NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

INTERNATIONAL PORTFOLIO, INC. AND RICHARD SHUSTERMAN,

Appellants

v.

PURPLEFISH, LLC T/A GREENFISH II, LP, THOMAS BAUMLIN, BASIL BOURQUE, KEVIN HILL, SEAN MCNAMARA, ERIC RAYMOND, ROUNDSTONE HEALTHCARE CAPITAL MANAGEMENT V, LLC T/A ROUNDSTONE HEALTHCARE CAPITAL MANAGEMENT V, LLP, ROUNDSTONE HEALTHCARE INVESTMENTS, LLC, ROUNDSTONE HEALTHCARE PARTNERS, LLC T/A JGUN HOSPITAL RECEIVABLES RESOLUTION FUND I, LP, ROUNDSTONE HEALTHCARE PARTNERS LLC, T/A ROUNDSTONE HEALTHCARE CAPITAL X, LP, ROUNDSTONE HEALTHCARE PARTNERS, LLC T/A ROUNDSTONE HEALTHCARE PARTNERS III, LP, ROUNDSTONE HEALTHCARE PARTNERS LLC T/A ROUNDSTONE HEALTHCARE PARTNERS IV, LP, ROUNDSTONE HEALTHCARE PARTNERS, LLC T/A ROUNDSTONE HEALTHCARE PARTNERS VI, LP, ROUNDSTONE HEALTHCARE PARTNERS LLC T/A ROUNDSTONE HEALTHCARE PARTNERS VII, LP, ROUNDSTONE HEALTHCARE PARTNERS LLC T/A ROUNDSTONE HEALTHCARE PARTNERS VIII, LP, TWO RIVERS CAPITAL MANAGEMENT LLC T/A TWO RIVERS HEALTHCARE XI, LP,

Appellees

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 401 EDA 2013

Appeal from the Order January 4, 2013
in the Court of Common Pleas of Montgomery County
Civil Division at No.: 2012-06748

BEFORE: GANTMAN, J., SHOGAN, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. **FILED DECEMBER 24, 2013**

Appellants, International Portfolio, Inc. and Richard Shusterman, appeal from the trial court's order sustaining the preliminary objections of Appellees, Purplefish, LLC t/a Greenfish II, L.P., *et al.*, and dismissing their complaint with prejudice. We affirm.

Appellees are hedge funds that invest money on behalf of their clients. Appellants purchased, sold, and engaged in the collection of large portfolios of medical debt receivables from hospitals. Appellants and Appellees entered into several agreements between 2008 and 2010 for the purchase and sale of sizeable portfolios of debt accounts (Debt Portfolios). On December 13, 2011, Appellees filed a complaint against Appellants and others in the United States District Court for the Eastern District of Pennsylvania (Federal Action).

In the Federal Action, Appellees accused Appellants of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.A. § 1962(c)-(d); fraud and/or fraud in the inducement; misappropriation and/or conversion of Appellees' monies; interference with contractual relations; and unjust enrichment. (***See*** RICO Complaint, Docket No. 2:11-cv-07628-MSG, at 38-40, 42-43, 51-55). Additionally, Appellees asserted a breach of

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* Retired Senior Judge assigned to the Superior Court.

contract claim against Appellant International Portfolio. (***See id.*** at 40-41). Appellees based their claims on Appellants' alleged failure to manage Appellees' Debt Portfolios properly, resulting in accounts never being placed, or untimely placed, with debt collectors, converting monies collected through collection agencies assigned by Appellant International Portfolio, and directing vendors to change ownership codes for accounts in order to misappropriate monies collected from debtors. (***See id.*** at 40, 51-52).

