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ORIGINAL

MICHAEL BALOGA
Plaintiff

v.

BRIAN D. JACISIN, ESQUIRE, et al
Defendants

: IN THE COURT OF COMMON PLEAS
: DAUPHIN COUNRT, PENNSYLVANIA

: NO. 2022 CV 6916

2023 JUL 11 AM 11:06
DAUPHIN COUNTY
CLERK OF COURT

ORDER

AND NOW, this 10th day of July, 2023, the upon consideration of the Preliminary Objections of Defendants Brian Jacisin, Robert Caruso, Jeffrey Frankenburger and Jonathan Fry, Plaintiff's Response Thereto, the Briefs, and oral argument of counsel, it is hereby ORDERED that:

Defendants' Preliminary Objections in the nature of a demurrer are SUSTAINED with leave granted to Plaintiff to file an Amended Complaint within 20 days of the date of this ORDER which meets Defendant's Preliminary Objections.

BY THE COURT

John F. Cherry
JOHN F. CHERRY
PRESIDENT JUDGE

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*APPENDIX
A.*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Baloga,	:	
Appellant	:	
	:	
v.	:	
	:	
Brian D. Jacisin, Robert	:	
Caruso, Jonathan Fry,	:	No. 1447 C.D. 2023
and Jeffrey Frankenburger	:	Submitted: April 8, 2025

BEFORE: HONORABLE ANNE E. COVEY, Judge
HONORABLE MATTHEW S. WOLF, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE COVEY

FILED: May 13, 2025

Michael Baloga (Baloga) appeals from the Dauphin County (County) Common Pleas Court's (trial court) August 15, 2023 order sustaining the preliminary objections (Preliminary Objections) filed by Brian D. Jacisin (Jacisin), Robert Caruso (Caruso), Jonathan Fry (Fry), and Jeffrey Frankenburger (Frankenburger) (collectively, Appellees), and dismissing Baloga's complaint alleging Wrongful Use of Civil Proceedings (Complaint). There are two issues before this Court: (1) whether the trial court erred by ruling that Baloga's Complaint failed to state a cause of action that survived sovereign immunity absent allegations demonstrating that Appellees acted outside the course and scope of their employment; and (2) whether the trial court erred by holding that Baloga failed to plead facts sufficient to state a claim for gross negligence. After review, this Court affirms.

In May 2018, the Wyoming Borough (Borough) Council's (Borough Council) president and vice-president sent a letter dated May 10, 2018 (May 10

*APPENDIX
B.*

Letter) to the State Ethics Commission (SEC) reporting that the Borough had received information that contractors working on a grant-funded Borough roadway project installed a driveway with a drainpipe on Borough Council member Baloga's property at no charge after Baloga had been involved in awarding the roadway project contract. The May 10 Letter alleged that Baloga's driveway was constructed using state grant funds in violation of the Public Official and Employee Ethics Act¹ (Ethics Act) and requested that the SEC investigate and file appropriate charges.

On May 24, 2018, SEC Executive Director/Director of Investigations Jacisin drafted a memo to SEC Executive Director Caruso recommending that the SEC investigate the allegations against Baloga on an *own motion* inquiry.² Thereafter, Jacisin and Caruso opened a preliminary inquiry based upon the May 10 Letter. By October 5, 2018 letter, Caruso notified Baloga of the allegations that an investigation had begun, and of the SEC's preliminary findings. In February 2019, the SEC issued an *Investigative Complaint/Findings Report* (Findings Report) against Baloga, which provided, in relevant part:

[] Baloga, in his capacity as a member of the [] Borough Council, . . . utilized the authority of his public office for the purpose of obtaining a pecuniary benefit of no less than \$3,840[.00], when he directed and/or authorized Borough personnel/employees and/or a vendor of the Borough to install a driveway/access way to his property at Borough expense and/or as part of an unrelated Borough Public Works project.

Complaint, Ex. D, Reproduced Record (R.R.) at 71a.

Thereafter, Baloga engaged in communications with SEC Deputy Executive Director Frankenburger and signed a Consent Agreement. Baloga claims he notified Frankenburger that he never directed anyone to provide him with a free

¹ 65 Pa.C.S. §§ 1101-1113.

² The SEC may initiate a preliminary inquiry upon a complaint signed under penalty of perjury by any person or upon its own motion. 65 Pa.C.S. § 1108(a).

driveway and he wanted the Consent Agreement to reflect such. However, on May 22, 2019, Frankenburger withdrew the Consent Agreement. *See* Complaint, ¶ 7. On September 12, 2019, Baloga, acting pro se, filed an Answer to the Findings Report. Baloga then retained counsel who filed an Amended Answer to the Findings Report and requested an evidentiary hearing. On March 5, 2021, approximately two years after the Investigative Division issued its Findings Report, and before the evidentiary hearing took place, the SEC withdrew and discontinued the proceedings against Baloga, stating that certain witnesses' recollections were inconsistent with previous statements and that one relevant witness had passed away.

On March 4, 2022, Baloga commenced this action in the Philadelphia County Common Pleas Court (Philadelphia Common Pleas) by writ of summons. On June 10, 2022, Baloga filed the Complaint. Baloga attached to the Complaint several exhibits including: (A) the May 10 Letter; (B) a May 24, 2018 memorandum from Jacisin to Caruso recommending that the SEC initiate an *Own Motion* inquiry; (C) an October 5, 2018 SEC letter informing Baloga of the investigation; (D) the Findings Report; (E) Baloga's Amended Answer to the Findings Report; (F) Baloga's Request for Issuance of Subpoenas; and (G) a Praecipe to Withdraw Investigative Complaint/Findings Report and Discontinue Matter. On June 15, 2022, the parties stipulated to the action's transfer from Philadelphia Common Pleas to the trial court. On July 19, 2022, Philadelphia Common Pleas transferred the case to the trial court.

On October 4, 2022, Appellees filed the Preliminary Objections, demurring therein that sovereign immunity barred Baloga's action³ and that Baloga

³ Pursuant to section 11 of [a]rticle 1 of the Constitution of Pennsylvania, it is hereby declared to be the intent of the General Assembly that the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy

had failed to allege sufficient facts to establish gross negligence. On October 24, 2022, Baloga filed a Response in Opposition to the Preliminary Objections. Appellees and Baloga filed supporting briefs. The trial court heard oral argument on July 7, 2023. On July 10, 2023, the trial court sustained the Preliminary Objections, but granted Baloga leave to amend the Complaint. With respect to the first Preliminary Objection, the trial court was “persuaded that [Baloga’s] **Complaint did not allege facts of misconduct which fell outside of the statutorily-imposed duty to investigate to state an exception to statutory immunity.**” R.R. at 18a (emphasis added). Regarding the second Preliminary Objection, the trial court explained: “[Baloga] failed to adequately plead sufficient facts to establish that [Appellees] acted with the requisite state of mind to state a claim for gross negligence under [Section 8351 of what is commonly referred to as the Dragonetti Act,⁴] 42 [Pa.]C.S. § 8351.” R.R. at 18a.

Baloga elected not to amend the Complaint and, instead, reduced the trial court’s July 10, 2023 order to a judgment⁵ and appealed to this Court.⁶ On

sovereign immunity and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity.

1 Pa.C.S. § 2310. The General Assembly has identified 10 negligent acts specifically exempted from sovereign immunity. *See* Section 8522 of the act commonly referred to as the Sovereign Immunity Act, 42 Pa.C.S. § 8522. Wrongful use of civil proceedings is not among them.

⁴ 42 Pa.C.S. §§ 8351-8354.

⁵ “An order that sustains preliminary objections, but with leave to file an amended complaint, is generally considered to be interlocutory and not a final, appealable decree.” *Hionis v. Concord Twp.*, 973 A.2d 1030, 1034 (Pa. Cmwlth. 2009). Notwithstanding, “a plaintiff who chooses not to file an amended complaint may appeal by filing a praecipe with the trial court to dismiss the original complaint with prejudice. In this way, the plaintiff can convert an interlocutory order into [a] final and appealable order.” *Id.* at 1035-36.

⁶ [This Court’s] review of a decision by a trial court sustaining preliminary objections is limited to a determination of whether the trial court abused its discretion or committed an error of law, or whether constitutional rights were violated. In an appeal

August 23, 2023, the trial court ordered Baloga to file a Concise Statement of Matters Complained of on Appeal pursuant to Pennsylvania Rule of Appellate Procedure (Rule) 1925(b) (Rule 1925(b) Statement). On September 13, 2023, Baloga filed his Rule 1925(b) Statement. On November 17, 2023, the trial court filed its opinion pursuant to Rule 1925(a) (Rule 1925(a) Opinion).

Baloga first contends that the trial court erred by finding as a matter of law at the preliminary objection stage that sovereign immunity bars Baloga's action because Appellees acted within the scope and course of their employment.⁷ Specifically, Baloga argues that a determination of whether Appellees were acting within the course and scope of their employment is a fact-intensive question normally reserved for the jury, and the trial court erred by reaching that conclusion at this stage.

In *La Frankie v. Miklich*, . . . 618 A.2d 1145 (Pa. Cmwlth. 1992) (en banc), [this Court] observed:

[T]he proper test to determine if a Commonwealth employee is protected from liability pursuant to 1 Pa.C.S. § 2310 and [Section 8522 of what is commonly known as the Sovereign Immunity Act], 42 Pa.C.S. § 8522[,] is to consider whether the

challenging the sustaining of preliminary objections in the nature of a demurrer, we must determine “whether on the facts averred, the law states with certainty that no recovery is possible.” *Hawks by Hawks v. Livermore*, . . . 629 A.2d 270, 271 n.3 ([Pa. Cmwlth.] 1993). The test for sustaining preliminary objections is whether, based on the pleadings, it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish a right to relief. Argumentative allegations or expressions of opinion are not accepted as true.

Drack v. Tanner, 172 A.3d 114, 118 n.6 (Pa. Cmwlth. 2017) (citations omitted).

