Franklin County Legal Journal

Vol. 33, No. 03 July 17, 2015 Pages 9 - 26

Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201–2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

Catherine M. Dusman, Plaintiff
v. Joseph O. Padasak, Jr., Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch, Civil Action No. 2013-4009

HEADNOTES

Preliminary Objections

1. Preliminary objections in the nature of a demurrer may be sustained where the contested pleading is legally insufficient and the law will not permit recovery. Bayada Nurses, Inc. v. Com., Dep't of Labor & Indus., 8 A.3d 866, 884 (Pa. 2010); Cardenas v. Schober, 783 A.2d 317, 321 (Pa. Super. Ct. 2001).

2. In deciding whether to sustain a demurrer, the Court's decision must be based solely on the pleadings, and in making its determination, the court must accept as true all well pleaded material allegations and reasonable inferences therefrom. Com., Dep't of Labor & Indus., 8 A.3d at 884; Schober, 783 A.2d at 321. The Court need not accept as true "conclusions of law, unwarranted inferences, allegations, or expressions of opinion." Com., Dep't of Labor & Indus., 8 A.3d at 884.

3. The Political Subdivision Tort Claims Act ("Tort Claims Act") places statutory limitations on liability of employees of local agencies for their negligence while acting in the course and scope of their employment. 42 Pa. C.S. § 8545.

An employee of a local agency is liable for civil damages on account of any injury to a person or property caused by acts of the employee which are within the scope of his office or duties only to the same extent as his employing local agency and subject to the limitations imposed by this subchapter. 42 Pa. C.S. § 8545.

4. Local agencies are liable for damages on account of an injury to a person or property if the damages would be recoverable under common law or statute if the injury were caused by a person not having a valid defense related to governmental immunity or official immunity, and the injury was caused by the negligent acts of the local agency or an employee of the local agency acting within the scope of his office or duties. 42 Pa. C.S. § 8542(a).

5. The act causing harm under Section 8542(a) must be one that pertains to: (1) the operation of any motor vehicle in the possession or control of the local agency; (2) the care, custody or control of personal property of other in the possession or control of the local agency; (3) the care, custody or control of real property in the possession of the local agency; (4) a dangerous condition of trees, traffic signs, lights or other traffic controls, street lights or street lighting systems under the care, custody or control of the local agency; (5) A dangerous condition of the facilities of steam, sewer, water, gas or electric systems owned by the local agency and located within rights-of-way; (6) a dangerous condition of streets owned by the local agency; (7) a dangerous condition of sidewalks within the rights-of-way of streets owned by the local agency; or (8) the care, custody or control of animals in the possession or control of a local agency. 42 Pa. C.S. § 8542(b).

6. The exceptions to sovereign immunity will be strictly construed, and "[d]amage suits will be barred unless the plaintiff establishes that the cause of action falls under one of the specifically enumerated legislative exceptions to immunity." Stackhouse v. Com., Pennsylvania State Police, 892 A.2d 54, 59 (Pa. Cmwlth. 2006).

7. In addition to the protections grounded in Section 8452, an employee of a local agency may assert any defenses which are available at common law to the employee, the defense that the conduct was authorized or required by law, or the defense the conduct was within

the policymaking discretion granted to the employee by law. 42 Pa. C.S. § 8546.

8. The immunities promulgated in Sections 8545 and 8546 do not apply if the act constituted a crime, actual fraud, actual malice or willful misconduct even if the employee acts within the scope of his employment. See 42 Pa. C.S. § 8550; Petula v. Mellody, 631 A.2d 762, 765 (Pa. Cmwlth. 1993).

9. Aside from the statutory immunity, there also exists at common law immunity for "high public officials" in defamation cases. Lindner v. Mollan, 677 A.2d 1194, 1199 (Pa. 1996); Petula v. Mellody, 631 A.2d at 766.

10. "[T]he doctrine of absolute privilege for high public officials applies 'provided that the statements are made or the actions are taken in the course of the official's duties or powers and within the scope of his authority, or as it is sometimes expressed, within his jurisdiction.'" Lindner, 677 A.2d at 1197 (quoting Matson v. Margiotti, 88 A.2d 892, 895 (Pa. 1952)).

11. The reasoning behind the absolute privilege is not to protect the high public official, but to protect the public. Lindner, 677 A.2d at 1196.

12. The abrogation of statutory immunities pursuant to Section 8550 of the Tort Claims Act is inapplicable to the common law absolute privilege for high public officials. Lindner, 677 A.2d at 1197; Petula, 631 A.2d at 766.

13. Section 8550 applies only to actions where an employee of a local government agency is the subject of a civil suit involving willful misconduct and the employee is not a "high public official." Lindner, 677 A.2d at 1197. That is, the only difference between the statutory and common law immunity is that a high public official may claim immunity regardless of whether his actions are motivated by malice.

14. Regardless of whether an employee of a local agency is a high public official, neither the statutory nor the common law immunity will shield the employee unless he was acting within the scope of his employment.

15. Generally, pursuant to Pa. R.C.P. 1030(a) a defendant must plead affirmative defenses in a responsive pleading as new matter. However, "[s]overeign immunity is an affirmative defense which ordinarily should be raised as new matter, but may be raised in preliminary objections when to delay a ruling thereon would serve no purpose." Stackhouse, 892 A.2d at 60 n. 7 (citing Faust v. Dep't of Revenue, 592 A.2d 835, 838 n. 3 (1991)).