In December 2011, Appellants became aware of document preservation letters Appellees sent to Appellants' business associates, advising them to maintain certain documents on account of the ongoing Federal Action. Specifically, the letters stated, in pertinent part:

> The undersigned is legal counsel to all named plaintiffs in the [Federal Action]. [Appellants] . . . have been sued by [Appellees] as a result of certain actions they have taken, including activities involving the solicitation of investment money from investors of discounted portfolios of medical receivables that hospitals have written off as bad debt expense . . . that [International Portfolio] sold to investors. A Complaint was filed in federal court in the Eastern District of Pennsylvania, case number 2:11-cv-07628 . . . . To the extent you desire more information about the allegations asserted in the [Federal] Litigation, you can obtain a copy from [Appellants], or obtain a copy online, as it is a public document.
>
> The purpose of this letter is to put you on notice of your obligation to maintain certain documents that may relate in any way to your dealings with any and each of [Appellants] from 2006 to the present, and certain documents that may relate in

> any way to your dealings with Medical Consortium, LLC,[1] from its inception to the present and Pan Asian Commercial Consulting Group, LLC,[2] from its inception to the present, including electronic documents and communications. . . . .

(Complaint, 3/19/12, at Exhibit A, Letter from Mark S. Haltzman, Esquire, Silverang & Donohue, LLC to Pat Serpico, Rubin & Raine (Document Preservation Letter), 12/29/11, at 1). On March 19, 2012, Appellants filed a complaint against Appellees for defamation, false light, and intentional interference with prospective contractual relations on the basis of the Document Preservation Letters. Appellees filed preliminary objections to the complaint on April 30, 2012, alleging, *inter alia*, that absolute judicial privilege barred the defamation claim and related causes of action. The court heard argument on August 22, 2012. On January 4, 2013, the court sustained Appellees' preliminary objections and dismissed Appellants' complaint. This timely appeal followed.[3]

Appellants raise four questions for this Court's review:

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[1] Medical Consortium, LLC's relationship to Appellants is not apparent from the record.

[2] Appellant Shusterman formed Pan Asian Commercial Consulting Group, LLC, "for the purpose of pursuing business deals in the Pacific Rim." (Complaint, 3/19/12, at 21 ¶ 54).

[3] The court did not order Appellants to file a statement of errors complained of on appeal and it did not file a Rule 1925(a) opinion. ***See*** Pa.R.A.P. 1925. However, its January 4, 2013 decision was accompanied by a thorough supporting opinion.

> 1. Whether the [t]rial [c]ourt erred by holding that the [l]etters that are the subject of this dispute, which were secret ex-parte letters sent under the pretext of "document preservation" for the sole purpose of defaming [Appellants] and destroying [Appellants'] business, to persons who had no legitimate relationship with the subject of [Appellees'] false federal RICO Complaint, were "issued in the regular course of judicial proceedings" and "pertinent to the controversy," when [Appellants'] allegations in the Complaint were to the contrary?
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> 2. Whether the [t]rial [c]ourt erred by holding that [l]etters at issue, sent by [Appellees] to independent third parties who [Appellees] allege were potential witnesses in litigation, were covered by the absolute judicial privilege (creating a brand new, not previously recognized exception to the law of defamation and an unprecedented expansion of the judicial privilege), when those parties had **no direct interest** in this litigation?
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> 3. Whether the [t]rial [c]ourt erred by refusing to submit the disputed factual issues of abuse of the litigation privilege, republication and overpublication to the jury?
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> 4. Whether the [t]rial [c]ourt erred by ruling that there was no "republication" of the Complaint in the RICO Action . . . under the doctrine as set forth by the Supreme Court in ***Bochetto v. Gibson***, 860 A.2d 67 (Pa. 2004)?

(Appellants' Brief, at 3 (emphasis in original)).

Our standard of review of this matter is well-settled.

> Our standard of review of a trial court's order granting preliminary objections in the nature of a demurrer is *de novo* and our scope of review is plenary. The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it.
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> > A demurrer by a defendant admits all relevant facts sufficiently pleaded in the complaint and all inferences fairly deducible therefrom, but not conclusions of law or unjustified inferences. In ruling on a demurrer, the court may consider only such

> matters as arise out of the complaint itself; it cannot supply a fact missing in the complaint.
>
> Consequently, preliminary objections should be sustained only if, assuming the averments of the complaint to be true, the plaintiff has failed to assert a legally cognizable cause of action. Where the complaint fails to set forth a valid cause of action, a preliminary objection in the nature of a demurrer is properly sustained.

