3.6 Trial Publicity

a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
b) Notwithstanding paragraph (a), a lawyer may state:

    1. the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
    2. information contained in a public record;
    3. that an investigation of the matter is in progress;
    4. the scheduling or result of any step in litigation;
    5. a request for assistance in obtaining evidence and information necessary thereto;
    6. a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
    7. in a criminal case, in addition to subparagraphs (1) through (6):

        1. the identity, residence, occupation and family status of the accused;
        2. if the accused has not been apprehended, information necessary to aid in apprehension of that person;
        3. the fact, time and place of arrest; and,
        4. the identity of investigating and arresting officers or agencies and the length of the investigation.

c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

COMMENT TO RULE 3.6:

1. It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.
2. Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.
3. The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.
4. Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).
5. There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

    (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

    (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or,

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

6. Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.
7. Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.
8. See Rule 3.8(e) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

a) make a false statement of material fact or law to a third person; or,
b) fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

COMMENT ON RULE 4.1

Misrepresentation

1. A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

2. This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Crime or Fraud by Client

3. Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the

representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6. Rule 1.6 permits a lawyer to disclose information when necessary to prevent or rectify certain crimes or frauds. See Rule 1.6(c). If disclosure is permitted by Rule 1.6, then such disclosure is required under this Rule, but only to the extent necessary to avoid assisting a client crime or fraud.

FORMAL OPINION 99-3

This opinion has not been updated in light of the new Pa. Code of Judicial Conduct effective July 1, 2014

Judicial Ethics Committee of the

Pennsylvania Conference of State Trial Judges

Judges and the Media

Canon 3A (6)
Canon 3A (7)
broadcasting, televising, recording or taking photographs
public comment

A judge should not comment publicly about a proceeding pending before any court. Canon 3 provides, in pertinent part:

> A judge should abstain from public comment about a pending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.
> Commentary. "Court personnel" does not include the lawyers in a proceeding before a judge. The conduct of lawyers is governed by DR 7-107 of the Code of Professional Responsibility.

The Committee notes that Pennsylvania's prohibition against public comment about pending proceedings is more restrictive than the Model Code of Judicial Conduct adopted by the American Bar Association in 1990. The Model Code provides as follows:

> A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be

> expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing (emphasis added).

The Committee suggests that the impact/fairness test of the Model Code is a good guide for deciding when a judge may make public statements in the course of his or her duties or explain the procedures of the court as permitted by Pennsylvania's Code. If there is a danger that the statement may affect the outcome of a proceeding, the judge must refrain from public comment.

Canon 3 also provides very extensive and detailed regulations with regard to the relationship between the court and the electronic media.

> A judge should prohibit broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions . . .

The Canon then goes on to outline certain circumstances in which electronic broadcasting is permitted in "trial court non-jury civil proceedings." The Canon specifically excludes support, custody and divorce proceedings from this section.

A judge must be particularly circumspect with regard to criminal matters. Rule 326 of the Rules of Criminal Procedure provides specific guidelines to be followed in widely publicized or sensational cases. Rule 327 places specific limitations on court personnel. Finally, Rule 328 places very specific limitations on photography and broadcasting in the courtroom and its environs:

> The taking of photographs in the courtroom or its environs or radio or television broadcasting from the courtroom or its environs during the progress of or in connection with any judicial proceedings, whether or not the court is actually in session, is prohibited. The environs of the courtroom is defined as the area immediately surrounding the entrances and exits to the courtroom.
> This rule is not intended to prohibit the taking of photographs or radio or television broadcasting of proceedings such as

> naturalization ceremonies or the swearing in of public officials which may be conducted in the courtroom.

Once again, while the rules carefully circumscribe the coverage of matters pending before the court, they do not completely prohibit contact with the media. Canon 3 specifically permits public discussion of the work of the court. If, for instance, the court is establishing a new program, a judge may, in the course of his or her responsibilities, properly discuss the new program with the media, as long as the judge is careful to refrain from comment on any pending matter.

At the end of the Code of Judicial Conduct is a section entitled "Reliance on Advisory Opinions" which provides that although the advisory opinions of the Judicial Ethics Committee are not binding upon the [Judicial Conduct Board and the Court of Judicial Discipline] and the Supreme Court of Pennsylvania, the opinions shall be taken into account in determining whether discipline should be recommended or imposed. The "rule of reliance" applies to this Formal Opinion. However, before engaging in contemplated conduct, any judge who, out of an abundance of caution, desires a Committee opinion which will provide advice about the judge's particular set of facts and to which the "rule of reliance" will also apply, may submit an inquiry to a member of the Committee, ordinarily, a member serving in the judge's Conference zone.

Singer v. Guckenheimer Enters.

United States District Court for the Eastern District of Pennsylvania

July 13, 2004, Decided

CIVIL ACTION NO. 03-0026

Reporter
2004 U.S. Dist. LEXIS 13258 *; 2004 WL 1562859

BARBARA SINGER and STEVEN SINGER, (H/W) v. GUCKENHEIMER ENTERPRISES, INC.

Prior History: Singer v. Guckenheimer Enters., 2004 U.S. Dist. LEXIS 12621 (E.D. Pa., July 1, 2004)

Disposition: Plaintiffs' Motion to Amend the Complaint was granted in part and denied in part.

Case Summary

Procedural Posture

Plaintiffs, a husband and a wife, sued defendant cafeteria for injuries sustained when the wife slipped and fell on the cafeteria's premises. Plaintiffs sought to amend their complaint to include a 42 U.S.C.S. § 1985(2) claim and punitive damages based on alleged misconduct by the cafeteria's counsel. They also sought to depose the cafeteria's counsel regarding the § 1985(2) claim. The cafeteria sought sanctions under Fed. R. Civ. P. 11.

Overview

Plaintiffs alleged that opposing counsel intimidated a key witness and influenced an expert witness to change certain language in his expert report. The court granted the motions in part. The fact that opposing counsel may have contacted the district attorney's office regarding the location of plaintiffs' key witness, for whom there was an outstanding bench warrant, was not an actionable offense. Counsel merely reported information contained in a public record. However, there was a factual dispute regarding whether opposing counsel conspired with a representative of the district attorney's office to intimidate or harass this witness. Discovery on this matter, except for deposition of opposing counsel, was proper. Plaintiffs were permitted to amend their complaint to include a 42 U.S.C.S. § 1985(2) claim seeking punitive damages. However, amendment was denied regarding the expert's report. Counsel's request that the expert remove a phrase from his report did not alter its substance or preclude its use. Counsel's conduct did not justify punitive damages. The motion for sanctions was also denied. Plaintiffs raised a material issue as to the alleged harassment of their key witness.

Outcome

The court granted plaintiffs' motion to amend their complaint as to the alleged conspiracy to intimidate and harass their key witness. The motion to amend was otherwise denied. The court denied the motion to depose the cafeteria's counsel. The court denied the cafeteria's motion for sanctions.

LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN1 **Judges, Discretionary Powers**

Fed. R. Civ. P. 15(a) states in relevant part: A party may amend the party's pleading only by leave of court or by written consent of the adverse party; and so leave shall be freely given when justice so requires. Fed. R. Civ. P. 15(a). A district court has the discretion to deny a party's request for leave to amend a complaint if it is apparent from the record that (1) the moving party has demonstrated undue delay, bad faith or dilatory motives, (2) the amendment would be futile, or (3) the

amendment would prejudice the other party. The United States Court of Appeals for the Third Circuit has recognized the strong liberality in allowing amendments under *Rule 15(a)*.

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > Elements

Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Witness Tampering > General Overview

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > General Overview

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > Obstruction of Judicial Processes

HN2[] Conspiracy Against Rights, Elements

The relevant language of *42 U.S.C.S. § 1985(2)* provides that an action for damages may be brought: If two or more persons in any State or Territory conspire to deter, by force, intimidation or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified.

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > Obstruction of Judicial Processes

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > General Overview

HN3[] Conspiracy Against Rights, Obstruction of Judicial Processes

42 U.S.C.S. § 1985 was enacted following the Civil War, and the legislative history of the statute bespeaks a Congressional intent to insulate witnesses, parties and grand or petit jurors from conspiracies to pressure or intimidate them in the performance of their duties, and an intent to guard against conspiracies the object of which is to deny citizens the equal protection of the laws. As the United States Court of Appeals for the Third Circuit explains, the section is concerned with conspiratorial conduct that directly affects or seeks to affect parties, witnesses or grand or petit jurors.

Torts > ... > Types of Damages > Punitive Damages > Aggravating Circumstances

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Compensatory Damages > General Overview

Torts > ... > Damages > Types of Damages > Nominal Damages

Torts > ... > Types of Damages > Punitive Damages > General Overview

HN4[] Punitive Damages, Aggravating Circumstances

Punitive damages are damages other than compensatory or nominal, awarded against a tortfeasor to punish him for outrageous conduct and to deter him and others like him from similar conduct.

Civil Procedure > Remedies > Damages > Punitive Damages

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > General Overview

Torts > ... > Types of Damages > Punitive Damages > Aggravating Circumstances

Civil Procedure > Remedies > Damages > General Overview

Torts > ... > Types of Damages > Punitive Damages > General Overview

HN5[] Damages, Punitive Damages

Punitive damages are available for a violation of *42 U.S.C.S. § 1985(2)*. In a civil rights case, punitive damages may be awarded when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN6 **Pleadings, Amendment of Pleadings**

A motion to amend a complaint should be granted unless there was undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Pleading & Practice > Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN7 **Motions to Dismiss, Failure to State Claim**

A court may deny a motion to amend a complaint on the grounds that the amendment would be futile. To assess futility, a court applies the same standard of legal sufficiency as applies under *Fed. R. Civ. P. 12(b)(6)*. Therefore, in deciding whether an amendment is futile, a court must take all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiffs. On the other hand, leave to file an amendment should be denied if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Torts > Intentional Torts > Defenses > General Overview

HN8 **Defenses, Demurrers & Objections, Affirmative Defenses**

Privilege is the modern term applied to those considerations which avoid liability where it might otherwise follow. Privilege is used to excuse a tort, because it signifies that a defendant has acted to further an interest of such social importance that it is entitled to protection, even at the expense of damage to the plaintiff. Actions of a defendant, which otherwise might form the basis of liability, are excused because the interests of society will be better served by allowing such actions.

