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SANDRA SMITH, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF GEORGE BRADLEY SMITH, AND AS GUARDIAN AD LITEM FOR HER CHILDREN KOLE SMITH AND BRANDY SMITH, NICOLE GAETA, KYLE SMITH, Plaintiff, v. CITY OF NORTH WILDWOOD, STATE OF NEW JERSEY, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAPE MAY COUNTY DOCKET NO. CPM-L-415-16 Civil Action **REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS BY DEFENDANT, THE CITY OF NORTH WILDWOOD**

On the Brief:
A. Michael Barker, Esquire
Jeffrey P. Sarvas, Esquire

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I. PREAMBLE

Plaintiffs' injunctive relief lawsuit should be dismissed. First, it is patently obvious that Plaintiff cannot establish any risk of future harm which is required to bring an injunctive relief claim. Plaintiffs essentially argue that Brad Smith's death alleviates the future harm requirement for an injunctive relief claim. It does not. Moreover, Plaintiffs have failed to exhaust their administrative remedies and failed to join indispensable parties. Substantively, the lawsuit also fails because it is undisputed that the tideland complained of is a natural condition which neither North Wildwood or the State of New Jersey created. To circumvent this ultimately fatal fact, Plaintiffs are now asserting that their public nuisance claim is based on the Defendants' alleged failure to properly supervise Inlet Beach. Plaintiffs, however, have presented no supportive case law and North Wildwood is unaware of case law establishing that an injunctive relief action for "creating" a public nuisance may be based on a theory of negligent supervision. Furthermore, Plaintiffs' negligent supervision theory is disingenuous on its face because Plaintiffs are not seeking an order to enjoin North Wildwood to increase its supervision of Inlet Beach but rather are seeking to close Inlet Beach because, according to Plaintiffs, the condition of Inlet Beach is so dangerous no amount of "supervision" could render the area safe for public use. Thus, even if there was some decisional law to support Plaintiffs' argument that a public nuisance injunctive relief claim could be based on a theory

of negligent supervision, in the instant case, the argument is simply logically untenable because Plaintiffs are arguing that Defendants "created" a public nuisance by failing to properly supervise an area that is so dangerous it must be closed because no amount of supervision could render it safe for public use. Thus, Plaintiff's disingenuous negligent supervision theory should be rejected by the Court and Plaintiff's public nuisance based claim for injunctive relief should be dismissed for reasons explained more fully below and in North Wildwood's Initial Brief in Support of Motion to Dismiss.

II. RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS

1. Admitted that the excerpt from Dr. Weggel's report is accurate.
2. Admitted that the excerpt from Dr. Weggel's report is accurate.
3. Admitted that the excerpt from Dr. Weggel's report is accurate.
4. Admitted.
5. Dr. Griffith's report speaks for itself; however, the City of North Wildwood obviously denies liability for Brad Smith's death.
6. Admitted that the excerpt from Dr. Griffith's report is accurate.

III. LEGAL ARGUMENT

A. Plaintiffs have not shown that they have exhausted their administrative remedies

Plaintiffs argue that "the proposed administrative remedies would be futile as the City of North Wildwood clearly had no interest in closing the Unprotected Inlet

Beach." (Pb5-6). This is a mischaracterization of North Wildwood's position. North Wildwood, in filing the instant motion to dismiss, is objecting to the propriety of the instant lawsuit, not stating unequivocally that it has "no interest" in addressing issues regarding Inlet Beach which are properly presented through the administrative process. While it is certainly North Wildwood's position that it has no legal duty to close Inlet Beach, this is not the same as taking the position that it will never close Inlet Beach, and Plaintiff improperly conflates the two. In that regard, by bringing the instant lawsuit without first applying to North Wildwood, Plaintiffs are ignoring entirely the jurisdiction of North Wildwood and the State of New Jersey, thereby depriving the residents of North Wildwood and the businesses surrounding Inlet Beach of an opportunity to be heard. Thus, contrary to Plaintiff's arguments, it is not appropriate for this Court to allow this action to proceed without Plaintiffs demonstrating that they have exhausted their administrative remedies.

B. Plaintiffs do not have standing to bring the instant suit for a permanent injunction

Plaintiffs argue, as they did in their Initial Brief in Support of the Order to Show Cause, that they have suffered a "special harm" in the death of Brad Smith, which provides them standing to bring this injunctive relief claim. This is simply not correct. Plaintiffs must demonstrate some risk of future harm to have standing to bring an injunctive relief claim. "It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry" for injunctive relief claim. L.A. v. Lyons,

461 U.S. 95, 107 n.8, 103 S. Ct. 1660, 1668 (1983) (finding that the plaintiff, an alleged victim of a police choke-hold, did not have standing to bring an injunctive relief claim to enjoin the police from using choke holds because of the speculative nature of a future injury to the plaintiff); see also, McNair v. Synapse Grp., Inc., 672 F.3d 213, 223 (3d Cir. 2012) (noting that when "prospective relief is sought, the plaintiff must show that he is 'likely to suffer future injury' from the defendant's conduct" and affirming the District Court's finding that the plaintiffs, former customers of the defendant, lacked standing to bring an injunctive relief claim as they were no longer customers of the defendant and did not intend to ever become customers again); Robinson v. Hornell Brewing Co., 2012 U.S. Dist. LEXIS 51460, at *17 (D.N.J. Apr. 11, 2012)[1] (finding that the plaintiff lacked standing to bring his injunctive relief claim because the plaintiff could not "plausibly demonstrate that he is likely to be fooled again into purchasing Defendants' products").

While Brad Smith's death did provide Plaintiffs' with standing to bring a suit for monetary damages, and indeed Plaintiffs have brought suits for monetary damages, Brad Smith's death does not provide Plaintiffs standing to bring an injunctive relief claim to close Inlet Beach. To bring an injunctive relief claim the Plaintiffs must be able to demonstrate some concrete risk of future harm which Plaintiffs simply cannot establish in the instant case. It is undisputed that there is no

[1] Unpublished case attached as Exhibit 13.

risk whatsoever that Plaintiffs will suffer a future harm based on the alleged public nuisance at Inlet Beach. Plaintiffs have made it clear they have no plans to return to Inlet Beach and even if they did, they are obviously aware of the beach's condition. Thus, as the above cited case law demonstrates, Plaintiffs simply do not have standing to bring a claim for injunctive relief.

C. Plaintiffs have failed to join all indispensable parties

Plaintiff argues that "[a]lthough the mentioned residents of North Wildwood may have an interest in keeping the beach open, it is not the duty of the Plaintiff to join them in this litigation." (Pb9). First, it most certainly is the duty of Plaintiffs to name all indispensable parties so that this matter may be properly adjudicated. Plaintiffs simply have not undertaken any effort to make that determination. It should be noted that since Plaintiffs failed to exhaust their administrative remedies the attendant public discussion of beach closure issues at Council meetings, with the requisite notice to residents and businesses, never occurred. Had Plaintiffs properly exhausted their administrative remedies, Plaintiffs would have been made aware of the indispensable parties who should have been named in this lawsuit. In that regard, this Court should not now reward Plaintiff's failure to properly engage North Wildwood, its residents and the businesses, by allowing Plaintiffs to proceed without joining all indispensable parties.

D. Plaintiffs have failed to state a legally cognizable claim upon which relief can granted

1. Plaintiff's public nuisance claim fails as a matter of law

It is undisputed that the "drop-off" of the shoreline at Inlet Beach is a natural condition of unimproved property which North Wildwood did not in any way cause or create. Thus, for that simple reason, Plaintiffs' public nuisance claim fails as a matter of law. In an attempt to circumvent this fatal flaw in Plaintiffs' public nuisance claim, Plaintiffs attempt to couch their public nuisance claim in terms of negligent supervision. In that regard, Plaintiffs cite no case law for the proposition that a public nuisance abatement claim for injunctive relief can be based on some sort of negligent supervision theory, and North Wildwood is not aware of any such case law. Moreover, Plaintiffs' attempt to base their public nuisance abatement claim for injunctive relief on a theory of negligent supervision is disingenuous on its face because Plaintiffs are not seeking a court order or a writ of mandamus to increase the lifeguard presence at Inlet Beach or otherwise to increase the supervision of Inlet Beach. Thus, even if there was some legal support for the proposition that a public nuisance abatement claim for injunctive relief could be based on a theory of negligent supervision, that theory is unavailing in the instant case because it is logically untenable. Plaintiffs are arguing that Defendants are liable for "creating" a public nuisance by failing to properly supervise an area while simultaneously arguing that the area is so dangerous no amount of supervision could

render it safe for public use, therefore the area must be closed. This argument simply does not track logically. The issue in the instant case is not whether Inlet Beach was properly supervised, it is whether the drop-off at Inlet Beach constitutes as public nuisance which North Wildwood or the State created. Since it is undisputed that the drop-off is a natural condition of Inlet Beach, as a matter of law, North Wildwood cannot be held liable for "creating" the nuisance. Thus, Plaintiffs public nuisance claim fails as a matter of law.

2. Plaintiffs cannot establish that they will suffer a continuing irreparable injury if injunctive relief is not granted

Plaintiffs argue that they have suffered a "special harm" which entitles them to bring this suit for injunctive relief. Essentially, Plaintiffs are arguing that a "special harm" alleviates the requirement of establishing any risk of continued harm to the plaintiff. Plaintiffs have presented no case law which supports this argument. While Plaintiffs characterize their risk of future of harm as "minor" in actuality it is non-existent. The law is clear that plaintiffs must establish some risk of future injury to themselves to satisfy the requirement for showing a "continuing, irreparable injury." McNair v. Synapse Grp. Inc., 672 F.3d 213, 225 (3d Cir. 2012) (stating that past injuries "may suffice to confer individual standing for monetary relief" but "a plaintiff seeking injunctive relief must demonstrate a likelihood of future harm");

Lundy v. Hochberg, 91 F. App'x 739, 745 (3d Cir. 2003)[2] (finding that the plaintiff attorney was not entitled to injunctive relief against an ex-partner enjoining the ex-partner from continuing to practice law without a license because the two were no longer partner and thus all potential damages were for past harms); Fullman v. Patton Twp. Police Dep't, 2013 U.S. Dist. LEXIS 35096, at *1 (M.D. Pa. Mar. 14, 2013)[3] ("Where the plaintiff suffers no continuing injury, an injunction would offer no meaningful relief."). In that regard, the Court in Lundy did not find that the plaintiff could establish the continuing harm requirement based solely on potential harms to other people by the ex-partner's alleged illegal practice of law despite the fact that there is obviously a public interest in preventing the illegal practice of the law. That is because, as the case law makes clear, plaintiffs who seek injunctive relief must be able to show that they themselves will suffer at least some risk of future harm if injunctive relief is not granted. Plaintiffs clearly cannot do so in the instant case and thus their injunctive relief claim fails.

E. North Wildwood asks that this Court dismiss North Wildwood to the extent it finds any of the arguments in the State of New Jersey's motion to dismiss are equally applicable to North Wildwood

If the Court finds that a basis for dismissal raised by the State would apply equally to North Wildwood, then North Wildwood requests that the Court, in the

[2] Unpublished case attached as Exhibit 14.
[3] Unpublished case attached as Exhibit 15.

interest of justice and judicial efficiency, also dismiss North Wildwood to the extent North Wildwood is entitled to dismissal on the same basis.

F. The State of New Jersey owns and controls the tideland where Brad Smith encountered the alleged danger

Co-Defendant, the State of New Jersey, argues in its motion to dismiss that any injunctive order against the State for the closure of Inlet Beach would be "inappropriate and ineffective" because North Wildwood is the entity with the authority to decide regarding the closure of Inlet Beach. First, it should be noted that in the lawsuits for compensatory damages the parties recently agreed that the locus of the Brad Smith drowning is tideland owned by the State of New Jersey. It is also undisputed that the State plays a significant role in regulating Hereford Inlet and the surrounding tidelands. Thus, it is the City of North Wildwood's position that regardless of who has "ultimate authority" to close Inlet Beach, the State nonetheless bears fiscal responsibility for any injunctive measures ordered in this case. See, e.g., Paterson v. Fargo Realty, Inc., 174 N.J. Super. 178, 193 (Cty. Ct. 1980) (apportioning the cost of abatement of the nuisance between the two defendants). Thus, North Wildwood asks that this Court be guided accordingly.

