IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

RICHARD G. PHILLIPS, and RICHARD G. PHILLIPS ASSOCIATES, P.C.	: JULY TERM, 2000
	: No. 1550
v.	
	: (Commerce Program)
ALAN H. "BUD" SELIG, *et al.*	
WORLD UMPIRES ASSOCIATION	: JULY TERM, 2001
v.	: No. 1255
RICHARD G. PHILLIPS ASSOCIATES, PC, *et al.*	: Superior Court Docket No. 1966 EDA 2007

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O P I N I O N

Albert W. Sheppard, Jr., J. …….…… September 12, 2007

This Opinion is submitted relative to the appeals of Richard G. Phillips and Richard G. Phillips Associates, P.C. in these consolidated cases.

Specifically, Richard G. Phillips and Richard G. Phillips Associates, P.C. appeals from: (a) the Order and Opinion issued on October 12, 2006 granting, in part, defendants' Motion for Summary Judgment, (b) the Order and Opinion of February 8, 2007 granting defendants' Motions for Summary Judgment, and (c) the Order of June 5, 2007 denying plaintiffs' Motion for Reconsideration.

For purposes of this appeal, this court respectfully submits and relies upon its prior Opinions of October 12, 2006 and February 8, 2007. These Opinions are appended here as Appendix "A" and Appendix "B", respectively.

For the reasons discussed in those Opinions, the court submits that its Orders should be affirmed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

RICHARD G. PHILLIPS and RICHARD G. PHILLIPS ASSOCIATES, P.C.	: JULY TERM, 2000
Plaintiffs,	: No. 1550
v.	: (Commerce Program)
ALAN H. "BUD" SELIG, *et al*.	: Control Nos. 011140, 011190, 011148
Defendants.	:

O R D E R

AND NOW, this 12th day of October 2006, upon consideration of defendants' separate Motions for Summary Judgment, the responses in opposition, the respective memoranda, all matters of record and after oral argument and in accord with the Opinion being filed contemporaneously, it is **ORDERED** that the Motions are **granted, in part**, as follows:

1. Plaintiffs' claims for defamation (Count III), invasion of privacy/false light (Count IV), commercial disparagement (Count V) and injurious falsehood (Count VII) are **dismissed**.

2. Plaintiffs' claims for interference with existing and prospective contractual relations (Counts I and II) and conspiracy (Count VIII) are held under advisement pending further oral argument.

3. Oral argument on the remaining claims is scheduled for Thursday, October 26, 2006 at 10:00 a.m. in Courtroom 513, City Hall.

BY THE COURT:

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ALBERT W. SHEPPARD, JR., J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

RICHARD G. PHILLIPS and RICHARD G. PHILLIPS ASSOCIATES, P.C.	: JULY TERM, 2000
Plaintiffs,	: No. 1550
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Defendants.	:

……

O P I N I O N

ALBERT W. SHEPPARD, J. …….……. October 12, 2006

Currently before the court are defendants' separate Motions for Summary Judgment. For the reasons discussed, the Motions are granted, in part.

I. Background

A. Procedural History

Plaintiff, Richard G. Phillips ("Phillips"), and his law firm, Richard G. Phillips Associates, P.C. (the "Phillips Firm"), commenced this action against numerous defendants on July 14, 2000. Plaintiffs contend that certain of the defendants interfered with plaintiffs' relationship with their client, a labor union, and defamed them by making statements which implied that they were incompetent, dishonest and unethical.

These defendants include: Joseph Brinkman and John Hirshbeck ("Umpire Defendants"), Ronald Shapiro, Esquire and Shapiro & Olander ("Shapiro Defendants") and the Office of the

APPENDIX "A"

Commissioner of Baseball, the American League of Professional Baseball Clubs, the National League of Professional Baseball Clubs, Allan H. "Bud" Selig (the Commissioner of Baseball), Robert Manfred (Executive Vice President of Labor and Human Resources for Major League Baseball), Richard "Sandy" Alderson (then-Executive Vice President of Baseball Operations for MLB) and Francis X. Coonelly (general labor counsel for MLB) ("MLB Defendants").[1]

Plaintiffs have asserted claims for interference with existing contractual relations (Count I) and interference with prospective contractual relations (Count II) against all defendants. Plaintiffs have also asserted claims for defamation[2] (Count III), invasion of privacy/false light (Count IV), commercial disparagement (Count V) and injurious falsehood (Count VII) against the Umpire Defendants and Shapiro Defendants. There is also a conspiracy claim against the MLB Defendants and the Shapiro Defendants (Count VIII).[3] Defendants have moved for summary judgment as to each of these claims.