Evidence > ... > Government Privileges > Official Information Privilege > General Overview

Torts > Intentional Torts > Defenses > General Overview

HN9 **Government Privileges, Official Information Privilege**

There is an important societal interest in reporting crimes. The Supreme Court of the United States has held that a private citizen has a duty to provide assistance to law enforcement officials when it is required. The informer's privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials. The interest of society in the apprehension of offenders and in the investigation of crime makes it the duty of all persons, upon request, to assist a peace officer in making an arrest, unless there is no doubt that the arrest is unprivileged and tortious.

Evidence > Privileges > Attorney-Client Privilege > General Overview

HN10 **Privileges, Attorney-Client Privilege**

The Supreme Court of Pennsylvania also has held that the attorney-client privilege does not preclude an attorney from disclosing the whereabouts of her fugitive client.

Legal Ethics > Professional Conduct > Opposing Counsel & Parties

HN11 **Professional Conduct, Opposing Counsel & Parties**

Pa. R. Prof. Conduct 3.6(c) permits an attorney to state without elaboration the information contained in a public record. Although the rule is primarily concerned with trial publicity, the rule provides that it is appropriate for an attorney to discuss information contained in a public record.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > Obstruction of Judicial Processes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > General Overview

HN12[] Entitlement as Matter of Law, Genuine Disputes

Filing a frivolous lawsuit to intimidate and affect an individual's attendance and testimony as a witness is enough to assert a 42 U.S.C.S. § 1985(2) claim.

Civil Procedure > Attorneys > General Overview

Civil Procedure > ... > Methods of Discovery > Depositions > Oral Depositions

Civil Procedure > Discovery & Disclosure > Discovery > Protective Orders

HN13[] Civil Procedure, Attorneys

Although the Federal Rules of Civil Procedure do not expressly prohibit a deposition by a party of another party's attorney, many courts have found that it is appropriate to grant such an order to prevent the deposition of a party's attorney unless the information sought is relevant, non-privileged and critical to the preparation of the case and that there is no other way to obtain the information.

Civil Procedure > ... > Methods of Discovery > Depositions > Oral Depositions

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

HN14[] Depositions, Oral Depositions

Fed. R. Civ. P. 30(a)(1) provides that a party may take by deposition the testimony of any person.

Civil Procedure > Discovery & Disclosure > Disclosure > General Overview

Evidence > Admissibility > Expert Witnesses > Helpfulness

Civil Procedure > Attorneys > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > Expert Witness Discovery

HN15[] Discovery & Disclosure, Disclosure

Fed. R. Civ. P. 26(a)(2)(B) permits counsel to assist in the preparation of expert reports. As indicated in the Advisory Committee note for Rule 26(a)(2)(B), the rule does not preclude counsel from providing assistance to experts in preparing the reports, and indeed assistance may be needed. An expert witness more likely preoccupies himself with his profession or field of expertise and has little appreciation for the requirements of Rule 26 or the legal significance of his choice of words. However, an expert report should set forth the substance of direct examination, and should reflect the testimony to be given by the witness.

Civil Procedure > Discovery & Disclosure > Disclosure > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Civil Procedure > Attorneys > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > Expert Witness Discovery

HN16[] **Discovery & Disclosure, Disclosure**

Effective cross-examination serves to expose inconsistencies of importance in an expert's report. It may also develop the extent to which an expert witness has been influenced by counsel to make changes in what he says.

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN17[] **Sanctions, Baseless Filings**

See Fed. R. Civ. P. 11.

Civil Procedure > Attorneys > General Overview

Civil Procedure > Sanctions > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN18[] **Civil Procedure, Attorneys**

Fed. R. Civ. P. 11 sanctions may be imposed only when an attorney has signed and filed papers without conducting a reasonable investigation of the facts and a normally competent level of legal research to support the presentation. To determine compliance with the rule, the court shall apply an objective standard of reasonableness under the circumstances. Rule 11 sanctions should be applied only in "exceptional circumstances."

Counsel: **[*1]** For BARBARA SINGER, STEVEN SINGER, H/W, Plaintiffs, THOMAS S. FARNISH, DEUTSCH LARRIMORE FARNISH & ANDERSON LLP, PHILADELPHIA, PA.

For GUCKENHEIMER ENTERPRISES, INC., Defendant, EVELYN R. DEVINE, WILLIAM J. DEVLIN, JR., DEVLIN & DEVINE, CONSHOHOCKEN, PA.

Judges: THOMAS J. RUETER United States Magistrate Judge.

Opinion by: THOMAS J. RUETER

Opinion

MEMORANDUM OF DECISION

THOMAS J. RUETER United States Magistrate Judge

This is a routine slip and fall personal injury case. This simple case has been transformed into an acrimonious battle between two lawyers representing each of the parties in this lawsuit. Plaintiffs' counsel has accused defense counsel of intimidating an important witness in plaintiffs' case and with influencing an expert witness to change certain language of his expert report. Plaintiffs now seek to amend the complaint to add a new cause of action based on defense counsel's actions. Defendant has returned the salvo and asserts that plaintiffs' counsel's allegations violated Fed. R. Civ. P. 11 and requests that sanctions be imposed by the court. Before the court is plaintiffs' Motion to Amend the Complaint [1] (Doc. No. 17) **[*2]** [2], and defendant's response in opposition thereto (Doc. No. 18.) Plaintiffs also filed a Surreply. (Doc. No. 20.) For the reasons stated below, plaintiffs' motion is GRANTED IN PART and DENIED IN PART.

I. *BACKGROUND*

This matter arises from an incident which occurred on September 7, 2001. Plaintiff Barbara Singer alleges **[*3]** she was injured on that date when she slipped and fell due to water and ice which had accumulated on the floor of defendant's cafeteria. (Pls.' Br. at 1.) According to plaintiffs, during the pre-trial discovery phase of this case, they identified a fact witness, Ms. Jocelyn Wright, from whom they obtained statements concerning her observations regarding the incident. The identity of Ms. Wright, along with her address, were made known to defense counsel. (Pls.' Mot. to Amend at 2.) Subsequently, Ms. Wright's deposition was scheduled for December 15, 2003, at the offices of Deutsch, Larrimore, Farnish & Andersson, L.L.P. Ms. Wright did

[1] Plaintiffs seek to file an amended complaint which includes a claim for witness tampering and punitive damages, and a request to extend the discovery deadline to allow plaintiffs to depose: Evelyn Devine, Esquire, counsel for defendant, Lou Vassil, insurance adjuster for defendant, and Detective David J. Budka. (Pls.' Br. at 2-18.)

[2] This court shall refer to plaintiffs' motion as Pls.' Mot. to Amend, and their brief in support of the motion as "Pls.' Br." Defendant's reply shall be referred to as "Def.'s Rep.," and its brief in support thereof as "Def.'s Br." Defendant numbered neither, so the court will take the liberty of assigning page numbers to both documents.

not appear for this deposition. [3] Her deposition was rescheduled for January 12, 2004.

[*4] According to plaintiffs, on January 12, 2004 the following individuals appeared at the deposition: Mr. Lou Vassil, an adjuster from defendant's insurance company; Mr. David J. Budka, a detective with the Philadelphia District Attorney's Office; and a videographer. (Pls.' Mot. to Amend at 2-3.) Ms. Wright did not appear for this deposition. Plaintiffs maintain that the presence of the aforementioned individuals

> was an intentional attempt to injure the plaintiffs' case via intimidatory and unprofessional tactics meant either to keep this witness from testifying at all or to tamper with the fact witness' ability to testify by causing surprise, confusion and unannounced pressure immediately preceding the discovery deposition in a context where it was certainly anticipated that the testimony would have been favorable to plaintiffs' case in chief.

Id. at 3-4. According to plaintiffs, on January 19, 2004 plaintiffs' counsel contacted Ms. Wright by telephone to advise that her deposition had been rescheduled for January 21, 2004. Plaintiffs' counsel asserts that during this conversation, Ms. Wright informed him that a man who identified himself as a detective had telephoned **[*5]** her at home and "had actually threatened to have her 'locked up' on welfare fraud charges if she testified for plaintiff herein, Barbara Singer." [4] *Id.* at 5.

Finally, plaintiffs allege that defense counsel, Evelyn Devine, Esquire, "tampered" with the report of Dr. Close, defendant's expert on plaintiff's medical condition. (Pls.' Br. at 13.) Plaintiffs maintain that during the deposition of Dr. Close, it "became obvious that his expert report had been materially changed." *Id.* Upon review of the file of Dr. Close, plaintiffs discovered a draft report which indicated that "I [Dr. Close] cannot refute Dr. Bruno's opinion." *Id.* Dr. Bruno is a physician who treated Mrs. Singer. Plaintiffs assert that this statement about Dr. Bruno does not appear in the final report of Dr. Close, and handwritten **[*6]** notes on the draft report indicate the following: "Atty. Devine wants to know if this can be removed." *Id.* Next to this statement were the letters, "OK." *Id.*; Pls.' Mot. to Amend, Ex. "C." Accordingly, plaintiffs seek to depose Ms. Devine to determine the "process through which the expert report was changed." (Pls.' Br. at 13-14.) Plaintiffs assert that the "outrageous misbehavior" of defendant and its counsel warrants an award of punitive damages. Thus, plaintiffs seek to file an amended complaint, alleging a violation of 42 U.S.C. § 1985(2), and a claim for punitive damages. (Pls.' Br. at 14-15.)

II. *LEGAL STANDARD*

A. *Motion to Amend the Complaint*

Federal Rule of Civil Procedure 15(a) **HN1**[↑] states in relevant part: "[A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and so leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). A district court has the discretion to deny a party's request for leave to amend a complaint "if it is apparent from the record that **[*7]** (1) the moving party has demonstrated undue delay, bad faith or dilatory motives; (2) the amendment would be futile; or (3) the amendment would prejudice the other party." Lake v. Arnold, 232 F.3d 360, 373 (3d Cir. 2000) (citing Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962)). Moreover, the Third Circuit has recognized the "strong liberality . . . in allowing amendments under Rule 15(a)." Bechtel v. Robinson, 886 F.2d 644, 652 (3d Cir. 1989).