IV. CONCLUSION

For the foregoing reasons, the Court should dismiss the instant action.

Respectfully Submitted:
BARKER, GELFAND & JAMES
a Professional Corporation

By: A. Michael Barker
A. Michael Barker, Esquire

Dated: 2-1-17

Exhibit List

Ex.	Description
13	Robinson v. Hornell Brewing Co., 2012 U.S. Dist. LEXIS 51460 (D.N.J. Apr. 11, 2012).
14	Lundy v. Hochberg, 91 F. App'x 739 (3d Cir. 2003).
15	Fullman v. Patton Twp. Police Dep't, 2013 U.S. Dist. LEXIS 35096 (M.D. Pa. Mar. 14, 2013).

Exhibit 13

Robinson v. Hornell Brewing Co.

United States District Court for the District of New Jersey

April 11, 2012, Decided; April 11, 2012, Filed

Civil No. 11-2183 (JBS-JS)

Reporter
2012 U.S. Dist. LEXIS 51460 *

STEVEN ROBINSON on behalf of himself and all others similarly situated, Plaintiff, v. HORNELL BREWING CO., et al., Defendants.

Subsequent History: Partial summary judgment denied by, Complaint dismissed at, Without prejudice *Robinson v. Hornell Brewing Co., 2012 U.S. Dist. LEXIS 176699 (D.N.J., Dec. 12, 2012)*

Prior History: *Robinson v. Hornell Brewing Co., 2012 U.S. Dist. LEXIS 33327 (D.N.J., Mar. 12, 2012)*

Core Terms

injunctive relief, label, beverages, products, subscription, subscribers, certify, named plaintiff, consumer fraud, ingredient, argues, certification, purchasing, continues, motion to certify, proposed class, future injury, consumers, exposure, evading, brand, dog

Counsel: [*1] Appearances: Daniel R. Lapinski, Esq., Philip A. Tortoreti, Esq., WILENTZ, GOLDMAN & SPITZER, Woodbridge, NJ; Allyn Z. Lite, Esq., Joseph J. DePalma, Esq., Bruce D. Greenberg, Esq., Katrina Carroll, Esq., LITE DePALMA GREENBERG, LLC, Newark, NJ, Attorneys for Plaintiff.

Robert P. Donovan, Esq., Lewis H. Goldfarb, Esq., Jamie Taylor, Esq., MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP, Newark, NJ, Attorneys for Defendants.

Judges: JEROME B. SIMANDLE, Chief United States District Judge.

Opinion by: JEROME B. SIMANDLE

Opinion

SIMANDLE, Chief Judge:

I. INTRODUCTION

This putative class action is before the Court on the motion of Plaintiff Steven Robinson to certify a class pursuant to *Fed. R. Civ. P. 23*. [Docket Item 41.] Plaintiff alleges that, for more than a decade, he was misled by labels on bottles of Defendants' Arizona Brand beverages touting "All Natural" ingredients and thereby induced into buying bottles of Arizona beverages that contained High Fructose Corn Syrup ("HFCS"), which he now believes is not a natural ingredient. Plaintiff is currently before the Court seeking to certify a *Rule 23(b)(2)* class of New Jersey consumers who purchased similarly labeled beverages that contained HFCS. Plaintiff proposes to certify [*2] his New Jersey Consumer Fraud Act ("NJCFA") claim on behalf of:

> All New Jersey citizens who purchased within the State of New Jersey, for personal consumption and not for resale, an Arizona brand beverage marketed, advertised and promoted as "100% NATURAL," but which contained HFCS or other non-natural ingredients, from April 13, 2005, until such time as Defendants reform said practice.

Am. Compl. ¶ 20. Plaintiff seeks, on behalf of this class, to enjoin Defendants from claiming that their products containing HFCS are "all natural."

Defendants oppose the motion for several reasons, including that Plaintiff has not demonstrated that he has standing to pursue injunctive relief on behalf of the class, or that he has met the requirements of *Rule 23, Fed. R. Civ. P.* For the reasons discussed below, the Court will deny Plaintiff's motion to certify because Plaintiff has failed to demonstrate that he has Article III standing to pursue injunctive relief, and is therefore not able to represent this *Rule 23(b)(2)* class.

II. BACKGROUND

Plaintiff alleges that he had been purchasing Arizona brand iced tea beverages for several years prior to April of 2011, and that each time he did so, his purchase [*3] was made, in part, based on his belief that the product was "all natural". Second Am. Compl. ¶¶ 52-55. This belief was created by the fact that the Arizona beverages were marked with labels bearing the representation that the product was "100% NATURAL"; Plaintiff claims to have paid a premium for those products over other iced tea products that were not so marked. Id. at ¶¶ 56-58.

Then, on April 6, 2011, while he was drinking a bottle of Arizona Iced Tea, Plaintiff alleges that he began a conversation with an acquaintance named Joe Santoli. Robinson Dep. at 17:6-8. Mr. Santoli told Plaintiff that the Arizona beverage, in fact, contained HFCS, which Mr. Santoli explained was not a natural ingredient. Id. at 17:8-13. Plaintiff testified that at the time he had already formed the opinion that HFCS was not a natural ingredient, and was surprised to hear that it was an ingredient in Arizona beverages, which he had always believed to be natural. Id. at 17:13; 83:14-17. Mr. Santoli informed Plaintiff that, in fact, people had sued Arizona's owners because of the labeling of their product. Id. 17:21-24.

Plaintiff said the conversation ended shortly thereafter, but he did not finish the bottle [*4] because he "had a very bad taste in my mouth about it. And, as I mentioned before, I think that I was deceived and lied to and cheated." Id. at 83:14-17. Plaintiff stated that he would not have purchased the Arizona beverages over the years had he known they were not "natural" as he understood that term.

> If it wasn't labeled all natural, I probably wouldn't have purchased it.
> Q: Why?
> A: I don't know. It — I mean, the taste wasn't, in my opinion, it was okay. It wasn't fantastic. So I probably wouldn't have purchased it. I mean, it was a big thing for me.

Id. at 148:23-149:4. In fact, Plaintiff states that he is unlikely to ever purchase an Arizona beverage again, regardless of whether Defendants change the labels on their Arizona branded products to more accurately reflect Plaintiff's understanding of their ingredients. Donovan Cert. Ex. D, Pltf.'s Response to Interrogatory No. 36. ("Plaintiff states that due to his current lack of trust regarding Defendants and their products, there are no changes [to Arizona product labeling] that would be sufficient for Plaintiff to purchase Arizona Products in the future.").

Plaintiff retained his current counsel on April 8, 2011. Donovan Cert. Ex. [*5] C. Plaintiff's original Complaint in this matter was filed on April 13, 2011. [Docket Item 1.] On May 18, 2011, Plaintiff filed his First Amended Complaint [Docket Item 3], and on July 14, 2011, Plaintiff filed his currently operative Second Amended Complaint [Docket Item 19]. Plaintiff's Second Amended Complaint seeks injunctive relief, on behalf of the proposed class, pursuant to the New Jersey Consumer Fraud Act ("NJCFA"), *N.J. Stat. Ann. § 56:8-2* (Count I), and seeks on his own behalf damages and restitution under theories of unjust enrichment, common law restitution, breach of express warranty, and breach of the implied warranty of merchantability (Counts II-IV).

Plaintiff filed his motion to certify a class on December 30, 2011. [Docket Item 41.] Briefing, including sur-reply briefs from both parties, was complete on the motion on March 23, 2012. The Court heard oral argument on the motion on April 3, 2012.

III. DISCUSSION

A. Standard

"District courts have discretion under Rule 23 to certify a class." Beck v. Maximus, Inc., 457 F.3d 291, 297 (3d Cir. 2006). To certify a class, the Court must find that the proposed class meets the prerequisites to a class action and that at least [*6] one individually named Plaintiff has Article III standing to raise the legal claims of the class. See McNair v. Synapse Group Inc., 672 F.3d 213, 2012 U.S. App. LEXIS 4593, 2012 WL 695655, *6 (3d Cir. Mar. 6, 2012) (holding that if individual plaintiffs lack Article III standing, they are not "entitled to represent the putative Rule 23(b)(2) class they asked the District Court to certify"); In re Chiang, 385 F.3d 256, 264, 46 V.I. 679 (3d Cir. 2004) ("plaintiffs must establish that all four requisites of Rule 23(a) and at least one part of Rule 23(b) are met."). "The burden of proving each of the requisite elements of Rule 23 rests with the party seeking certification." Jones v. Goord, 190 F.R.D. 103, 111 (S.D.N.Y. 1999) (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)).

However, "it is not necessary for the plaintiffs to establish the merits of their case at the class certification stage, and ... in determining whether a class will be certified, the substantive allegations of the complaint must be taken as true." Chiang, 385 F.3d at 262. "Depending on the circumstances, [however,] class certification questions are sometimes 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,' [*7] and 'courts may delve beyond the pleadings to determine whether the requirements for class certification are satisfied.'" Beck, 457 F.3d at 297 (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 167 (3d Cir. 2001)).

The Third Circuit has explained in some detail the "rigorous analysis" that the district court evaluating a motion to certify a class must undertake. In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 309 (3d Cir. 2008). Specifically, the Third Circuit held that, to certify a class, a district court must make findings "that each Rule 23 requirement is met." Id. at 310. Thus, Plaintiff has the burden of proving that Article III standing exists as to at least one individually named plaintiff to pursue the identified class relief, and Plaintiff has the burden of introducing evidence sufficient to meet a burden of proof by a preponderance of the evidence that he has met each element of Rule 23.

B. Article III Standing for Injunctive Relief

Article III of the Constitution of the United States limits the scope of federal courts to actual cases or controversies. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); Danvers Motor Co. v. Ford Motor Co., 432 F.3d 286, 290-91 (3d Cir. 2005). [*8] A plaintiff does not present a case or controversy when he or she does not have a personal stake in the ongoing litigation, and as such, a federal court does not have subject-matter jurisdiction over such a suit. See Ballentine v. United States, 486 F.3d 806, 814, 48 V.I. 1059 (3d Cir. 2007) (summarizing requirements of Article III standing necessary to constitute case or controversy). The Supreme Court has long held that to seek prospective or injunctive relief, plaintiffs (including individually named plaintiffs representing a class) must be able to demonstrate more than mere injury from past wrongs. "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." O'Shea v. Littleton, 414 U.S. 488, 495-96, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974) (quoted in City of Los Angeles v. Lyons, 461 U.S. 95, 102, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)).

The Third Circuit recently considered the issue of Article III standing to pursue class-based injunctive relief in a factual and procedural circumstance similar to that confronting the Court in the instant matter. In McNair v. Synapse Group, Inc., the individual plaintiffs brought claims for damages and [*9] injunctive relief under several state consumer fraud statutes, including the New Jersey Consumer Fraud Act. Under the operative complaint before the Third Circuit, the named plaintiffs sought, on behalf of the proposed class, injunctive relief only, and sought individual damages for their own losses. McNair v. Synapse Group, Inc., 672 F.3d 213, 2012 U.S. App. LEXIS 4593, 2012 WL 695655, *5 (3d Cir., Mar. 6, 2012).