B. Factual Overview

Since 1979, plaintiffs have served as counsel to the Major League Umpires Association ("MLUA"), the former union for MLB umpires. Plaintiffs executed a retainer agreement with the MLUA which was set to expire in April 2003 (the "Retainer Agreement"). Phillips was widely known as the spokesperson for the MLUA, although the MLUA was in fact led by a president and board of directors whom were elected by the membership. Under the Retainer Agreement, plaintiffs were the exclusive counsel for the MLUA and were responsible for, *inter alia*, the

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1 On April 28, 2006, plaintiffs' counsel stipulated on the record that defendants David Phillips and Timothy Welke were to be dismissed from this case. Defendant Shapiro Negotiations Institute was dismissed from this case by stipulation on October 27, 2005. Following this court' ruling on preliminary objections on September 19, 2001, no claims remained against Defendant World Umpires Association ("WUA").

2 In considering plaintiffs' defamation claim at the preliminary objection stage, the court dismissed some of plaintiff's allegations on the ground that they were too vague to support such a claim. These paragraphs included ¶¶ 42, 48-52, 68 and 101. *See* September 19, 2001 Opinion at 12.

3 On September 19, 2001, this court dismissed the following claims: fraudulent conveyance (Count VI); quantum meruit/unjust enrichment (Count IX) and breach of contract (Count X). *See* September 19, 2001 Opinion.

negotiation of the umpires' collective bargaining agreement ("CBA") with the American and National Leagues (the "Leagues") in return for an annual retainer fee ($55,000.00 per year for four years), an annual administration fee ($25,000.00 per year for four years) and 2.5% of the total value of the umpires' compensation under the CBA. The CBA, which was set to expire at the end of 1999, contained a "no strike" clause which prohibited the umpires from engaging in a "strike or other work stoppage during the period of the [CBA]." CBA at §§ I, XIX, Ex. 16.

Beginning in 1998 and into 1999, tensions began to rise between the umpires and MLB in connection with several issues, such as the definition of the strike zone, performance evaluations of umpires, the use of MLB umpires in a game being played in Cuba and a proposal to move certain of MLB's operations - - including supervision of the umpires - - from the Leagues, to the Office of the Commissioner. In the midst of these developments, the MLUA held its annual meeting in Phoenix, Arizona, where these issues, as well as the renewal of the Phillips Firm's contract with the MLUA, was discussed. At that meeting, defendants Hirschbeck and Brinkman led an effort to have the Phillips Firm replaced with the Shapiro defendants as counsel for the MLUA. Their efforts were unsuccessful and the members of the MLUA voted 49-14 to renew its contract with the Philips Firm in the form of the Retainer Agreement.

Tension continued to mount among the umpires. As a result, a special meeting of the umpires was scheduled for July 14, 1999. Aware of the "no strike" provision in the CBA, Phillips and the president of the MLUA suggested an alternative to a strike: a mass resignation with a demand for severance pay. Following discussion and debate, the umpires at the meeting agreed on the mass resignation plan and submitted written notices of their intent to resign effective September 5, 1999. At the same time, the umpires executed professional services agreements with Professional Umpire Services, Inc., an entity that plaintiffs had incorporated days earlier as a mechanism through which the MLB could hire the umpires back after their mass

resignation. However, some umpires (including the Umpire Defendants) did not support this strategy - - or Phillips - - and refused to submit resignations or sign the professional services agreement.

Immediately following the meeting, Phillips held a press conference announcing the mass resignation strategy. The next day, July 15, 1999, the Phillips Firm faxed the resignation letters to the presidents of the Leagues; approximately 57 of the total active staff of 68 umpires resigned. News of the mass resignation was widely publicized throughout the media. Many sports commentators and other members of the media questioned and even criticized the strategy; some even levied attacks upon Phillips personally. Other vocal opponents of the strategy included defendants Hirschbeck and Brinkman. Many of the umpires began to have second thoughts about the resignations, and beginning on July 18, 1999, some of the umpires rescinded their resignations. It appeared at this point that the mass resignation strategy was in danger of failing.