16. The determination of whether an employee of a local agency is a high public official must be determined by the judiciary on a case-by-case basis and "depend[s] on the nature of his duties, the importance of his office, and particularly whether or not he has policy-making functions.'" Lindner, 677 A.2d at 1198 (quoting Montgomery v. City of Philadelphia, 140 A.2d 100, 105 (Pa. 1958)); Matta v. Burton, 721 A.2d 1164, 1166 (Pa. Cmwlth. 1998).

17. There are no Pennsylvania cases that categorically pronounce whether a superintendent of a school district is a high public official.

18. Whether a school superintendent is a high public official for purposes of common law absolute privilege, depends on the nature of a superintendent's duties, the importance of his office, and of particular importance, whether or not he has policy-making functions. Lindner, 677 A.2d at 1198.

19. Defendant, a school superintendent, is not high public official for purposes of common law immunity. The extent of policymaking powers for school superintendents pertains to their prerogative to issue directives relating to methods of teaching in schools under their supervision, but they are subordinate and answerable to the school board of directors, and it is the board that has broad policymaking powers; they have no right to vote on policy considerations; and they are tasked with other ministerial duties such as visiting the schools under their supervision, noting the methods of teaching and branches taught, and any other

duties appointed to the superintendent by the school board, which purportedly may entail implementation of policies adopted by the school board.

20. Unlike school superintendents, in cases where the Pennsylvania courts have found a defendant to be a high public official, the positions of the individuals were high ranking and the policymaking authority was clear. See McKibben v. Schmotzer, 700 A.2d 484, 490 (Pa. Super. Ct. 1997); Suppan v. Kratzer, 660 A.2d 226, 230 (Pa. Cmwlth. 1995); Factor v. Goode, 612 A.2d 591, 593 (Pa. Cmwlth. 1992); Jonnet v. Bodick, 244 A.2d 751, 753 (Pa. 1968).

21. In deciding whether an employee's acts occurred within the scope of his duties a court may look to [w]hether the employee was working as an employee at the time, what allegations are made in the complaint that the employee has stepped outside of the scope of employment, whether the type of activity engaged in was within their duties as an employee and whether the activity engaged in was within the normal activities engaged in by employees employed in the capacity that a defendant is employed in. Pursel v. McCartney, 79 Pa. D. & C. 4th 47, 49 (Pa. Com. Pl. 2006) (citing Brown v. Quaker Valley School District, 486 A.2d 526, 528 (Pa. Commw. Ct. 1984); Goralski v. Pizzimenti, 540 A.2d 595, 600 (Pa. Commw. Ct. 1988); Weissman v. City of Philadelphia, 513 A.2d 571, 573 (Pa. Commw. Ct. 1986)).

22. "The question of whether a privileged occasion was abused is for the determination of a jury unless the facts are such that but one conclusion can be drawn." Montgomery v. City of Philadelphia, 140 A.2d 100, 103 n. 4 (Pa. 1958).

23. A defendant is only entitled to the protective veil of 42 Pa. C.S. § 8545 if his statements do not constitute willful misconduct.

24. "Willful misconduct," for purposes of the statutory exception to the defense of governmental immunity under the Tort Claims Act, has the same meaning as the term "intentional tort." Kuzel v. Krause, 658 A.2d 856, 859 (Pa. Cmwlth. 1995). That is, "[t]he governmental employee must desire to bring about the result that followed his conduct or be aware that it was substantially certain to follow." Id.

25. To sufficiently plead malice, a plaintiff cannot aver mere conclusory statements of malicious conduct, but rather, must plead specific facts that, if true, would demonstrate malicious conduct. See Malia v. Monchak, 543 A.2d 184, 189 (Pa. Cmwlth. 1988).

26. Specific allegations of a malicious motive behind Defendant's alleged defamatory statements provides circumstantial evidence of Defendant's malicious intent and precludes statutory immunity at the preliminary objection stage of the case.

27. Defendant acted outside the scope of his employment when he made an alleged work-related defamatory statement to persons having no relation to Plaintiff's or Defendant's employment.

28. While a school superintendent's duties do not specifically require him to provide work performance information to his employee's prospective employer, a duty to disseminate such information may be implied in the ordinary course of any employer's duties.

29. To protect employers from liability regarding legitimate dissemination of information to a potential employer about their employee's job performance, the legislature has provided statutory immunity so long as the employer acted in good faith. 42 Pa. C.S. § 8340.1.

30. The purpose of the pleadings is to place a defendant on notice of the claims upon which he will have to defend." Yacoub v. Lehigh Valley Med. Assoc., P.C., 805 A.2d 579, 588 (Pa. Super. Ct. 2002). A complaint must give the defendants fair notice of the plaintiff's claims and a summary of the material facts that support those claims. Id. Pa. R.C.P. 1019(a) requires that material facts be stated in a concise and summary form. The complaint "must apprise the defendant of the claim being asserted and summarize the essential facts to support that claim." Estate of Swift v. Northeastern Hosp. of Phila., 690 A.2d 719, 723 (Pa. Super. Ct. 1997).

31. When determining whether a pleading contains insufficient specificity the Court will consider "whether the plaintiff's complaint informs the defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may know without question upon what grounds to make his defense." Rambo v. Greene, 906 A.2d 1232, 1236 (Pa. Super. Ct. 2006).

32. Article I, Sections 1 and 8 of the Pennsylvania Constitution, provides "protection against disclosure of personal matters in which a person has a legitimate expectation of privacy." Pennsylvania State Educ. Ass'n ex rel. Wilson v. Com., Dep't of Cmty. & Econ. Dev., Office of Open Records, 981 A.2d 383, 385 (Pa. Cmwlth. 2009) aff'd, 2 A.3d 558 (Pa. 2010).

33. Preliminary objection to violation of right to privacy claim based on specificity of the pleadings which failed to specify the applicable portions of the Pennsylvania Constitution that are applicable to the claim will be sustained.