The McNair plaintiffs alleged that they had formerly been subscribers of certain magazines that outsourced their subscription services to the defendant Synapse. Synapse operated the subscription plans on a "continuous service

plan," meaning that the subscription would never expire, and the subscriber would continue to be billed for the subscription until the subscriber affirmatively sought to cancel the subscription. *2012 U.S. App. LEXIS 4593, [WL] at *1*. The plaintiffs alleged that Synapse's notification mailings, through which it informed the subscribers that the subscription was about to be automatically renewed unless the consumer requested cancellation, were intentionally obscure and designed to prevent all but the most alert or dedicated consumers from successfully cancelling their subscriptions. *2012 U.S. App. LEXIS 4593, [WL] at *1-2*. None of the **[*10]** individually named plaintiffs alleged or offered evidence that they were, at the time of the motion to certify, current subscribers to any of defendant Synapse's products. *672 F.3d 213, 2012 U.S. App. LEXIS 4593, [WL] at *7*. As a result, the Third Circuit concluded that the plaintiffs had not "established any reasonable likelihood of future injury" and therefore "have no basis for seeking injunctive relief against Synapse." *2012 U.S. App. LEXIS 4593, [WL] at *8*.

The Third Circuit, relying on *City of Los Angeles v. Lyons, 461 U.S. 95, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)*, and subsequent cases, held that when "prospective relief is sought, the plaintiff must show that he is 'likely to suffer future injury' from the defendant's conduct." *McNair, 2012 U.S. App. LEXIS 4593, [WL] at *6* (quoting *Lyons, 461 U.S. at 105*). The court further held that "In the class action context, that requirement must be satisfied by at least one named plaintiff." Id. Therefore, the court concluded, because none of the identified plaintiffs were currently subscribers to any Synapse product, and none could show a likelihood that they would become subscribers at some definite point in the future (beyond pure speculation), they all lacked Article III standing to pursue any injunctive relief, and the purely injunctive class they sought to represent **[*11]** could not be certified.

The present case is controlled by *McNair*. Here, Plaintiff has testified and stated in his answers to interrogatories that he has no intention of ever purchasing any Arizona product in the future. Indeed, he effectively stated that even were Arizona products to alter their labeling to comport with his understanding of the word "natural", he would not benefit from that change because he will no longer purchase such a product. Therefore, Plaintiff cannot demonstrate that he is likely to suffer future injury from Defendant's labeling practices.

Plaintiff's arguments attempting to distinguish McNair are unavailing. First, Plaintiff argues that McNair (as well as other cases regarding standing to pursue injunctive relief) is distinguishable from the instant circumstance based on a theory of "exposure" to a threat of injury from the defendant. Plaintiff argues that the McNair case stands only for the proposition that a plaintiff lacks standing to pursue injunctive relief when the plaintiff is not, at the time the case is filed, currently exposed to the threat of harm. Plaintiff argues that this exposure was absent in the McNair case because none of the named plaintiffs **[*12]** was subscribed to a magazine that outsourced its subscription services to Synapse. By contrast, Plaintiff argues, he continues to be exposed to the threat of injury every time he sees the allegedly offending "All Natural" label on a container of Defendants' beverages, which happens every time he steps into a convenience store or grocery store that sells such products. Plaintiff argues that, notwithstanding his deposition testimony and answers to interrogatories that he will no longer purchase Arizona products, he continues to be subject to harm by Defendant's "natural" labels because he is "exposed" to them, and is therefore "threatened" by them even if he does not purchase the product itself.

> Plaintiff maintains an interest in any injunctive order relating to Defendants' representations because, until such a time as Defendants are enjoined from unlawfully representing their beverages as "All Natural," Plaintiff is subject to Defendants' repeated violations.

Pltf.'s sur-reply at 2. See also id. note 2 ("That Plaintiff is now knowledgeable of the fact that Defendants' representations are deceptive in no way diminishes Plaintiff's exposure to the unlawful conduct and ongoing threat of **[*13]** harm. Instead, while still being subject to Defendants' unlawful activity, Plaintiff's heightened awareness of Defendants' unlawful activity reduces (but does not eliminate) the likelihood that Plaintiff will ultimately suffer actual harm.").

The Court interprets this argument to suggest one of two ways that Plaintiff is still subject to the threat of future injury by Defendants' labeling: (1) that merely seeing the label "All Natural" on the Arizona products that Plaintiff is not purchasing will harm him in some way, and/or (2) that despite his disavowal of purchasing Arizona products under oath (and, indeed, his having brought a class action lawsuit against Arizona's owners), it is possible that he may still be misled by the "All Natural" label and be induced into purchasing the product again in the future as a

result of Defendants' continuing misrepresentations. This is not the sort of likelihood of future injury that the *McNair* court or the *Lyons* Court had in mind.

This Court concludes that merely seeing a label that Plaintiff believes is incorrect or that he believes could be misleading to others is not the kind of concrete adverse effect or injury necessary to create a cognizable **[*14]** case or controversy required by Article III. Similarly, Plaintiff's apparent concern that he may still, perhaps accidentally, purchase Defendants' products is too hypothetical or conjectural to create standing to pursue injunctive relief on behalf of the proposed class. *McNair, 2012 U.S. App. LEXIS 4593, [WL] at *7* ("Perhaps they [plaintiffs] may accept a Synapse offer in the future, but, speaking generally, the law accords people the dignity of assuming that they act rationally, in light of the information they possess.").

Indeed, the Court concludes that, far from being distinguishable on this point, the *McNair* case presented a much closer case than Plaintiff's. The McNair plaintiffs argued that they were unable to easily identify which magazines outsourced their subscriptions to Synapse, and were therefore at risk of again unknowingly subscribing to a Synapse magazine and being again defrauded by the allegedly misleading Synapse subscription renewal practices. McNair at note 15. In the instant matter, by contrast, Plaintiff is not so threatened. Plaintiff can immediately tell whether the beverage he wishes to buy is being sold by Defendants (and is therefore not actually "natural" has he defines it) because it will **[*15]** be clearly labeled with Defendants' Arizona brand labels.

In oral argument, Plaintiff's counsel analogized the position of Plaintiff in this case to that of a hypothetical dog bite victim. In the hypothetical, the victim has been attacked and bitten by a dog that continues to wander loose in the neighborhood. The victim continues to be exposed to the threat of further injury whenever he steps out of his house into the neighborhood, even if he is not actually attacked and bitten every time he opens his door. This victim would therefore be able to establish standing to pursue injunctive relief to tie up the dog. Similarly, Plaintiff's counsel argued, Plaintiff Robinson continues to face the exposure to the threat of injury whenever he walks into a convenience store selling Arizona beverages, even if he does not actually purchase the product. The Court finds this analogy unpersuasive because, in the dog bite hypothetical, the victim has no control over whether the dog will attack him, while Plaintiff himself can control the risk of injury by merely refraining from buying the Arizona beverage. As in *McNair*, the Court affords the Plaintiff the dignity of assuming he will act rationally in **[*16]** light of the information he possesses.

Additionally, Plaintiff argues that Article III standing is saved in this case because the injury he suffered is "capable of repetition yet evading review" under the mootness doctrine articulated in *Merle v. United States, 351 F.3d 92, 94 (3d Cir. 2003)*. Plaintiff argues that the injury he suffered will continue to be suffered by other consumers in the proposed class, but that the issue will evade the Court's review because once a consumer becomes aware of the alleged deceptive labeling, he or she can no longer demonstrate standing to pursue injunctive relief.

The *McNair* court declined to apply the doctrine in a nearly identical context. The court cited Third Circuit precedent that the "capable of repetition yet evading review" doctrine requires a "reasonable expectation that the same complaining party [will] be subject to the same action again." *McNair, 2012 U.S. App. LEXIS 4593, 2012 WL 695655 at *7* (quoting *Spencer v. Kemna, 523 U.S. 1, 17, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998)*).

> But the inescapable fact is — as Appellants' speculation about their future actions reflects — they cannot 'make a reasonable showing that [they] will again be subjected to the alleged illegality.' That means they cannot successfully **[*17]** invoke the 'capable of repetition yet evading review' doctrine.

Id. (quoting *Lyons, 461 U.S. at 109*) (internal citations omitted). The same result is inescapable here. The Third Circuit has been clear that the "capable of repetition yet evading review" doctrine only applies if the alleged injury may be suffered by the same complaining party, not by some other similarly situated individual. Plaintiff cannot plausibly demonstrate that he is likely to be fooled again into purchasing Defendants' products. Therefore, the Third Circuit has clearly stated that the doctrine does not apply to him; he cannot maintain this action for injunctive relief on behalf of himself, and therefore he cannot maintain it on behalf of the class.

Since Plaintiff lacks Article III standing to represent this class, the Court does not consider the remaining bases of Defendants' opposition to class certification.

IV. CONCLUSION

For the reasons stated above, the Court denies Plaintiff's motion for certification of a *Rule 23(b)(2)* class in this case because he has failed to meet his burden of demonstrating Article III standing to pursue injunctive relief on behalf of the class. The Court pauses to note that, as a result **[*18]** of the controlling precedent in this area, class action plaintiffs pursuing injunctive relief to prevent consumer fraud may, in general, have a difficult time satisfying the demands of Article III standing. By necessity, such cases can involve only identified plaintiffs who have become aware of the misleading nature of the label. Under the logic of *McNair*, such individual plaintiffs are therefore unable to plausibly claim a likelihood of being "injured" (i.e., misled) by the label again in the future. This conclusion would seem to prevent any *Rule 23(b)(2)* class action pursuing injunctive relief against consumer fraud based on mislabeling in federal court for violations of the New Jersey Consumer Fraud Act. While this Court's holding is controlled by the clear precedent of *McNair* on this point, it is to be hoped that future Third Circuit opinions will clarify whether this is the intended result of the McNair holding.

The accompanying Order will be entered.

April 11, 2012

Date

/s/ Jerome B. Simandle

JEROME B. SIMANDLE

Chief U.S. District Judge

ORDER

This matter coming before the Court on the motion of Plaintiff Steven Robinson to certify a class pursuant to *Fed. R. Civ. P. 23* [Docket Item 41]; **[*19]** the Court having considered the arguments of the parties in favor of and opposing the motion; for the reasons stated in the Opinion of today's date; and for good cause shown;

IT IS this 11th day of **April, 2012** hereby

ORDERED that Plaintiff's motion to certify a class shall be, and it hereby is, **DENIED**.

/s/ Jerome B. Simandle

JEROME B. SIMANDLE

Chief U.S. District Judge

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Exhibit 14

Lundy v. Hochberg

United States Court of Appeals for the Third Circuit

September 16, 2003, Submitted Under Third Circuit LAR 34.1(a) ; October 22, 2003, Decided ; October 22, 2003, Filed

Nos. 02-1343, 02-2041; 02-3678; 02-2053; 02-3732; 02-3845

Reporter
91 Fed. Appx. 739 *; 2003 U.S. App. LEXIS 21700 **

MARVIN LUNDY v. ROBERT HOCHBERG; JOHN HAYMOND; JOHN HAYMOND, P.C. t/a HAYMOND & LUNDY; SCOTT E. DIAMOND; HAYMOND, NAPOLI, DIAMOND, P.C. Marvin Lundy, Appellant in Nos. 02-2053, 02-3732 & 02-3845 Robert Hochberg, Appellant in Nos. 02-1343, 02-2041 & 02-3678

Notice: [**1] RULES OF THE THIRD CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Prior History: Appeal from the United States District Court for the Eastern District of Pennsylvania. (D.C. No. 99-cv-05048). District Judge: The Honorable Norma L. Shapiro.

Haymond v. Lundy, 174 F. Supp. 2d 269, 2001 U.S. Dist. LEXIS 13486 (E.D. Pa., 2001)

Disposition: Vacated and remanded.