⁷ Importantly, the trial court held that the “Complaint did not allege facts of misconduct which fell outside of the statutorily-imposed duty to investigate to state an exception to statutory immunity.” R.R. at 18a. The trial court **did not conclude as a matter of law that Appellees acted within the scope and course of their employment.**

Commonwealth employee was acting within the scope of his or her employment; whether the alleged act which causes injury was negligent and damages would be recoverable but for the availability of the immunity defense; and whether the act fits within one of the [10] exceptions to sovereign immunity.

La Frankie, 618 A.2d at 1149. On the other hand, if a defendant who is a Commonwealth employee was not acting within the scope of [his] employment, he cannot claim the affirmative defense of sovereign immunity.

Schell v. Guth, 88 A.3d 1053, 1067 (Pa. Cmwlth. 2014).

The Pennsylvania Supreme Court has observed:

Pennsylvania's sovereign immunity statute . . . turns on whether a public employee was acting within "the scope of [his] duties." [1 Pa.C.S. § 2310.] This Court has interpreted that language as embracing the common law "scope of employment" inquiry, [*Justice v. Lombardo*, 208 A.3d 1057, 1068 (Pa. 2019),] which we analyze using the factors set forth in the Restatement (Second) of Agency. Under that test, an employee's conduct falls within [his] scope of [] employment if:

- (a) it is of the kind he is employed to perform;
- (b) it occurs substantially within the authorized time and space limits;
- (c) it is actuated, at least in part, by a purpose to serve the master[;] and
- (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.

Restatement (Second) of Agency § 228 (1958). The Restatement also makes clear that the "[c]onduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." *Id.*, § 228(2).

McGuire v. City of Pittsburgh, 285 A.3d 887, 892-93 (Pa. 2022) (footnotes omitted).

[The Pennsylvania Supreme Court has] long held that whether a particular act of an employee is within the scope of his employment is ordinarily a question of fact for the jury. We have explained that **the only exception to this well-established rule is where neither the facts nor the inferences to be drawn from them are in dispute**. In such a case, the court may decide the scope[-]of[-]employment question as a matter of law. However, where more than one inference may be drawn from the facts, the issue of whether an employee was acting within the scope of employment is for the jury.

Justice, 208 A.3d at 1068 (emphasis added; citations omitted).

As [our Supreme] Court has observed,

[i]n the context of vicarious liability, a principal is **liable to third parties for the frauds, deceits, concealments, misrepresentations, torts, negligent acts[,] and other malfeasances of his agent**, even though the principal did not authorize, justify, participate in[,], or know of such conduct or even if he forbade the acts or disapproved of them, **as long as they occurred within the agent's scope of employment**. This rule of liability is based on the premise that it is more reasonable for a principal, who has placed the agent in the position of trust and confidence, to be the one to suffer from the wrongful act of a third person, as opposed to an innocent stranger.

Travelers Cas. & Sur. Co. v. Castegnaro, . . . 772 A.2d 456, 460 (Pa. 2001) (citations omitted).

McLaughlin v. Nahata, 298 A.3d 384, 396 (Pa. 2023) (emphasis added).

Section 1107 of the Ethics Act describes the SEC's powers and duties, which include:

(12) Initiat[ing] an inquiry pursuant to [S]ection 1108(a) [of the Ethics Act, 65 Pa.C.S. § 1108(a)] (relating to investigations by [the SEC]) where a complaint has not been filed but where there is a reasonable belief that a conflict may exist.

(13) Issu[ing] findings, reports[,] and orders relating to investigations initiated pursuant to [S]ection 1108 [of the Ethics Act] which set forth the alleged violation, findings of fact[,] and conclusions of law. An order may include recommendations to law enforcement officials. Any order resulting from a finding that a public official or public employee has obtained a financial gain in violation of this chapter may require the restitution plus interest of that gain to the appropriate governmental body. The [SEC] or the Office of Attorney General shall have standing to apply to the Commonwealth Court to seek enforcement of an order requiring such restitution. This restitution requirement shall be in addition to any other penalties provided for in this chapter.

(14) Hold[ing] hearings, tak[ing] testimony, issu[ing] subpoenas[,] and compel[ling] the attendance of witnesses.

65 Pa.C.S. § 1107.

With respect to investigations, Section 1108 of the Ethics Act states, in pertinent part:

(a) *Preliminary inquiry.* — Upon a complaint signed under penalty of perjury by any person **or upon its own motion**, the [SEC], through its executive director, shall conduct a preliminary inquiry into any alleged violation of this chapter. The [SEC] shall keep information, records[,] and proceedings relating to a preliminary inquiry confidential. The [SEC] shall, however, have the authority to refer the case to law enforcement officials during a preliminary inquiry or anytime thereafter without providing notice to the subject of the inquiry. . . .

....

(c) *Initiation of investigation.* — If a preliminary inquiry establishes reason to believe that this chapter has been violated, the [SEC] may, through its executive director, initiate an investigation to determine if there has been a violation. . . . No investigation may be commenced until the person who is the subject of the investigation has been notified and provided a general statement of the alleged violation or violations of this chapter and other applicable statutes with respect to such investigation. . . .

....

(e) *Findings report.* — The [SEC], upon the completion of an investigation, shall issue a findings report to the subject of the investigation setting forth the pertinent findings of fact. The subject shall have the right to respond to said findings and to request an evidentiary hearing on said matter. The [SEC] shall grant any request for a hearing.

65 Pa.C.S. § 1108 (text emphasis added).

Baloga alleged in the Complaint that Appellees commenced a preliminary inquiry upon their own motion (rather than upon a sworn complaint), that the allegations were meritless, that Appellees failed to sign the investigative complaint, and that Appellees misrepresented witness statements.⁸ See R.R. at 35a-

⁸ In the Complaint, Baloga summarizes Appellees' alleged conduct as follows:

[Appellees] materially participated in the procurement, initiation, and/or continuance of the aforementioned civil proceeding against [Baloga] in a grossly negligent manner. In fact, [Appellees] initiated and continued the matter with knowledge that it lacked probable cause and misrepresented testimony in order to manufacture probable cause for a purpose other than that of securing the proper discovery, joinder of parties[,] or adjudication of the claim in which the civil proceeding was based.

[] At no time did [Appellees] reasonably believe in the existence of facts to support their claims at the time of the initiation of the civil proceeding.

R.R. at 40a-41a.

40a. However, alleging that Appellees engaged in such conduct is not equivalent to pleading facts that, if true, would demonstrate that the conduct **was beyond the scope of Appellees' statutorily-assigned tasks** for investigating alleged Ethics Act violations. This Court must consider whether, based on the Complaint's allegations, taken as true, and the documents attached thereto,⁹ Appellees were acting within the scope of their employment. When evaluating scope of employment, this Court first examines whether the subject conduct "is of the kind [Appellees were] employed to perform[.]" *McGuire*, 285 A.3d at 892 (quoting Restatement (Second) of Agency § 228(a)).

Here, as permitted by Section 1108(a) of the Ethics Act, the SEC "upon its own motion" conducted a preliminary inquiry into an alleged violation that the Borough Council president and vice president reported to the SEC. Consistent with Section 1108(c) of the Ethics Act, Caruso informed Baloga of the allegation, that that SEC commenced an investigation, and of the SEC's preliminary findings. Thereafter, the SEC issued the Findings Report.

Although Baloga alleges in the Complaint that "[a]t no time did [Appellees] reasonably believe in the existence of facts to support their claims at the time of the initiation of the civil proceeding[.]" he does not allege facts demonstrating why Appellees had reason to disbelieve the allegations in the May 10 Letter. R.R. at 41a. Notably, Baloga does not dispute that the driveway exists on his property or that contractors working on a grant-funded Borough roadway project

⁹ Notably,

[c]ourts reviewing preliminary objections may consider not only the facts pleaded in the complaint, but also documents or exhibits attached to the complaint, and based upon the averments and documentary support may address challenges to the legal sufficiency of the complaint.

Diess v. Pa. Dep't of Transp., 935 A.2d 895, 903 (Pa. Cmwlth. 2007).

installed the driveway with a drainpipe. Baloga merely objects that Appellees did not require the Borough Council president and vice-president to complete a standard Ethics Complaint under oath, an action that the Ethics Act does not require when the SEC acts on its own motion, as it did in this case. *See* 65 Pa.C.S. § 1108(c).

Assuming, *arguendo*, that Baloga's allegation is true and Appellees' actions were either grossly negligent or conducted in bad faith, "frauds, deceits, concealments, misrepresentations, torts, negligent acts[,] and other malfeasances" do not necessarily render such conduct outside the scope of Appellees' employment. *McLaughlin*, 298 A.3d at 396 (quoting *Travelers Cas. & Sur. Co. v. Castegnaro*, 772 A.2d 456, 460 (Pa. 2001)); *see also Sutton v. Bickell*, 220 A.3d 1027 (Pa. 2019); *Minor v. Kraynak*, 155 A.3d 114 (Pa. Cmwlth. 2017).

Under the test described in *McGuire*, this Court must consider whether the subject actions "occurred substantially within the authorized time and space limits[.]" *McGuire*, 285 A.3d at 892 (quoting Restatement (Second) of Agency § 228(a)). However, there is no allegation in the Complaint that Appellees' actions occurred beyond the authorized time and space limits. The *McGuire* test also requires this Court to evaluate whether the challenged actions were "actuated, at least in part, by a purpose to serve the master." *McGuire*, 285 A.3d at 892 (quoting Restatement (Second) of Agency § 228(a)). In his Complaint, Baloga does not attribute any motivation for Appellees' actions to anything other than a purpose to serve the SEC. Instead, Baloga alleges gross negligence. Thus, there are no allegations in Baloga's Complaint that, if true, would demonstrate that Appellees were acting other than in the course and scope of their employment with the SEC. Accordingly, it was not error for the trial court to conclude that Baloga did not allege sufficient facts in the Complaint for an exception to statutory immunity to apply and, in the absence of such facts, dismiss Baloga's Complaint.