On July 22, 1999, MLB officials held a meeting in Milwaukee to discuss the umpire situation. At the meeting, it was decided that all of the rescissions received up to that point would be accepted. It was also decided that the MLB would begin the process of replacing the umpires who had not yet rescinded their resignations. During the course of the day, MLB Commissioner Selig spoke with Hirshbeck on two or three occasions, during which Hirschbeck expressed his “unhappiness” - - along with that of several other umpires - - with the mass resignation strategy. Selig talked also to Shapiro (a personal friend) briefly about the situation. Shapiro offered Selig his assistance. By the end of that day, the National League had made eight offers of employment to minor league umpires and the American League had made twelve offers, all of which were accepted. By July 27, 1999, all of the umpires had rescinded their resignations. Eventually, the MLB defendants rehired all but 22 umpires, who were replaced.

The avalanche of media attention was supplanted by a wave of litigation. On July 23, 1999, the Phillips Firm filed a lawsuit against the Leagues in the United States District Court for the Eastern District of Pennsylvania, seeking a temporary restraining order to prevent the Leagues from accepting the umpires' resignations, which was ultimately unsuccessful. In August 1999, the Phillips Firm filed a demand for arbitration on behalf of the MLUA pursuant to the CBA, challenging the propriety of MLB's acceptance of the resignations of the 22 umpires who had been left unemployed. They asserted that the Leagues violated the CBA by conspiring with an insurgent union movement and the Umpire Defendants to encourage the umpires to terminate their relationship with the Phillips Firm. Following the seventeen day arbitration hearing - - at which Phillips appeared as a witness - - the arbitrator found no evidence of a conspiracy and concluded that there was no wrongdoing on the part of MLB or the Leagues. The arbitrator's decision, in pertinent part, was later affirmed on appeal by both the United States District Court for the Eastern District of Pennsylvania and the Third Circuit Court of Appeals.

Meanwhile, defendants Hirschbeck and Brinkman, along with thirteen other umpires, had created an organizing committee - - the Major League Umpires Independent Organizing Committee ("IOC") to, *inter alia*, challenge the MLUA. Shapiro served as an advisor to the group. In October 1999, the IOC filed a petition with the National Labor Relations Board ("NLRB") to decertify the MLUA, the effect of which would essentially create a new organization capable of contracting with a different law firm, but which otherwise would leave the union intact. In November 1999, the IOC held an informational meeting in Baltimore, Maryland to discuss the decertification petition and other issues. Shapiro and other members of the Shapiro firm participated in the meeting. Following the meeting, a decertification election was held by mail ballot. The election was supervised by the NLRB. On November 30, 1999, the ballots were counted by the NLRB. The majority of the 93 eligible voters selected the IOC; the

vote was 57-35 (with one ballot voided).

In December 1999, the Phillips Firm, on behalf of the MLUA, filed a petition with the NLRB to overturn the decertification election, claiming that, *inter alia*, the Leagues had violated the National Labor Relations Act ("NLRA") by negotiating with a union other than the MLUA and by offering benefits in order to encourage the umpires to disavow the MLUA. In its post-hearing brief to the Hearing Examiner, the MLUA alleged that the Leagues had wrongfully refused to deal with Phillips and the MLUA and had acted to coerce the umpires to remove the Phillips Firm as the representative for the union. The NLRB rejected the MLUA's claims and concluded that the Leagues' conduct was reasonable under the CBA and the election had not been improperly influenced.[4]

On February 24, 2000, the umpires voted to decertify the MLUA and to certify defendant WUA as their new union. Plaintiffs allege that the vote resulted from the defendants' negative statements about them. Defendant Shapiro now serves as the collective bargaining representative to the WUA. The MLUA is without any members; however, the Phillips Firm has served as counsel to the MLUA in several lawsuits and in connection with other filings over the past few years. Def. Jt. Stmt of Facts at 28-29. Plaintiffs filed this action on January 2, 2001.

4 In reaching its decision, the NLRB did not consider the "pre-petition conduct" of the parties, including that which that took place in June 1999. ***See*** 330 N.L.R.B. 670 at 676-7.