Krajewski v. Gusoff, 53 A.3d 793, 802 (Pa. Super. 2012), *appeal granted*, 74 A.3d 119 (Pa. 2013) (citations and quotation marks omitted).

In their first issue, Appellants argue that the court "erred by contravening the factual allegations in [the] complaint" when deciding Appellees' preliminary objections. (Appellants' Brief, at 16). We disagree.

It is well-settled that, when considering preliminary objections in the form of a demurrer, the court must "accept as true all well-pleaded material facts set forth in the complaint and all inferences fairly deductible from those facts." ***Yocca v. Pittsburgh Steelers Sports, Inc.***, 854 A.2d 425, 436 (Pa. 2004) (citation and internal quotation marks omitted). "However, [it is] not required to accept a party's allegations as true to the extent they constitute conclusions of law." ***Cable & Assoc. Ins. Agency, Inc. v. Commercial Nat'l Bank of Pa.***, 875 A.2d 361, 363 (Pa. Super. 2005) (citation omitted). In other words, the court "need not consider the pleader's conclusions of law, unwarranted inferences from facts, opinions, or argumentative allegations." ***Wiernik v. PHH U.S. Mortg. Corp.***, 736 A.2d

616, 619 (Pa. Super. 1999), *appeal denied*, 751 A.2d 193 (Pa. 2000) (citations omitted).

Here, Appellants argue that the court was required to accept the complaint's averment that Appellees "mailed a series of extrajudicial communications to . . . many of [Appellants'] collection agencies, vendors, business associates and third parties under the false pretense of document preservation, but the real purpose was to defame, disparage and harm [Appellants.]" (Complaint, 3/19/12, at 6 ¶ 8) (record citation omitted); (***see also*** Appellants' Brief, at 16-17). They maintain that the court erred when it did not accept this statement as true and instead found that the Letters were "issued in the regular course of judicial proceedings, and . . . pertinent to the controversy." (Appellants' Brief, at 16). We disagree.

Preliminarily, we observe that, in the case of the absolute judicial privilege asserted by Appellees in their preliminary objections, their alleged motive in sending the Document Preservation Letters was immaterial to the determination of whether the privilege applied. (***See*** [Appellees'] Preliminary Objections to [Appellants'] Complaint, 4/30/12, at 9 ¶ 14); ***see also Richmond v. McHale***, 35 A.3d 779, 784 (Pa. Super. 2012) ("Importantly, the existence of the privilege does not depend upon the motive of the defendant in making the allegedly defamatory statement."); ***Miketic v. Baron***, 675 A.2d 324, 327 (Pa. Super. 1996) ("One who publishes defamatory matter within the scope of an absolute privilege is

immune from liability regardless of occasion or motive.") (citation omitted). Therefore, the trial court would not have been required it to find the judicial privilege inapplicable, even if it had accepted Appellants' allegations of Appellees' improper motive as true.

Moreover, although it is a fact that Appellees mailed letters to several of Appellants' business associates, it is not a fairly deducible inference that the documents were sent under a false pretense. ***See Yocca***, ***supra*** at 436. Additionally, when Appellants characterized Appellees' purpose in sending the letters as an attempt "to defame, disparage and harm," they offered an argumentative allegation that the court was not required to adopt. (Complaint, 3/19/12, at 6 ¶ 8) (record citation omitted); ***see also Wiernik***, ***supra*** at 619. Therefore, we conclude that the court did not err when it declined to accept Appellant's argumentative allegations as true and instead determined that the Document Preservation Letters were issued in the "regular course of judicial proceedings and [were] pertinent and material" to the Federal Action. (Trial Ct. Op., at 5); ***see also Bochetto***, ***supra*** at 71 (same). Appellants' first issue does not merit relief.

In their second argument, Appellants assert that "the trial court erred by holding that the letters, sent to independent third parties who [Appellees] contend were potential witnesses in the RICO action with no direct interest in the litigation, were subject to absolute litigation privilege." (Appellant's Brief, at 17; ***see id.*** at 17-25). Specifically, Appellants cite ***Post v. Mendel***,

507 A.2d 351, 355-57 (Pa. 1986), for their assertion that "Pennsylvania law is clear that only communications with those that have a direct interest in the litigation, not communications with independent witnesses, . . . can benefit from the absolute litigation privilege." (Appellant's Brief, at 17) (emphases omitted). Appellants' argument fails.