Baloga next argues that the trial court erred by holding that he failed to plead facts sufficient to state a valid claim for gross negligence under Section 8351 of the Dragonetti Act for wrongful use of civil proceedings.

Section 8351(a) of the Dragonetti Act provides:

Elements of action. — A person who takes part in the procurement, initiation[,] or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings [if]:

- (1) he acts in a **grossly negligent manner or without probable cause** and primarily for a purpose other than that of securing the proper discovery, joinder of parties[,] or adjudication of the claim in which the proceedings are based; and
- (2) the proceedings have terminated in favor of the person against whom they are brought.

42 Pa.C.S. § 8351(a) (text emphasis added). Section 8352 of the Dragonetti Act states:

A person who takes part in the procurement, initiation[,] or continuation of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either:

- (1) reasonably believes that under those facts the claim may be valid under the existing or developing law;
- (2) believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information; or
- (3) believes as an attorney of record, in good faith that his procurement, initiation[,] or continuation of a civil cause is not intended to merely harass or maliciously injure the opposite party.

42 Pa.C.S. § 8352.

The Pennsylvania Supreme Court has stated:

Gross negligence has . . . been consistently recognized as involving something more than ordinary negligence, and is generally described as “want of even scant care” and an “extreme departure” from ordinary care. *Royal Indem. Co. v. Sec. Guards, Inc.*, 255 F.Supp.2d 497, 505 (E.D. Pa. 2003), quoting *Williams v. State Civil Serv. Comm’n*, . . . 306 A.2d 419, 422 ([Pa. Cmwlth.] 1973), *aff’d* . . . 327 A.2d 70 ([Pa.] 1974); see also [*In re*] *Scheidmantel*, 868 A.2d [464,] 485 [(Pa. Super. 2005)] (gross negligence is “a lack of slight diligence or care comprising a conscious, voluntary act or omission in ‘reckless disregard’ of a legal duty and the consequences to another party”). See also Black’s Law Dictionary 1057 (7th ed. 1999) (gross negligence is a “lack of slight diligence or care” and a “conscious, voluntary act or omission in reckless disregard of a legal duty and the consequences to another party”).

....

. . . . [G]ross negligence does not rise to the level of the intentional indifference or “conscious disregard” of risks that defines recklessness, but it is defined as an “extreme departure” from the standard of care, beyond that required to establish ordinary negligence, and is the failure to exercise even “scant care.” *Royal Indem. Co.*, 255 F.Supp.2d at 505. See also 2 Dan B. Dobbs, *The Law of Torts* § 140 (gross negligence is “a high, though unspecified degree of negligence, or as courts sometimes say, the failure to use even slight care[.]”)[.] Thus, gross negligence involves more than a simple breach of the standard of care (which would establish ordinary negligence), and instead describes a “flagrant” or “gross deviation” from that standard. *Bloom [v. Dubois Reg. Med. Ctr.]*, 597 A.2d [671,] 679 [(Pa. Super. 1991)] (gross negligence involves behavior that is “flagrant, grossly deviating from the ordinary standard of care”).

Feleccia v. Lackawanna Coll., 215 A.3d 3, 20-21 (Pa. 2019) (footnote omitted).

Regarding the SEC’s investigation, Section 1108 of the Ethics Act provides in relevant part:

(d) *Termination of investigation.* — If an investigation conducted under this chapter indicates that no violation has been committed, the [SEC] shall immediately terminate the investigation and send written notice of such determination to the complainant and the person who was the subject of the investigation.

(e) *Findings report.* — The [SEC], upon the completion of an investigation, shall issue a findings report to the subject of the investigation setting forth the pertinent findings of fact. **The subject shall have the right to respond to said findings and to request an evidentiary hearing on said matter. The [SEC] shall grant any request for a hearing. . . . Any response to the findings report must either admit or deny by corresponding number and letter the pertinent facts set forth. The subject of the investigation shall have access to any evidence intended to be used by the [SEC] at the hearing and any exculpatory evidence developed by the [SEC] in the course of its investigation. . . .** Hearings conducted upon request shall be instituted within 45 days after the filing of the response.

65 Pa.C.S. § 1108 (text emphasis added).

Baloga argues that he

pled specifically that Appellees consciously, voluntarily, and recklessly disregarded their legal duties and the consequences to Baloga. . . . Appellees began the investigation on mere suspicion instead of following their legal duty to verify the allegations under oath. R.[R. at] 35a [] ¶¶ 11-15; R.[R. at] 46a-47a. Appellees issued the [] Findings Report without identifying an author contrary to Pennsylvania law. R.[R. at] 36a [] ¶¶ 18-19; R.[R. at] 54a-95a. In order to prosecute Baloga, Appellees grossly misrepresented the facts learned in their investigation, in which none of the fifteen (15) witnesses accused Baloga of the alleged unethical conduct. R.[R. at] 38a-40a [] ¶¶ 30-41; R.[R. at] 62a [] ¶¶ 24, 24(a), 24(c); R.[R. at] 63a [] ¶¶ 25, 25(b); R.[R. at] 126a-142a; R.[R. at] 143a-162a; R.[R. at] 163a-200a.

Appellees then required Baloga sign a one-sided [C]onsent [A]greement that contained false information. R.[R. at]

37a [] ¶¶ 21-24. Appellees' insistence on continuing the prosecution in the absence of evidence further caused Baloga to retain counsel, who was finally able to stop Appellees' misconduct in early 2021 by demanding an evidentiary hearing and issuing subpoenas requiring the disclosure of the author of the [C]omplaint. R.[R. at] 37a-[]38a [] ¶¶ 25-29; R.[R. at] 96a-201a; R.[R. at] 202a-211a; R.[R. at] 212a-216a.

Baloga Br. at 21-22.

However, accepting them as true, as this Court must, those alleged facts do not support a conclusion that Appellees' conduct was grossly negligent. Contrary to Baloga's assertion, the Ethics Act does not require that the SEC obtain a sworn complaint to initiate an inquiry. The SEC may proceed on its own motion. *See* 65 Pa.C.S. § 1108(a). Further, there is nothing in the Ethics Act that requires that the author of an Investigative Complaint/Findings Report be identified therein. Even if the Ethics Act required such identification, its omission would not constitute gross negligence.

Relative to Baloga's contention that Appellees "grossly misrepresented the facts learned in their investigation[,]” and that “none of the [15] . . . witnesses accused Baloga of the alleged unethical conduct,” Baloga Br. at 21, Appellees were permitted to consider the sworn witness statements and other evidence gathered in their investigation, weigh the witnesses' credibility, and reach conclusions on the facts. *See* 65 Pa.C.S. § 1108(e). Although the witness statements do not include accusations of unethical conduct, certain facts contained therein corroborate some of the SEC's allegations. The Findings Report is, in effect, a complaint. *See id.* Consistent therewith, “[i]n Pennsylvania, as a fact-pleading state, a complaint must apprise the defendant of the nature and extent of the plaintiff's claim so that the defendant has notice of **what the plaintiff intends to prove at trial** and may prepare to meet such proof with his own evidence.” *Clark v. Se. Pa. Transp. Auth.*, 691 A.2d 988, 991 n.6 (Pa. Cmwlth. 1997) (emphasis added).

Here, the May 10 Letter stated, in pertinent part:

On May 4th around 5:30 P[.]M[.], James O'Hara [(O'Hara)], owner of O'Hara Trucking returned a call from Council Member Michael Flynn [(Flynn)] who inquired about the incident. O'Hara indicated he didn't know anything about the driveway and drain[]pipe access but would check into it. On the afternoon of May 9, 2018, O'Hara Trucking employee Bob Opalka [(Opalka)] . . . called . . . Flynn and confirmed that the O'Hara [Trucking] work crew who was working on the grant-funded project completed the work for . . . Baloga on *his* private property at no charge. The crew installed a large drain[]pipe that provided access to Baloga's driveway from the road. The crew also used materials from the grant-funded project to pave Baloga's driveway. Opalka related to Flynn that Baloga was a "nice guy" and "had been watching our equipment."

R.R. at 45a (emphasis added).

Such allegations involve precisely the type of restricted activities the SEC is charged with investigating. *See* Section 1103 of the Ethics Act, 65 Pa.C.S. § 1103. The Ethics Act permits the SEC to conduct a preliminary inquiry and investigation and issue an investigative complaint and findings report which the subject of the investigation may challenge and request a hearing. *See* 65 Pa.C.S. § 1108. At its essence, Baloga's Complaint challenges the core of the SEC's investigative function. Baloga alleges therein that the Appellees were grossly negligent in their investigation and in reaching their factual findings. Nonetheless, Section 1108(c) of the Ethics Act merely requires "reason to believe that [the Ethics Act] has been violated" to proceed with an investigation. 65 Pa.C.S. 1108(c). The Ethics Act requires the SEC to issue factual findings, but does not require that the factual findings be undisputed. *See id.* That the subject disputes the SEC's factual findings is not alone sufficient to establish gross negligence by the investigators.

Instead, the Ethics Act permits the subject of the investigation to challenge the factual findings and demand supporting evidence in a hearing.

Finally, Baloga did not allege in the Complaint that Appellees “*required* Baloga sign a one-sided [C]onsent [A]greement that contained false information[,]” Baloga Br. at 21 (emphasis added), but, rather, that “[Baloga] signed a “Consent Agreement[,]” the terms of which were dictated exclusively by . . . Frankenburger[.]” R.R. at 37a. None of Baloga’s allegations, if true, reflect “an ‘extreme departure’ from the standard of care, beyond that required to establish ordinary negligence, and is the failure to exercise even ‘scant care.’” *Feleccia*, 215 A.3d at 20 (quoting *Royal Indem. Co.*, 255 F.Supp.2d at 505). Accordingly, the trial court did not err by holding that Baloga failed to plead facts sufficient to state a valid claim for gross negligence under Section 8351 of the Dragonetti Act for wrongful use of civil proceedings.