Core Terms

unauthorized practice of law, district court, injunction, redressed, partnership, practice of law, license, asserts, malpractice, state law claim, parties, conspiracy, aiding and abetting, injunctive relief, standing to bring, federal court, particularized, possessed, injuries, courts

Case Summary

Procedural Posture
Appellee attorney sued appellant former partner and appellee former partners in the United States District Court for the Eastern District of Pennsylvania seeking, inter alia, injunctive relief with respect to appellant's unauthorized practice of law. The district court enjoined appellant from practicing law without a license and dismissed a claim of conspiracy to aid and abet unauthorized practice. Appellant and the attorney sought review.

Overview

Appellant, the attorney, and the other former partners formed a law partnership in Pennsylvania. The attorney dissolved the partnership, claiming to have learned that appellant was practicing law without a license. The appellate court found that the district court should not have entertained the attorney's state law claims because the attorney lacked U.S. Const. art. III standing. The attorney sued under *42 Pa. Cons. Stat. Ann. § 2524(a)*, which allowed civil claims for prospective injunctive relief against an unauthorized practitioner of law. However, past wrongs did not amount to a real and immediate threat of injury as required for standing to seek an injunction. The attorney claimed that appellant's continued unauthorized practice would cause the attorney to lose fees, but the record did not support that conclusion or suggest that any injuries the attorney claimed to be suffering could be

redressed by a favorable decision. The attorney also argued that he could be liable for malpractice in connection with appellant's unauthorized practice, but no such liability was imminent. The attorney therefore could not contest his claims in federal court.

Outcome
The district court's judgment was vacated and remanded for entry of an order of dismissal.

LexisNexis® Headnotes

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN1[] Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts, in every appeal presented to it, regardless of whether the parties contest jurisdiction.

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Evidence > Burdens of Proof > General Overview

HN2[] The United States Supreme Court has succinctly summarized the now familiar elements a plaintiff must demonstrate to establish U.S. Const. art. III standing: First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision. At all times, the party invoking federal jurisdiction bears the burden of establishing these elements. At the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Legal Ethics > Unauthorized Practice of Law

HN3[] The question of a plaintiff's U.S. Const. art. III standing to bring a claim must be considered in light of the specific allegations that the plaintiff has brought and the relief sought.

Legal Ethics > Unauthorized Practice of Law

HN4[] A Pennsylvania statute criminalizes the unauthorized practice of law by any person who conveys the impression that he is a practitioner of the law of any jurisdiction in Pennsylvania. *42 Pa. Cons. Stat. Ann. § 2524(a)*. This statute also permits an individual to bring a civil claim against such an "unauthorized practitioner," but solely for the benefit of prospective injunctive relief. *§ 2524(c)*.

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Legal Ethics > Unauthorized Practice of Law

HN5[] See *42 Pa. Cons. Stat. Ann. § 2524(c)*.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Legal Ethics > Unauthorized Practice of Law

HN6[] Having elected to litigate a claim in the federal courts, a plaintiff must prove he has presented a sufficiently concrete case or controversy to meet the jurisdictional requirements of U.S. Const. art. III before he can proceed. U.S. Const. art. III, § 2.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Legal Ethics > Unauthorized Practice of Law

HN7[] Generally, a plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury to demonstrate standing. But where the claim at issue is one for injunctive relief, past wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

HN8[] The "case or controversy" limitation of U.S. Const. art. III requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Civil Procedure > ... > Justiciability > Standing > Personal Stake

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Torts > Vicarious Liability > Partners > General Overview

HN9[] To establish U.S. Const. art. III standing, an "injury in fact" must not only be "concrete and particularized," but also actual or imminent, not "conjectural" or "hypothetical." Stated another way, the plaintiff must be immediately in danger of sustaining some direct injury.

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Malpractice & Professional Liability > Attorneys

Torts > Procedural Matters > Statute of Limitations > General Overview

HN10[↓] Pennsylvania's statute of limitations for bringing attorney malpractice claims is two years. *42 Pa. Cons. Stat. § 5524(7)*.

Constitutional Law > The Judiciary > Case or Controversy > Advisory Opinions

Legal Ethics > Unauthorized Practice of Law

HN11[↓] It is not the place of the federal courts to involve themselves in abstract disputes and provide advisory opinions on matters of state law, particularly where issues of state constitutional law are in dispute.

Civil Procedure > Judgments > Relief From Judgments > General Overview

Constitutional Law > The Judiciary > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Legal Ethics > Unauthorized Practice of Law

HN12[↓] The U.S. Const. art. III courts are for addressing the claims of individuals possessing particularized injuries that can actually be redressed by a favorable judgment.

Counsel: For Marvin Lundy, Appellant (02-2053, 02-3732, 02-3845): Paul R. Rosen, Spector, Gadon & Rosen, Philadelphia, PA.

For Marvin Lundy, Appellant (02-3845): Bruce L. Thall, Spector, Gadon & Rosen, Philadelphia, PA.

For Robert Hochberg, Appellant (02-1343, 02-2041, 02-3678): Donald S. Litman, Philadelphia, PA.

For Marvin Lundy, Appellee (02-1343, 02-2041, 02-3678): Paul R. Rosen, Spector, Gadon & Rosen, Philadelphia, PA.

For Robert Hochberg, Appellee (02-2053, 02-3732): Donald S. Litman, Philadelphia, PA.

For Scott E. Diamond, Appellee (02-3732, 02-3845): Scott E. Diamond, Hochberg, Napoli & Diamond, Philadelphia, PA.

Judges: Before: MCKEE, SMITH, and COWEN, Circuit Judges.

Opinion by: D. Brooks Smith

Opinion

[*739] OPINION OF THE COURT

MITH, *Circuit Judge*.

Before us are just some of the bitter fruits of a legal partnership gone awry. Appellee/cross-appellant **[**2]** Marvin Lundy filed in the District Court state law claims for prospective injunctive relief against his former law partners Robert Hochberg, John Haymond, and Scott Diamond for the unauthorized practice of law and "conspiracy" to "aid and abet" the unauthorized practice of law. Hochberg appeals from the grant of a judgment and permanent injunction against him, while Lundy cross-appeals from the District Court's dismissal of his "conspiracy" and "aid

and abetting" claims relating to the same against Haymond and Diamond. Because Lundy is without standing to pursue these state law claims in an Article III court, we will vacate the orders of the District Court and [*740] remand with instructions to dismiss these claims. [1]

[**3] I.

In October 1997, appellant Robert Hochberg and his then-partner John Haymond, personal injury attorneys both then licensed and practicing in Connecticut, formed a new legal partnership in Pennsylvania with appellee/cross-appellant Marvin Lundy. Mr. Lundy, then already possessing a personal injury practice of his own in Philadelphia, joined with Messrs. Hochberg and Haymond because of their experience and expertise in generating legal business through television and other advertising techniques. The resulting partnership, Haymond & Lundy ("H&L"), lasted two years.

Around October 1999, Lundy claims to have learned that Hochberg had previously pled guilty to a federal count of conspiracy to commit bank fraud, had been disbarred in Massachusetts and suspended in Connecticut as a result, and was therefore practicing law in Pennsylvania without a license. Lundy Second Stage Br. at 3. Lundy asserts that, as a result, he declared his partnership with Haymond and Hochberg dissolved on October 9. [2] The former partners filed crossing complaints in the Eastern District of Pennsylvania, alleging assorted federal and state law claims against the other. [3] Lundy alleged, *inter alia* [**4] , that Haymond, Hochberg, and Diamond - who was previously associated with Lundy, but left to practice with Haymond and Hochberg when H&L was dissolved - committed a civil RICO violation by conspiring to defraud Lundy of his law firm and clients, and therefore sought various damages and compensation. Lundy also brought state law claims pursuant to a Pennsylvania statute authorizing civil actions for prospective injunctive relief to prevent the unauthorized practice of law by non-lawyers.

[**5] Although all the federal question claims dropped out of the litigation over time, both Hochberg and Haymond's supplemental state law breach of contract claim against Lundy and Lundy's unauthorized practice of law claim against Hochberg eventually went to trial. The District Court tried the breach of contract claim first, resulting in a verdict of liability in favor of Haymond against Lundy for breach of the partnership agreement on January 26, 2001. On February 21, 2001, the bench trial commenced on Lundy's unauthorized practice of law claim against Hochberg. This resulted in a judgment against Hochberg on August 31, 2001, and [*741] a permanent injunction prohibiting him from practicing law in Pennsylvania unless and until he obtained admission to the Pennsylvania Bar either in full or *pro hac vice*. [4] Nonetheless, out of deference to the Pennsylvania courts, the District Court had earlier abstained from involving itself in the question of whether Haymond, a licensed practitioner, could be held liable for "conspiracy" to "aid and abet" Hochberg's unauthorized practice of law and dismissed that novel claim. The parties appealed these respective judgments and, consistent with what the [**6] District Court found to be the "consistently overlitigated" and "vexatious" nature of this dispute, also dispute the amount of attorneys' fees subsequently awarded by the District Court.

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[1] All of the appeals set forth in the caption relate to the unauthorized practice of law claim. The second and third issues appealed in case number 02-3845, together with the appeals in case numbers 00-1969 and 02-3781, are unrelated to the unauthorized practice of law claim and are disposed of in a separate decision filed this same date.

[2] The record belies Lundy's present assertions of ignorance regarding Hochberg's criminal conviction and licensure status. The District Court expressly found, based on testimony given by Lundy at trial, that Lundy was informed of Hochberg's indictment when Lundy, Haymond, and Hochberg were negotiating to form H&L in April 1997, and that Lundy and his attorney, negotiating the merger through an arms-length transaction, knew or should have known about the subsequent plea, sentencing, and licensure proceedings. Hochberg's August 4, 1997 guilty plea well preceded the final formation of H&L that October.

[3] When the parties initially brought their assorted claims below, Hochberg and Haymond had continued as partners and were allied against Lundy. Hochberg and Haymond have since also gone their separate ways and have, not surprisingly, also chosen to resolve the differences existing between them through litigation.

[4] The Connecticut Bar reinstated Hochberg's license to practice law in that state in November of 2001. Nonetheless, under the terms of the District Court's injunction, Hochberg appears to be prohibited from undertaking any actions at a law firm in Pennsylvania that may be construed as "practicing law" until he is also licensed in Pennsylvania.

The District Court premised its jurisdiction on *28 U.S.C. § 1331* and *§ 1367*. We have jurisdiction over these appeals pursuant to *28 U.S.C. § 1291*. On appeal, Hochberg asserts, *inter alia*, that pursuant to our decision in *Lyon v. Whisman, 45 F.3d 758 (3d Cir. 1995)*, and the principles relating to supplemental jurisdiction stated by the Supreme Court in *United Mine Workers v. Gibbs, 383 U.S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)*, **[**7]** the District Court never properly possessed subject-matter jurisdiction over the state unauthorized practice of law claims because they did not sufficiently "derive from a common nucleus of operative fact" as the federal questions so as to permit the District Court to exercise supplemental jurisdiction over those claims in the first instance. [5] Lundy responds that supplemental jurisdiction was appropriate, and that the District Court inappropriately abstained from considering whether "the Pennsylvania Constitution would be violated were the [District] Court to entertain jurisdiction over Pennsylvania Bar members."

[8] II.**

Before addressing the merits of the parties' allegations in this appeal, we must satisfy ourselves that it was appropriate for an Article III court to consider the state law claims brought by Lundy. While neither party raised the issue of whether Lundy possessed Article III standing to bring his claims, *HN1*[↑] "every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts, in every appeal presented to it, regardless of whether the parties contest jurisdiction." *Lewis v. Int'l Broth. of Teamsters, 826 F.2d 1310 (3d Cir. 1987)* (citing *Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1986)* (internal quotations omitted)). *See also Lyon, 45 F.3d at 760* (vacating a district court judgment for lack of jurisdiction even after a trial on the merits); *Trent Realty Assoc. v. First Fed. Sav. & Loan Assoc., 657 F.2d 29, 36 (3d Cir. 1981)* (vacating a district court order, though "cognizant that some frustration is inevitable by a holding on appeal that a matter which has proceeded to judgment for one of **[**9]** the parties must be remanded" for lack of federal jurisdiction).