> It has long been the law of Pennsylvania that statements made by judges, attorneys, witnesses and parties in the course of or pertinent to any stage of judicial proceedings are absolutely privileged and, therefore, cannot form the basis for liability for defamation. The policy behind this principle is manifest:
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> > The reasons for the absolute privilege are well recognized. A judge must be free to administer the law without fear of consequences. This independence would be impaired were he to be in daily apprehension of defamation suits. The privilege is also extended to parties to afford freedom of access to the courts, to witnesses to encourage their complete and unintimidated testimony in court, and to **counsel to enable him to best represent his client's interests**. Likewise, the privilege exists because the courts have other internal sanctions against defamatory statements, such as perjury or contempt proceedings.
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> The limitations on the scope of this privilege are equally well-defined. As the Supreme Court has explained, the protected realm is limited to those communications which are issued **in the regular course of judicial proceedings and which are pertinent and material to the redress or relief sought**. Importantly, the existence of the privilege does not depend upon the motive of the defendant in making the allegedly defamatory statement. The privilege is absolute and cannot be destroyed by abuse. Moreover, the privilege extends not only to communications made in open court, but also encompasses pleadings and even less formal communications such as preliminary conferences and correspondence between counsel in furtherance of the client's interest. ***Moses v.***

> ***McWilliams***, 379 Pa. Super. 150, 549 A.2d 950, 956 (1989 [1988]) (*en banc*), *appeal denied,* 521 Pa. 630, 631, 558 A.2d 532 (1989) (privilege is accorded to pre-trial communications between witnesses and counsel); ***Pelagatti v. Cohen***, 370 Pa. Super. 422, 536 A.2d 1337, 1344 (1987)[, *appeal denied*, 548 A.2d 256 (Pa. 1988)] (privilege is accorded to communications pertinent to *any* stage of judicial proceedings). Lastly, all doubt as to whether the alleged defamatory communication was indeed pertinent and material to the relief or redress sought is to be resolved in favor of pertinency and materiality. Whether a particular statement is absolutely privileged is a question of law for the court.

Richmond, ***supra*** at 784-85 (some citations and emphases and all quotation marks omitted; some emphasis in original and some emphasis added).

In its opinion, the trial court found that:

> statements made in a letter requesting that parties retain documents that may be relevant to discovery in a pending matter are made in the "regular course of judicial proceedings" and are "pertinent and material" to the claims at issue in the securities litigation, and must be afforded absolute immunity under the judicial privilege.

(Trial Ct. Op., at 5). We agree.

Appellees sent Letters to Appellants' business colleagues that advised of the ongoing Federal Action, and directed that the entities preserve any documents between themselves and Appellants or Appellants' subsidiaries due to the documents' potential relevance. (***See*** Document Preservation Letter, 12/29/11, at 1). Although the Letters also informed their recipients that the RICO complaint was a public record that they could obtain from

Appellants or online if they desired further information, they did not repeat the pleading's allegations or expressly incorporate them. (***See id.***).

Therefore, we conclude that the trial court properly found, as a matter of law, that Appellees sent the Document Preservation Letters in the regular course of judicial proceedings, that they were pertinent and material, and that, therefore, they were judicially privileged. ***See Richmond***, ***supra*** at 784; (***see also*** Trial Ct. Op., at 5).