II. Discussion

A. Standard For Summary Judgment

"Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Pa.R.C.P. 1035.2; Horne v. Haladay, 1999 Pa. Super. 64, 728 A.2d 954 (1999). This burden rests with the moving party and the court is required to examine the entire record in a light most favorable to the non-moving party. First Wisconsin Trust Co. v. Strausser, 439 Pa. Super. 192, 198, 653 A.2d 688, 691 (1995). Applying this standard, this court finds that plaintiffs have failed to produce evidence of facts essential to certain of the causes of action pled and that summary judgment is appropriate as to those Counts.

B. The Alleged Statements of Shapiro, Brinkman and Hirshbeck Do Not Support Claims For Defamation, Invasion of Privacy/False Light, Commercial Disparagement or Injurious Falsehood

Counts III, IV, V and VII purport to state claims against the Umpire Defendants and the Shapiro Defendants for defamation, invasion of privacy/false light, commercial disparagement and injurious falsehood, respectively.[5] While each of the torts are separate and distinct causes of action, each centers around the same premise: that a disparaging statement was made by defendant(s) concerning plaintiff(s). Plaintiffs themselves concede that no overtly defamatory statements were made, instead they claim such statements were conveyed through innuendo.

5 Phillips brought the defamation, invasion of privacy/false light and injurious falsehood claims, personally. The commercial disparagement claim was brought by the Phillips Firm. However, for purposes of this analysis, the claims will be considered together.

Specifically, the statements at issue include comments by the Shapiro Defendants that Phillips' resignation plan was "one of the worst in labor history" and that the plan "didn't make sense to [Shapiro] or any other labor attorney [Shapiro] has spoken with…" as well as other statements which plaintiffs contend "suggests an inference to the reader either that Phillips and his firm are incompetent attorneys or that he and his firm are dishonest." Pl. Mem at 97-8. Along similar lines, Brinkman is accused of stating: "I just don't think [MLB] wants to work with Richie [Phillips]" and "I really don't think we can [negotiate a new CBA] with Richie because there is a total distrust of him among the people in baseball." Pl. Mem. at 106. Plaintiffs did not cite to any specific statements by Hirshbeck in their brief in opposition to defendants' Motions for Summary Judgment.

Specifically, in an action for defamation, the plaintiff has the burden of proving: 1) a false and defamatory statement concerning another, 2) an unprivileged publication to a third party, 3) fault amounting at least to negligence on the part of the publisher, and 4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Restatement (Second) Torts, § 558 (1977).

Whether a challenged statement is capable of defamatory meaning is a question of law for the court to determine in the first instance. Bell v. Mayview State Hospital, 2004 Pa. Super. 242, 853 A.2d 1058, 1061-2 (2004). It is recognized that certain communications, though undoubtedly offensive, do not rise to the level of defamation. *See* Kryeski v. Schott Glass Technologies, Inc., 426 Pa. Super. 105, 116, 626 A.2d 595, 600-1 (1993). Honest utterances reflecting personal belief and opinion are not actionable. Bell, 853 A.2d at 1062; Beverly Enterprises v. Trump, 182 F.3d 183 (3d Cir. 1999). Where a challenged statement is an expression of opinion, it is actionable only if the plaintiff can demonstrate that the communicated opinion "may reasonably be understood

to imply the existence of undisclosed defamatory facts justifying the opinion." Baker v. Lafayette College, 516 Pa. 291, 532 A.2d 399, 402 (1987); Restatement (Second) of Torts § 566 cmt. c. It is for the court to determine whether a statement is one of opinion or fact. *See* Malia v. Monchak, 116 Pa. Cmwlth. 484, 496 543 A.2d 184, 190 (1988).

Here, this court finds that plaintiffs have failed to identify a single statement by any of the defendants that meets the test of defamation under Pennsylvania law, as each of the proffered statements constitute expressions of opinion based on public facts. This court has already ruled that the Shaprio Defendants' alleged statements characterizing the resignation strategy as "doomed" and "flawed" are opinions and therefore not actionable. *See* September 19, 2002 Opinion at 13, n.15. The remaining allegations proffered in support of plaintiffs' defamation claim are no different. The undisputed facts demonstrate that the mass resignation strategy and Phillips' role in it was the subject of intensive media coverage. It is also apparent that many people - - not just defendants - - publicly expressed unfavorable opinions of both the strategy and of Phillips during this time period. Against that backdrop, plaintiffs cannot sustain a defamation claim based on the alleged statements. While defendants' statements - - and those made by many others not party to this lawsuit - - were likely annoying, embarrassing and insulting to plaintiffs, Phillips in particular - - they cannot be considered the basis for a defamation claim under Pennsylvania law.