For all of the above reasons, the trial court’s order is affirmed.¹⁰


ANNE E. COVEY, Judge

¹⁰ Baloga requests that if this Court affirms the trial court’s order, that it permit Baloga to amend his Complaint. This Court declines to grant Baloga’s request. When Baloga chose not to file an amended complaint and appealed from the trial court’s order by filing a praecipe with the prothonotary, he effectively dismissed the original complaint with prejudice, and converted an interlocutory order into a final and appealable order. *See Hionis; see also Horan v. Newingham* (Pa. Cmwlth. No. 2622 C.D. 2015, filed Oct. 24, 2016), slip op. at 6 (emphasis added) (“[A] plaintiff who chooses not to file an amended complaint may appeal by filing a praecipe with the prothonotary that **effectively dismisses the original complaint with prejudice, thereby converting an interlocutory order into a final and appealable order.**”) After utilizing this method to obtain appellate review of what had been an interlocutory order, Baloga may not, upon pursuing an unsuccessful appeal, attempt to amend his Complaint.

This Court’s unreported memorandum opinions issued after January 15, 2008, may be cited “for [their] persuasive value, but not as binding precedent.” Section 414(a) of the Commonwealth Court’s Internal Operating Procedures, 210 Pa. Code § 69.414(a). This Court cites to *Horan* for its persuasive value.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MICHAEL BALOGA,

Petitioner

v.

BRIAN D. JACISIN, ROBERT CARUSO,
JONATHAN FRY, AND JEFFREY
FRANKENBURGER,

Respondents

: No. 301 MAL 2025

:
:
: Petition for Allowance of Appeal
: from the Order of the
: Commonwealth Court

ORDER

PER CURIAM

AND NOW, this 2nd day of December, 2025, the Petition for Allowance of Appeal
is DENIED.

APPENDIX
C.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MICHAEL BALOGA,

Petitioner

v.

BRIAN D. JACISIN, ROBERT CARUSO,
JONATHAN FRY, AND JEFFREY
FRANKENBURGER,

Respondents

: No. 301 MAL 2025

:
: Motion for Reconsideration

ORDER

PER CURIAM

AND NOW, this 20th day of January, 2026, the Motion for Reconsideration is
DENIED.

A True Copy Elizabeth E. Zisk
As Of 01/20/2026

Attest: 
Chief Clerk
Supreme Court of Pennsylvania

APPENDIX
D,

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice of the claims or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT nyang geupeunan OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas ex-puestas en las paginas siguientes, usted tiene veinte (20) dias de plazo al partir de la fecha de la demanda y la notificacion. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o notificacion. Ademias, la corte puede decidir a favor del demandante y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede perder dinero o sus propiedades u otros derechos importantes para usted.

USTED LE DEBE TOMAR ESTE PAPEL A SU ABOGADO INMEDIATAMENTE. SI USTED NO TIENE A UN ABOGADO, VA A O TELEFONEA LA OFICINA EXPUSO ABAJO. ESTA OFICINA LO PUEDE PROPORCIONAR CON INFORMACION ACERCA DE EMPLEAR A UN ABOGADO.

SI USTED NO PUEDE PROPORCIONAR PARA EMPLEAR UN ABOGADO, ESTA OFICINA PUEDE SER CAPAZ DE PROPORCIONARLO CON INFORMACION ACERCA DE LAS AGENCIAS QUE PUEDEN OFRECER LOS SERVICIOS LEGALES A PERSONAS ELEGIBLES EN UN HONORARIO REDUCIDO NI NINGUN HONORARIO.

Philadelphia Bar Association
Lawyer Reference and Information Service
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Attorneys for Plaintiff

MICHAEL BALOGA
65 Shulde Lane
Wyoming, PA 18644

Plaintiff,

v.

BRIAN D. JACISIN, ESQ.
613 North Street, Rm 309
Wyoming, PA 18644

And

ROBERT P. CARUSSO
613 North Street, Rm 309
Wyoming, PA 18644

And

JEFFREY FRANKENBURGER, ESQ.
613 North Street, Rm 309
Wyoming, PA 18644

And

JONATHAN FRY
613 North Street, Rm 309
Wyoming, PA 18644

Defendants.

PHILADELPHIA COUNTY, PA
COURT OF COMMON PLEAS

CIVIL ACTION

NO.: 220300609

**JURY OF TWELVE (12) JURORS
DEMANDED.**

CIVIL ACTION COMPLAINT

I. PARTIES, JURISDICTION, AND VENUE

1. _____ Plaintiff, Michael Baloga, is an adult individual who resides at the above-captioned address.

2. _____ Defendant, Brian D. Jacisin, Esquire, is an adult individual with a primary place of employment at the above-captioned address. The claims asserted against Defendant, Brian D. Jacisin, Esquire are asserted against Defendant, Brian D. Jacisin, Esquire in his individual capacity.

3. _____ Defendant, Robert P. Carusso, is an adult individual with a primary place of employment at the above-captioned address. The claims asserted against Defendant, Robert P. Carusso are asserted against Defendant, Robert P. Carusso in his individual capacity.

4. _____ Defendant, Jeffrey Frankenburger, Esquire, is an adult individual with a primary place of employment at the above-captioned address. The claims asserted against Defendant, Jeffrey Frankenburger, Esquire are asserted against Defendant, Jeffrey Frankenburger, Esquire in his individual capacity.

5. _____ Defendant, Jeffrey Frankenburger, Esquire, is an adult individual with a primary place of employment at the above-captioned address. The claims asserted against Defendant, Jeffrey Frankenburger, Esquire are asserted against Defendant, Jeffrey Frankenburger, Esquire in his individual capacity.

6. _____ Defendant, Jonathan Fry, is an adult individual with a primary place of employment at the above-captioned address. The claims asserted against Defendant, Jonathan Fry are asserted against Defendant, Jonathan Fry in his individual capacity.

II. OPERATIVE FACTS

7. Plaintiff incorporates all prior paragraphs as if fully set forth at length herein.

INITIATION OF THE STATE ETHICS COMMISSION INVESTIGATION

8. On or about May 15, 2018, the Pennsylvania Investigative Division of the State Ethics Commission (“SEC”) received correspondence from Non-Parties, Steve Nalewajko and Frank Yurek, who were the Borough of Wyoming Council President and Vice President, respectively. *See Exhibit A.*

9. Mr. Nalewajko and Mr. Yurek stated that they had “received information that appears to suggest that a member of counsel [Plaintiff, Michael Baloga] has received free installation of a driveway on his private property, labor, and other materials that were funded by a State grant.” *See Exhibit A.*

10. Mr. Nalewajko and Mr. Yurek requested that “this matter be investigated, [sic] and appropriate charges be filed against Counsel Member Baloga.” *See Exhibit A.*

11. Upon information and belief, Defendant, Brian D. Jacisin, Esquire received and reviewed the aforementioned letter from Mr. Nalewajko and Mr. Yurek.

12. Following receipt of the aforementioned letter, Defendant, Brian D. Jacisin, Esquire did not require Mr. Nalewajko and Mr. Yurek to complete the standard Ethics Complaint, which would have required Mr. Nalewajko and Mr. Yurek to provide the basis of their complaint under oath.

13. Instead, Defendant, Brian D. Jacisin, Esquire drafted a memo on or about May 24, 2018 to Defendant, Robert P. Caruso recommending that an “inquiry” into the allegations be initiated on an “Own Motion” basis. *See Exhibit B.*

14. Defendant, Brian D. Jacisin, Esquire explained that “there is sufficient evidence **such as suspicion of a violation** of the Ethics Act has transpired.” *See Exhibit B.* In the memo, Defendant, Brian D. Jacisin, Esquire did not cite any reason or explanation as to why the SEC

did not require Mr. Nalewajko and Mr. Yurek to complete a standard Ethics Complaint under oath. *See Id.*

15. On or about April 8, 2018, relying on the unsworn letter from Mr. Nalewajko and Mr. Yurek, Defendant, Brian D. Jacisin, Esquire, in conjunction with Defendant, Robert P. Caruso caused an “preliminary investigation” to ensue.

16. On or about October 5, 2018, Defendant, Robert P. Caruso sent Plaintiff a letter informing Plaintiff that SEC had “conducted a preliminary inquiry” and would be beginning an “investigation”. *See Exhibit C.*

17. The gist of the allegations was that Plaintiff in his capacity as a member of the Wyoming Borough Council violated various provisions of the State Ethics Act and engaged in a conflict of interest “by utilizing the authority of his public office for the purpose of obtaining a pecuniary benefit when he directed and/or authorized Borough personnel/employees and/or a vendor of the Borough to install a driveway/access way to his Property, at Borough expense and/or as part of an on [sic] unrelated Borough Public Works Project” and failed to report same. *See Exhibit C.*

18. At the time that the October 5, 2018 letter was sent, Defendant, Robert P. Caruso knew or should have known that there was no basis to allege that Plaintiff had directed or authorized the installation of a driveway/access way on his Property; i.e. that the core allegation was without merit.

THE STATE ETHICS COMMISSION INVESTIGATION

19. On or about February 5, 2019, the SEC issued an “Investigative Complaint / Findings Report” against Plaintiff, which is unsigned and fails to identify the author. *See Exhibit D.*

20. The failure to sign and identify the author of the “Investigative Complaint / Findings Report” violates Pennsylvania law. *See 1 Pa. Code §33.11(a)* (requires every pleading filed by an

agency, such as the SEC, to be signed in ink by the party in interest); *see also* 1 Pa. Code §33.11(b)(1)(4) (requires every pleading to be signed by the attorney having authority with respect thereto).

21. Acting *pro se* as he could not financially afford to retain counsel, Plaintiff filed an “Answer to the Findings of State Ethics Investigation” on or about September 12, 2019.

