there is no support in the law to exclude administrative proceedings or a review process associated with those proceedings from the term legal process. Therefore, the defendant's demurrer to the complaint based on a failure to state a cause of action for abuse of process will be denied.

For the reasons stated herein an appropriate order will be entered as part of this opinion.

ORDER OF COURT

NOW this 23rd day of November, 1994, the defendant's preliminary objection in the form of a demurrer to the complaint for failure to state a cause of action under Section 8351 of the Judicial Code, Wrongful Use of Civil Proceedings, [42 Pa.C.S.A. Section 3851] is **SUSTAINED**. IT IS FURTHER ORDERED THAT the defendant's demurrer to the plaintiff's complaint for failure to state a cause of action for the tort of abuse of process is **DENIED**.

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