The remainder of plaintiffs' claims based on these alleged statements fail for the same reason. Counts V and VII purport to state claims for commercial disparagement and injurious falsehood, respectively. As commercial disparagement is a type of injurious falsehood, the court finds these counts to be duplicative, as both causes of action require that the publication be more than merely false. Under the tort of injurious falsehood, the publication of a disparaging statement concerning the business of another is actionable where plaintiff can demonstrate that:

1) the defendant published a disparaging statement concerning the business of the plaintiff, 2) the statement was false, 3) the defendant intended that the publication cause pecuniary loss or reasonably should have recognized that publication would result in pecuniary loss, 4) the publication caused actual pecuniary loss, and 5) the publisher knew the statement was false or acted in reckless disregard of its truth or falsity. Pro Golf Mfg. v. Tribune Review Newspaper Co., 570 Pa. 242, 246, 809 A.2d 243, 246 (2002) (*citing* Restatement (Second) Torts § 623(A) (1977)); Restatement (Second) of Torts §§ 623A. As previously stated, all of the statements at issue were opinions and therefore are not actionable.

Finally, this court turns to plaintiffs' claim for invasion of privacy/false light. Such a claim is intended to protect a plaintiff's interest in keeping private matters from public view. To state a cause of action in Pennsylvania, a plaintiff must demonstrate an intentional intrusion on the seclusion of his private concerns which was substantial and highly offensive to a reasonable person. Pro Golf Mfg., Inc., 570 Pa. at 242. McGuire v. Shubert, 1998 Pa. Super. LEXIS 4647, 722 *A*.2d 1087 (1998). Here, plaintiffs have failed to demonstrate that defendants, or any of them, disclosed matters of "private concern". The mass resignation strategy and surrounding circumstances were very public events involving an admittedly public figure.[6] The subject matter of the alleged statements received considerable coverage in the national media; there was nothing "private" about it. Moreover, the statements at issue clearly relate to Phillips in his professional capacity, not to matters of "private concern." As such, the claim for invasion of privacy/false light is not viable here.

6 *See* Shapiro Def. Mem at 10, n. 8.

III. Conclusion

Based on the foregoing, summary judgment is granted in favor of the Umpire Defendants and the Shapiro Defendants relative to plaintiffs' claims for defamation (Count III), invasion of privacy/ false light (Count IV), commercial disparagement (Count V) and injurious falsehood (Count VII). These counts are dismissed. The court will enter a contemporaneous Order consistent with this Opinion

Defendants' Motions regarding plaintiffs' claims for interference with existing and prospective contractual relations (Counts I and II) and conspiracy (Count VIII) are held under advisement pending further oral argument. The parties agree that the elements of a cause of action for intentional interference with contractual relations, whether existing or prospective, are: 1) the existence of a contractual or prospective contractual relation between the complainant and a third party, 2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring, 3) the absence of privilege or justification on the part of the defendant; and 4) the occasioning of actual legal damage as a result of the defendant's conduct. Al Hamilton Contracting Co. v. Cowder, 434 Pa. Super. 491, 497, 644 A.2d 188, 191 (1994).

Specifically, this court would like to hear further argument from the parties concerning the second and third elements, as well as with respect to the issue of causation. The parties should also be prepared to discuss what effect, if any, the NLRB's conclusions have on the remaining claims.

Oral argument on these remaining claims is scheduled for Thursday, October 26, 2006 at 10:00 a.m. in Courtroom 513, City Hall.