22. Following a series of email communications between Plaintiff and Defendant, Jeffrey Frankenburger, Esquire, Plaintiff signed a “Consent Agreement”, the terms of which were dictated exclusively by Defendant, Jeffrey Frankenburger, Esquire.

23. Thereafter, Plaintiff repeatedly advised Defendant, Jeffrey Frankenburger, Esquire that he never directed anyone to provide him with a free driveway and that he wanted the Consent Agreement amended to reflect the truth or he would withdraw from the same.

24. Finally, on or about May 22, 2019, Defendant, Jeffrey Frankenburger, Esquire withdrew the Consent Agreement.

25. On or about September 22, 2020, Non-Party, Attorney Peter Paul Olszewski, Jr. entered his appearance on behalf of Plaintiff and demanded a full evidentiary hearing on the allegations.

26. On or about November 12, 2020, Plaintiff filed an Amended Answer to the Investigative Complaint / Findings Report. *See* Exhibit E.

REQUESTS FOR ISSUANCE OF SUBPOENAS

27. In preparation for the full evidentiary hearing, on or about December 23, 2020, Plaintiff, through Attorney Olszewski, filed a Request For Issuance Subpoenas. Following a status conference on January 4, 2021, the hearing examiner agreed to issue each of Plaintiff’s requested subpoenas except for a subpoena directed to Attorney Frankenburger, which was taken under advisement and eventually briefed.

28. As a result of the “Investigative Complaint / Findings Report” being unsigned and the SEC’s refusal to identify the author, the initial purpose in calling Attorney Frankenburger as a witness was to determine the author of the “Investigative Complaint / Findings Report” due to the numerous willful, deliberate, and intentional misrepresentations set forth in the “Investigative Complaint / Findings Report”. *See* Exhibit F, Pages 7-9.

29. Although the SEC initially opposed the subpoena to Attorney Frankenburger, the SEC, through Attorney Frankenburger, withdrew and discontinued all charges against Plaintiff on or about March 5, 2021 rather than reveal the author of the “Investigative Complaint / Findings Report” or allow the malicious prosecution to be shown for what it was before the hearing examiner. *See* Exhibit G.

THE WILLFUL, DELIBERATE, & INTENTIONAL MISREPRESENTATIONS

30. Paragraph 25 of the “Investigative Complaint / Findings Report” states:

James O’Hara, during a December 13, 2018 interview with the Commission Investigator, confirmed that he authorized the construction of the driveway and the installation of the drainage pipe for Baloga’s benefit following discussions with Baloga.

See Exhibit E, ¶ 25.

31. Paragraph 25 of the “Investigative Complaint / Findings Report” states:

O’Hara would not have directed the work without the request being made by Baloga.

See Exhibit E, ¶ 25(b).

32. However, any reading of Non-Party, James O’Hara’s December 13, 2018 Sworn Statement clearly confirms that Mr. O’Hara made no such representations. Under no circumstances can anyone engaged in a search for the truth interpret the transcript of Non-Party, James O’Hara’s December 13, 2018 Sworn Statement to confirm what Paragraphs 25 and 25(b) allege.

33. Indeed, the relevant portions of Mr. O'Hara's Sworn Statement read as follows:

Fry: Did you ever have any conversations with Mr. Michael Baloga, Wyoming Borough Council Member, prior to construction?

O'Hara: I met him, not prior to it, but uh, I met him in his, not prior to it, but uh, I met him in his yard. Project was almost completed summer of 2016.

Fry: Okay. So you never had any discussions with him at all?

O'Hara: No. (emphasis added)

34. Further, at no time during Mr. O'Hara's Sworn Statement did he state that he would not have directed the work without the request being made by Mr. Baloga.

35. Paragraph 24 of the "Investigative Complaint / Findings Report" states:

Prior to the start of construction on Shulde Lane in October 2015, Baloga approached Borough Engineer, Daryl Pawlush (following a council meeting), and requested construction of a driveway to connect the lower (southwest) end of his (Baloga's) property to Shulde Lane.

See Exhibit E, ¶ 24.

36. Paragraph 24(a) of the "Investigative Complaint / Findings Report" states:

Baloga requested the contractor (O'Hara) complete the driveway during construction of the Shulde Lane Sewer project.

See Exhibit E, ¶ 24(a).

37. Paragraph 24(c) of the "Investigative Complaint / Findings Report" states:

Pawlush did not deny speaking to O'Hara to facilitate Baloga's request for construction of the driveway.

See Exhibit E, ¶ 24(c).

38. However, any plain reading of Mr. Pawlush's Sworn Statement confirms the author of the "Investigative Complaint / Findings Report" mischaracterized Mr. Pawlush's Sworn Statement. Neither Mr. Baloga, Mr. O'Hara, or Mr. Pawlush, nor any of the other twelve (12) witnesses interviewed during the SEC's "investigation" ever said or accused Plaintiff of requesting Mr. O'Hara to construct or complete a driveway during the Sewer Project. Telling, the secret author of the

“Investigative Complaint / Findings Report” failed to attribute that allegation to anyone. See Exhibit E, ¶ 24(a).

39. Further, the transcript of Mr. Pawlush’s Sworn Statement reflects the unadulterated truth. When asked, “Did you facilitate any information to the contractor at all?”, Mr. Pawlush replied, “I can’t recall. I can’t recall if I talked to the contractor or anyone in that regard.”

40. In fact, when Mr. Pawlush was asked specifically whether Mr. O’Hara ever spoke to him about constructing a driveway on Mr. Baloga’s property, on two separate occasions, Mr. Pawlush responded with a definitive answer: “No.”. The Pawlush Transcript reads as follows:

JF: Did O’Hara ever talk to you about maybe completing the work on his property?

DP: No. (Emphasis added)

41. Moreover, when Mr. O’Hara was asked whether Mr. Pawlush ever spoke to him about constructing a driveway on Mr. Baloga’s property, Mr. O’Hara had no problem with his recollection. The answer was a definitive “No.”(Emphasis added).

III. CAUSES OF ACTION

COUNT I

WRONGFUL USE OF CIVIL PROCEEDINGS Pursuant to 42 Pa.C.S.A. § 8351 & Common Law *Plaintiff v. All Defendants*

42. Plaintiff incorporates all prior paragraphs as if fully set forth at length herein.

43. Defendants materially participated in the procurement, initiation, and/or continuance of the aforementioned civil proceeding against Plaintiff in a grossly negligent manner. In fact, Defendants initiated and continued the matter with knowledge that it lacked probable cause and misrepresented testimony in order to manufacture probable cause for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the civil proceeding was based.

44. At no time did Defendants reasonably believe in the existence of facts to support their claims at the time of the initiation of the civil proceeding.
45. The aforementioned civil proceeding terminated in favor of Plaintiff.
46. As a result of Defendants' actions, Plaintiff has suffered harm to his reputation, attorney fees, emotional distress, and other loss; all of which Plaintiff is entitled to recover from Defendants in this matter.
47. Pursuant to Section 8353, Plaintiff is also entitled to punitive damages, which are warranted here.

WHEREFORE, Plaintiff, Michael Baloga, by and through his undersigned counsel, respectfully demands judgment in his favor and against Defendants, individually and/or jointly and severally, for an amount well in excess of fifty thousand dollars (\$50,000), including all compensatory and consequential damages, plus punitive damages, all applicable interest, and any further relief that this Honorable Court deems necessary and just.

Respectfully Submitted,

WEISBERG LAW

SCHAFKOPF LAW, LLC

/s/ Matthew B. Weisberg
Matthew B. Weisberg, Esquire
L. Anthony DiJiacomo, III, Esquire

/s/ Gary Schafkopf
Gary Schafkopf, Esquire
Attorneys for Plaintiff

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Fax: 888-283-1334

Attorneys for Plaintiff

MICHAEL BALOGA

v.

BRIAN D. JACISIN, ESQ.

PHILADELPHIA COUNTY, PA
COURT OF COMMON PLEAS

NO.: 220300609

CERTIFICATE OF SERVICE

I, Matthew B. Weisberg, Esquire, hereby certify that on this ____ day of June 2022, a true and correct copy of the foregoing Complaint was served via ECF and US Mail upon the following defendants:

BRIAN D. JACISIN, ESQ.
613 North Street, Rm 309
Wyoming, PA 18644

ROBERT P. CARUSSO
613 North Street, Rm 309
Wyoming, PA 18644

JEFFREY FRANKENBURGER, ESQ.
613 North Street, Rm 309
Wyoming, PA 18644

JONATHAN FRY
613 North Street, Rm 309
Wyoming, PA 18644

WEISBERG LAW

/s/ Matthew B. Weisberg
Matthew B. Weisberg, Esquire
L. Anthony DiJiacomo, III, Esquire
Attorneys for Plaintiff

SCARTELLI  OLSZEWSKI, P.C.

ATTORNEYS AT LAW

Scranton
411 Jefferson Avenue
Scranton, PA 18510
p: 570.346.2600
f: 570.346.9077

PLEASE REPLY TO OUR SCRANTON OFFICE

peter@scartelli.com

Wilkes-Barre
7 Public Square
Wilkes-Barre, PA 18701
p: 570.822.1400
f: 570.704.4220

November 12, 2020

Jeffery S. Frakenburger, Esquire
Assistant Council, Investigations
State Ethics Commission
Finance Building
613 North Street, Room 309
Harrisburg, PA 17120-0400

**RE: Michael Baloga
Docket No. 18-038**

Dear Mr. Frakenburger:

Attached please find Mr. Baloga's Amended Answer to the Commission's Investigative Complaint / Findings Report.

As previously discussed, while it had been my hope to now be in a position to negotiate an amicable resolution of this matter, multiple findings in the report are so intentionally contrary to the evidence, that any resolution short of the Commission's total withdrawal of the alleged violations, is all but impossible.

These discrepancies are not inadvertent errors or matters of discretionary interpretation. Findings 25 and 24 in particular set forth knowing and intentional falsehoods, and in my judgement, are authored with corrupt and evil motive.