Moreover, we determine that Appellants' reliance on ***Post***, ***supra*** is misplaced. (***See*** Appellants' Brief, at 17). In ***Post***, ***supra***, defendant and plaintiff both were attorneys and opposing counsel in ongoing litigation. Defendant sent a letter to plaintiff that "disparaged [his] integrity as a member of the legal profession" based on his trial conduct. ***Post***, ***supra*** at 352; ***see id.*** at 352-53. He then sent a copy of the letter to the judge presiding over the case, the Disciplinary Board of the Supreme Court of Pennsylvania, and a physician who was the plaintiff's client and a witness in the litigation. ***See id.*** Our Supreme Court observed that, in order to be privileged, "a challenged communication . . . must bear a certain relationship to the proceeding." ***Id.*** at 356. In concluding that the letter was not privileged, the Court stated that, "[a]lthough the letter made reference to matters which occurred in an ongoing trial, the letter was not directly relevant to the court proceedings." ***Id.***

These facts are distinguishable from the case here, where the Document Preservation Letters requested that the recipients preserve documents that could be material to the ongoing Federal Action and "logically [could be] expected to affect the course of the trial." ***Id.*** Therefore, unlike the circumstances in ***Post***, ***supra***, these letters were "pertinent and material" to the underlying RICO litigation and sent in the "regular course of judicial proceedings." ***Richmond***, ***supra*** at 784.

Likewise, we are not persuaded by Appellants' argument in reliance on ***McGuire v. Shubert***, 722 A.2d 1087 (Pa. Super. 1998), *appeal denied*, 743 A.2d 921 (Pa. 1999). (***See*** Appellants' Brief, at 21-22 (arguing that "***Post*** and ***McGuire*** control this Court's analysis")). ***McGuire*** involved an underlying equity action between adjoining landowners, the McGuires and Shuberts, that concerned the McGuires' alleged violation of the Dam Safety and Encroachment Act due to their construction of a dam on their property. ***See McGuire***, ***supra*** at 1088. Deborah Shubert worked at Mellon Bank, where the McGuires banked. ***See id.*** at 1089. She improperly accessed the McGuires' bank account data for trial, without their permission, to obtain information on their net worth. ***See id.***

Later, the McGuires brought an action against the Shuberts for, *inter alia*, breach of confidentiality. ***See id.*** The Shuberts filed preliminary objections in which they asserted the litigation privilege, which the trial court sustained. ***See id.*** This Court reversed, finding that the privilege does not

apply to illegally-obtained information that later is used during a judicial proceeding. ***Id.*** at 1091-92. As observed by the ***McGuire*** Court:

> [t]he McGuires did not have a reduced expectation of privacy in their bank accounts because of the equity litigation. . . . The McGuires' bank account information was not necessarily the type of information which inevitably had to be revealed in litigation concerning whether the McGuires had committed a violation of the Dam Safety and Encroachment Act by constructing a dam on their property. . . .

Id.

Conversely, in this case, Appellants reasonably could have had "a reduced expectation of privacy" in documents evidencing their financial dealings with its business associates because this was precisely the type of evidence that would be revealed in the Federal Action. ***Cf. id.*** Therefore, we conclude that the facts of ***McGuire*** are distinguishable from those presented here, and that Appellants' reliance on that case is misplaced. Appellants' second issue is not meritorious.

We address Appellants' third and fourth questions together. In these issues, Appellants argue that, because they "claimed that [Appellees] abused the litigation privilege, the trial court erred by refusing to submit the issue of abuse to the jury," and that "even if 'republication' could be decided as a matter of law [by the trial court], [it] erred in holding that there was no 'republication.'" (Appellants' Brief, at 26, 29). We disagree.

It is well-settled that the litigation privilege "may be lost if the publisher exceeds the scope of his privilege by publishing the defamation to

unauthorized parties. It is a question of law whether privilege applies in a given case, but a question of fact for the jury whether a privilege has been abused." ***Miketic***, ***supra*** at 327 (citations omitted). However, "[t]he question of whether a privileged occasion was abused is for the determination of a jury **unless the facts are such that but one conclusion can be drawn**." ***Montgomery v. Philadelphia***, 140 A.2d 100, 103 n.4 (Pa. 1958) (emphasis added).