34. "'[N]either statutory authority, nor appellate case law has authorized the award of monetary damages for a violation of the Pennsylvania Constitution.'" R.H.S. v. Allegheny Cnty. Dep't of Human Servs., Office of Mental Health, 936 A.2d 1218, 1226 (Pa. Cmwlth. 2007) (quoting Jones v. City of Phila., 890 A.2d 1188, 1208 (Pa. Cmwlth.)).

35. Demurrer based on Plaintiff's demand of judgment in excess of $50,000 for right to privacy claim under the Pennsylvania Constitution will be sustained as Pennsylvania law does not permit monetary damages for a violation of the Pennsylvania Constitution.

Appearances:

J. McDowell Sharpe, Esq., *Counsel for Plaintiff*

Michael I. Levin, Esq., *Counsel for Defendant*

OPINION

Before Meyers, J.

This is a case involving allegations of defamation of an assistant superintendent at the Chambersburg Area School District ("CASD") by the superintendent of CASD. Assistant superintendent Catherine M. Dusman ("Plaintiff") alleges that superintendent Joseph O. Padasak, Jr. ("Defendant") made false statements which damaged her reputation and were outside the scope of Defendant's employment as superintendent. Padasak filed preliminary objections to the amended complaint. Pursuant to the discussion that follows, Defendant's preliminary objections will be sustained in part and overruled in part.

PROCEDURAL HISTORY

Plaintiff initiated this action on October 4, 2013 by filing a Praecipe for Writ of Summons with this Court, followed by a Complaint on August 25, 2013. Within the Complaint Plaintiff alleged defamation, false light, intentional infliction of emotional distress, and a violation of her constitutional rights under the Pennsylvania and United States Constitutions.

Defendant removed the action to the United States District Court for the Middle District of Pennsylvania based on the privacy claim under the United States Constitution. However, Plaintiff subsequently filed an Amended Complaint which excluded the federal privacy claim and therefore moved the District Court for remand of the case to this Court because the District Court no longer had subject matter jurisdiction. On August 25, 2014 the District Court granted the motion and remanded the case to this Court. On October 28, 2014 Defendant filed Preliminary Objections to Plaintiff's Amended Complaint, along with a Memorandum of Law in support of his position. On January 8, 2015 Plaintiff filed a brief in opposition of the preliminary objections. Argument was held before this Court on April 9, 2015. This matter is now ready for a decision.

FACTUAL BACKGROUND

Plaintiff is an assistant superintendent and Defendant the superintendent at CASD.[1] Plaintiff alleges that Defendant made false statements about her "outside the scope of his responsibilities and authority as a superintendent." Plaintiff avers that on or around October 5, 2012 Defendant made false statements about Plaintiff to Andrew Nelson, Sarah Herbert, and Melissa Cashdollar, three elementary principals under Plaintiff's direct supervision, that an audit had uncovered that Plaintiff did not have a Commission from the Pennsylvania Department of Education and as a result Plaintiff could no longer legally supervise them. Plaintiff alleges that at some later time Defendant made similar comments to Dr. Ted Rabold and Dr. P. Duff Rearick, neither of whom were employees of or affiliated with CASD at the time. Still later, similar false statements relating to Plaintiff's Commission are alleged to have been made to Lauren Stickell, a teacher who at the time was president of CAEA, the teacher's union for CASD.

Plaintiff further alleges that in November 2012 she applied for a position as the superintendent at Tuscarora School District ("TSD"). Chris Bigger, an administrative employee of CASD also applied for the position. During the interview process Plaintiff took credit for successfully implementing a standards-based report card system at CASD for Kindergarten through Third Grade. Mr. Bigger also took credit for the system. Subsequent to the interviews Defendant had a conversation with Clifford A. Smith, the president of the board of directors for TSD. Plaintiff alleges that Defendant falsely told Mr. Smith that Plaintiff had lied about implementing the standards-based report cards and that Defendant's close friend Mr. Bigger had actually been responsible for its implementation.

1 All facts are drawn from Plaintiff's Amended Complaint.

Immediately thereafter, Plaintiff was informed that she was no longer a candidate for the position.

Plaintiff next contends that on February 19, 2013 Defendant invited Public Opinion reporter Brian Hall to sit in on Defendant's mid-year evaluation of Plaintiff because Mr. Hall was "shadowing" Defendant for the day. Plaintiff avers that Defendant allowed Mr. Hall to "receive the unauthorized release of confidential information during that evaluation." Plaintiff alleges that Defendant subsequently took Mr. Hall out to lunch and informed him that Defendant planned on demoting Plaintiff from assistant superintendent to a non-supervisory position of Director of Early Education.

DISCUSSION

Before the Court are Defendant's Preliminary Objections to Plaintiff's Amended Complaint. Within the Amended Complaint, Plaintiff alleges: two counts of defamation (Counts I and II); one count of false light (Count III); one count of violation of right to privacy under the Pennsylvania Constitution (Count IV); and one count of intentional infliction of emotional distress (Count V). Defendant contends that: Counts I, II, III and V are legally insufficient based on Pa. R.C.P. 1028(a)(4) because Defendant is entitled to immunity from tort claims; Count IV should be dismissed pursuant to Pa. R.C.P. 1028(a)(3) because Plaintiff failed to specify which sections of the Pennsylvania Constitution and statutes that Defendant violated; and Count IV is legally insufficient pursuant to Pa. R.C.P. 1028(a)(4) because Plaintiff does not have a right to privacy with regard to her evaluation, job performance and term as assistant superintendent, and because Plaintiff cannot recover money damages in a claim based on violations of her right to privacy.