B. *42 U.S.C. § 1985(2)*

HN2[↑] The relevant language of 42 U.S.C. § 1985(2) provides that an action for damages may be brought:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified.

Section 1985 **HN3**[↑] was enacted following the Civil War, and the legislative history of the statute "bespeaks a Congressional **[*8]** intent to insulate witnesses, parties and grand or petit jurors from conspiracies to

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[3] Plaintiffs maintain that Ms. Wright failed to appear for medical reasons. (Pls.' Mot. to Amend at 2.) Defendant asserts that "defense counsel has had no contact whatsoever with this witness and has never learned why she has failed to appear for her duly scheduled depositions on December 15, 2003 and January 12, 2004." (Def.'s Br. at 2.)

[4] According to plaintiffs, Ms. Wright advised plaintiffs' counsel that there is no basis for the accusations that she had committed welfare fraud. (Pls.' Mot. to Amend at 5-6; *Id.*, Ex. "A," Affidavit of Wright.)

pressure or intimidate them in the performance of their duties, and an intent to guard against conspiracies the object of which is to deny citizens the equal protection of the laws." *Brawer v. Horowitz, 535 F.2d 830, 839 (3d Cir. 1976)*. As the Third Circuit explained, the section is concerned with "conspiratorial conduct that directly affects or seeks to affect parties, witnesses or grand or petit jurors." *Id. at 840*.

C. *Punitive Damages*

HN4[⬆] Punitive damages are damages other than compensatory or nominal, awarded against a tortfeasor to punish him for outrageous conduct and to deter him and others like him from similar conduct. *In re TMI Metro. Edison Co., 67 F.3d 1119, 1124 (3d Cir. 1995)*(applying Pennsylvania law), *cert. denied*, *517 U.S. 1163, 134 L. Ed. 2d 660, 116 S. Ct. 1560 (1996)*. ***HN5***[⬆] Punitive damages are available for a violation of *Section 1985(2)*. *Irizarry v. Quiros, 722 F.2d 869, 872 (1st Cir. 1983)*. *See also Smith v. Wade, 461 U.S. 30, 56, 75 L. Ed. 2d 632, 103 S. Ct. 1625 (1983)*(In a civil rights case, punitive damages may be awarded "when the **[*9]** defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.").

III. *DISCUSSION*

HN6[⬆] A motion to amend a complaint should be granted unless there was "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Foman v. Davis, 371 U.S. at 182*. In the case *sub judice*, defendant has not alleged dilatoriness on the part of plaintiffs, nor has defendant asserted that granting plaintiffs' motion to amend would cause undue prejudice. Rather, defendant avers that plaintiffs' *Section 1985(2)* and punitive damage claims are futile. With respect to the 1985(2) claim, defendant maintains that even assuming *arguendo* defense counsel contacted the Philadelphia District Attorney's Office to notify authorities of Ms. Wright's whereabouts, such communication would be privileged. [5] (Def.'s Rep. at 4-8.) Accordingly, defendant contends that plaintiffs have "no claim pursuant **[*10]** to *§ 1985(2)*." *Id*. at 8.

HN7[⬆] A court may deny a motion to amend a complaint on the grounds that the amendment would be **[*11]** futile. To assess futility, a court "applies the same standard of legal sufficiency as applies under *Rule 12(b)(6)*." *In re Burlington Coat Factory, 114 F.3d 1410, 1434 (3d Cir. 1997)*. Therefore, in deciding whether an amendment is futile, a court must take all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiffs. *Jenkins v. McKeithen, 395 U.S. 411, 421, 23 L. Ed. 2d 404, 89 S. Ct. 1843 (1969)*. On the other hand, leave to file an amendment should be denied if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)*.

A. Plaintiffs' *Section 1985(2)* Claim

This court interprets plaintiffs' motion to amend the complaint regarding their *1985(2)* claim to be a two-pronged request. First, plaintiffs allege that in an effort to intimidate plaintiffs' witness, Jocelyn Wright, defendant contacted the office of the Philadelphia District Attorney and notified a representative from that office that Ms. Wright, a witness with an outstanding bench warrant, would appear for a scheduled **[*12]** deposition for January 12, 2004. [6] (Pls.' Mot. to Amend at 2-5.) For the reasons set forth below, the court finds that even assuming this allegation were true, this prong of plaintiffs' *1985(2)* claim would fail since such an

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[5] Defense counsel does not specifically deny that she contacted the District Attorney's Office. In her reply brief, counsel asserts the following with respect to this issue: "Through the course of her investigation, the undersigned counsel learned that plaintiff's witness, Jocelyn Wright was a fugitive based upon a criminal complaint of welfare fraud, and therefore wished to preserve her liability testimony in the civil case in the event that Ms. Wright was jailed and unavailable to testify at the time of trial." Ms. Devine added that "defense counsel has no knowledge as to who was present from the DA's office. At no time did defense counsel or the adjuster from St. Paul Insurance Company arrive with such an individual." (Def.'s Rep. at 4.) Finally, defense counsel indicates that "at no time has defense counsel ever spoken to a 'Mr. Budka' from the Philadelphia DA's office." *Id*. at 5.

[6] Plaintiffs maintain that Detective Budka was present for the deposition of Ms. Wright at the behest of defense counsel. Plaintiffs aver that "the only reasonable interpretation of Mr. Budka's surprise presence in plaintiffs' counsel's office on the very afternoon and at the precise time of this rescheduled discovery deposition, is that defense counsel, Ms. Devine, and/or Mr. Vassil tricklishly [sic] conspired to notify this 'detective' to be present at the appointed time." (Pls.' Mot. to Amend at 4.)

action is privileged and Attorney Devine is therefore excused from tortious liability. The mere fact that Attorney Divine may have contacted the District Attorney's Office as to the whereabouts of Ms. Wright does not constitute an actionable offense.

HN8[] "Privilege is the modern term applied **[*13]** to those considerations which avoid liability where it might otherwise follow." W. Prosser and W. Keeton, *Law of Torts*, § 16 at 109 (5th ed. 1984). Privilege is used to excuse a tort, because it signifies that a defendant has acted to further an interest of "such social importance that it is entitled to protection, even at the expense of damage to the plaintiff." *Id.* Actions of a defendant, which otherwise might form the basis of liability, are excused because the interests of society will be better served by allowing such actions.

It has long been recognized that HN9[] there is an important societal interest in reporting crimes. *See* In re Quarles, 158 U.S. 532, 535, 39 L. Ed. 1080, 15 S. Ct. 959 (1895)("It is the duty . . . of every citizen to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States."). Indeed, citizens are often called upon to assist authorities in their efforts to combat criminal behavior. As Justice Cardozo explained, "still, as in the days of Edward I, the citizenry may be called upon to enforce the justice of the state, not faintly and with lagging steps, but honestly and bravely and with whatever **[*14]** implements and facilities are convenient and at hand." Babington v. Yellow Taxi Corp., 250 N.Y. 14, 17, 164 N.E. 726 (1928). The Supreme Court of the United States has held that a private citizen has a duty to provide assistance to law enforcement officials when it is required. United States v. New York Tel. Co., 434 U.S. 159, 175 n.24, 54 L. Ed. 2d 376, 98 S. Ct. 364 (1977). *See also* Roviaro v. United States, 353 U.S. 53, 59, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957)("The [informer's] privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials."). Similarly, the Restatement (Second) of Torts explains that "the interest of society in the apprehension of offenders and in the investigation of crime makes it the duty of all persons, upon request, to assist a peace officer in making an arrest, unless there is no doubt that the arrest is unprivileged and tortious." Comment on Subsection (2), Restatement (Second) of Torts § 139 (1965).

Moreover, HN10[] the Supreme Court of Pennsylvania also has held that the attorney-client privilege did not preclude an attorney from disclosing **[*15]** the whereabouts of her fugitive client. *Commonwealth v. Maguigan, 511 Pa. 112, 511 A.2d 1327, 1337-38 (Pa. 1986)*. In that case, the court reasoned that it had a right and obligation to ascertain certain information which may lead to the determination of the location of a criminal defendant who failed to appear for trial. Thus, even the attorney-client privilege yields to society's interest in the apprehension of criminals. Finally, Pennsylvania Rule of Professional Conduct 3.6(c) HN11[] permits an attorney to "state without elaboration . . . (2) the information contained in a public record." Although the rule is primarily concerned with trial publicity, the rule provides that it is appropriate for an attorney to discuss information contained in a public record. At worst, Attorney Devine merely reported information contained in a public record, i.e., the outstanding bench warrant, to the authorities. *See* Def's. Rep., Ex. D. Accordingly, this court finds that there was nothing improper about Attorney Devine reporting to the authorities that Ms. Wright, an individual with an outstanding bench warrant, would be attending a deposition on a date certain, since **[*16]** such communication was privileged.

Plaintiffs' second allegation is that defendant conspired with a representative from the Philadelphia District Attorney's Office in an effort to intimidate and/or harass witness Wright. (Pls.' Br. at 12-13.) The court finds this allegation troubling. An affidavit submitted under penalty of perjury by Ms. Wright indicates that during the weekend of January 17-18th, 2004, she received a telephone call from an individual who identified himself as a detective working in the Philadelphia District Attorney's Office. According to the affidavit, the detective informed Ms. Wright that he would "lock [her] up if she testified on behalf of Barbara Singer. He said that if I testified that I would be prosecuted for welfare fraud." (Pls.' Mot. to Amend, Ex. A.) This statement, if made at the behest of defendant and/or defense counsel, would establish plaintiffs' claim under Section 1985(2). *See* Heffernan v. Hunter, 189 F.3d 405, 409-11 (3d Cir. 1999)(holding that HN12[] filing a frivolous lawsuit to intimidate and affect an individual's attendance and testimony as a witness was enough to assert a 1985(2) claim); Chahal v Paine Webber, 725 F.2d 20, 25 (2nd Cir. 1984) **[*17]** (statements made to potential witness in a lawsuit to dissuade him from testifying sufficient to withstand motion for summary judgment). [7] A genuine issue of material fact exists

[7] Defendant relies in large part on Thomas v. Ford Motor Co.,

regarding whether Detective Budka or a representative from the District Attorney's Office, acting in concert with defendant and/or defense counsel, attempted to threaten, harass or intimidate Ms. Wright in an effort to dissuade her from testifying on behalf of plaintiffs in this case. Therefore, plaintiffs are entitled to extend the discovery deadline in order to obtain the deposition testimony of Detective Budka and Mr. Vassil with respect to any communication these individuals had with Ms. Wright and Attorney Devine.