BY THE COURT:

ALBERT W. SHEPPARD, JR., J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

RICHARD G. PHILLIPS, and RICHARD G. PHILLIPS ASSOCIATES, P.C.	: JULY TERM, 2000
	: No. 1550
v.	:
ALAN H. "BUD" SELIG, *et al.*	
WORLD UMPIRES ASSOCIATION	: JULY TERM, 2001
v.	: No. 1255
RICHARD G. PHILLIPS ASSOCIATES, PC, *et al.*	: (Commerce Program)
	: Control Nos. 011140, 011190, 011148

O R D E R

AND NOW, this 8TH day of February 2007, upon consideration of defendants' three separate Motions for Summary Judgment relative to plaintiffs' claims of interference with existing and prospective contractual relations (Counts I and II) and conspiracy (Count VIII), the plaintiffs' response in opposition, the respective memoranda, all matters of record, the oral argument conducted on December 15, 2006 and in accord with the Opinion being contemporaneously filed with this Order, it is **ORDERED** that said Motions are **Granted** and plaintiffs' claims are **Dismissed**.

BY THE COURT:

_____
ALBERT W. SHEPPARD, JR., J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

RICHARD G. PHILLIPS, and RICHARD G. PHILLIPS ASSOCIATES, P.C.	: JULY TERM, 2000
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v.	: No. 1255
RICHARD G. PHILLIPS ASSOCIATES, PC, *et al.*	: (Commerce Program)
	: Control Nos. 011140, 011190, 011148

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O P I N I O N

ALBERT W. SHEPPARD, JR., J. ……..……..….. February 8, 2007

Currently before the court are defendants' three separate Motions for Summary Judgment with respect to Counts I and II (interference with existing and prospective contractual relations) and VIII (conspiracy). For the reasons discussed, the court grants the Motions.

I. Background

A. Procedural History

On October 12, 2006, this court granted summary judgment with respect to plaintiffs' claims for defamation (Count III), invasion of privacy/false light (Count IV), commercial disparagement (Count V) and injurious falsehood (Count VII). The court held defendants' Motions regarding plaintiffs' claims for interference with existing and prospective contractual

APPENDIX "B"

relations and conspiracy under advisement pending further oral argument. Specifically, the court requested:

> The parties agree that the elements of a cause of action for intentional interference with contractual relations, whether existing or prospective, are as follows: 1) the existence of a contractual or prospective contractual relation between the complainant and a third party; 2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; 3) the absence of privilege or justification on the part of the defendant; and 4) the occasioning of actual legal damage as a result of the defendant's conduct. Al Hamilton Contracting Co. v. Cowder, 434 Pa. Super. 491, 497, 644 A.2d 188, 191 (1994). Specifically, this court would like to hear further argument from the parties concerning the second and third elements, as well as with respect to the issue of causation. The parties should also be prepared to discuss what effect, if any, the NLRB's conclusions have on the remaining claims.

See October 12, 2006 Opinion at 11. Oral argument was held on December 15, 2006.

B. Factual Background

This court incorporates the operative facts set forth previously in its October 12, 2006 Opinion.

II. Discussion

A. Summary Judgment Standard

Pa.R.C.P. 1035.2 (2) provides that summary judgment is appropriate:

> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. 1035.2 (2). As stated by the Superior Court, "[o]ur rules of civil procedure are designed to eliminate the poker game aspect of litigation and compel the players to put their cards face up on the table before trial begins." Paparelli v. GAF Corp., 379 Pa. Super. 62, 549 A.2d 597 (1988); Roland v. Kravco, Inc., 355 Pa. Super. 493, 513 A.2d 1029 (1986). The fact that defendants bear the burden as the moving parties does not mean that plaintiffs are entitled to a trial based simply on the allegations of the complaint. In order to withstand summary

judgment, plaintiffs must set forth specific facts showing that there is a genuine issue for trial. Pa.R.C.P. 1035.2 (2); s*ee also* Fennell v. Nationwide Mut. Fire Ins. Co., 412 Pa. Super. 534, 540, 603 A.2d 1064, 1067 (1992); Aimco Imports, Ltd. v. Industrial Valley Bank & Trust Co., 291 Pa. Super. 233, 236, 435 A.2d 884 (1981); Amabile v. Auto Kleen Car Wash., 249 Pa. Super. 240, 376 A.2d 247 (1977). Plaintiffs cannot merely claim that evidence exists in opposition to summary judgment and expect their claims to survive.