I. Legal Sufficiency: Immunity from Tort Claims

Defendant contends that Counts I, II, III, and V of the Amended Complaint must be dismissed pursuant to Rule 1028(a)(4) because Defendant is immune from tort claims.[2] Preliminary objections in the nature of a demurrer may be sustained where the contested pleading is legally insufficient and the law will not permit recovery. Bayada Nurses, Inc. v. Com., Dep't of Labor & Indus., 8 A.3d 866, 884 (Pa. 2010); Cardenas v. Schober, 783 A.2d 317, 321 (Pa. Super. Ct. 2001). The Court's decision must be based solely on the pleadings, and in making its determination, the court must accept as true all well pleaded material allegations and reasonable inferences therefrom. Com., Dep't of Labor & Indus., 8 A.3d at 884;

2 Defendant does not claim that the Amended Complaint does not sufficiently establish the claims in each Count. Rather, he asserts civil immunity as the basis for the demurrers.

Schober, 783 A.2d at 321. The Court need not accept as true "conclusions of law, unwarranted inferences, allegations, or expressions of opinion." Com., Dep't of Labor & Indus., 8 A.3d at 884.

The Political Subdivision Tort Claims Act ("Tort Claims Act") places statutory limitations on liability of employees of local agencies for their negligence while acting in the course and scope of their employment. An evaluation of the relevant statutes provides guidance as to the extent of immunity that an employee of a local agency is entitled to.

> An employee of a local agency is liable for civil damages on account of any injury to a person or property caused by acts of the employee which are within the scope of his office or duties only to the same extent as his employing local agency and subject to the limitations imposed by this subchapter.

42 Pa. C.S. § 8545. Local agencies are liable for damages on account of an injury to a person or property if the damages would be recoverable under common law or statute if the injury were caused by a person not having a valid defense related to governmental immunity or official immunity, and the injury was caused by the negligent acts of the local agency or an employee of the local agency acting within the scope of his office or duties. 42 Pa. C.S. § 8542(a). Furthermore, the act causing harm must be one that pertains to:

> (1) the operation of any motor vehicle in the possession or control of the local agency; (2) the care, custody or control of personal property of other in the possession or control of the local agency; (3) the care, custody or control of real property in the possession of the local agency; (4) a dangerous condition of trees, traffic signs, lights or other traffic controls, street lights or street lighting systems under the care, custody or control of the local agency; (5) A dangerous condition of the facilities of steam, sewer, water, gas or electric systems owned by the local agency and located within rights-of-way; (6) a dangerous condition of streets owned by the local agency; (7) a dangerous condition of sidewalks within the rights-of-way of streets owned by the local agency; or (8) the care, custody or control of animals in the possession or control of a local agency.

42 Pa. C.S. § 8542(b). The exceptions to sovereign immunity will be strictly construed, and "[d]amage suits will be barred unless the plaintiff establishes that the cause of action falls under one of the specifically enumerated legislative exceptions to immunity." Stackhouse v. Com., Pennsylvania

State Police, 892 A.2d 54, 59 (Pa. Cmwlth. 2006).

In addition to the protections grounded in Section 8452, an employee of a local agency may assert any defenses which are available at common law to the employee, the defense that the conduct was authorized or required by law, or the defense the conduct was within the policymaking discretion granted to the employee by law. 42 Pa. C.S. § 8546.

However, the immunities promulgated in Sections 8545 and 8546 do not apply if the act constituted a crime, actual fraud, actual malice or willful misconduct. 42 Pa. C.S. § 8550. This is the case even if the employee acts within the scope of his employment. See Petula v. Mellody, 631 A.2d 762, 765 (Pa. Cmwlth. 1993).

Aside from the statutory immunity, there also exists at common law immunity for "high public officials" in defamation cases. Lindner v. Mollan, 677 A.2d 1194, 1199 (Pa. 1996); Petula v. Mellody, 631 A.2d at 766. "[T]he doctrine of absolute privilege for high public officials applies 'provided that the statements are made or the actions are taken in the course of the official's duties or powers and within the scope of his authority, or as it is sometimes expressed, within his jurisdiction.'" Lindner, 677 A.2d at 1197 (quoting Matson v. Margiotti, 88 A.2d 892, 895 (Pa. 1952)); see also Petula v. Mellody, 631 A.2d at 766 ("high public officials are exempted by the doctrine of absolute privilege from civil suits for damages arising out of false defamatory statements and even from statements motivated by malice, provided the statements are made in the course of the official's duties or powers and within the scope of the high official's authority or within his or her jurisdiction"). The Pennsylvania Supreme Court explained that the reason for the absolute privilege is not to protect the high public official, but to protect the public. Lindner, 677 A.2d at 1196

> "[I]t has been found to be in the public interest and therefore sounder and wiser public policy to 'immunize' public officials, for to permit slander, or libel * * * suits where the official's charges turn out to be false, would be to deter all but the most courageous or the most judgment-proof public officials from performing their official duties."

Id. (quoting Matson, 88 A.2d at 899-900)).

Significantly, the abrogation of statutory immunities pursuant to Section 8550 of the Tort Claims Act is inapplicable to the common law absolute privilege for high public officials. Lindner, 677 A.2d at 1197; Petula, 631 A.2d at 766. Section 8550 applies only to actions where an employee of a local government agency is the subject of a civil suit involving willful misconduct *and the employee is not a "high public official."* Lindner,

677 A.2d at 1197. That is, the only difference between the statutory and common law immunity is that a high public official may claim immunity regardless of whether his actions are motivated by malice. Regardless of whether an employee of a local agency is a high public official, neither the statutory nor the common law immunity will shield the employee unless he was acting within the scope of his employment.