[*18] Plaintiffs also seek to depose Attorney Devine in order to ascertain what role, if any, she played in notifying the District Attorney's Office as to Ms. Wright's whereabouts [8], or any effort Ms. Devine may have made to intimidate Ms. Wright. (Pls.' Br. at 13.) This court is reluctant to grant plaintiffs' request to take the deposition of Attorney Devine. ***HN13***[↑] Although the Federal Rules of Civil Procedure do not expressly prohibit a deposition by a party of another party's attorney, [9] "many courts have found that it is appropriate to grant such an order to prevent the deposition of a party's attorney . . . unless . . . the information sought is relevant, non-privileged and critical to the preparation of the case and that there is no other way to obtain the information." *Slater v. Liberty Mut. Ins. Co., 1999 U.S. Dist. LEXIS 275, 1999 WL 46580, at *1 (E.D. Pa. Jan. 14, 1999)*(citations omitted). During the deposition of Messrs. Budka and Vassil, plaintiffs' counsel can ascertain how Detective Budka learned that Ms. Wright was scheduled for deposition on January 12, 2004, and whether Detective Budka was instructed to contact Ms. Wright at the behest of defendant and/or defense counsel subsequent **[*19]** to the scheduled deposition. Since an alternative way exists to discover such information, this court will deny plaintiffs' request to depose Attorney Devine until the depositions of Messrs. Budka and Vassil are completed. At that time, plaintiffs may request the court's permission to depose Attorney Devine if such discovery is warranted by the outcome of the deposition testimony of Messrs. Budka and Vassil.

[*20] For the foregoing reasons, this court grants plaintiffs' Motion to Amend the Complaint and Extend the Discovery Deadline to the extent that plaintiffs seek to investigate the alleged intimidation and/or harassment of Ms. Wright. Plaintiffs are hereby permitted to take the deposition testimony of Detective Budka and Mr. Vassil on or before August 13, 2004. Plaintiffs' motion also is granted to the extent they seek to amend their Complaint to add a claim under *Section 1985(2)*. Plaintiffs may add such a claim, and also seek punitive damages based on that claim, and request additional discovery based upon the punitive damages claim.

B. Report of Dr. Close

As noted above, plaintiffs also seek to depose Attorney Devine in an effort to ascertain the process through which the expert report of Dr. Close was altered so as to support their claim for punitive damages. Plaintiffs allege that Dr. Close "was directly asked by defense counsel to alter a material fact in his initial expert report by concealing the fact that he could not disagree with the conclusions of plaintiffs' expert, Dr. Bruno, on an important issue in this case." (Pls.' Br. at 14.) This court finds that the actions **[*21]** of Attorney Devine do not constitute outrageous conduct justifying punitive damages.

Fed. R. Civ. P. 26(a)(2)(B) ***HN15***[↑] permits counsel to assist in the preparation of expert reports. As indicated in the Advisory Committee note for *Rule 26(a)(2)(B)*, the

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137 F. Supp. 2d 575 (D. N.J. 2001), and the cases cited therein, in an effort to persuade this court that the alleged intimidation suffered by Ms. Wright was not direct enough to come under the purview of *42 U.S.C. § 1985(2)*. (Def.'s Rep. at 15-16.) In *Thomas*, the plaintiff alleged that faulty air bags had caused the death of his wife. Defendant argued that plaintiff had strangled his wife, and was thus responsible for her death. After gathering evidence in that case, defendant contacted authorities in an effort to commence a criminal investigation. Plaintiff filed a motion to amend a complaint to allege a *§ 1985(2)* violation. The *Thomas* court denied the motion and held that *§ 1985(2)* was not intended to deter that sort of communication. However, in so holding, the court found it significant that defendant's statements to the authorities were directly linked to the defense that Ford planned to present. *Id. at 589*. Such is not the case *sub judice*. Defendant is not attempting to design and support a defense. Plaintiffs' allegation is that defendant is merely attempting to intimidate a fact witness. Therefore, the *Thomas* case is inapposite to the case at bar.

[8] This court reiterates that the initial reporting by Attorney Devine of the whereabouts of Ms. Wright to the Philadelphia District Attorney's Office is privileged, and thus not subject to tortious liability. The question at issue is whether plaintiffs can depose Attorney Devine to question her about her role in the alleged harassment of Ms. Wright which may have occurred subsequent to the notification a representative from the District Attorney's Office may have received from counsel regarding Ms. Wright's whereabouts.

[9] *See Fed. R. Civ. P. 30(a)(1)*(***HN14***[↑] a party may take by deposition "the testimony of any person").

rule "does not preclude counsel from providing assistance to experts in preparing the reports, and indeed . . . assistance may be needed." As one court acknowledged, "the expert witness more likely preoccupies himself with his profession or field of expertise" and has "little appreciation for the requirements of Rule 26" or the legal significance of his choice of words. Marek v. Moore, 171 F.R.D. 298, 301 (D. Kan. 1997). *See also* Clintec Nutrition Co. v. Baxa Corp., 1998 U.S. Dist. LEXIS 13541, 1998 WL 560284, at *6 (N.D. Ill. Aug. 26, 1998)(declining to exclude report despite expert's admission that he did not prepare the first draft of his report and that he prepared it with counsel's assistance). However, an expert report should set forth the substance of direct examination, and should reflect the testimony to be given by the witness. Marek, 171 F.R.D. at 300-01. This court **[*22]** finds that the request by defense counsel to remove the phrase "I cannot refute Dr. Bruno's opinion" did not alter the substance of Dr. Close's report, and does not preclude the report from qualifying as one "prepared . . . by the witness, within the meaning of Rule 26(a)(2)(B)." *Id.* The deletion of the language did not change Dr. Close's opinions and the "basis and reasons therefor." Fed. R. Civ. P. 26(a)(2)(A). [10] Furthermore, a deposition of Attorney Devine is not critical, since an explanation of why Dr. Close deleted the language is readily ascertainable during plaintiffs' cross-examination of the expert. *See* Marek, 171 F.R.D. at 302 **HN16**[] ("Effective cross-examination serves to expose inconsistencies of importance. It may also develop the extent to which an [expert] witness has been influenced by counsel to make changes in what he says.").

[*23] C. Defendant's Request for Rule 11 Sanctions

In its Reply to Plaintiffs' Motion to Amend the Complaint, defendant implies that plaintiffs' filing of the motion constituted "a frivolous action pursuant to Federal Rule of Civil Procedure 11." (Def.'s Rep. at 4.) Plaintiffs object to the imposition of sanctions, and rely, *inter alia*, upon defendant's failure to properly seek such sanctions. Fed. R. Civ. P. 11 provides in relevant part:

> **HN17**[] the signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own **[*24]** initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 11 **HN18**[] sanctions may be imposed only when an attorney has signed and filed papers without conducting "a reasonable investigation of the facts and a normally competent level of legal research to support the presentation." Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 94 (3d Cir. 1988). To determine compliance with the rule, the court shall apply an objective standard of reasonableness under the circumstances. Lieb v. Topstone Indus., Inc., 788 F.2d 151, 157 (3d Cir. 1986). Rule 11 sanctions should be applied only in "exceptional circumstances." Gaiardo v. Ethyl Corp., 835 F.2d 479, 483 (3d Cir. 1987). Such circumstances are not present in this case. Plaintiffs have raised a genuine issue of material fact as to the alleged harassment of plaintiffs' witness, Jocelyn Wright. As stated above, this court granted **[*25]** plaintiffs' request to extend the discovery deadline to investigate what role, if any, defendant and/or defense counsel played in this alleged harassment. Only after completion of that discovery may plaintiffs file an amended complaint. [11] Likewise, the

[10] In fact, during the deposition of Dr. Close, plaintiffs' counsel questioned the witness as to a statement which appeared in a draft which did not appear in Close Number-2, the final report. (Def.'s Rep., Ex. E at 49.) Counsel asked Dr. Close why the words "I cannot refute Dr. Bruno's opinion" appear in the draft of his report, but not in the final version. *Id.* at 48-49. Dr. Close explained that he accommodated Attorney Devine's request to remove the phrase, since Dr. Close had no objection to its deletion. *Id.* at 49. Later, Dr. Close acknowledged that his opinion was consistent with the opinion of Dr. Bruno, in that both physicians cannot say within a degree of medical certainty that plaintiff Barbara Singer did not suffer a fracture. *Id.* at 77. This acknowledgment further explains the reason for the deletion, and also demonstrates that there are no material differences in the substance of the various drafts of Dr. Close's reports regarding the diagnosis of plaintiff Barbara Singer.

[11] The court directs that plaintiffs' counsel conduct the depositions of Messrs. Vassil and Budka before filing the Proposed Amended Complaint. The allegations leveled by

court cannot say that counsel's raising the issue of Dr. Close's expert report is without any basis. Accordingly, defendant's motion for *Rule 11* sanctions is denied.

IV. *CONCLUSION*

For all of the foregoing reasons, plaintiffs' motion to amend the complaint is GRANTED IN PART and DENIED IN PART. Plaintiffs may amend their complaint to include a *42 U.S.C. § 1985(2)* claim, as well as a claim for punitive damages. The request to add a claim for punitive **[*26]** damages based on Dr. Close's report is DENIED. The amended complaint shall be filed on or before September 7, 2004. Defendant's response to the amended complaint shall be filed on or before September 21, 2004. The discovery deadline is extended to allow plaintiffs to schedule the depositions of Messrs. Vassil and Budka on or before August 13, 2004. Plaintiffs must seek leave of court to depose Attorney Devine after said depositions, if the evidence so warrants.