B. Plaintiffs Have Failed To Produce Evidence of Wrongdoing By Defendants Sufficient to Support Their Tortious Interference Claims

Counts I and II purport to state claims against the Umpire Defendants, the Shapiro Defendants and the MLB Defendants for interference with both an existing and prospective contractual relationship, namely the Phillips firm's Retainer Agreement with the MLUA (the "Retainer Agreement"). It is undisputed that the elements of this cause of action, whether existing or prospective, are:

> (1) the existence of a contractual or prospective contractual relation between the complainant and a third party;
>
> (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring;
>
> (3) the absence of privilege or justification on the part of the defendant; and
>
> (4) the occasioning of actual legal damage as a result of the defendant's conduct.

Al Hamilton, supra., 644 A.2d at 191.

Plaintiffs' claim for interference with prospective contractual relations fails to satisfy the first element. A prospective contract is "something less than a contractual right, something more than a mere hope." Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 209, 412 A.2d 466, 471 (1979). To prove the existence of a prospective contractual relationship, plaintiffs must present this court with facts sufficient to give rise to a "reasonable probability" that particular anticipated contracts would have been entered into, but for the conduct of defendants. Id. This is an objective standard which, of course, must be supported by adequate proof. Id. The mere possibility that an existing contract could be renewed is not sufficient to create a triable issue of fact as to the existence of prospective relations. Id.

Certainly, as representatives of the MLUA since 1979, plaintiffs may arguably have had some expectation that their contract with the union would have been renewed in the future. Nevertheless, the Retainer Agreement was set to expire in April 2003 and was terminable at will by either party after April 2002. Plaintiffs have failed to provide any evidence to establish a "reasonable likelihood" that Phillips or his firm would have been retained following the expiration of the Retainer Agreement, especially in light of the negative publicity and fallout from the failed mass resignation strategy. Nor have plaintiffs identified any other prospective contracts with which defendants allegedly interfered. Plaintiffs themselves admit that they are in possession of no such evidence and such information was "difficult if not impossible to ascertain." Phillips Dep. at 687-9. Accordingly, Count II is dismissed.

With respect to plaintiffs' interference with existing contractual relations claim (Count I) the plaintiffs have satisfied the first element, that is, the existence of a contract. But, the court continues to have concerns about plaintiffs' ability to satisfy the remaining elements. For this reason, the court asked the parties to address these issues at a second oral argument. Based upon the record, this court finds that, even when construing the record in a light most favorable to

plaintiffs, plaintiffs have failed to satisfy their burden.

In order to satisfy the second essential element of an interference with existing contractual relations claim, plaintiffs must prove that the defendants harbored a specific intent to harm them.[7] In analyzing such a claim, Pennsylvania Courts have traditionally applied the Restatement (Second) Torts § 767 (1979) which provides:

> In determining whether an actor's conduct in intentionally interfering with a contract …of another is improper or not, consideration is given to the following factors: (a) the nature of the actor's conduct; (b) the actor's motive; (c) the interests of the other with which the actor's conduct interferes; (d) the interests sought to be advanced by the actor; (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; (f) the proximity or remoteness of the actor's conduct to the interference; and, (g) the relations between the parties.

Small v. Juniata College, 452 Pa. Super. 410, 682 A.2d 350 (1996); Strickland v. University of Scranton, 700 A.2d 979, 985, 1997 Pa. Super. 2894 (1997) ("[i]n order for intentional interference with contract to be actionable as a tort, the interference must be improper"). Comment "j" to § 766 expands upon the issue of intent:

> . . . If the actor is not acting criminally nor with fraud or violence or other means wrongful in themselves but is endeavoring to advance some interest of his own, the fact that he is aware that he will cause interference with the plaintiff's contract may be regarded as such a minor and incidental consequence and so far removed from the defendant's objective that as against the plaintiff the interference may be found to be not improper.

Id. Thus, in order to succeed on their claim, the plaintiffs must demonstrate that defendants acted solely – or at least primarily – to cause specific harm to plaintiffs' relationship with the MLUA. In this regard, plaintiffs have failed to satisfy their burden. Plaintiffs have not set forth a sufficient factual basis to prove that any of these defendants' actions were motivated by a desire to harm Phillips rather then to further their own specific interests. That some of the defendants "may" have personally disliked Phillips alone is insufficient to withstand summary

7 Because the issues of intent to harm (second element) and the absence of privilege or justification (third element) are interrelated and often overlap, they will be discussed together where applicable.

judgment; it is not the same as intent to harm.