A. High Public Official

A critical issue which must be determined by the Court is whether Defendant is to be afforded absolute immunity that a "high public official" is entitled to. Plaintiff contends, correctly, that generally, pursuant to Pa. R.C.P. 1030(a) a defendant must plead affirmative defenses in a responsive pleading as new matter. However, "[s]overeign immunity is an affirmative defense which ordinarily should be raised as new matter, but may be raised in preliminary objections when to delay a ruling thereon would serve no purpose." Stackhouse, 892 A.2d at 60 n. 7 (citing Faust v. Dep't of Revenue, 592 A.2d 835, 838 n. 3 (1991)). If the defense is evident on the face of the complaint under attack and the opposing party has not filed preliminary objections to the preliminary objections asserting the privilege and immunity, then the court may properly make a decision at this stage. Factor v. Goode, 612 A.2d 591, 592 n. 2 (Pa. Cmwlth. 1992). Here, Plaintiff has not filed preliminary objections to Defendant's Preliminary Objections to Plaintiff's Amended Complaint. Moreover, whether the common law immunity applies is plainly discernable from the face of the Amended Complaint.

With that in mind we turn to whether Defendant is a "high public official." The determination of whether an employee of a local agency is a high public official must be determined by the judiciary on a case-by-case basis and "depend[s] on the nature of his duties, the importance of his office, and particularly whether or not he has policy-making functions.'" Lindner, 677 A.2d at 1198 (quoting Montgomery v. City of Philadelphia, 140 A.2d 100, 105 (Pa. 1958)); Matta v. Burton, 721 A.2d 1164, 1166 (Pa. Cmwlth. 1998). Thus, it is for the Court to decide whether a local agency employee meets the criteria to be considered a high public official.

There are no Pennsylvania cases that categorically pronounce whether a superintendent of a school district is a high public official. Defendant cites to three federal district court cases which rely on Pennsylvania cases to determine that superintendents are high public officials for purposes of the absolute privilege. However, as Plaintiff points out, the district court misconstrued the holdings of the Pennsylvania cases it cited to. In Smith v. Sch. Dist. of Philadelphia, the district court proclaimed

that "Pennsylvania courts have recognized that school superintendents . . . qualify as high public officials for purposes of this common law doctrine." 112 F.Supp.2d 417, 425 (E.D. Pa. 2000). In coming to this conclusion the district court cited to two Pennsylvania Commonwealth Court cases, Petula and Matta. In Petula, the school superintendents argued on appeal, in the alternative, that they were high public officials and thus immune from a defamation suit. 631 A.2d at 766. However, the Commonwealth Court did not address the argument because the trial court's decision that immunity applied to the superintendents was based on the statutory immunity. Id. The question of whether a school superintendent was a high public official was left open in that case. Id. In Matta, the Commonwealth Court found "that a school board director is sufficiently important and possesses such discretionary authority as to qualify as a high public official." 721 A.2d at 1166. That case involved a school board director, not a school superintendent. Defendant also cites to Montanye v. Wissachickon Sch. Dist., CIV.A. 02-8537, 2003 WL 22096122, at *14 (E.D. Pa. Aug. 11, 2003) and Zugarek v. S. Tioga Sch. Dist., 214 F.Supp.2d 468, 479 (M.D. Pa. 2002) for the proposition that superintendents are high public officials. However, both of those cases merely rely on the holding in Smith, which is misguided as discussed above.

Noting that there is a lack of Pennsylvania case law directly on point to guide us regarding whether a school superintendent is a high public official for purposes of common law absolute privilege, the Court must make its own determination based on the nature of a superintendent's duties, the importance of his office, and of particular importance, whether or not he has policy-making functions. Lindner, 677 A.2d at 1198. To make this decision we turn to the Public School Code of 1949, specifically Section 10-1081, which delineates the duties of superintendents.

> The duties of district superintendents shall be to visit personally as often as practicable the several schools under his supervision, to note the courses and methods of instruction and branches taught, to give such directions in the art and methods of teaching in each school as he deems expedient and necessary, and to report to the board of school directors any insufficiency found, so that each school shall be equal to the grade for which it was established and that there may be, as far as practicable, uniformity in the courses of study in the schools of the several grades, and such other duties as may be required by the board of school directors. The district superintendent shall have a seat on the board of school directors of the district, and the right to speak on all matters before the board, but not to vote.

24 P.S. § 10-1081. The extent of policymaking powers for school superintendents pertains to their prerogative to issue directives relating to methods of teaching in schools under their supervision. However, school superintendents are subordinate and answerable to the school board of directors, and it is the board that has broad policymaking powers. Superintendents are under the supervision and control of the school board. See 24 P.S. § 5-510 ("[t]he board of school directors in any school district may adopt and enforce such reasonable rules and regulations as it may deem necessary and proper, regarding the management of its school affairs and the conduct and deportment of all superintendents . . ."). Superintendents are appointed by the school board of directors and actions taken by the superintendent are reportable to the school board. While they have the right and duty to make recommendations to the school board, it is clear, under Section 10-1081, that superintendents have no right to vote on policy considerations. Superintendents are also tasked with other ministerial duties such as visiting the schools under their supervision, noting the methods of teaching and branches taught, and any other duties appointed to the superintendent by the school board, which purportedly may entail *implementation* of policies adopted by the school board. It is not difficult to observe why the holding in Matta, is easily distinguishable from the case at bar, in that a school director has an extensive policymaking function and a school superintendent has a modicum of policymaking discretion which does not greatly influence the public. In cases where the Pennsylvania courts have found a defendant to be a high public official, the positions of the individuals were high ranking and the policymaking authority was clear. See McKibben v. Schmotzer, 700 A.2d 484, 490 (Pa. Super. Ct. 1997) (mayor who "routinely makes significant public policy decisions and is accountable to the voting public" was high public official); Suppan v. Kratzer, 660 A.2d 226, 230 (Pa. Cmwlth. 1995) (holding that "[a] mayor and a borough council president are high public officials entitled to the absolute privilege described in Factor"); Factor v. Goode, 612 A.2d 591, 593 (Pa. Cmwlth. 1992) (mayor and revenue commissioner fell within category of high public officials); Jonnet v. Bodick, 244 A.2d 751, 753 (Pa. 1968) (township supervisors of second class township are high public officials, as "[t]hey exercise the entire legislative and executive powers of the municipality and there can be no doubt of the fact that they do indeed exercise policy-making functions") Accordingly, we find that Defendant is not a "high public official" for purposes of common law absolute privilege, and therefore, the immunity will not apply to any of the Counts in the Amended Complaint.