*Appendix
F.*

SCARTELLI OLSZEWSKI, P.C.

ATTORNEYS AT LAW

The Report fails to acknowledge the fundamental fact that Wyoming Borough offered surplus fill material generated from the project to anyone who wanted it free of charge, as is common practice by municipalities throughout Pennsylvania. It was a financial benefit to both the Borough as well as to O'Hara Construction to make this offering.

The Findings inaccurately describe the location, boundaries, and ownership of the driveway in question. The maps referenced in the Report contain specific warnings that they are not meant to provide engineering data or to be used to determine boundaries. Not only do the maps themselves contain these specific warnings, an interview of Luzerne County Mapping personnel confirmed those circumstances. The maps cited by the findings are inherently unreliable and are totally inadmissible in any hearing.

The motivation for initiating this investigation is unquestionably grounded in retaliation toward Mr. Baloga for his cooperation with the Pennsylvania State Police criminal investigation in the Borough's former mayor. You scoff at this issue, but you are wrong, and I predict these could well be unfortunate consequences for all involved.

Collateral to the Baloga investigation, the Commission also reviewed the Statements of Financial Interests of all Wyoming Borough Council members and determined that multiple Council members in fact filed deficient statements. The Commission thereafter exercised its discretion and allowed these council members to amend their statements without finding violations of the Ethics Act. In exchange for this

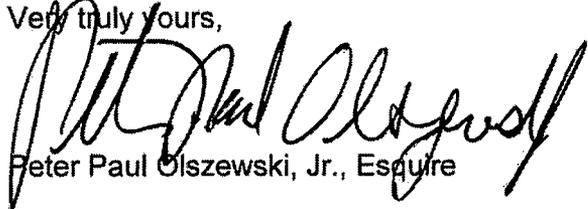
SCARTELLI  OLSZEWSKI, P.C.

ATTORNEYS AT LAW

favorable treatment, the Commission then sought incriminating evidence against Mr. Baloga, from those same counsel members.

Under all of these circumstances and for additional reasons that will come to light in the future, I urge the Commission to immediately withdraw all allegations against Mr. Baloga.

Very truly yours,



Peter Paul Olszewski, Jr., Esquire

Cc: Michael Baloga
Robin M. Hittie, Esquire
Robert P. Caruso

IV. CONCLUSION

The investigation of **Mr. Baloga** by the Investigative Division was elicited and corrupt beginning with the initial decision of Mr. Jacisin to forgo requiring the Complainant to complete, sign, and have notarized the standard SEC Ethics Complaint Form. Thereafter, during multiple interviews, SEC "Investigator" Jonathan Fry knowingly and intentionally lied to those he interviewed simply in the hope of eliciting a damning response against **Mr. Baloga**. The author of the Complaint/ Findings Report knowingly, intentionally, and with corrupt and evil motive ignored transcribed Sworn Statements and fabricated allegations in the Complaint for the exclusive purpose of generating a Complaint against **Mr. Baloga**.

Given the totality and context of the aforementioned corruption, it is relevant, material, and imperative to allow **Mr. Baloga** to call and examine Attorney Frankenburger as a defense witness.

Respectfully submitted,
Scartelli Olszewski, P.C.

Date: February 16, 2021

BY: /s/ Peter Paul Olszewski, Jr.
Peter Paul Olszewski, Jr., Esquire
Attorney for Respondent Michael Baloga
411 Jefferson Avenue
Scranton, PA 18510
(570) 346-2600
ID No. 41286

SCARTELLI OLSZEWSKI, P.C.
A Professional Corporation
By: **Peter Paul Olszewski, Jr., Esquire**
ATTORNEYS FOR RESPONDENT
411 Jefferson Avenue
Scranton, PA 18510
(570) 346-2600
IDENTIFICATION #41286

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania*: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

BY: /s/ Peter Paul Olszewski, Jr.
Peter Paul Olszewski, Jr., Esquire

STATE ETHICS COMMISSION

Finance Building
613 North Street, Room 309
Harrisburg, PA 17120-0400

In Re: Michael Baloga
65 Shulde Lane
Wyoming, PA 18644

Case No. 18-038

Issued: February 5, 2019

BRIEF OF RESPONDENT, MICHAEL BALOGA, IN SUPPORT OF RESPONDENT'S

REQUEST FOR ISSUANCE OF HEARING SUBPOENA TO JEFFREY

FRANKENBURGER, ESQUIRE

I. RELEVANT PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Based upon Discovery received from the Investigative Division of the State Ethics Commission, it appears that on or about May 15, 2018, the SEC received correspondence alleging that Respondent, Michael Baloga (hereinafter referred to as "**Mr. Baloga**") committed a "transgression of the State Ethics Act" in his capacity as a Wyoming Borough Council Member. A copy of that correspondence which has been redacted by the Investigative Division is attached hereto, made apart hereof, incorporated by reference and marked as Exhibit "**A**". That correspondence was reviewed by Brian D. Jacisin,

Esquire, Deputy Executive Director/ Director of Investigations. In response to said correspondence, instead of providing its author with a formal SEC Ethics Complaint Form which requires the complainant to swear or affirm the allegations under penalty of perjury, Mr. Jacisin elected to forego that standard procedure and instead recommended proceeding pursuant to the "Own Motion" procedure set forth in **65 Pa.C.S.A. §1108(a)**. More specifically, by Memorandum dated May 24, 2018 to SEC Executive Director, Robert P. Caruso, Mr. Jacisin concluded that "there is sufficient evidence such as suspicion of a violation of the Ethics Act has transpired", and specifically recommended to Director Caruso that the SEC proceed for "Own Motion Inquiry". An SEC redacted copy of said Memorandum is attached hereto made apart hereof, incorporated by reference, and marked Exhibit "B".

It appears that Director Caruso blindly agreed with Mr. Jacisin's recommendation, and on or about April 8, 2018, in fact initiated a preliminary investigation pursuant to the "Own Motion" provisions of **61 Pa.C.S.A. §1108(a)**.¹

Thereafter, by letter dated October 5, 2018, **Mr. Baloga** was advised that the Investigative Division had completed a preliminary inquiry into allegations that **Mr. Baloga** may have violated provisions of the State Ethics Act, **65 Pa.C.S.A. §1101 et seq.**, and

¹ By declining to have the Complainant complete a formal Ethics Complaint Form, both Mr. Jacisin and Director Caruso effectively protected the Complainant from potential criminal penalties associated with false statements and perjury associated with dishonest allegations. The record is void of any rational, reasonable basis not to require the complainant to complete the standard SEC Ethics Complaint Form.

that based thereon, the Investigative Division would be undertaking a formal investigation into the allegations. A copy of that letter is attached hereto as Exhibit "C".

On or about February 5, 2019, the Investigative Division issued an "Investigative Complaint/ Findings Report" against **Mr. Baloga**. The Complaint is unsigned and completely fails to identify its author.² A copy of said Complaint is attached hereto, made a part hereof, incorporated by reference, and marked Exhibit "D".

The Complaint alleges that **Mr. Baloga** violated Section 1103(a) of the Public Official and Employee Ethics Act, **65 Pa.C.S.A. §1103(a)**, by allegedly directing/ authorizing Wyoming Borough Personnel/ Employees and/or a Borough Vendor to install a driveway/accessway to his property at the expense of the Borough as a part of an unrelated Borough Public Works Project. The Complaint also alleges that **Mr. Baloga** violated **65 Pa.C.S. A. §1104(d) and §1105(b)(1), (5), (6), (7), (8), (9), and (10)** when **Mr. Baloga** failed to report the receipt of materials/labor in the form of the driveway/accessway as a gift upon statements of financial interests filed for the 2016 calendar year, and further failed to correctly complete statements of financial interest for years 2013-2017.³

² **Mr. Baloga** avers this is directly contrary to the provisions of **1 Pa. Code . §33.11(a)** which requires each Pleading filed by an agency to be signed in ink by the party in interest. **1 Pa. Code §33.11(b)(1)(4)** requires the pleading to be signed by the attorney having authority with respect thereto. Clearly, the Complaint is a Pleading as defined in **1 Pa. Code §31.3**. Moreover, despite multiple requests to identify the author of the Complaint, Attorney Frankenburger refuses to do so.

³ At the specific direction of Brian D. Jacisin, Esquire, Deputy Executive Director/ Director of Investigations, when the Commission initiated its investigation of **Mr. Baloga** it also reviewed the Statements of Financial Interest filed

On or about September 12, 2019, **Mr. Baloga** filed a pro se "Answer to the Findings of State Ethics Investigation".

On or about April 8, 2019, again acting pro se because he could not financially afford to retain counsel, following a series of email communications between **Mr. Baloga** and Investigative Division Counsel, Jeffrey Frankenburger, Esquire, **Mr. Baloga** signed a "Consent Agreement". Said Consent Agreement was drafted exclusively by Attorney Frankenburger, the terms of which were unilaterally dictated by Attorney Frankenburger. It was a "take it or leave it" offer. Said Consent Agreement is attached hereto, made a part hereof, incorporated by reference, and marked Exhibit "E".⁴

Thereafter, **Mr. Baloga** repeatedly advised Attorney Frankenburger that he never directed anyone to provide him with a free driveway, and that he wanted the Consent Agreement amended or he would withdraw from the same. By email dated April 16, 2019, Attorney Frankenburger advised **Mr. Baloga** as follows: if he refuses to go forward and take responsibility for his actions or "argues in opposite of the stipulations" the Commission may well reject the Consent Agreement." Under those circumstances Frankenburger threatened that the Investigative Division will pursue this matter to the

by other Wyoming Borough elected officials for filing "erroneous" statements. The Investigative Division ultimately allowed Borough Tax Collector Paula Konopka and council members Diane Smiles, Michael Flynn, and Stephen Nalewajko to simply file amended Statements without penalty. Interestingly, thereafter these council members all cooperated with the Commission's investigation against **Mr. Baloga**.