HN2[↑] **[*742]** The Supreme Court succinctly summarized the now familiar elements a plaintiff must demonstrate to establish Article III standing in *Lujan v. Defenders of Wildlife, 504 U.S. 555, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)*:

> First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be "fairly ... traceable to the challenged action of the defendant, and not ... the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be 'redressed by a favorable decision.'"

Id. at 560-61 (citations omitted). At all times, "the party invoking federal jurisdiction bears the burden of establishing these elements." *Id. at 561*. "At the final stage, those facts (if controverted) must be 'supported adequately **[**10]** by the evidence adduced at trial.'" *Id.* (quoting *Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 115 n. 31, 60 L. Ed. 2d 66, 99 S. Ct. 1601 (1979)*). Because the parties did not brief the issue of whether Lundy had successfully proven these elements, we requested supplemental briefing from the parties on this issue. *See Lunderstadt v. Colafella, 885 F.2d 66, 69 (3d Cir. 1989)*.

Hochberg argues that Lundy lacks Article III standing because Lundy: [1] seeks redress for past wrongs that are not "accompanied by present adverse effects"; [2] did not demonstrate his alleged injury is causally related to the claim of unauthorized practice of law; and [3] a favorable decision enjoining Hochberg from practicing law could not alleviate any present threat of injury to Lundy. Lundy responds that he sustained the following injuries that he contends would be redressed through his unauthorized practice of law claim: [1] "that Hochberg's acts and omissions 'placed the clients of the law firm at risk, and created both ethical and financial risks to all lawyers and

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[5] In the event that the District Court's supplemental jurisdiction were upheld, Hochberg also asserted that the District Court abused its discretion in continuing to maintain that jurisdiction once all the federal claims were dismissed. *See, e.g., Annulli v. Panikkar, 200 F.3d 189 (3d Cir. 1999), abrogation on other grounds recognized by Forbes v. Eagleson, 228 F.3d 471 (3d Cir. 2000)*.

others at [H&L]"; [2] that Hochberg and his present firm still retain cases belonging **[**11]** to Lundy and are denying him the fees associated with those cases; and [3] because several cases retained by Hochberg stem from a time when Lundy was partners with Hochberg, Lundy "is thereby responsible for each and every claim which may be made against him in connection with Hochberg practicing law without a license, and while disbarred and suspended." Thus, Lundy asserts he "has been damaged and remains at risk as a result of Haymond's foisting off Hochberg on Lundy as Managing Partner of Haymond & Lundy, LLP" from October 1997 to October 1999.

III.

HN3[↑] The question of a plaintiff's Article III standing to bring a claim must be considered in light of the specific allegations that a plaintiff has brought and the relief sought. *See, e.g., City of Los Angeles v. Lyons, 461 U.S. 95, 102, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41-42, 48 L. Ed. 2d 450, 96 S. Ct. 1917 (1976)*. Lundy brought his unauthorized practice of law claims pursuant to *HN4*[↑] a Pennsylvania statute criminalizing the unauthorized practice of law by any person who "conveys the impression that he is a practitioner **[**12]** of the law of any jurisdiction" in Pennsylvania. *42 Pa. C.S.A. § 2524(a)*. This statute also permits an individual to bring a civil claim against such an "unauthorized practitioner," **[*743]** but solely for the benefit of prospective injunctive relief. *See § 2524(c)*. [6]

Lundy asserts that he is a "person contemplated by the framers of [*§ 2524*] who would vindicate the public policy because of his personal injury." Had Lundy brought these claims in Pennsylvania's courts, which are not bound by the constitutional requirements of Article III, perhaps that would be enough. Nonetheless, *HN6*[↑] having elected to litigate this claim in the federal courts, Lundy must prove **[**13]** he has presented a sufficiently concrete case or controversy to meet the jurisdictional requirements of Article III before he can proceed. *See* U.S. Const. art. III, § 2. [7]

HN7[↑] Generally, a "plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury'" **[**14]** to demonstrate standing. *Lyons, 461 U.S. at 101-02*. But where the claim at issue is one for injunctive relief, "past wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy." *Id. at 103*. Thus, Lundy's "standing to seek the injunction requested" in federal court "depended on whether he was likely to suffer future injury from" Hochberg's continued unauthorized practice of law. *Id. at 105*.

Lundy's assertions that Hochberg's unauthorized practice while a partner at H&L "placed" him at risk and caused other past injuries obviously fail to amount to an injury that can be redressed by an injunction against Hochberg's present and future unauthorized practice of law. *Lyons, 461 U.S. at 105* ("injunction requested depended on whether he was likely to suffer future injury"). Lundy is no longer in partnership with Hochberg and, we feel we can safely conclude from the record, will not be again. Nonetheless, Lundy's assertions that he is both being denied attorney fees as a result of Hochberg's continued unauthorized practice of law and that Lundy is "responsible **[**15]** for each and every claim which may be made against him in connection with Hochberg's practicing law without a license" attempt to allege present and future harm. We consider these arguments in turn.

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[6] *HN5*[↑] "Injunction.- In addition to criminal prosecution, unauthorized practice of law may be enjoined in any county court of common pleas having personal jurisdiction over the defendant. The party obtaining such an injunction may be awarded costs and expenses incurred, including reasonable attorney fees, against the enjoined party." *42 Pa. C.S.A. § 2524(c)*.

[7] Because Lundy's purported claims for injunctive relief against Haymond and Diamond for "conspiracy" to "aid and abet" the unauthorized practice of law derive from and are premised upon Lundy's direct claim against Hochberg, we see no need to analyze them separately and we decline to do so. If Lundy lacks Article III standing to bring the underlying claim against Hochberg, *a fortiori*, he is without standing to bring the derivative claims. Furthermore, as Haymond has now separated from and is in litigation with Diamond and Hochberg regarding the subsequent breakup of their practice, any claim that Lundy had against Haymond to enjoin his "aiding and abetting" of Hochberg's unauthorized practice of law appears moot.

First, Lundy asserts that Hochberg's continued practicing of law presently and prospectively denies him of revenues and fees that might otherwise go to him. Of course, the same could be said by just about any other lawyer who does not presently have Hochberg's firm's clients as his own. Thus, we doubt that this allegation of harm is anything more than a "generalized grievance" that Lundy shares with every other lawyer practicing in Pennsylvania. *See Lujan, 504 U.S. at 575*. Lundy seems "no more entitled to an injunction than any other citizen" or attorney and without a sufficiently particularized injury. *Lyons, 461 U.S. at 111*.

[*744] Nonetheless, even if we assume "that the injury . . . affects the plaintiff [Lundy] in a personal and individual way," *Lujan, 504 U.S. at 560 n. 1*., *HN8*[↑] "the 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action [**16] of the defendant, and not injury that results from the independent action of some third party not before the court." *Eastern Kentucky Welfare Rights Organization, 426 U.S. at 41-42*. Neither Lundy's complaint, the trial record, nor the District Court's ultimate findings of fact and conclusions of law suggest that, but for Hochberg's unauthorized practicing of law, Lundy's former clients would leave Hochberg's present law firm and return to Lundy. Thus, Hochberg's continuing practice is not causing Lundy's "injury." Rather, the record indicates that Lundy's "injury" resulted from "the independent action of some third party not before the court," *id.*, specifically his former clients' decisions to take their business elsewhere. Certainly, the record suggests that Hochberg engaged in the unauthorized practice of law because his "decisions on behalf of [the] law firm" could "require legal judgment." Nonetheless, it also shows that Hochberg was not primarily a practitioner, but mostly a firm manager and administrator. There is only sparse evidence of client contact by Hochberg, and none of it suggests that Hochberg was the primary point of contact or "draw" for any [**17] of those clients. Thus, nothing suggests that any "particularized" injuries Lundy contends he was suffering could be "redressed by a favorable decision" banning Hochberg from legal practice. *Lujan, 504 U.S. at 560-61*.

This is not to suggest that neither Hochberg nor Haymond committed no wrongs that could be actionable in initially inducing Lundy's clients to abandon him. We express no opinion on that question here; before us is whether Lundy was suffering a continuing injury that was "fairly traceable" specifically to Hochberg's conduct of practicing law without a license and, therefore, "likely, as opposed to merely speculative, that the injury [would] be redressed by a favorable decision" and prospective injunction. *Lujan, 504 U.S. 555 at 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130* (quotations and alterations omitted). Whether Lundy had standing to bring an action for damages stemming from past frauds or misrepresentations purportedly made by Hochberg or Haymond to Lundy's former clients is a separate issue. Because, however, the record below does not reflect that Lundy's purported loss of clients and fees was caused by, was likely to be redressed [**18] by, or (with the benefit of the hindsight now possessed) in any way even was redressed by an injunction against Hochberg from the District Court pursuant to *§ 2524(c)*, that allegation of injury cannot form the basis for the Article III standing which Lundy must show to bring his claims.

Lundy's letter brief now also asserts that he will be "responsible for each and every claim which *may* be made against him in connection with Hochberg practicing law without a license." Lundy Letter Br. at 5 (emphasis added). Unlike Lundy's previous allegation, this alleged injury seems sufficient to "demonstrate a 'personal stake in the outcome'" to justify Article III standing. *Lyons, 461 U.S. at 101* (quoting *Baker v. Carr, 369 U.S. 186, 204, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962)*). Nonetheless, *HN9*[↑] an "injury in fact" must not only be "concrete and particularized," but also "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id. at 560*. Stated another way, the plaintiff must be "immediately in danger of sustaining some direct injury." *Lyons, 461 U.S. at 102*.

Despite his present representations to this Court, Lundy neither alleged in his [**19] [*745] complaint nor proved at trial that any malpractice liability was likely to result from his past partnership with Hochberg or Haymond. Nonetheless, assuming those allegations had been "supported adequately by the evidence adduced at trial," *Lujan, 504 U.S. at 561*, they still would not present adequate grounds for invoking an Article III court's jurisdiction. Lundy admits in his letter brief that some malpractice liability "may" result from his *past* association with Hochberg, but he does not contend such liability is "imminent," or even likely. *Id. at 560*; *Whitmore v. Arkansas, 495 U.S. 149, 155, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990)*; *see also Lyons, 461 U.S. at 102*. Lundy alleges that *if* a malpractice suit is brought against him, and *if* that suit stems from a matter upon which Hochberg contributed during his partnership with Lundy from October 1997 to October 1999, and *if* it is found that Hochberg actually committed malpractice, and

if Lundy is found derivatively liable for Hochberg's malpractice because Hochberg's Connecticut law license was suspended at that time, *then* Lundy will suffer **[**20]** an injury. We dismiss this "hypothetical" and "conjectural" injury as nothing more than an eleventh hour effort by Lundy to justify his litigation of these generalized, non-diverse, state law claims in an Article III court.

Lundy's "malpractice" theory of injury also encounters causation and redressability problems similar to those upon which his "denial of fees" theory foundered. Again, to the extent that Lundy might have any liability for Hochberg's conduct on cases stemming from the partnership at H&L, any negligent acts which could fairly be ascribed to Lundy have already occurred. Lundy has not been in partnership with, or otherwise associated with and responsible for, the practice of Hochberg and his present partners, despite Lundy's claims of part "ownership" over some pending contingent fees, since October 1999. Therefore, there is no prospect of any liability to Lundy resulting from Hochberg's continued practice; an injunction against Hochberg's present and future practice can do nothing to redress Lundy's past injuries. [8]

[21]** Despite our holding, we in no way countenance Hochberg's apparent past violations of Pennsylvania law and the risks and harms to which he evidently exposed both his former partners and clients. Nonetheless, ***HN11***[↑] it is not the place of the federal courts to involve themselves in abstract disputes and provide advisory opinions on matters of state law, particularly where issues of state constitutional law are in dispute. Hochberg notes, and Lundy does not deny, that Lundy has already taken these very same unauthorized practice of law and related state law claims against Hochberg, Haymond, and Diamond to the Pennsylvania Court of Common Pleas for Philadelphia County. Hochberg Br. at 9. We trust that Pennsylvania's courts are capable of considering Lundy's state law claims and, unhampered by the jurisdictional strictures of Article III, of affording whatever relief is proven to be appropriate.