B. Count I

In Count I Plaintiff alleges defamation.[3] Defendant contends that he is immune from the claim based on both the statutory and common law immunities. However, to be safeguarded by the protections of either of the two, the employee who committed the purported tortious conduct must have acted *within the scope of his office or duties*. If he acted outside the capacity of his position, he is stripped of the common law and statutorily granted cloak of armor and may be sued for any tortious conduct where a valid cause of action lies. Thus, the question before us is whether the alleged false statements of Defendant were made within the scope of his employment as the superintendent of CASD. In deciding whether an employee's acts occurred within the scope of his duties a court may look to:

> [w]hether the employee was working as an employee at the time, what allegations are made in the complaint that the employee has stepped outside of the scope of employment, whether the type of activity engaged in was within their duties as an employee and whether the activity engaged in was within the normal activities engaged in by employees employed in the capacity that a defendant is employed in.

Pursel v. McCartney, 79 Pa. D. & C. 4th 47, 49 (Pa. Com. Pl. 2006) (citing Brown v. Quaker Valley School District, 486 A.2d 526, 528 (Pa. Commw. Ct. 1984); Goralski v. Pizzimenti, 540 A.2d 595, 600 (Pa. Commw. Ct. 1988); Weissman v. City of Philadelphia, 513 A.2d 571, 573 (Pa. Commw. Ct. 1986)). In making this determination we are mindful that "[t]he question of whether a privileged occasion was abused is for the determination of a jury unless the facts are such that but one conclusion can be drawn." Montgomery v. City of Philadelphia, 140 A.2d 100, 103 n. 4 (Pa. 1958).

Because we find that Defendant is not a high public official, Defendant may invoke only the statutory immunity promulgated in 42 Pa. C.S. § 8545 if he acted within the scope of his duties and without malice. Plaintiff alleges that Defendant falsely stated

> that an audit had uncovered that Cathy did not have a Commission from the Pennsylvania Department of Education, and, that, as a result, she was no longer legally able to supervise them, and the district would be fined a significant sum because of her lack of commission. He added that she should be fired.

(Am. Compl. ¶ 6). Plaintiff avers that Defendant made these statements

3 To make out a claim for defamation a plaintiff must establish: (1) the defamatory character of the communication.; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) the understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of a conditionally privileged occasion. 42 Pa. C.S. § 8343. Defendant does not challenge whether Plaintiff has pleaded sufficient facts to demonstrate a cause of action for defamation.

on three separate occasions beginning on or around October 5, 2012. We will analyze each in turn. First, Plaintiff alleges that Defendant made these statements to three elementary principals under Plaintiff's direct supervision. (Id. at ¶ 6). On its face, Defendant's statement relating to Plaintiff's Commission in regards to her status as assistant superintendent appears to be made within the scope of Defendant's employment. The statement does not appear to be personal in nature or affect only her right as a private citizen. See Matta, 721 A.2d at 1167. It is directed toward three elementary principals who are under the direct supervision of Plaintiff and pertains to Plaintiff's legal capacity as a supervisor to the principals. Defendant, as superintendent, has authority to assign duties to assistant superintendents and has supervisory control over assistant superintendents, such as Plaintiff. See 24 P.S. § 10-1082.[4] Therefore, Defendant has a direct interest in the professional affairs of Plaintiff. Whether an assistant superintendent has a Commission from the Department of Education is of interest to a school superintendent, and making statements on the subject appear to be within the scope of Defendant's duties. However, we need not decide that issue because the manner in which Defendant made the comments and the motive behind them is a factual question that cannot be determined at this juncture, and thus, statutory immunity cannot be applied at this point.

While there is no doubt that defamation is not found within the eight exceptions to statutory immunity from suit for local agencies or employees of a local agency, Defendant is only entitled to the protective veil of 42 Pa. C.S. § 8545 if his statements do not constitute willful misconduct. "Willful misconduct," for purposes of the statutory exception to the defense of governmental immunity under the Tort Claims Act, has the same meaning as the term "intentional tort." Kuzel v. Krause, 658 A.2d 856, 859 (Pa. Cmwlth. 1995). That is, "[t]he governmental employee must desire to bring about the result that followed his conduct or be aware that it was substantially certain to follow." Id. To sufficiently plead malice, a plaintiff cannot aver mere conclusory statements of malicious conduct, but rather, must plead specific facts that, if true, would demonstrate malicious conduct. See Malia v. Monchak, 543 A.2d 184, 189 (Pa. Cmwlth. 1988) (holding that plaintiff did not sufficiently plead the statements by the defendant were malicious where the complaint averred the statements were "motivated by malicious personal animosity" but did not include any underlying facts that if true would evince malicious conduct).