BY THE COURT:

THOMAS J. RUETER

United States Magistrate Judge

ORDER

AND NOW, this 13th day of July, 2004, upon consideration of Plaintiffs' Motion to Amend the Complaint, (Doc. No. 17), Defendant's Response thereto (Doc. No. 18), and Plaintiffs' Surreply, (Doc. No. 20), it is hereby

ORDERED that plaintiffs' motion is GRANTED in PART and DENIED in PART. Plaintiffs shall file their amended complaint in accordance with the memorandum of opinion issued on this date, on or before September 7, 2004. Defendant shall file an answer to the amended complaint no later than September 21, 2004. The discovery deadline is extended until August 13, 2004 to allow plaintiffs to depose Messrs. Vassil and Budka.

BY THE **[*27]** COURT: THOMAS J. RUETER United States Magistrate Judge

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plaintiffs against Attorney Devine are most serious and should be grounded upon admissible evidence.

Commonwealth v. Casper

Supreme Court of Pennsylvania

March 6, 1978, Argued ; October 5, 1978, Decided

No Number in Original

Reporter
481 Pa. 143 *; 392 A.2d 287 **; 1978 Pa. LEXIS 1047 ***

COMMONWEALTH of Pennsylvania, Appellant, v. William CASPER

Prior History: [*1]** No. 264 March Term, 1977, Appeal from the Order of the Superior Court of Pennsylvania at No. 204 April Term, 1976, reversing the Judgments of sentence of the Court of Common Pleas of Butler County, Pennsylvania, Criminal Division at C.A. No. 60 September, 1974, C.A. No. 170 December 1974 and C.A. No. 173 December 1974

Case Summary

Procedural Posture
The commonwealth appealed an order of the Superior Court of Pennsylvania, which reversed the judgments of sentence of the trial court by granting defendant's motion for a venue change in the action against defendant for extortion and macing.

Overview
Defendant was charged with extortion, macing, and other charges after it was alleged that he demanded political contributions from public employees. Defendant filed his motion for venue change away from Butler County based on pre-trial publicity. The court reversed and remanded the superior court's decision to grant defendant's motion for a venue change. The superior court's finding that an atmosphere of hostility against defendant in Butler County was to be presumed because of extreme and extensive publicity was erroneous. Only six newspaper articles mentioned defendant's name prominently, and weeks passed between each article. The last news account occurred two and a half months before trial. There were no accounts of a prior criminal record. Only three people that had heard of the case were selected for the jury in defendant's trial. The superior court engaged in an exercise of judicial notice unwarranted by the record when it found that prejudice was supported by the fact defendant was a public figure. There was no evidence that defendant was well known, and the public figure element was too amorphous to be added as a basis for pretrial presumption of prejudice.

Outcome
The court reversed and remanded the superior court's decision to reverse the trial court by granting defendant's motion for a venue change because the superior court's finding that prejudice was to be presumed because of extreme and extensive publicity was erroneous. Only six newspaper articles, with weeks passing between the articles, mentioned defendant's name and only three jurors had heard of the case.

LexisNexis® Headnotes

Civil Procedure > Preliminary Considerations > Venue > General Overview

Criminal Law & Procedure > ... > Challenges to Jury Venire > Pretrial Publicity > Prejudice

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Venue > Motions to Transfer > General Overview

Criminal Law & Procedure > ... > Challenges to Jury Venire > Pretrial Publicity > General Overview

Criminal Law & Procedure > ... > Challenges to Jury Venire > Pretrial Publicity > Burdens of Proof

Criminal Law & Procedure > ... > Challenges to Jury Venire > Pretrial Publicity > Change of Venue Requests

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

HN1 **Preliminary Considerations, Venue**

An application for a change of venue is addressed to the sound discretion of the trial court, and its exercise of discretion will not be disturbed by an appellate court in the absence of an abuse of discretion. In reviewing the trial court's decision, the only legitimate inquiry is whether any juror formed a fixed opinion of [the defendant's] guilt or innocence as a result of the pre-trial publicity. Normally, one who claims that he has been denied a fair trial because of prejudicial pre-trial publicity must show actual prejudice in the empanelling of the jury. But this rule is subject to an important exception. In certain cases there can be pretrial publicity so sustained, so pervasive, so inflammatory, and so inculpatory as to demand a change of venue without putting the defendant to any burden of establishing a nexus between the publicity and actual jury prejudice, because the circumstances make it apparent that there is a substantial likelihood that a fair trial cannot be had.

Civil Procedure > ... > Venue > Motions to Transfer > General Overview

Criminal Law & Procedure > ... > Challenges to Jury Venire > Pretrial Publicity > Prejudice

HN2 **Venue, Motions to Transfer**

A presumption of prejudice pursuant to the pervasive pretrial publicity exception requires the presence of exceptional circumstances. Similarly, generalizations in this area are difficult because each case must turn on its special facts. Nonetheless, there are certain factors relevant to a determination of whether prejudice should be presumed. It is clear that the mere existence of pre-trial publicity does not warrant a presumption of prejudice. Similarly, a possibility that prospective jurors will have formed an opinion based on news accounts will not suffice.

Civil Procedure > ... > Venue > Motions to Transfer > General Overview

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

HN3 **Venue, Motions to Transfer**

Extensive pretrial publicity within a county does not necessarily preclude a fair trial in that community. Courts instead look to more discrete factors, viz., whether the pre-trial publicity was factual and objective, or consisted of sensational, inflammatory and slanted articles demanding conviction; whether the pre-trial publicity revealed the existence of the accused's prior criminal record; whether it referred to confessions, admissions or reenactments of the crime by the defendant; and whether such information is the product of reports by the police and prosecutorial officers. Should any of the above elements be found, the next step of the inquiry is to determine whether such publicity has been so extensive, so pervasive that the community must be deemed to have been saturated with it. The size and character of the area concerned, and more particularly the pervasiveness of the media coverage in the community, warrant consideration. Presence of one of these elements does not automatically warrant a presumption of prejudice.

Civil Procedure > ... > Venue > Motions to Transfer > General Overview

HN4 **Venue, Motions to Transfer**

Courts have focused on whether there has been such a cooling-off period between the publicity and the commencement of trial that the prejudicial effect of the publicity may be deemed to have dissipated. The critical factor in the finding of presumptive prejudice is the recent and pervasive presence of inherently prejudicial publicity, the likely effect of which is to render a fair trial impossible.

Civil Procedure > ... > Venue > Motions to Transfer > General Overview

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

HN5 **Venue, Motions to Transfer**

It is saturation with inherently prejudicial publicity, and not the possibility of saturation alone, that is important

since extensive pretrial publicity does not necessarily preclude a fair trial.

Evidence > Judicial Notice > Adjudicative Facts > Facts Generally Known

Evidence > Judicial Notice > General Overview

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

HN6 **Adjudicative Facts, Facts Generally Known**

Fed. R. Evid. 201(b), which is in accord with Pennsylvania law, provides that a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Civil Procedure > ... > Jurors > Selection > General Overview

HN7 **Jurors, Selection**

The voir dire examination is the proper place to determine whether a defendant's public notoriety has resulted in a prospective juror's prejudice. This is the normal rule and practice in Pennsylvania.

Counsel: Robert F. Hawk, Richard W. Given, Asst. Dist. Attys., Butler, for appellant.

David O'Hanesian, Pittsburgh, for appellee.

Judges: Eagen, C. J., and O'Brien, Roberts, Pomeroy, Nix, Manderino and Larsen, JJ. Nix and Manderino, JJ., would grant a new trial for the reasons set forth in the opinion of the Superior Court, 249 Pa.Super. 21, 375 A.2d 737 (1977).

Opinion by: POMEROY

Opinion

[*147] **[**289]** OPINION

In this case we are asked to review an order of the Superior Court holding that the trial court abused its discretion in denying a pre-trial motion for a change of venue. 249 Pa.Super. 21, 375 A.2d 737 (1977). The Superior Court concluded that the pre-trial publicity in the case at bar was "extreme and extensive," *249 Pa. Super. at 24, 375 A.2d at 739*, and that the defendant's status as the chairman of a local political party committee, together with the nature **[***2]** of the charges, made a fair trial impossible and required that **[*148]** prejudice be presumed. The court further held that "the familiarity of the accused's name with the local populace *prior to* the time when the charges were brought against him," *249 Pa. Super. at 33, 375 A.2d at 743*, is a factor which must be considered by a trial court whenever presented with a pre-trial motion for change of venue. Because this requirement represented a significant change in our law **[**290]** in this area, we allowed an appeal by the Commonwealth. [1] We conclude that the change announced by the Superior Court is open to serious question and that in any event its decision to order a change of venue in the instant case was without support in the record. Accordingly, we reverse.

[*3]** I.

This case had its inception when eight employees of the Pennsylvania Department of Transportation (PennDot) in Butler County reported that they were being forced to make political contributions. An investigation by the state police and the Butler County District Attorney's Office followed, and as a result a criminal complaint was filed on May 16, 1974, charging appellee William Casper with, *inter alia*, numerous counts of demanding political contributions from public employees, an offense commonly known as "macing." Act of April 6, 1939, P.L. 16, § 1, 25 P.S. § 2374 (1963). Appellee, who had been chairman of the Butler County Democratic Committee for some nine years, was indicted on these charges on September 12, 1974. At this time a special grand jury was empaneled to investigate charges related to the original charges against appellee, and on November 29, 1974, the special grand jury made its presentment recommending that additional indictments for crimes of a similar nature be filed against appellee. Indictments were returned by the regular grand jury on December

[1] This Court has jurisdiction pursuant to Section 204(a) of the Appellate Court Jurisdiction Act, Act of July 31, 1970, P.L. 673, No. 223, 17 P.S. § 211.204(a) (Supp. 1978), since superseded by Section 724(a) of the Judicial Code, 42 Pa. C.S. § 724(a) (effective June 28, 1978).