IV.

For the foregoing reasons, we conclude that Lundy is without standing to contest **[*746]** in the federal courts Hochberg's unauthorized practice of law and Haymond and Diamond's "conspiracy" to "aid and abet. Therefore, the District Court lacked jurisdiction to grant a permanent injunction against **[**22]** Hochberg. ***HN12***[↑] The Article III courts are for addressing the claims of individuals possessing particularized injuries that can actually be redressed by a favorable judgment. Concluding that Lundy is not such a person, we will vacate the orders of the District Court and remand for it to enter an order of dismissal.

By The Court,

/s/ D. Brooks Smith

Circuit Judge

DATED: October 22, 2003

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[8] We also note that ***HN10***[↑] Pennsylvania's statute of limitations for bringing attorney malpractice claims is two years. *42 Pa. C.S. § 5524(7)*; *Garcia v. Community Legal Services Corp., 362 Pa. Super. 484, 524 A.2d 980 (Pa. Super. 1987)*. Because Lundy dissolved his partnership with Hochberg and Haymond on October 8, 1999, the statute of limitations for any claims against Lundy regarding Hochberg's conduct has probably expired. This further mitigates the possibility that the "hypothetical" and "conjectural" malpractice injury to Lundy would ever occur. *See Lyons, 461 U.S. at 102*; *Lujan, 504 U.S. at 560*.

Exhibit 15

Fullman v. Patton Twp. Police Dep't

United States District Court for the Middle District of Pennsylvania

March 14, 2013, Decided; March 14, 2013, Filed

Civil Action No. 4:12-CV-1879; Civil Action No. 4:12-CV-1880; Civil Action No. 4:12-CV-1881; Civil Action No. 4:12-CV-1882; Civil Action No. 4:12-CV-1883; Civil Action No. 4:12-CV-2061; Civil Action No. 4:12-CV-2063; Civil Action No. 4:13-CV-0235

Reporter
2013 U.S. Dist. LEXIS 35096 *; 2013 WL 1089059

ISAAC KENNETH FULLMAN, Plaintiff, v. PATTON TOWNSHIP POLICE DEPARTMENT, SGT. MATTHEW SHUPENKO, CHIEF JOHN PETRICK, Defendants.ISAAC KENNETH FULLMAN, Plaintiff, v. PENN STATE UNIVERSITY POLICE DEPARTMENT, and OFFICER MATTHEW MASSARO, Defendants.ISAAC KENNETH FULLMAN, Plaintiff, v. CENTRE COUNTY DISTRICT ATTORNEYS OFFICE, Defendant.ISAAC KENNETH FULLMAN, Plaintiff, v. STATE COLLEGE BOROUGH POLICE DEPARTMENT, OFFICER BRIAN FOSTER and OFFICER MICHAEL S. MAMOLEN, Defendants.ISAAC KENNETH FULLMAN, Plaintiff, v. FERGUSON TOWNSHIP POLICE DEPARTMENT, and OFFICER DEVON MICHAEL MORAN, Defendants.ISAAC KENNETH FULLMAN, Plaintiff, v. CENTRE COUNTY COURTHOUSE DISTRICT ATTORNEYS OFFICE and CENTRE COUNTY COURTHOUSE, Defendants.ISAAC KENNETH FULLMAN, Plaintiff, v. CENTRE COUNTY CORRECTIONAL FACILITY, JEFFREY T. HITE, MICHAEL WOODS, LT. JEANNA ANANEA CAPT. JOHN PERRYMAN, and LT. M GORDON, Defendants.ISAAC KENNETH FULLMAN, Plaintiff, v. CENTRE COUNTY COURTHOUSE, CENTRE COUNTY DISTRICT ATTORNEY'S OFFICE, SEAN P. MCGRAW, CENTRE COUNTY CORRECTIONAL FACILITY, WARDEN JEFFREY T. HITE, and CAPTAIN JOHN PERRYMAN, Defendants.

Subsequent History: Magistrate's recommendation at *Fullman v. Patton Twp. Police Dep't, 2013 U.S. Dist. LEXIS 83403 (M.D. Pa., May 16, 2013)*

Prior History: *Fullman v. Patton Twp. Police Dep't, 2012 U.S. Dist. LEXIS 186887 (M.D. Pa., Sept. 21, 2012)*

Core Terms

civil action, magistrate judge, report and recommendation, amended complaint, recommending, appointing counsel, pro se, liberally, alleges, dismissal without prejudice, complaint alleges, correctional facility, extension of time, case file, incarcerated, undersigned, objection to the report, violations, requests, factors, maximum, further explanation, found guilty, police stop, all-inclusive, rights

Case Summary

Overview

Pro se plaintiff's cases had overlapping and repetitive claims and defendants, so all but one were dismissed to allow consolidation; counsel was not appointed, as plaintiff showed his ability to present his case in that the action survived summary dismissal, the legal issues were not complex, and there was no need for factual investigation.

Outcome

Seven of eight cases dismissed in their entirety without prejudice and motion for appointment of counsel denied.

LexisNexis® Headnotes

Civil Procedure > Parties > Pro Se Litigants > Pleading Standards

HN1[] Pro Se complaints in particular should be construed liberally.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Arrests

Torts > Intentional Torts > False Arrest > General Overview

HN2[] In Pennsylvania, a plaintiff cannot bring a civil rights action for false arrest based on presently valid criminal convictions and sentences. To challenge a state conviction, the plaintiff would have to bring a direct appeal through the state, and, once exhausted, a petition through Pennsylvania's Post Conviction Relief Act.

Torts > Public Entity Liability > Immunities > Absolute Immunity

HN3[] A plaintiff cannot sue a prosecutor for the fact that he was prosecuted. He can only sue a prosecutor for actions outside of the role of a prosecutor. Actions fairly within the prosecutor's function as an advocate are entitled to protection. A prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity. Acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings for trial, and which occur in the course of his role as an advocate for the State are entitled to the protections of absolute immunity.

Civil Procedure > ... > Justiciability > Mootness > General Overview

Constitutional Law > ... > Case or Controversy > Mootness > General Overview

HN4[] A plaintiff cannot obtain an injunction for being held past his maximum release date when he is no longer being held. Article III of the Constitution limits federal courts to the adjudication of cases or controversies. If one or more issues involved in an action become moot, the adjudication of the moot issue or issues should be refused. The central question of all mootness problems is whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief. Where the plaintiff suffers no continuing injury, an injunction would offer no meaningful relief.

Civil Procedure > Attorneys > Appointment of Counsel

HN5[] A court has authority to request an attorney to represent any person unable to afford counsel. *28 U.S.C.S. § 1915(e)(1)*. The United States Court of Appeals for the Third Circuit has announced the factors that are to be considered by a district court in deciding whether to exercise its discretion and seek counsel for an indigent litigant in a civil case. Following Tabron, the first consideration by a district court should be whether the petitioner's claim has some merit in fact and law. Only after determining that the claim has some merit should the court consider these six additional factors: (1) the plaintiff's ability to present his or her own case; (2) the complexity of the legal issues; (3) the degree to which factual investigation will be necessary and the plaintiff's ability to pursue such an investigation; (4) the amount the case is likely to turn on credibility determinations; (5) whether the case will require the testimony of expert witnesses; and (6) whether the plaintiff can attain and afford counsel on his own behalf.

Counsel: **[*1]** Isaac Kenneth Fullman (4:12-cv-01879-MWB-MCC, 4:12-cv-01880-MWB, 4:12-cv-01881-MWB, 4:12-cv-01882-MWB, 4:12-cv-01883-MWB, 4:12-cv-02061-MWB, 4:12-cv-02063-MWB, 4:13-cv-00235-MWB), Plaintiff, Pro se, Philadelphia, PA.

Judges: Matthew W. Brann, United States District Judge.

Opinion by: Matthew W. Brann

Opinion

MEMORANDUM

BACKGROUND:

As an initial matter, plaintiff Isaac Kenneth Fullman, proceeding *pro se*, has eight separate actions[1] pending before the undersigned. The court is addressing all eight actions in one memorandum and order for three reasons: First, Fullman himself refers to multiple cases in his filings with the court; second, all eight have overlapping and repetitive alleged facts and defendants; and third, because the court will dismiss seven of the actions so that Fullman may file one all-inclusive amended complaint that consolidates all of his claims into one action.

Civil Action No. 4:12-CV-1879:

On September 20, 2012, Fullman, proceeding *pro se*, filed a complaint pursuant to *42 U.S.C. § 1983*. (Doc. No. 1). Construing the complaint liberally[2], Fullman's complaint **[*2]** alleges that a racially motivated police stop on April 23, 2010, resulted in him being found guilty of a driving under the influence (hereinafter "DUI") charge in the Court of Common Pleas of Centre County, Pennsylvania; the jury for his DUI trial held on December 14, 2010, was not impartial because the jurors were all Caucasian and Fullman is African-American; his counsel for the DUI trial, Edward Blanarick, Esquire, was ineffective because he refused to argue that the jury was impartial; and Fullman also refers generally to *Eighth* and *Fourteenth Amendment* violations. The named defendants are the Patton Township Police Department, Sgt. Matthew Shupenko and Chief John Petrick.

The matter was initially referred to United States Magistrate Judge Martin C. Carlson. On September 21, 2012, the magistrate judge filed a twelve-page report and recommendation (Doc. No. 5), recommending that Fullman's complaint be dismissed without prejudice in order for Fullman to file an amended complaint. Objections to the report and recommendation were filed by Fullman on November 16, 2012. **[*3]** (Doc. No. 13). Fullman also filed a Motion to Appoint Counsel on December 12, 2012. (Doc. No. 14).

Civil Action No. 4:12-CV-1880:

On September 20, 2012, Fullman, proceeding *pro se*, filed a complaint pursuant to *42 U.S.C. § 1983*. (Doc. No. 1). Construing the complaint liberally, Fullman's complaint alleges a racially motivated police stop on December 12, 2008, resulted in him being found guilty of a driving under the influence (hereinafter "DUI") charge in the Court of Common Pleas of Centre County, Pennsylvania and Fullman also refers generally to *Eighth* and *Fourteenth Amendment* violations. The named defendants are the Pennsylvania State University Police Department and Officer Matthew Massaro.

The matter was initially referred to United States Magistrate Judge Martin C. Carlson. On September 21, 2012, the magistrate judge filed a twelve-page report and recommendation (Doc. No. 4), recommending that Fullman's complaint be dismissed without prejudice in order for Fullman to file an amended complaint. Objections to the report and recommendation were filed by Fullman on October 15, 2012. (Doc. No. 9). Fullman also filed a Motion for Extension of Time/Motion to Appoint Counsel on December **[*4]** 12, 2012. (Doc. No. 13).

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[1] Additionally, Fullman had two prior actions in the Middle District of Pennsylvania 3:12-CV-1876 and 4:12-CV-2233 that were dismissed on the merits.

[2] *HN1*[↑] *Pro Se* complaints in particular should be construed liberally. *Dluhos v. Strasberg, 321 F.3d 365, 369 (3d Cir. 2003)*.