Plaintiff avers in the Amended Complaint that "Padasak knew or should have known, of the false nature of these statements, but issued such false statements as part of a long-standing, malicious attempt to discredit

4 Assistant district superintendents shall perform such duties as may be assigned them by the boards of school directors or by the district superintendents." 24 P.S. § 10-1082

Cathy, which ultimately culminated with her purported demotion from assistant superintendent on or around March 23, 2013." (Am. Compl. at ¶ 10). Defendant contends that this averment is conclusory. We disagree. Unlike Malia, Plaintiff specifically alleges a malicious motive behind Defendant's statements, i.e., to discredit Plaintiff. Viewing the averments as true, Plaintiff's purported demotion from assistant superintendent as a result of the statements provides circumstantial evidence of Defendant's malicious intent. Therefore, because there remains a question of fact as to Defendant's motive behind the statements, Defendant is not entitled to statutory immunity at this stage of the case.

Plaintiff also avers that Defendant made identical statements to Lauren Stickell, a teacher who was at the time, president of CAEA, the teacher's union for the CASD. (Id. at ¶ 8). Just as the statements made to the three principals were within the scope of Defendant's employment, so too were the statements made to Ms. Stickell. Ms. Stickell was a teacher's union representative at the time the statements were made. A statement by Defendant to Ms. Stickell regarding Plaintiff's ability to supervise members of the union would also appear to be within Defendant's normal course of duties as superintendent of CASD. However, for the same reasons stated above, there remains a question of fact regarding whether the statements were made with a malicious intent, and therefore, statutory immunity will not apply at this stage.

Finally, Plaintiff alleges that Defendant made similar statements to Dr. Rabold and Dr. Rearick, neither of whom were employees of or affiliated with CASD. (Id. at ¶ 7). Viewing the pleaded facts as true, we can certainly envision a conversation about Plaintiff, between the superintendent of CASD and two doctors who have no relation to CASD, as occurring outside the scope of Defendant's employment as superintendent of the school district. Unlike the other allegations within this Count that pertain to conversations between Defendant and personnel of CASD, the alleged conversation here has no correlation, by inference or otherwise, to Defendant's employment as superintendent. Therefore, for purposes of these preliminary objections, Defendant acted outside the scope of his duties, and thus he forfeits the immunities afforded by statute and common law. Furthermore, the issue of whether Defendant acted with malice is left open. Accordingly, the demurrer as to Count I will be overruled.

C. Count II

Count II also involves a claim of defamation. Specifically, Plaintiff avers that in November 2012 she applied for a position as the superintendent at TSD. CASD employee Chris Bigger also applied for the position. During

the interview process Plaintiff took credit for the successful implementation of a standards-based report card system at CASD for Kindergarten through Third Grade. Mr. Bigger also took credit for the system. Subsequent to the interviews Defendant had a conversation with Clifford A. Smith, the president of the board of directors for TSD. Plaintiff alleges that during the conversation Defendant falsely told Mr. Smith that Plaintiff had lied about implementing the standards-based report card system and that Defendant's close friend Mr. Bigger had actually been responsible for its implementation. Shortly thereafter, Plaintiff was informed that she was no longer a candidate for the position.

While a school superintendent's duties do not specifically require him to provide work performance information to his employee's prospective employer, a duty to disseminate such information may be implied in the ordinary course of any employer's duties. However, the record is not sufficiently developed for the Court to make a conclusive determination that the statement made by Defendant to Mr. Smith was within the scope of Defendant's employment.[5] For example, if Defendant initiated discussion with Mr. Smith and made the statement without solicitation from Mr. Smith, a jury may conclude that the conduct was outside the scope of Defendant's employment. On the other hand, if Mr. Smith initiated the discussion, it is more akin to conduct within the scope of Defendant's duties. As the record stands, we cannot construe that but one conclusion can be drawn. Even if it were within the scope of duties of Defendant, there still remains a question of fact as to whether Defendant made the statement with malicious intent. To protect employers from liability regarding legitimate dissemination of information to a potential employer about their employee's job performance, the legislature has provided statutory immunity so long as the employer acted in good faith. 42 Pa. C.S. § 8340.1. That Section further states that

> [t]he presumption of good faith may be rebutted only by clear and convincing evidence establishing that the employer disclosed information that:
>
> (1) the employer knew was false or in the exercise of due diligence should have known was false;
>
> (2) the employer knew was materially misleading;
>
> (3) was false and rendered with reckless disregard as to the truth or falsity of the information; or
>
> (4) was information the disclosure of which is prohibited by any contract, civil, common law or statutory right of the current or former employee.

Id. In the Amended Complaint, Plaintiff alleges that "Padasak knew

5 We note that Defendant did not challenge the pleadings as to Count II based on insufficient specificity.

the information given to Mr. Smith was false, or in the exercise of due diligence should have known was false; he knew his information was materially misleading; or the information was false and rendered with reckless disregard as to the truth or falsity of the information," and that the statements were made outside the scope of Defendant's employment.[6] Thus, for purposes of the preliminary objections Defendant is not entitled to immunity and the demurrer as to Count II will be overruled.

D. Count III

In Count III Plaintiff asserts a claim of false light based on the facts averred in Count I of the Amended Complaint. The demurrer as to Count III will be overruled in accordance with our discussion, supra Count I.

E. Count V

Count V alleges intentional infliction of emotional distress based on the facts alleged in Counts I through IV. For the reasons previously stated herein, the demurrer as to Count V will be overruled in accordance with our discussions in Counts I through IV.