16, 1974, based on the recommendations of the special grand jury. The September **[*149]** and December **[***4]** indictments were consolidated for trial. [2]

On January 10, 1975, appellee filed an application for a change of venue based on the pre-trial publicity, which motion was denied after hearing on January 24, 1975 by the trial court. [3] Trial commenced on February 18, 1975, and thirty-one counts were submitted to the jury. [4] The jury returned verdicts of acquittal on nineteen counts, and found Casper guilty of seven counts of "macing," three counts of extortion, and one count each of conspiracy and criminal solicitation. Timely post-trial motions were filed and denied, and Casper was sentenced on the extortion convictions to a term of one **[***5]** to two years. He received probation on the other convictions. Total fines imposed were $ 11,500.

Casper raised several issues in his appeal to the Superior Court, but the **[***6]** court found it necessary to reach only one, *viz.*, whether it was error for the trial court to refuse to grant a pretrial motion for a change of venue. On this point, as noted above, the court held that the motion should have been granted, and ordered a new trial in another county. This appeal followed.

[*150] II.

Appellee did not renew his motion for a change of venue at any time during or at the end of the voir dire examination, and it **[**291]** has not been contended at any time that a prejudiced jury was actually empaneled. See *Commonwealth v. Rolison, 473 Pa. 261, 266-71, 374 A.2d 509, 511-13 (1977)* (plurality opinion), citing American Bar Association Standards Relating to Fair Trial & Free Press § 3.4(b), and Commentary (Approved Draft, 1968). Rather he contends, and the Superior Court agreed, that it was an abuse of discretion to deny his change of venue motion filed a little more than a month prior to trial.

Our cases make it clear that ***HN1***[↑] an application for a change of venue is addressed to the sound discretion of the trial court, and its exercise of discretion will not be disturbed by an appellate court in the absence of an abuse of discretion. *E.g.*, **[***7]** *Commonwealth v. Scott, 469 Pa. 258, 266, 365 A.2d 140 (1976)*; *Commonwealth v. Hoss, 469 Pa. 195, 199, 364 A.2d 1335 (1976)*; *Commonwealth v. Kichline, 468 Pa. 265, 273, 361 A.2d 282 (1976)*; *Commonwealth v. Powell, 459 Pa. 253, 289, 328 A.2d 507 (1974)*; *Commonwealth v. Russell, 459 Pa. 1, 326 A.2d 303 (1974)*. [5] **[***9]** "In reviewing the trial court's decision, the only legitimate inquiry is whether any juror formed a fixed opinion of [the defendant's] guilt or innocence as a result of the pre-trial publicity." *Commonwealth v. Kichline, supra, 468 Pa. at 274, 361 A.2d at 287*. Normally, one who claims that he has been denied a fair trial because of prejudicial pre-trial publicity must show actual prejudice in the empaneling of the jury. See *Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975)*; *Commonwealth v. Rolison, supra*; *Commonwealth v. Hoss, **[*151]** 469 Pa. 195, 201, 364 A.2d 1335 (1976)*; *Commonwealth v. Pierce, 451 Pa. 190, 195, 303 A.2d 209*, *cert. denied*, *414 U.S. 878, 94 S.Ct. 164, 38 L.Ed.2d 124 (1973)*. But this rule is subject to an important exception. In certain cases there "can be pretrial publicity so sustained, so pervasive, **[***8]** so inflammatory, and so inculpatory as to demand a change of venue without putting the defendant to any burden of establishing a nexus between the publicity

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[2] Appellee had requested in early October a continuance of the trial of the September indictments, averring that the preliminary hearing transcript was as yet unavailable to counsel, that the indictments had been only recently received by counsel, and that the case had received extensive pre-trial publicity. The motion was granted and the matter continued until January, 1975.

[3] In the same order denying the change of venue, the court ordered that all veniremen who had sat as jurors in two previous and somewhat related cases were to be excluded from the jury panel in appellee's trial. An additional continuance was later ordered by the court to the February sessions because it appeared that this exclusion would cause an insufficient number of veniremen to be available for appellee's trial.

[4] The evidence at trial basically was that Casper supervised a "macing" and political contribution scheme affecting PennDot employees and lessors of equipment in the Butler County area. Employees who did not contribute the required $ 60 or $ 120 were transferred to less desirable jobs or given less overtime. Lessors who did not contribute $ 100 per piece of equipment leased by them lost their contracts with the state.

[5] As Judge Magruder remarked:

> "'Abuse of discretion' is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *In re Josephson, 218 F.2d 174, 182 (1st Cir. 1954)*.

and actual jury prejudice," *Commonwealth v. Frazier, 471 Pa. 121, 127, 369 A.2d 1224, 1227 (1977)*, because the circumstances make it apparent that there is a substantial likelihood that a fair trial cannot be had. See *Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963)*; *Commonwealth v. Rolison, supra*; *Commonwealth v. Dobrolenski, 460 Pa. 630, 334 A.2d 268 (1975)*, citing American Bar Association Standards Relating to Fair Trial and Free Press § 3.2 (Approved Draft, 1968); *Commonwealth v. Pierce, supra.* [6] It is this exception that we must discuss here.

It is trite but true to note that ***HN2***[↑] a presumption of prejudice pursuant to this exception requires the presence of exceptional circumstances. Similarly, generalizations in this area are difficult because "each case must turn on its special facts." *Commonwealth v. Pierce, supra, 451 Pa. at 198 n.3, 303 A.2d at 213 n.3*, quoting *Marshall v. United States, 360 U.S. 310, 312, 79 S.Ct. 1171, 1172, 3 L.Ed.2d 1250, 1252 (1959)*. Nonetheless, there are certain factors which this **[***10]** Court has identified as relevant to a determination of whether prejudice should be presumed.

It is clear that the mere existence of pre-trial publicity does not warrant a presumption of prejudice. Similarly, **[*152]** a possibility **[**292]** that prospective jurors will have formed an opinion based on news accounts will not suffice. A frequently quoted passage in *Irvin v. Dowd, 366 U.S. 717, 722-23, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961)*, restates these points:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror **[***11]** can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

See also, *e. g., Commonwealth v. Richardson, 476 Pa. 571, 578, 383 A.2d 510, 514 (1978)*; *Commonwealth v. Powell, supra, 459 Pa. at 260, 328 A.2d at 511*; *Commonwealth v. Martinolich, 456 Pa. 136, 147-48, 318 A.2d 680, 687*, *appeal dismissed and cert. denied*, *419 U.S. 1065, 95 S.Ct. 651, 42 L.Ed.2d 661 (1974)*; see generally *United States v. Williams, 568 F.2d 464, 467-68 (5th Cir. 1978)*. Moreover, ***HN3***[↑] "[e]xtensive pretrial publicity within a county or district does not necessarily preclude a fair trial in that community." *Commonwealth v. Powell, supra, 459 Pa. at 260-61, 328 A.2d at 510*. We instead look to more discrete factors, *viz.*, whether the pre-trial publicity was, on the one hand, factual and objective, or, on the other hand, consisted of sensational, inflammatory and "slanted articles demanding conviction," *United States v. Sawyers, 423 F.2d 1335, 1343 (4th Cir. 1970)*; [7] **[*153]** whether the pre-trial publicity revealed the existence of the accused's prior criminal record; [8] whether it referred to confessions, admissions or reenactments **[***12]** of the crime by the defendant; [9] **[***13]** and whether such information is the product of reports by the police and prosecutorial officers. [10] Should any of the above elements be found, the next step of the inquiry is to determine whether such publicity has been so extensive, so sustained and so pervasive that the community must be deemed to have been saturated with it. In this connection the size and character of the

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[6] There is another class of cases in which prejudice need not be shown, *viz.*, where the activities of the news media cause the trial proceedings themselves to be "entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob." *Murphy v. Florida, supra, 421 U.S. at 799, 95 S.Ct. at 2036*, discussing *Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966)*, and *Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965)*. No such situation is asserted to be present in the case at bar.

[7] See, e. g., *Commonwealth v. Frazier, supra, 471 Pa. at 132, 369 A.2d at 1229*; *Commonwealth v. Stoltzfus, 462 Pa. 43, 53, 337 A.2d 873, 878 (1975)*; *Commonwealth v. Douglas, 461 Pa. 749, 753, 337 A.2d 860, 862 (1975)*; *Commonwealth v. Pierce, supra, 451 Pa. at 192-93, 303 A.2d at 211*.

[8] See, e. g., *Marshall v. United States, supra*; *Commonwealth v. Frazier, supra*; *Commonwealth v. Fortune, 464 Pa. 367, 346 A.2d 783 (1975)*; *Commonwealth v. Pierce, supra*; *Commonwealth v. Allen, 448 Pa. 177, 292 A.2d 373 (1972)*.

[9] See, e. g., *Commonwealth v. Kichline, supra*; *Commonwealth v. Pierce, supra.*

[10] See *Commonwealth v. Pierce, supra, 451 Pa. at 198-200, 303 A.2d at 214-15*.

area concerned, and more particularly the pervasiveness of the media coverage in the community, warrant consideration. [11]

The presence of one of the above elements does not, however, automatically warrant a presumption of prejudice. For example, as we noted in *Commonwealth v. Kichline, supra, 468 Pa. at 277, 361 A.2d at 288-89*, quoting *Commonwealth v. Nahodil, 462 Pa. 301, 306, 341 A.2d 91, 93 (1975)*:

> "'In *Pierce*, we condemned and proscribed the practice of police and law **[**293]** enforcement agents in releasing to the news media the existence and contents of statements or confessions given by those accused of crime. However, a violation of our ruling in **[***14]** *Pierce* does not necessarily mandate a new trial. It must also appear that the news **[*154]** accounts were so "inherently prejudicial" that the possibility of a fair trial was questionable.'"

Similarly, ***HN4***[↑] we have focused on whether there has been such a "cooling-off period" between the publicity and the commencement of trial that the prejudicial effect of the publicity may be deemed to have dissipated. [12] The critical factor in the finding of presumptive prejudice, as the above review indicates, is the recent and pervasive presence of "inherently prejudicial" publicity, the likely effect of which is to render a fair trial impossible. *Commonwealth v. Frazier, supra; Commonwealth v. Kichline, supra; Commonwealth v. Nahodil, supra; Commonwealth v. Powell, supra; Commonwealth v. Russell, supra.*

[*15]** III.