⁴ This "Consent Agreement" essentially amounted to a full admission of guilt and mandated exorbitant restitution which the Investigative Division cannot justify.

fullest extent of the law, would seek treble damages, would seek criminal prosecution, and would assist in his criminal prosecution for the felony conflict of interest charge which carries a maximum five years in a State Correctional Institution and \$10,000 fine. See **65 Pa.C.S.A. §1109(a)**.” A true and correct copy of said email is attached hereto, made a part hereof, incorporated by reference and marked Exhibit “F”.

Thereafter, by correspondence dated May 22, 2019, Attorney Frankenburger advised the Commissioners of the State Ethics Commission and others that, “events have transpired which necessitates the Commission’s revocation of the Consent Agreement and Stipulation filed on April 8, 2019.” This correspondence specifically provides, “Emails between the respondent and the Investigative Division are attached to this correspondence highlighting respondent’s **recalcitrance**.”(Emphasis added) While it is unknown which emails Attorney Frankenburger provided to the Commissioners and to this Honorable Hearing Examiner, it is clear that Attorney Frankenburger made a deliberate effort to smear **Mr. Baloga’s** credibility and character by characterizing his conduct as “recalcitrant”. Said correspondence is attached hereto, made a part hereof, incorporated by reference, and marked Exhibit “G”.

It was not until on or about September 22, 2020 that the Undersigned filed his Entry of Appearance on behalf of **Mr. Baloga**. Additionally, by correspondence also dated September 22, 2020 to Attorney Frankenburger, the undersigned requested a “Full Evidentiary Hearing” pursuant to **51 Pa. Code §21.23(a)(1)**, and at said Hearing be fully open to all members of the public pursuant to **51 Pa. Code §21.25(f)**.

On or about November 12, 2020, the undersigned filed **Mr. Baloga's** Amended Answer to an Investigative Complaint/Findings Report. A true and correct copy of said Amended Answer is attached here, made a part hereof, incorporated by reference, and marked Exhibit "**H**".

In preparation for the upcoming Hearing, on or about December 23, 2020, **Mr. Baloga** filed a Request For Issuance Subpoenas. In response thereto, the Honorable Hearing Examiner conducted a Status Conference on January 4, 2021. During said conference it was agreed that due to Covid-19 related restrictions, the public hearing in the within matter be continued from January 25, 26, 27 to March 22, 23, 24 and 25, 2021. Additionally, during said Conference, the Hearing Examiner agreed to issue each of **Mr. Baloga's** subpoenas with the exception of the Subpoena Request Directed to Attorney Frankenburger, which Request was taken under advisement. A Briefing Schedule was issued with regard to the relevance of Attorney Frankenburger's testimony at said Hearing. The within Brief is submitted on behalf of **Mr. Baloga**.

II. **THE PURPOSE OF CALLING ATTORNEY FRANKENBURGER AS A WITNESS**

As previously stated, the Investigative Complaint/ Findings Report is not signed by its author. Nor does the Pleading in any way identify its author. Despite a Discovery Request to identify the author, Attorney Frankenburger continues to refuse to do so.(The identity of the author remains secret.) Under these circumstances, the initial purpose in

calling Attorney Frankenburger as a witness is to confirm whether he in fact is the author of the Complaint. Should Attorney Frankenburger deny that he is the author, the undersigned will inquire as to the identity of the author, and may well then terminate any further questioning of Attorney Frankenburger. The undersigned would then request the Hearing Examiner to issue a subpoena to the identified author. The author will then be subject to considerable cross-examination, about the allegations in the Complaint.

In the event that Attorney Frankenburger is in fact the author of the aforesaid Pleading, the undersigned would proceed to question him about numerous **willful, deliberate, and intentional misrepresentations** set forth in the Complaint. While not a fully comprehensive list, the areas of inquiry, and the basis for the inquiries would include, but not be limited to the following allegations in the Complaint/ Findings Report:

- Paragraph 25 reads: "James O'Hara, during a December 13, 2018 interview with the Commission Investigator, confirmed that he authorized the construction of the driveway and the installation of the drainage pipe for Baloga's benefit following discussions with Baloga." Any reading of James O'Hara's December 13, 2018 Sworn Statement clearly confirms that Mr. O'Hara **made no such representations**. Under no circumstances can anyone engaged in a search for the truth interpret the transcript of the Sworn Statement to confirm what this paragraph alleges.

Indeed, the relevant portions of Mr. O'Hara's Sworn Statement read as follows:

Fry: Did you ever have any conversations with Mr. Michael Baloga, Wyoming Borough Council Member, prior to construction?

O'Hara: I met him, not prior to it, but uh, I met him in his, not prior to it, but uh, I met him in his yard. Project was almost completed summer of 2016.

Fry: Okay. So you never had any discussions with him at all?

O'Hara: No. (emphasis added)

See Transcript of O'Hara Sworn Statement, said transcript attached hereto as Exhibit "I", Page 3, Line 21 to Page 4, Line 4.

- Paragraph 25(b) reads: "O'Hara would not have directed the work without the request being made by Baloga." **At no time during his Sworn Statement** did Mr. O'Hara ever say that he would not have directed the work without the request being made by Mr. Baloga. (The allegation in Paragraph 25(b) is a deliberate, dishonest misrepresentation intentionally made to mislead the Hearing Examiner and Commissioners.)
- Paragraph 24 reads: "Prior to the start of construction on Shulde Lane in October 2015, Baloga approached Borough Engineer, Daryl Pawlush (following a council meeting), and requested construction of a driveway to connect the lower (southwest) end of his (Baloga's) property to Shulde Lane. **Once again, any plain reading of Mr. Pawlush's Sworn Statement confirms that he never uttered those words.** See Transcript of Daryl Pawlush's Sworn Statement dated November 7, 2018, attached hereto as Exhibit "J".
- Paragraph 24(a) reads: "Baloga requested the contract or (O'Hara) complete the **driveway during construction of the Shulde Lane Sewer project.**" **Neither Mr. Baloga, Mr. O'Hara, Mr. Pawlush, nor any of the other 12 witnesses interviewed during the within investigation ever said or accused Mr. Baloga of requesting Mr. O'Hara to construct or complete a driveway during the Sewer Project.** Notably, the secret author of the Complaint fails to attribute that allegation to anyone. This is yet another deliberate, dishonest misrepresentation made to mislead the Hearing Examiner and Commissioners.
- Paragraph 24(c) reads: "Pawlush did not deny speaking to O'Hara to facilitate Baloga's request for construction of the driveway." This allegation is a blatant and intentional attempt to dishonestly deceive the Hearing Examiner and Commissions into believing that Mr. Pawlush must have spoken to Mr. O'Hara. The unadulterated truth, as reflected in the transcript of Mr. Pawlush's Sworn Statement, is that when asked, "Did you facilitate any information to the contractor at all?", Mr. Pawlush replied, "I can't recall. I can't recall if I talked to the contractor or anyone in that regard." See Exhibit "J", Page 5, Line 16 thru Page 6, Line 1.

When Mr. Pawlush was asked, whether Mr. O'Hara ever spoke to him about constructing a driveway on Mr. Baloga's property, on two separate occasions, Mr. Pawlush responded with a definitive answer: "**No.**". The Pawlush Transcript reads as follows:

JF: Did O'Hara ever talk to you about maybe completing the work on his property?

DP: No. (Emphasis added)

See Exhibit "J", Page 7, Lines 3-4

Moreover, when Mr. O'Hara was asked whether Mr. Pawlush ever spoke to him about constructing a driveway on Mr. Baloga's property, Mr. O'Hara had no problem with his recollection. The answer was a definitive "**No.**"(Emphasis added) See Exhibit "I", Page 5, Line 13-14.⁵

- While Interviewing multiple witnesses, Investigative Division "Investigator" Jonathan Fry intentionally and unequivocally lied to multiple witnesses in an effort to intimidate the witness into providing a desired response.⁶

III. ISSUE PRESENTED:

Whether the Honorable Hearing Examiner should issue a subpoena to Jeffrey Frankenburger, Esquire thereby allowing Respondent to call Attorney

⁵ In no uncertain terms, given the obvious, blatant, willful, deliberate, and intentional misrepresentations set forth in paragraphs 24 and 25 of the Investigative Complaint/Findings Report, the unidentified author, and all accomplices, should clearly be subjected to an internal disciplinary investigation conducted by the State Ethics Commission, and if in fact the author or any accomplices is a licensed attorney in the Commonwealth of Pennsylvania, the Commission should immediately refer him or them to the Disciplinary Board of the Supreme Court of Pennsylvania. Consideration should also be given to referring the circumstances surrounding this entire investigation to the Pennsylvania State Police and/or to the Office of the Pennsylvania Attorney General for full and complete criminal investigation.

⁶ While under certain extremely limited circumstances the use of artifice or deception by a criminal investigator to obtain a confession does not amount constitutional infirmity, those circumstances are few and far between, and those circumstances are totally inapplicable to Investigator Fry. Fry is no criminal investigator. He is not a "municipal police officer" as that term is defined by the Uniform Police Jurisdiction Act 42 Pa.C.S.A. § 8951, et. seq., and as such is not authorized to investigate or to enforce the criminal laws of the Commonwealth of Pennsylvania. See also, Commonwealth v. Kitchen, 730 A.2d 513 (Pa. Super 1999). Instead, Fry's Conduct violates the most basic notions of fundamental fairness, and is the antithesis of conduct expected from any employee of the State Ethics Commission.

Frankenburger as a Defense Witness for the purpose of eliciting: 1) Relevant and material evidence of bias by the Investigative Division against Mr. Baloga; and 2) multiple acts of intentional misconduct made by multiple members of the Investigative Division of this State Ethics Commission, for the exclusive purpose of corruptly attempting to convict Mr. Baloga of violating the State Ethics Act.