II. Insufficient Specificity of Count IV

Defendant next objects to Count IV of the Amended Complaint contending that it must be dismissed because it lacks specificity as required by Rule 1028(a)(3). "The purpose of the pleadings is to place a defendant on notice of the claims upon which he will have to defend." Yacoub v. Lehigh Valley Med. Assoc., P.C., 805 A.2d 579, 588 (Pa. Super. Ct. 2002). A complaint must give the defendants fair notice of the plaintiff's claims and a summary of the material facts that support those claims. Id. Pa. R.C.P. 1019(a) requires that material facts be stated in a concise and summary form. The complaint "must apprise the defendant of the claim being asserted and summarize the essential facts to support that claim." Estate of Swift v. Northeastern Hosp. of Phila., 690 A.2d 719, 723 (Pa. Super. Ct. 1997). When determining whether a pleading contains insufficient specificity the Court will consider "whether the plaintiff's complaint informs the defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may know without question upon what grounds to make his defense." Rambo v. Greene, 906 A.2d 1232, 1236 (Pa. Super. Ct. 2006).

Count IV fails to specify which section of the Pennsylvania Constitution Defendant violated when sharing information with Public

6 We note that raising this defense is not the proper subject of preliminary objections. Nonetheless, the Amended Complaint sufficiently rebuts the presumption of good faith within the statute.

Opinion reporter Mr. Hill. Since the claim is based on a violation of Plaintiff's right to privacy, we can surmise that the allegation is grounded in Article I, Sections 1 and 8 of the Pennsylvania Constitution, which provides ""protection against disclosure of personal matters in which a person has a legitimate expectation of privacy." Pennsylvania State Educ. Ass'n ex rel. Wilson v. Com., Dep't of Cmty. & Econ. Dev., Office of Open Records, 981 A.2d 383, 385 (Pa. Cmwlth. 2009) aff'd, 2 A.3d 558 (Pa. 2010). Nonetheless, the Amended Complaint failed to specify the applicable portions of the Pennsylvania Constitution that are applicable to prayer for relief. Furthermore, although Count IV is titled "Violation of *Constitutional* Right to Privacy Under the *Pennsylvania Constitution*" (emphasis added), in ¶ 35 Plaintiff claims that the right to privacy is also "protected by state statute." Plaintiff fails to specify which statute guarantees a state constitutional right to privacy. Accordingly, the preliminary objection regarding specificity of the pleadings as to Count IV will be sustained.

III. Legal Sufficiency of Count IV

Finally, Defendant contends that Count IV is legally insufficient pursuant to Rule 1028(a)(4) because Plaintiff does not have a right to privacy with regard to her evaluation, job performance and term as assistant superintendent. Defendant also asserts that Plaintiff cannot recover money damages in a claim based on violations of her right to privacy. We apply the same demurrer standard as delineated supra.

In Count IV Plaintiff alleges a violation of her constitutional right to privacy under the Pennsylvania Constitution. The claim is based on Defendant inviting Public Opinion reporter Brian Hall to sit in on Defendant's evaluation of Plaintiff and Defendant telling Mr. Hall that he planned to demote Plaintiff to a non-supervisory position of Director of Early Education. For the alleged violation of her right to privacy, Plaintiff demands judgment in excess of $50,000. (Am. Compl. ¶ 36). However, "'neither statutory authority, nor appellate case law has authorized the award of monetary damages for a violation of the Pennsylvania Constitution.'" R.H.S. v. Allegheny Cnty. Dep't of Human Servs., Office of Mental Health, 936 A.2d 1218, 1226 (Pa. Cmwlth. 2007) (quoting Jones v. City of Phila., 890 A.2d 1188, 1208 (Pa. Cmwlth.)). Thus, Pennsylvania law will not permit monetary recovery for violations of the Pennsylvania Constitution, including alleged violations of the right to privacy. Plaintiff urges the Court to disregard the case law because the controlling case law was decided by the Commonwealth Court and the instant case will purportedly proceed on appeal to the Superior Court. Notwithstanding that fact, we are bound by the higher courts. This Court is not in a position to issue a decision

that is counter to the prevailing case law on the precise issue at hand. Accordingly, the demurrer as to Count IV will be sustained and Count IV will be dismissed.[7]

CONCLUSION

In light of the foregoing, Defendant's preliminary objections will be sustained in part and overruled in part. Count IV will be dismissed. All other Counts will remain. An Order of Court consistent with this Opinion is attached.

ORDER OF COURT

AND NOW, this 21st day of May, 2015, upon review and consideration of the Defendant Joseph O. Padasak, Jr.'s Preliminary Objections to Plaintiff's Amended Complaint, the Amended Complaint, the parties' briefs, the law, and having heard oral argument,

IT IS HEREBY ORDERED that, pursuant to the attached Opinion, Defendant's preliminary objections are S**USTAINED IN PART AND OVERRULED IN PART** as follows:

- The preliminary objections based on legal insufficiency as to Counts I, II, III and V are **OVERRULED**;
- The preliminary objections based on insufficient specificity as to Count IV is **SUSTAINED**.
- The preliminary objections based on legal insufficiency as to Count IV is **SUSTAINED** and Count IV is **DISMISSED**.

Pursuant to the requirements of Pa. R. Civ. P. 236 (a)(2),(b) and (d), the Prothonotary shall give written notice of the entry of this Order of Court, including a copy of this Opinion and Order of Court, to each party's attorney of record and shall note in the docket the giving of such notice and the time and manner thereof.

7 We need not reach the preliminary objection regarding legal sufficiency of the right to privacy claim with regard to Plaintiff's evaluation, job performance and term as assistant superintendent.