In the case at bar, the trial court did not enter detailed findings of fact, but noted the following in its opinion denying post-trial motions:

> "We refused a change of venue because we determined that the newspaper coverage was fair reporting of matters involved in the investigation and enforcement in this case. No sensationalism was attached to it, and no one involved as enforcer or prosecutor 'provided prejudicial information.' In fact, we had concluded that no undue fervor over nor interest in the case had been created. This was later borne out by the fact that, except for persons involved in the case as parties or as witnesses, very few attended trial as spectators. This case fits within the requirements of *Commonwealth v. Russell*, [supra, which was the latest appellate authority available **[*155]** to the trial court] to sustain the Court's fair exercise of discretion."

The Superior Court, after examining the record, made its own factual findings and arrived at a contrary conclusion, *viz.*, that because the case had received "extreme and extensive publicity," "an atmosphere of hostility towards the defendant in this locale" was to be presumed. **[***16]** *249 Pa.Super. at 29, 375 A.2d at 739, 741*. Since the newspaper clippings in the record [13] are critical to the Superior Court's conclusion that the trial court should have granted a change of venue, a

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[11] See *Commonwealth v. Frazier, supra* (local newspaper reached practically every household in the county); *Commonwealth v. Kichline, supra, 468 Pa. at 274, 361 A.2d at 287* (articles from Berks County newspapers, where case was to be tried, were few and non-inflammatory; articles from newspapers which were published in other counties and which had a limited circulation in Berks County found not to have had a prejudicial effect in Berks County).

[12] See, e. g., *Commonwealth v. Hoss, supra, 469 Pa. at 204-05, 364 A.2d at 1340* (five month delay); *Commonwealth v. Kichline, supra, 468 Pa. at 275-76, 361 A.2d at 288* (six month delay); *Commonwealth v. Nahodil, supra* (six month delay); *Commonwealth v. Stoltzfuz, supra* (one year delay); *Commonwealth v. Douglas, supra* (eleven month delay); *Commonwealth v. Dobrolenski, supra* (five month delay); *Commonwealth v. Powell, supra, 459 Pa. at 260, 328 A.2d at 511 (1974)* (one year delay after homicide and two months after trial of co-felon); *Commonwealth v. Hoss, 445 Pa. 98, 106, 283 A.2d 58, 63 (1971)* (five months between arrest and trial deemed a "lengthy time period").

[13] In support of his argument, appellee has also submitted to this Court, in an appendix to his brief, several newspaper articles not part of the record below. This conduct is disapproved. An appellate court cannot consider facts not of record, *Commonwealth v. Jasper, 472 Pa. 226, 372 A.2d 395 (1976)*; *Commonwealth v. Thomas, 465 Pa. 442, 350 A.2d 847 (1976)*; *Commonwealth v. Young, 456 Pa. 102, 317 A.2d 258 (1974)*, and this settled rule has particular force when the argument that the trial court abused its discretion in refusing a change of venue is based on newspaper articles which were not presented to the trial court. "Such articles must be brought to the court's attention . . . to enable it to make an initial determination as to whether the information is in fact prejudicial." *United States v. Pomponio, 517 F.2d 460, 463* (4th Cir.), *cert. denied*, ***423 U.S. 1015, 96 S.Ct. 448, 46 L.Ed.2d 386 (1975)***.

review of the factual background and the pre-trial publicity is necessary.

[*17]** A.

As noted in part I of this opinion, an investigation began in early 1974 following reports from PennDot employees that they were being forced to make political contributions. On May 16, 1974, the *Butler Eagle*, the major newspaper of the community, [14] **[**294]** reported that 28 "macing" charges had been filed against Casper by the district attorney; Casper's photograph appeared next to the article, which was at the top of the front page. On July 26, 1974, the district attorney petitioned the court for the empaneling of a special investigative grand jury, and the contents of the petition were reported in the *Eagle*. The issuance of subpoenas for **[*156]** testimony on the petition (as to which the district attorney refused all comment), was reported on August 20. Testimony was taken on the petition for an investigating grand jury in chambers on August 26, and the contents of the testimony were not reported. The court approved the petition on September 13, and it was reported by the *Eagle* on that day that a special grand jury had not sat in Butler County in almost 20 years. A September 16 article in the *Eagle* reported that the special grand jury had been **[***18]** recessed until September 30 in order to permit Assistant District Attorney Alexander Lindsay additional time to prepare the case. The testimony of a witness at a preliminary hearing on the "macing" charges was reported in two paragraphs in the latter part of the article, apparently as background material. Mr. Lindsay, according to the *Eagle*, "refused to comment on the nature of the testimony to be presented to the panel. He further said, 'There will be nothing public for a long time.'"

The special grand jury's presentments were made public on December 3, 1974; the jury's recommendations for indictments were reported in a single-column story, with which Casper's photograph appeared, on pages 1 and 2 of the *Eagle*. A second story on page 15, occupying about one and one-half columns, summarized the presentments. On the next day, December 4, **[***19]** the *Eagle* reported the court's approval of the recommendations for indictments and its action forwarding the presentments to the December grand jury.

[14] The *Eagle*, a daily newspaper, has a circulation of 28,397; Butler County's population, as of 1970, was 127,941. [1976-77] Pennsylvania Manual 887, 555.

The Superior Court in its opinion for the majority stated that "[t]here were at least 24 stories relative to the scheme in the local newspapers and the defendant's name appeared in print at least 36 times"; that "[d]efendant's picture appeared in the local newspapers several times beside news stories about the scandal"; that "testimony of the witnesses at the special investigating grand jury proceedings was reported in copious detail"; and that news accounts continued from the inception of the investigation "up to and including the time of the trial." *249 Pa.Super. at 24, 375 **[*157]** A.2d at 739*. Our independent review of the record has revealed that each of these factual findings is erroneous.

The record contains 15 articles in the *Butler Eagle*; in only 10 of them is Casper's name mentioned, and in only six of these articles is his name mentioned in the first three paragraphs. [15] **[***21]** Casper's photograph appears twice, once in May, 1974, and once on December 3 of that year. None of these articles contains any testimony **[***20]** before the special grand jury. The only mention of pre-trial testimony was the summary of preliminary hearing testimony reported in September, and while the grand jury's presentments were summarized in early December, that summary was "buried" on page 15 of the *Eagle*. Of the six *Eagle* articles in which Casper's name is prominently **[**295]** mentioned, one appeared in May, 1974, one in July, one in September, two on December 3, and one on December 4. The December 4 article, which appeared two and one-half months before trial, is the last news account appearing in the trial record. The Superior Court also laid stress on the presence of "editorials" and "letters to the editor." The record contains one of each,

[15] The Superior Court's error in this regard may have occurred because six of these articles are printed twice in the record. The record also contains three articles from the *Butler County News*, a bi-weekly paper with a circulation of 6,723. [1976-77] Pennsylvania Manual 887. The articles appeared in late August, mid-September, and early November; only in the September article is Casper's name mentioned in the first half of the story. The August article does contain some speculation, based on reports from an anonymous source, that the solicitation of contributions may amount to extortion. But this single article, in which appellee's name is not mentioned and which appeared in a newspaper of limited circulation some five months before trial, hardly warrants a presumption of prejudice. Two brief Associated Press dispatches are also reprinted; neither appears to have come from a Butler County newspaper.

and in neither of them is Casper's name mentioned. [16]

[*158] B.

The essential predicate of "inherently prejudicial" publicity that may give rise to a presumption of prejudice is simply absent from this record. It is conceded by appellee that there are no accounts of prior criminal record and no articles recounting confessions or reenactments of the offenses by the accused. It is also conceded here, as it was in the Superior Court, that the police and the prosecutorial officers scrupulously adhered to the requirements of *Commonwealth **[***22]** v. Pierce, supra.* [17] The last element that may warrant a finding of "inherently prejudicial" publicity, *viz.*, accounts that "point to the accused's guilt in terms that go beyond objective news reporting and enter the realm of the emotional and of the inflammatory," *Commonwealth v. Frazier, supra, 471 Pa. at 131-32, 369 A.2d at 1229*, is also absent. We cannot accept the proposition that mention of a defendant's name in the lead paragraphs of six newspaper articles which, as the summary above shows, were both separated by ample lapses of time and were factual and summary in nature, warrants the Superior Court's characterization of "extreme and extensive" publicity. Since there is no "inherently prejudicial" publicity present here, we think that no independent significance need be accorded to the extensive circulation of the *Eagle* in Butler County or to the fact that a special grand jury had been empaneled. ***HN5***[⬆] It is **[*159]** saturation with "inherently prejudicial" publicity, and not the possibility of saturation alone, that is important since, as we have noted, "[e]xtensive pretrial publicity . . . does not necessarily preclude a fair trial." *Commonwealth v. Powell, **[***23]** supra, 459 Pa. at 260, 328 A.2d at 510*. *Accord, e. g., Gordon v. United States, 438 F.2d 858, 874* (5th Cir.), *cert. denied*, *404 U.S. 828, 92 S.Ct. 63, 30 L.Ed.2d 56 (1971)*. And the gap of two and one-half months between the close of the publicity and the trial in the instant case, which might or might not serve to dispel the effects of "inherently prejudicial" publicity in other cases, serves here to make even more plain the want of basis for a presumption of prejudice, since here there was no such publicity.

[*24]** Further confirmation of the Superior Court's mistake in presuming prejudice in the case at bar is provided by the transcript of the voir dire proceeding -- a portion of the record the Superior Court did not **[**296]** find it necessary to examine. The twelve jurors and the two alternates in this case were chosen from 42 veniremen. Of these, 15, or only about one-third, had *any* knowledge of the case from news accounts or by word of mouth. Two of these persons indicated that they would have difficulty in deciding the case solely on the basis of the evidence presented at trial and were dismissed for cause. The other thirteen had a vague recollection of the accounts [18] and not one of these prospective jurors stated that he had formed any opinion concerning Casper's guilt or innocence. Only three of these thirteen persons were empaneled, one as an alternate who was later excused. [19] In sum, we are

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[16] The letter to the editor, which appeared in the *Eagle* on August 26, expressed support for the district attorney's request for a special investigative grand jury. The editorial, which appeared on September 16, consisted principally of a quotation of Judge Dillon's order empaneling the grand jury and concluded: "The public has a right to expect a full and complete investigation and prosecution of this apparent abuse of public authority, and the special grand jury appears necessary to get it." No expression of sentiment "demanding conviction," *United States v. Sawyers, supra*, appears in either publication.