Civil Action No. 4:12-CV-1881:

On September 20, 2012, Fullman, proceeding *pro se,* filed a complaint pursuant to *42 U.S.C. § 1983.* (Doc. No. 1). Construing the complaint liberally, Fullman's complaint alleges a racially motivated police stop by Officer Brian Foster on July 31, 2010, resulted in him being found guilty of a DUI charge in the Court of Common Pleas of Centre County, Pennsylvania; the jury for his DUI trial held on December 14, 2010, was not impartial because the jurors were all Caucasian and Fullman is African-American; his counsel for the DUI trial, Edward Blanarick, Esquire, was ineffective because he refused to argue that the jury was impartial; Officer Michael S. Mamolen charged him with a harassment misdemeanor 3 because Fullman is African American; Fullman also alleges *Eighth* and *Fourteenth Amendment* violations for racial discrimination; and Fullman requests "the Disorderly Charge summary dismissed and expunged off my criminal record." The named defendant is the Centre County Courthouse District Attorney's Office.

The matter was initially referred to United States Magistrate Judge Martin C. Carlson. On September 21, 2012, the magistrate judge **[*5]** filed a twelve-page report and recommendation (Doc. No. 5), recommending that Fullman's complaint be dismissed without prejudice in order for Fullman to file an amended complaint. Objections to the report and recommendation were filed by Fullman on October 15, 2012. (Doc. Nos. 9 and 10). Fullman also filed a Motion for Extension of Time/Motion to Appoint Counsel on December 12, 2012. (Doc. No. 14).

Civil Action No. 4:12-CV-1882:

On September 20, 2012, Fullman, proceeding *pro se,* filed a complaint pursuant to *42 U.S.C. § 1983.* (Doc. No. 1). Construing the complaint liberally, Fullman's complaint alleges a racially motivated police stop by Officer Brian Foster on July 31, 2010, resulted in him being found guilty of a DUI charge in the Court of Common Pleas of Centre County, Pennsylvania; Fullman asks for his citations to be dismissed because of the alleged racial profiling; Officer Michael S. Mamolen charged him with a harassment misdemeanor 3 because Fullman is African American; Fullman also alleges *Eighth* and *Fourteenth Amendment* violations for racial discrimination; and Fullman requests "the Disorderly Charge summary dismissed and expunged off my criminal record." The named defendants **[*6]** are the State College Borough Police Department, Officer Brian Foster and Officer Michael S. Mamolen.

The matter was initially referred to United States Magistrate Judge Martin C. Carlson. On September 21, 2012, the magistrate judge filed a twelve-page report and recommendation (Doc. No. 5), recommending that Fullman's complaint be dismissed without prejudice in order for Fullman to file an amended complaint. Objections to the report and recommendation were filed by Fullman on October 15 and 26, 2012. (Doc. Nos. 9 and 10). Letters requesting an extension of Time and to reconsider the denial of appointment of counsel were filed by Fullman on November 16, 2012 and December 10, 2012. (Doc. Nos.12 and 13).

Civil Action No. 4:12-CV-1883:

On September 20, 2012, Fullman, proceeding *pro se,* filed a complaint pursuant to *42 U.S.C. § 1983.* (Doc. No. 1). Construing the complaint liberally, Fullman's complaint alleges a racially motivated police stop by Officer Brian Foster on July 31, 2010, resulted in him being found guilty of a DUI charge in the Court of Common Pleas of Centre County, Pennsylvania; he also alleges *Eighth* and *Fourteenth Amendment* violations for racial discrimination. The named **[*7]** defendants are the Ferguson Township Police Department and Officer Devon Michael Moran.

The matter was initially referred to United States Magistrate Judge Martin C. Carlson. On September 27, 2012, the magistrate judge filed a ten-page report and recommendation (Doc. No. 5), recommending that Fullman's complaint be dismissed without prejudice in order for Fullman to file an amended complaint. What can be construed as objections to the report and recommendation were filed by Fullman on October 15, 2012. (Doc. Nos. 8 and 9). Fullman also filed a Motion for Extension of Time on December 10, 2012. (Doc. No. 13).

Civil Action No. 4:12-CV-2061:

On October 15, 2012, Fullman, proceeding *pro se*, filed a complaint pursuant to *42 U.S.C. § 1983*[3]. (Doc. No. 1). Construing the complaint liberally, Fullman's complaint alleges he was incarcerated 13-days beyond his 90-day maximum release date; he also alleges *Eighth* and *Fourteenth Amendment* violations for racial discrimination; and he is requesting compensatory and punitive damages for his claims. The named defendants are the Centre County Courthouse District Attorney's Office and the Centre County Courthouse.

The matter was initially referred to United States Magistrate Judge Martin C. Carlson. On October 16, 2012, the magistrate judge filed a twenty-one-page report and recommendation (Doc. No. 5), recommending that Fullman's complaint be dismissed without prejudice in order for Fullman to file an amended complaint. Fullman did not file objections to the report and recommendation.

Civil Action No. 4:12-CV-2063:

On October 15, 2012, Fullman, proceeding *pro se*, filed a complaint pursuant to *42 U.S.C. § 1983*[4]. (Doc. No. 1). Construing the complaint liberally, Fullman's complaint alleges that he was incarcerated in the Centre County Correctional Facility 12-days beyond his 90-day maximum sentence; he also alleges a litany of other offenses, specifically that "[a]nother day I would like to sue for is. . . I was. . . incarcerated for one whole day at the Philadelphia Police [*9] Department. . . the next day the Centre County Sheriffs. . . pick[ed] me up and transported me to the Centre County Correctional Facility. . . and did not acknowledge [the day in custody in Philadelphia] as time served;" he also alleges he was not paid for work in the Centre County Correctional Facility; he would like black tube socks that he claims the facility lost to be replaced; that the law library in the facility was deficient; that he had to wait seven-days for hygiene items while incarcerated; that his *Eighth Amendment* right against cruel and unusual punishment was violated because he was incarcerated past his maximum release date; and that his *Fourteenth Amendment* rights were violated because he did not have equal protection of the laws. The named defendants are the Centre County Correctional Facility, Jeffrey T. Hite, Michael Woods, Jeanna Ananea, John Perryman and M. Gordon.

The matter was initially referred to United States Magistrate Judge Martin C. Carlson. On October 18, 2012, the magistrate judge filed a twenty-eight-page report and recommendation (Doc. No. 5), recommending that Fullman's complaint be dismissed without prejudice in order for Fullman to file an amended complaint. Fullman did not file objections to the report and recommendation.

Civil Action No. 4:13-CV-0235:

On January 31, 2013, Fullman, proceeding *pro se*, filed a complaint pursuant to *42 U.S.C. § 1983*. (Doc. No. 1). Construing the complaint liberally, Fullman's complaint alleges that he was incarcerated in the Centre County Correctional Facility beyond his 90-day maximum sentence; that his *Eighth Amendment* right against cruel and unusual punishment was violated because he was incarcerated past his maximum release date; that his *Fourteenth Amendment* rights were violated because he did not have equal protection of the laws; and he requests injunctive relief along with compensatory and punitive damages. The named defendants are the Centre County Correctional Facility, Jeffrey T. Hite, Michael Woods, Jeanna Ananea, John Perryman [*11] and M. Gordon.

The matter was initially referred to United States Magistrate Judge Martin C. Carlson. On February 5, 2013, the magistrate judge filed a twenty-five page report and recommendation (Doc. No. 5), recommending that Fullman's complaint be dismissed without prejudice in order for Fullman to file an amended complaint. On February 19, 2013, Fullman filed objections to the report and recommendation.

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[3] On the standard form civil complaint provided [*8] by the Middle District of Pennsylvania, titled "Form to Be Used by a Prisoner in Filing a Civil Rights Complaint," Fullman wrote a checkmark for both a ***42 U.S.C. § 1983*** and ***28 U.S.C. § 1331*** claim. As Fullman did not list a single federal actor in his complaint, the court is proceeding with the claim as solely a ***§ 1983*** claim.

[4] On the standard form civil complaint provided by the Middle District of Pennsylvania, titled "Form to Be Used by a Prisoner in Filing a Civil Rights Complaint," Fullman wrote a checkmark for both a ***42 U.S.C. § 1983*** and ***28 U.S.C. § 1331*** claim. As Fullman did not list a single federal actor in his complaint, [*10] the court is proceeding with the claim as solely a ***§ 1983*** claim.

DISCUSSION:

Substantive Claims:

Magistrate Judge Carlson conducted a thorough analysis of all eight civil actions. Consequently, this Court will not rehash the sound reasoning of the Magistrate Judge and will instead adopt all eight report and recommendations in their entirety, with one procedural exception.

All eight cases have overlapping and repetitive claims and defendants, as referenced above. For the sake of clarity, the undersigned will dismiss seven of the eight actions so as to consolidate all of Fullman's actions into one case. Fullman will be permitted to file one, all-inclusive complaint in Civil Action No. 4:12-CV-1879, only.

Fullman's amended complaint must comply with the terms of this order, and the report and recommendations of Magistrate Judge Carlson, otherwise, it will **[*12]** be dismissed with prejudice. Specifically, Fullman must grasp and take into consideration that:

First, *HN2*[↑] he cannot bring a civil rights action for false arrest based on presently valid criminal convictions and sentences. To challenge a state conviction, Fullman would have to bring a direct appeal through the state, and, once exhausted, a petition through Pennsylvania's Post Conviction Relief Act (PCRA).

Second, *HN3*[↑] he cannot sue a prosecutor for the fact that he was prosecuted. He can only sue a prosecutor for actions outside of the role of a prosecutor. Actions "fairly within the prosecutor's function as an advocate" are entitled to protection. *See Buckley v. Fitzsimmons, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209, 226 (1993)* (internal citations omitted). "A prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity. *Id.* "[A]cts undertaken by a prosecutor in preparing for the initiation of judicial proceedings for trial, and which occur in the course of his role as an advocate for the State are entitled to the protections of absolute immunity." *Id.*

Third, *HN4*[↑] he cannot **[*13]** obtain an injunction for being held past his maximum release date, as he is no longer being held. Article III of the Constitution limits federal courts to the adjudication of "cases" or "controversies." *Am. Bird Conservancy v. Kempthorne, 559 F. 3d 184, 188 (3d Cir. 2009)*. "If one or more issues involved in an action become moot. . . the adjudication of the moot issue or issues should be refused." *N.J. Tpk. Auth. v. Jersey Cent. Power & Light, 772 F.2d 25, 30 (3d Cir. 1985)*. "[T]he central question of all mootness problems is whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief." *Jersey Cent. Power & Light Co. v. New Jersey, 772 F.2d 35, 39 (3d Cir. 1985)*. As Fullman suffers no continuing injury, an injunction would offer no meaningful relief.

Fourth, Fullman cannot sue a courthouse, a correctional facility or the entire district attorney's office. For further explanation, see the report and recommendation of the Magistrate Judge. (Doc. No. 5 in Civil Action No. 4:12-CV-2061).

Fifth, to establish a supervisory liability claim, Fullman would have to set forth specific allegations of involvement. For further **[*14]** explanation, see the report and recommendation of the Magistrate Judge. (Doc. No. 5 in Civil Action No. 4:12-CV-2063).

Sixth, currently, as written, Fullman's access to the courts claim fails to state a claim upon which relief can be granted. For further explanation, see the report and recommendation of the magistrate judge. (Doc. No. 5 in Civil Action No. 4:12-CV-2063).

Seventh, currently, as written, Fullman's deprivation of property claim fails to state a claim upon which relief can be granted. For further explanation, see the report and recommendation of the Magistrate Judge. (Doc. No. 5 in Civil Action No. 4:12-CV-2063).

Eighth, currently, as written, Fullman's conditions of confinement claim fails to state a claim upon which relief can be granted. For further explanation, see the report and recommendation of the Magistrate Judge. (Doc. No. 5 in Civil Action No. 4:12-CV-2063).

Fullman's complaints are deficient as currently stated. Thus, the undersigned will give him three weeks to file one, all-inclusive amended complaint in Civil Docket No. 4:12-CV-1879 to bring all of his claims in one amended complaint. Fullman is directed to comply with the terms of this order and the report [*15] and recommendations of the Magistrate Judge in writing his amended complaint. Failure to do so with result in the complaint being dismissed with prejudice.