Preliminarily, we observe that Appellants concede that the RICO complaint itself "was within the scope of absolute litigation privilege." (Appellants' Brief, at 26-27); ***see also Morley v. Gory***, 814 A.2d 762, 765 (Pa. Super. 2002), *appeal denied*, 822 A.2d 704 (Pa. 2003) ("[S]tatements by a party . . . cannot be the basis of a defamation action [when] they occur in the pleadings. . . ."") (citation omitted). They argue, however, that "the Letters citing to the RICO Complaint constituted an 'extrajudicial republication' of the [RICO] Complaint . . . which exceeded the scope of the privilege." (Appellants' Brief, at 27). The trial court found this argument "specious," and we agree. (Trial Ct. Op., at 6; ***see id.*** at 5-6).

In their brief, Appellants heavily rely on ***Bochetto***, ***supra***, and argue that "the republication here is the functional equivalent of the republication in ***Bochetto***." (Appellants' Brief, at 30; ***see id.*** at 3, 9-12, 15, 18, 27-33). We agree with the trial court that Appellants' reliance is misplaced, because

the facts of ***Bochetto*** are distinguishable from those in the case at bar. (***See*** Trial Ct. Op., at 4).

In ***Bochetto***, our Supreme Court considered the issue of "whether an attorney is absolutely immune from liability on the basis of the judicial privilege when he faxes to a reporter a complaint that he has previously filed." ***Bochetto***, ***supra*** at 69. Specifically, Attorney Kevin W. Gibson brought a legal malpractice claim against Attorney George Bochetto on behalf of his client, Pickering Hunt. ***See id.*** The malpractice complaint alleged that Bochetto breached his fiduciary duty to Pickering Hunt during his representation in real estate litigation. ***See id.*** Gibson also faxed a copy of the complaint to a freelance reporter who regularly wrote for the Legal Intelligencer, and the periodical published the reporter's article, detailing the allegations in the malpractice complaint. ***See id.*** at 70.

Bochetto filed a defamation action against Gibson for sending a copy of the malpractice complaint to the reporter.[4] ***See id.*** Our Supreme Court held that "[a]s Gibson's act of sending the complaint to [the reporter] was an extrajudicial act that occurred **outside of the regular course of the judicial proceedings** and **was not relevant in any way to those**

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[4] The defamation complaint also alleged that the malpractice complaint itself was defamatory. ***See Bochetto***, ***supra*** at 70. However, the trial court properly found that the absolute judicial privilege applied to the allegations in the complaint and therefore could not form the basis for a defamation action. ***See id.*** at 72.

proceedings, it is plain that it was not protected by the judicial privilege." ***Id.*** at 73 (emphases added).

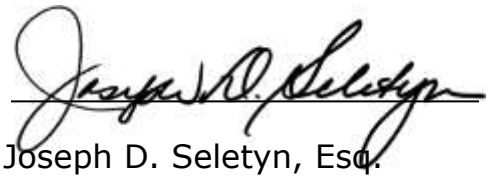
We agree with the trial court that the holding of ***Bochetto*** is inapplicable to the facts presented in this case. (***See*** Trial Ct. Op., at 4). Preliminarily, we observe that, the Document Preservation Letter does not enclose a copy of, or even an internet citation for, the RICO complaint. (***See*** Document Preservation Letter, 12/29/11, at 1). In fact, it does not include any quotation to, or other express incorporation of, any of the complaint's allegedly defamatory statements. (***See id.***). Finally, Appellees sent the Letter to Appellants' business associates in the regular course of judicial proceedings for the preservation of potentially relevant documents in the Federal Action; they did not send it to the press or other media. (***See*** Complaint, 3/19/12, at 26-27 ¶ 70). Therefore, ***Bochetto*** is not legally controlling of our disposition.

Hence, based on the foregoing evidence regarding what the Document Preservation Letter did and did not contain, we conclude that "the facts are such that but one conclusion can be drawn." ***Montgomery***, ***supra*** at 103 n.4. Even "assuming the [properly pleaded] averments of the complaint to be true," the court correctly found that Appellees did not abuse the absolute judicial privilege by republishing the allegedly defamatory allegations of the RICO complaint. ***Krajewski***, ***supra*** at 802; ***see also Miketic***, ***supra*** at

327; ***Montgomery***, ***supra*** at 103 n.4; (Trial Ct. Op., at 5-6). Appellants' third and fourth issues do not merit relief.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/24/2013