[17]

> "[W]e rule that in this Commonwealth policemen and members of the staffs of the office of District Attorneys shall not release to the news media: (a) the existence or contents of any statement or confession given by the accused, or his refusal to give a statement or to take tests; (b) prior criminal records of the accused including arrests and convictions; (c) any inflammatory statements as to the merits of the case, or the character of the accused; (d) the possibility of a plea of guilty; (e) nor shall the authorities deliberately pose the accused for photographs at or near the scene of the crime, or in photographs which connect him with the scene of the crime."

451 Pa. at 200, 303 A.2d at 215. See Pa.Code of Professional Responsibility, Disciplinary Rule 7-107; ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press, §§ 1.1, 2.1 (1968).

[18] *E. g.*, "Well, really, I can't say I paid that much attention to it. I scan the paper when I get home from work"; "I read a little bit. I can't recall anything"; "I don't know much about it"; "Not in detail, no."

[19] Compare *Commonwealth v. Frazier, supra, 471 Pa. at 130-31, 369 A.2d at 1229* (28 of 32 prospective jurors know of case from news accounts; 11 challenged for cause on grounds of fixed opinion or recollection of prior criminal record of accused; change of venue ordered); *Commonwealth v. Martin, 465 Pa. 134, 348 A.2d 391 (1975)*, *cert. denied*, ***428 U.S. 923,***

satisfied that there is nothing in **[*160]** this record warranting a conclusion that the pre-trial publicity here made it highly unlikely that a "panel of impartial, 'indifferent' jurors," *Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961)*, could be chosen **[***25]** from the Butler County community.

IV.

The Superior Court also found an additional element present here **[***26]** which it believed warranted a presumption of prejudice. It found that appellee was a well-known political figure in the community, and reasoned that this status, together with the nature of the offenses alleged, presented a grave danger to the likelihood of a fair trial. [20] Again, we **[*161]** disagree. We think that the Superior Court engaged in an exercise of judicial notice unwarranted by the record in this case, and that its "public figure" element in ascertaining whether prejudice should be presumed should not now be adopted as part of our law.

[*27]** We deal first with the finding that appellee was well-known. Nothing in the record was mentioned by the court in support of this conclusion, and there is no suggestion of appellee's supposed prominence in the trial court's opinion. Thus we deal with an exercise of judicial notice by an appellate court. ***HN6***[↑] *Rule 201(b) of the Federal Rules of Evidence*, which is in accord **[**297]** with Pennsylvania law, [21] provides: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." We think it plain that neither the Superior Court nor this Court is in a position to assert that it is so familiar with conditions in Butler County as to be certain, contrary to the conclusion of the trial court, that Casper was prominent in the community, or that local political party chairmen generally are well-known in the Commonwealth. Once again, the voir dire transcript is instructive. All 42 prospective jurors were asked whether they were related to or acquainted with Casper. **[***28]** One person stated that she knew appellee from her work on a local party committee, and was excused; three others said that they "knew of" him. None of these persons sat on the jury. [22]

Next to be considered is the "public figure" element in the Superior Court's opinion. The difficulty of knowing, **[*162]** with any reasonable degree of certainty, precisely how well a person is known in the community is one reason why we have difficulty with a "public figure" element giving rise to a presumption of prejudice. Moreover, "[w]e cannot accept the position that 'prominence **[***29]** brings prejudice.'" *Hale v. United*

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96 S.Ct. 3234, 19 L.Ed.2d 1226 (1976) (97 of 107 veniremen knew of case; 23 of 221 veniremen professed fixed opinion and excused for cause; no prejudice shown); *Commonwealth v. Hoss, 445 Pa. 98, 106, 283 A.2d 58, 63 (1971)* (26 of 138 prospective jurors had fixed opinion and were excused for cause; no prejudice shown).

[20] The court expressed this view as follows:

> "Because well-known persons are particularly vulnerable to news stories about alleged wrongdoing on their part especially in smaller communities, we would add to the factors to be considered in determining whether pre-trial publicity had the effect of denying a defendant a fair trial in a particular community another element; namely, the extent to which the public was familiar with the defendant's name prior to the news stories about his involvement in the activities for which he was ultimately tried. By so doing we are recognizing that news reports about a person whose name is familiar to the general public and who holds high political office are followed more closely than are news reports about strangers, therefore magnifying the effect of such reports. A public figure, especially a public, political figure, is particularly vulnerable to trial by the press before a witness is ever called to testify against him. 'This should be especially true when the charges involved are grounded in politics, and by their very nature, invite the glare of publicity that tends to arouse adverse public opinion. We should always abhor trial by newspaper, radio and television'. See *Commonwealth v. Evans, 190 Pa.Super. 179, 154 A.2d 57 (1959)* (Dissenting opinion by Watkins, J.)
>
> "The defendant is clothed with the presumption of innocence until his guilt is proven beyond a reasonable doubt. This county chairman of a local political party was subject to adverse publicity over a long period of time and as the nature of the charges is grounded in politics he was in a position of having the presumption of innocence destroyed before trial, so reducing the burden of proof by the Commonwealth and preventing a fair trial." *249 Pa.Super. at 29, 375 A.2d at 741-42*.

[21] See, *e. g.*, *Emert v. Larami Corp., 414 Pa. 396, 397 n.1, 200 A.2d 901 (1964)*; *Commonwealth v. Brose, 412 Pa. 276, 194 A.2d 322 (1963)*; *Clouser v. Shamokin Packing Co., 240 Pa.Super. 268, 361 A.2d 836 (1976)*.

[22] It is also of interest that no more than four people stated that they knew of Casper's co-defendant, a former state legislator from Butler County. A slightly larger number had heard of the district attorney.

States, 435 F.2d 737, 747 (5th Cir. 1970), *cert. denied*, *402 U.S. 976, 91 S.Ct. 1680, 29 L.Ed.2d 142 (1971)* (trial of bank president for various "white-collar" crimes). Indeed, a defendant enjoying prominence in the community might well view his status as an advantage. On the whole, we think that this additional element is entirely too amorphous and subject to speculation to be added as a basis for a pretrial presumption of prejudice in any but the most truly extraordinary cases:

> ***HN7***[↑] "'The voir dire examination is the proper place to determine whether a defendant's public notoriety has resulted in a prospective juror's prejudice.' *United States v. Hoffa, 367 F.2d 698 (7th Cir. 1966)*, vacated on other grounds, *394 U.S. 310, 89 S.Ct. 1163, 22 L.Ed.2d 297 (1969)*. This is the normal rule and practice in Pennsylvania. *Commonwealth v. Jones, 452 Pa. 299, 304 A.2d 684 (1973)*. *Commonwealth v. McGrew, 375 Pa. 518, 525, 100 A.2d 467, 470 (1953)*." *Commonwealth v. Martin, 465 Pa. 134, 149, 348 A.2d 391, 398 (1975)* (plurality opinion), *cert. denied*, *428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976)*.

Cf. *Commonwealth v. **[***30]** Hoss, 469 Pa. 195, 364 A.2d 1335 (1976)*. [23]

Moreover, the nature of the charges, the appellant's position as a party official, and the fact that this trial occurred some six months after the climax of the Watergate scandal do not affect our conclusion that prejudice should not have been presumed. The opinion of the court which **[*163]** had to deal directly with the effect of pre-trial publicity on the Watergate prosecutions -- the United States Court of Appeals for the District of Columbia Circuit -- is pertinent here:

> "A judge reviewing pretrial publicity before the *voir dire* would have to attempt to determine from his own reactions how the community **[***31]** would respond to that publicity. The subjective nature of this determination is well illustrated by the arguments in the briefs. The Government maintains that since '[t]he **[**298]** offenses charged here were not crimes of violence and passion,' but rather legally complex white collar crimes, pretrial publicity would make little impression on most citizens. Br. for the United States (hereinafter Govt. br.) at 76-77. Haldeman, on the other hand, maintains that the publicity was such as to arouse strong personal feelings in all who came in contact with it:
>
> > Each citizen and thus each prospective juror was led to believe that his security and way of life was [sic] personally threatened by what these appellants had done. There could be no sympathy for them. The publicity was calculated to inspire the jurors with a high sense of duty involving much more significant issues than bringing some petty criminal to justice. They were made to feel that they were patriots repelling an attack on their country by an enemy within the gates.
>
> Haldeman reply br. at 12. After the *voir dire* a judge can determine which description of the publicity's impact is accurate; before **[***32]** the *voir dire* a judge could only have guessed.
>
> "Our own reading of the 2,000-page *voir dire* demonstrates that the Government's assessment of the public's interest in Watergate matters is correct. Most of the venire simply did not pay an inordinate amount of attention to Watergate. This may come as a surprise to lawyers and judges, but it is simply a fact of life that matters which interest them may be less fascinating to **[*164]** the public generally." *United States v. Haldeman, 181 U.S.App.D.C. 254, 285, 559 F.2d 31, 62 n.37 (1976)* (en banc), *cert. denied*, *431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977)*.

As we have indicated above, the voir dire transcript in the case at bar leads us to the same conclusion. We think that it would be quite unwarranted to presume, as a matter of judicial notice, that potential jurors in a case involving political corruption will necessarily assume that, since all political figures are inherently dishonest, the defendant must be guilty. Nor in a case involving political or governmental corruption should a greater degree of protection be created for a political party official than is accorded any other accused person. **[***33]** We should not assume that the average citizen called as a juror is unable to lay aside any preconceived notions about politics in general which he might have when he enters the jury box and swears to decide the case solely on the basis of the law and the evidence presented at trial. To do so is to express a lack of

[23] Should there be some likelihood that one's prior prominence in the community may add to the public interest in the charges against him, the allowance of continuances and the careful fashioning of voir dire procedures and questions may well prove useful in the selection of an impartial jury. The record reflects such action by the trial court here.

confidence in our jury system, which, for all its imperfections, has shown itself to be worthy of our trust.

The order of the Superior Court is reversed, and the case is remanded to that court for consideration of appellee's other assignments of error.

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