Motions for appointment of counsel:

As to Fullman's objections to the denial of appointment of counsel and his Motion to Appoint Counsel[5] (Doc. Nos. 14, 13, 14, and 13 respectively) in Civil Action No. 4:12-CV-1879, Civil Action No. 4:12-CV-1880, Civil Action No. 4:12-CV-1881 and Civil Action No. 4:12-CV-1883), the undersigned also denies appointing counsel.

HN5[↑] The court has authority "to request an attorney to represent any person unable to afford counsel." *28 U.S.C. § 1915(e)(1)* (emphasis added). In *Tabron v. Grace,* the Third Circuit announced the factors that are to be considered by a district court in deciding whether to exercise its discretion and seek counsel for an indigent litigant in a civil case. *6 F.3d 147, 153 (3d Cir. 1993), cert. denied, 510 U.S. 1196, 114 S. Ct. 1306, 127 L. Ed. 2d 657 (1994).* [*16] Following *Tabron,* the first consideration by a district court should be whether the petitioner's claim has "some merit in fact and law." *Parham v. Johnson, 126 F.3d 454, 457 (3d Cir. 1997)* (citing *Tabron, 6 F.3d at 157*).

Only after determining that the claim has some merit should the court consider these six additional factors: 1) the plaintiff's ability to present his or her own case; 2) the complexity of the legal issues; 3) the degree to which factual investigation will be necessary and the plaintiff's ability to pursue such an investigation; 4) the amount the case is likely to turn on credibility determinations; 5) whether the case will require the testimony of expert witnesses; and 6) whether the plaintiff can attain and afford counsel on his own behalf. *Id. at 457-58* (citing *Tabron, 6 F.3d at 155-56, 157 n. 5*).

As a threshold matter, I consider the merit of plaintiff's claims. *Tabron, 6 F.3d at 155.* Although it is too early to fully assess if the plaintiff's claim has merit, the court will provide plaintiff an opportunity to amend his complaint, so that, arguably, his complaint may have merit.

Utilizing the six factors laid out in *Parham,* I find that only one of the six factors [*17] favors seeking counsel. The other five factors against seeking counsel outweigh the one in favor.

This Court commences its analysis of the matter at hand by considering the only *Parham* factor that conceivably favors the Court ultimately seeking counsel to represent Fullman. At the present, the plaintiff is proceeding *in forma pauperis* and represents that he cannot afford counsel. The circumstances of this case may change. In the event that they do, the Court has the discretion to appoint counsel, provided, however, that an attorney is prepared to represent the plaintiff.

The other five factors articulated by *Parham* clearly outweigh the need to seek counsel. Fullman has shown his ability to present his case thus far, as the instant action survived summary dismissal. The legal issues are not particularly complex, nor is there a need for intense factual investigation. As the Magistrate Judge pointed out, Fullman's filings show he knows the basis of his claim. If this case turns on credibility determinations and may require expert testimony, we find that this type of claim may require an expert and a jury may need to determine credibility of the witnesses. However, as trial is still remote [*18] in time, we do not believe counsel is necessary at

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[5] Also sometimes titled a Motion for Extension of Time/Motion to Appoint Counsel. As the motion to extend time requests time to amend his complaint, and the undersigned is ordering an amended complaint, the court will deal with these as Motions to Appoint Counsel only.

this stage in the proceedings. In the event the circumstances of this case change, the court will consider and evaluate a new application for counsel at such time.

CONCLUSION:

Counsel will not be appointed for Fullman. Inasmuch as any of Fullman's motions, letters or objections request time to amend his complaint, this request will be granted.

As to Civil Docket No. 4:12-CV-1879, Fullman will be ordered to consolidate his claims and file one, all-inclusive amended complaint.

As to Civil Docket Nos. 4:12-CV-1880; 4:12-CV-1881; 4:12-CV-1882; 4:12-CV-1883; 4:12-CV-2061;4:12-CV-2063 and 4:13-CV-0235 these cases will be dismissed in their entirety without prejudice, so that Fullman can bring all his claims under Civil Docket No. 4:12-CV-1879.

Accordingly, the undersigned will adopt the report and recommendation of the magistrate judge in part, and deny it in part.

An appropriate Order will follow.

/s/ Matthew W. Brann

Matthew W. Brann

United States District Judge

ORDER

In accordance with the accompanying memorandum,

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. In Civil Action No. 4:12-CV-1879 United States Magistrate Judge Martin C. Carlson's Report **[*19]** and Recommendation is ADOPTED in part. (Doc. No. 5)

2. On or before Thursday, April 11, 2013, the plaintiff shall file one, all-inclusive amended complaint in Civil Action No. 4:12-CV-1879 only.

A. The plaintiff's amended complaint shall be complete, in and of itself, without reference to any prior filings.
B. The plaintiff's amended complaint must include appropriate allegations of the defendants personal involvement.
C. The plaintiff's amended complaint must specifically state, in separate numbered counts, which constitutional right he alleges the defendant(s) have violated and which defendant(s) they are alleging are involved in each count.

D. In accordance with *Fed. R. Civ. P. 8(d)*, each averment of the plaintiff's amended complaint shall be simple, concise and direct.
E. Should the plaintiff fail to file his amended complaint within the required time period, or fail to follow the above mentioned procedures, the undersigned will dismiss the action with prejudice.

8. In Civil Action No. 4:12-CV-1879 Fullman's Motion to Appoint Counsel (Doc. No. 14) is DENIED.

9. In Civil Action No. 4:12-CV-1880 United States Magistrate Judge Martin C. Carlson's Report and Recommendation is ADOPTED in part. **[*20]** (Doc. No. 5)
10. In Civil Action No. 4:12-CV-1880 Fullman's Motion to Appoint Counsel (Doc. No. 13) is DENIED.
11. Civil Action No. 4:12-CV-1880 is DISMISSED.

12. The clerk is directed to close the case file in Civil Action No. 4:12-CV-1880.
13. In Civil Action No. 4:12-CV-1881 United States Magistrate Judge Martin C. Carlson's Report and Recommendation is ADOPTED in part. (Doc. No. 5)
14. In Civil Action No. 4:12-CV-1881 Fullman's Motion for Extension of Time and to Appoint Counsel (Doc. No. 14) is DENIED.
15. Civil Action No. 4:12-CV-1881 is DISMISSED.
16. The clerk is directed to close the case file in Civil Action No. 4:12-CV-1881.
17. In Civil Action No. 4:12-CV-1882 United States Magistrate Judge Martin C. Carlson's Report and Recommendation is ADOPTED in part. (Doc. No. 5)
18. Civil Action No. 4:12-CV-1882 is DISMISSED.
19. The clerk is directed to close the case file in Civil Action No. 4:12-CV-1882.
20. In Civil Action No. 4:12-CV-1883 United States Magistrate Judge Martin C. Carlson's Report and Recommendation is ADOPTED in part. (Doc. No. 5)
21. In Civil Action No. 4:12-CV-1883 Fullman's Motion for Extension of Time (Doc. No. 13) is DENIED.

22. **[*21]** Civil Action No. 4:12-CV-1883 is DISMISSED.
23. The clerk is directed to close the case file in Civil Action No. 4:12-CV-1883.
24. In Civil Action No. 4:12-CV-2061 United States Magistrate Judge Martin C. Carlson's Report and Recommendation is ADOPTED in part. (Doc. No. 5)
25. Civil Action No. 4:12-CV-2061 is DISMISSED.
26. The clerk is directed to close the case file in Civil Action No. 4:12-CV-2061.
27. In Civil Action No. 4:12-CV-2063 United States Magistrate Judge Martin C. Carlson's Report and Recommendation is ADOPTED in part. (Doc. No. 5)
28. Civil Action No. 4:12-CV-2063 is DISMISSED.
29. The clerk is directed to close the case file in Civil Action No. 4:12-CV-2063.
30. In Civil Action No. 4:13-CV-0235 United States Magistrate Judge Martin C. Carlson's Report and Recommendation is ADOPTED in part. (Doc. No. 5)
31. Civil Action No. 4:13-CV-0235 is DISMISSED.
32. The clerk is directed to close the case file in Civil Action No. 4:13-CV-0235.
33. Civil Action No. 4:12-CV-1879 is referred back to United States Magistrate Judge Martin C. Carlson for further proceedings.

/s/ Matthew W. Brann

Matthew W. Brann

United States District Judge

End of Document

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Attorney for Defendant, City of North Wildwood

SANDRA SMITH, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF GEORGE BRADLEY SMITH, AND AS GUARDIAN AD LITEM FOR HER CHILDREN KOLE SMITH AND BRANDY SMITH, NICOLE GAETA, KYLE SMITH, Plaintiff, v. CITY OF NORTH WILDWOOD, STATE OF NEW JERSEY, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAPE MAY COUNTY DOCKET NO. CPM-L-415-16 Civil Action **CERTIFICATION OF SERVICE**

I, A. Michael Barker, Esquire, being of full age, hereby certify as follows:

1. I am an attorney-at-law licensed to practice in the State of New Jersey, and I am the Senior Partner with the Law Offices of Barker, Gelfand & James. I am the attorney entrusted with the handling of this matter on behalf of the Defendant, the City of North Wildwood, and I am familiar with the facts set forth herein.

2. On the 1st day of February, 2017, the original of the within Reply Brief in Support of Motion to dismiss by Defendant City of North Wildwood was sent via FedX overnight delivery to the Superior Court of New Jersey, County of Cape May, 9 North Main Street, Cape May Court House, New Jersey 08210, for filing.

3. On the 1st day of February, 2017, a true and correct copy of the aforesaid documents was sent via email and first-class mail to:

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D'AMATO LAW FIRM
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Joseph C. Grassi, Esquire
Barry, Corrado & Grassi, P.C.
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Wildwood, New Jersey 08360
Attorney Plaintiff Brandy Smith

Kristina Miles, Esquire
Office of the Attorney General
Hughes Justice Complex
25 Market Street
7th Floor West, P.O. Box 093
Trenton, New Jersey 08625
Counsel for Defendant
State of New Jersey

4. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false I am subject to punishment.

Dated: February 1, 2017

A. Michael Barker, Esquire

BARKER, GELFAND & JAMES

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*CERTIFIED BY THE SUPREME COURT OF NEW JERSEY AS A CIVIL TRIAL ATTORNEY
** LICENSED TO PRACTICE IN PENNSYLVANIA

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PLEASE REPLY TO
ATLANTIC COUNTY OFFICE

February 1, 2017

Direct Filing/Law Division
Cape May County Superior Court
9 North Main Street
Cape May Court House, New Jersey 08210

Re: Sandra Smith, Individually and as Executrix of the Estate of George Bradley Smith and as Guardian Ad Litem for her children, Cole smith, Brandy Smith, Nicole Gaeta and Kyle Smith v. City of North Wildwood, State of New Jersey
Docket Number: CPM-L-415-16
Date of Event: July 27, 2012
Our File Number 60289-01

Dear Sir/Madam:

As you are aware, we represent the Defendant City of North Wildwood in the above captioned matter.

We enclose for filing an original and one (1) copy of Reply Brief in support of Defendant, City of North Wildwood's Motion to Dismiss. Please return a filed copy in the self-addressed, stamped envelope provided, charging any applicable filing fee to this Law Firm's Account Number 140568.

Re: Sandra Smith, Individually and as Executrix of the Estate of George Bradley Smith and as Guardian Ad Litem for her children, Cole smith, Brandy Smith, Nicole Gaeta and Kyle Smith v. City of North Wildwood, State of New Jersey
Docket Number: CPM-L-415-16
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Our File Number 60289-01

Thank you.

Very truly yours,

BARKER, GELFAND & JAMES
a Professional Corporation

By: A. Michael Barker
A. Michael Barker, Esquire

AMB/gb

Cc: ***with copy of enclosure to:***
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