Suggested Answer: **In the affirmative.**

LAW AND ARGUMENT

A. The testimony of Jeffrey Frankenburger, Esquire (hereinafter referred to as "Attorney Frankenburger") will be both relevant and material to issues of bias and lack of credibility exhibited by members of the Investigative Division against Mr. Baloga, and is likely to expose multiple examples of dishonest, egregious unethical and potentially criminal misconduct by multiple members of the Investigative Division of the State Ethics Commission.

The Courts of this Commonwealth are empowered by Statute to issue subpoenas for the purposes of Compelling the attendance and testimony of a witness at a trial or other judicially sanctioned proceeding. **42 Pa. Cons. Stat. Ann. § 5905 (Purdon's 1982).** The power to issue subpoenas is vested exclusively in the judiciary and, pursuant to express statutory grant, in certain non-judicial bodies. **Cohen v. Pelagatti, 1983 WL 265448 (Pa. Com. Pl.)**

As a non-judicial body, the State Ethics Commission derives its power to issue subpoenas to potential witnesses in an administrative hearing pursuant to the provisions of **1 Pa. Code §35.142** which reads as follows:

§35.142 Subpoenas.

(a) Issuance. Subpoenas for the attendance of witnesses or for the production of documentary evidence, unless directed by the agency upon its own motion, will issue only upon application in writing to the agency head or the presiding officer, except that during sessions of a hearing in a proceeding, such application may be made orally on the record before the agency head or presiding officer, who is hereby given authority to determine the relevancy and materiality of the evidence sought and to issue such subpoenas in accordance with such determination. Such written applications shall specify as nearly as may be the general relevance, materiality, and scope of the testimony or documentary evidence sought, including as to the documentary evidence, specification as nearly as may be, of the documents desired and the facts to be provided by them in sufficient detail to indicate the materiality and relevance of such documents.

More specifically, with regard to subpoenas for witnesses to appear for hearings before the State Ethics Commission, **51 Pa. Code §21.24(a)(8)** provides that the Hearing Officer has the duty and power to issue subpoenas upon written request for the production of documents, records, and persons needed for the proceeding. The Hearing Officer will be provided with a name and addresses of the persons and a description of the documents or records involved, and will be satisfied that the documents, records, or testimony are relevant and are not protected by privilege. Additionally, **51 Pa. Code §21.25(h)** provides that subpoenas may be issued at the request of the parties to the Hearing on the approval of the Commission or Hearing Officer. Information subpoenaed shall be relevant and not privileged.

Fundamentally, a subpoena compels the attendance of a person desired as a witness. **Commonwealth v. Melson, 556 A.2d 836(Pa. Super 1989)**. Said differently, a

"subpoena" is a process to cause a witness to appear and give testimony. **Commonwealth v. Wilson, 44 A.2d 520(Pa. Super 1945).**

In this case, **Mr. Baloga** has complied with each of the provisions of the Pa. Code for the issuance of a subpoena to Attorney Frankenburger. As set forth below, Attorney Frankenburger's Testimony will be relevant, and is certainly not privileged. On or about December 23, 2020, **Mr. Baloga** filed his Request for Issuance of Subpoenas. See Exhibit "K". The Request for Subpoena for Attorney Frankenburger provided as follows:

Jeffrey Frankenburger, Esquire
Assistant Council, Investigations

Mr. Frankenburger is an Assistant Counsel in the Investigative Division of the State Ethics Commission.⁷ It appears that Mr. Frankenburger was assigned to prosecute the Baloga Matter.

The SEC Investigative Complaint/Findings Report against Mr. Baloga is unsigned by its author. No signed verification supports the allegations of the Complaint. Mr. Baloga suspects that Attorney Frankenburger is the author of the Complaint.

Pursuant to his Sixth Amendment Right of Confrontation, Mr. Baloga intends to call Attorney Frankenburger as a Defense Witness and to initially establish that he is indeed the author of the SEC Complaint.

Thereafter, Mr. Frankenburger will be questioned about the veracity of the factual allegations as set forth in the Investigative Complaint/ Findings Report.

⁷ While working in the prosecution of **Mr. Baloga**, Attorney Frankenburger has apparently been promoted from Assistant Counsel to the position of "Supervising Investigative Counsel".

Neither Mr. Frankenburger (nor anyone else) can claim of Attorney Client Privilege with respect to authoring the Complaint/Findings Report. This Pleading has been widely distributed to third parties, thereby resulting in waiver of any potential claim of privilege (which never existed in the first place).

As set forth above, **Mr. Baloga** has summarized multiple blatant examples of willful, deliberate, and intentional dishonesty set forth in the Complaint. Because Attorney Frankenburger steadfastly refuses to identify the author of the Complaint, Mr. Frankenburger will be asked under oath to identify the author of the Complaint. Should Attorney Frankenburger indeed be the author, questions about the multiple misrepresentations will ensue. In the event Mr. Frankenburger is not the author, the undersigned would request the Honorable Hearing Examiner to issue a subpoena to the identified author. Questioning the author about the misrepresentations would then commence.

In Pennsylvania, relevant evidence is defined by **Pa.R.E. 401** which reads as follows:

Rule 401. Test for Relevant Evidence

Evidence is relevant if:

- (a) It has any tendency to make a fact more or less probable than it would be without the evidence; and
 - (b) The fact is of consequence in determining the action.
- "The threshold for relevant evidence is low given the liberal 'any tendency' prerequisite."

Mitchell v. Evan Shikora, D. O., et. al, 209 A. 3d 307, 314(Pa 2019).
“All relevant evidences admissible, except as otherwise provided by law.” **Pa. R. E. 402.** “evidence that is not relevant is not admissible.” **Id.**

“For evidence to be admissible, it must be competent and relevant”. **American Future Systems, Inc. v. BBB, 872 A.2d 1202, 1213 ¶25 (Pa. Super. 2005).** “Evidence is competent if it is material to the issue to be determined at trial.” **Id.** “Evidence is relevant if it tends to prove or disprove a material fact”. **Id.** “Relevant evidence is admissible if its probative value outweighs its prejudicial impact”. **Id.** However, even relevant evidence may be precluded. Pursuant to Pennsylvania Rule of Evidence 403, “the court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” **Pa. R.E. 403.**

There is nothing more relevant than 1) identifying the author of the very document that serves as the foundation of the Investigative Division's Case; and 2) demonstrating that the foundational document to the case alleges multiple false, dishonest, and erroneous conclusions/allegations. Cross examination of the author of this non privileged document will demonstrate that allegations that **Mr. Baloga** utilized his position as a Wyoming Borough Councilman to obtain the construction of a “free driveway” on his property. As such, the relevance test is met.

Moreover, **Mr. Baloga's** right to call the author of the Complaint as a witness is supported by the Pennsylvania Constitution. It is axiomatic that during the upcoming

Hearing before this Honorable Hearing Examiner, **Mr. Baloga** is entitled to all protections that the Pennsylvania Constitution affords him. See, **Bouch v. SEC, 848 A.2d 1078 (Pa. Commw. 2004)**. Among these protections is **Mr. Baloga's** right to confront his accusers as guaranteed by Article 1, Section 9 of the Pennsylvania Constitution. See, **Commonwealth v. Gentile, 640 A.2d 1309 (Pa. Super 1994)**. This protection affords **Mr. Baloga** the opportunity to at least raise a doubt in the minds of the fact finders as to whether the prosecution is biased against him. See, **Commonwealth v. Evans, 512A.2d 626 (Pa.1986)**). Evidence of bias, interest, or corrupt motive is generally admissible and a proper inquiry on cross examination, and the decision to permit or limit such examination is a matter within the sound discretion of the court. **Commonwealth v. Murray, 83 A.3d 137 (Pa. 2013)**.

Thus, **Mr. Baloga** may cross examine a witness to show that the witness has a direct or collateral interest in the result of the trial, or posses a bias which colors the witness's testimony, or a motive to give false testimony. **Commonwealth v. Butler, 601 A. 2d 268(Pa. 1991); Commonwealth v. Robinson, 491 A. 2d 107(Pa. 1985)**.⁸

Finally, if indeed the upcoming Hearing is a search for the truth, **Mr. Baloga** is entitled to confront the individual who authored and published the legal Pleading accusing him of violating the State Ethics Act. As a matter of fundamental fairness, **Mr. Baloga** must be entitled to challenge the factual foundations of the alleged violation.

⁸ While the bulk of Pennsylvania Appellate decisions deciding issues of bias, corrupt motive and the like are in the criminal context, given the applicability of all constitutional protections in administrative proceedings, these decisions are equally applicable to and binding upon administrative proceedings.

IV. CONCLUSION

The investigation of **Mr. Baloga** by the Investigative Division was elicited and corrupt beginning with the initial decision of Mr. Jacisin to forgo requiring the Complainant to complete, sign, and have notarized the standard SEC Ethics Complaint Form. Thereafter, during multiple interviews, SEC "Investigator" Jonathan Fry knowingly and intentionally lied to those he interviewed simply in the hope of eliciting a damning response against **Mr. Baloga**. The author of the Complaint/ Findings Report knowingly, intentionally, and with corrupt and evil motive ignored transcribed Sworn Statements and fabricated allegations in the Complaint for the exclusive purpose of generating a Complaint against **Mr. Baloga**.

Given the totality and context of the aforementioned corruption, it is relevant, material, and imperative to allow **Mr. Baloga** to call and examine Attorney Frankenburger as a defense witness.

Respectfully submitted,
Scartelli Olszewski, P.C.

Date: February 16, 2021

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STATE ETHICS COMMISSION

Finance Building
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Harrisburg, PA 17120-0400

In Re: Michael Baloga
65 Shulde Lane
Wyoming, PA 18644

Case No. 18-038

Issued: February 5, 2019

CERTIFICATE OF SERVICE

I, Peter Paul Olszewski, Jr., Esquire, counsel for the Respondent hereby certify that on the 16 day of February, 2021, I served a true and correct copy of the Respondent's Brief In Support of Respondent's Request For Issuance of Hearing Subpoena to Jeffrey Frankenburger, Esquire via e-mail upon the following persons addressed as follows:

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