With respect to the MLB Defendants, plaintiffs argue that, when faced with the prospect of needing umpires to officiate the baseball playoffs and after assembling an emergency meeting of top executives to determine how to respond to the umpire crisis, Selig replaced the umpires - - not to protect MLB's paramount business interests and operational needs - - but rather to deprive plaintiffs of the financial benefits of their Retainer Agreement with the MLUA. Neither logic nor the record supports this conclusion.

Further, following a full hearing on the matter, the NLRB concluded that MLB did not violate the CBA by trying to encourage umpires to rescind their resignations and by hiring replacement umpires to meet MLB's operational needs. Def. Exh. 9 at I, 83. Thus, in that it was determined (by the entity charged with deciding these matters) that the MLB Defendants acted lawfully with respect to the umpires, it follows that MLB could not simultaneously have acted unlawfully with respect to the umpires' agent, that is the plaintiffs.

Plaintiffs have also failed to prove a specific intent to harm on the part of the Shapiro Defendants. Plaintiffs have produced no evidence which demonstrates that the Shapiro Defendants, or any of them, acted specifically to harm plaintiffs. The Phillips Firm did not represent the individual umpires, it represented the union as a whole. It would not be improper for Shapiro to advise umpires to consult personal counsel when they were well within their right to do so. At worst, the facts could demonstrate that Shapiro was trying to put himself in a position which would enable him to take over Phillips' job which, in and of itself, was not improper under the circumstances. *See* Gilbert v. Otterson, 379 Pa. Super. 481, 489, 550 A.2d 550, 554 (1988), *citing* Restatement (Second) Torts § 768 (1979) ("[o]ne's privilege to engage in business and to compete with others implies a privilege to induce third persons to do their

business with him rather than with his competitors").[8] This situation is unique and differs from the traditional attorney/client relationship insofar as a majority vote by the entire union was required to change union representation. It is not as if one phone call could result in the replacement of the Phillips firm.

Plaintiffs have likewise failed to produce evidence of actionable conduct by the Umpire Defendants. This court has previously held that plaintiffs can not base any claim of impropriety on the NLRA. *See* September 19, 2001 Opinion at 14. Nor can plaintiffs' claims be based on statements made by the umpires. This court has already dismissed plaintiffs' defamation and related claims, finding that each of the proffered statements constituted expressions of opinion based on public facts. *See* October 12, 2006 Opinion at 9.

Neither the actions nor the statements of the Umpire Defendants were unlawful. Plaintiffs concede that it is within the power of the union membership to "oust the existing leadership." Pl. Mem. at 28. Under the NLRA, all the umpires had the right to select by a majority vote which union, if any, they preferred as their exclusive bargaining agent. The Umpire Defendants also had a protected statutory right to question the MLUA's leadership and to form and elect a new union to serve as their bargaining agent with MLB. 29 U.S.C. § 157. The decertification election was directly supervised by the NLRB. The NLRB rejected the petition of the MLUA (which was filed by the Phillips Firm) to overturn the decertification election, concluding that the election had not been improperly influenced. This court should not and will not disturb this finding.

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8 Arguably, Shapiro's conduct, if proven, may be that which is considered sanctioned by the rules of the game, a form of privilege and cannot be the basis of a tortious interference claim. *See* Glenn v. Point Park College, 441 Pa. 474, 272 A.2d 895 (1971); Labor Ready, Inc. v. Labor, 2001 Phila. Ct. Com. Pl. LEXIS 99 (2001). (Competition without unlawful means is a justified interference and is not actionable).

As a further argument, plaintiffs stress that certain telephone conversations took place between defendant, Selig and defendants, Shapiro and Hirschbeck, on July 22, 1999. Specifically, plaintiffs argue that the telephone conversations at issue caused MLB to change its strategy with respect to the hiring replacements for those umpires who had rescinded. Plaintiffs also cite evidence that MLB was "seemingly provoking the umpires" regarding the strike zone and other issues. But, it is unclear how these allegations support Phillips' claims. Surely, plaintiffs cannot contend that Selig's actions were nothing more than a means to cause harm to Phillips. There is no evidence to support such an accusation, an accusation which defies both logic and the record. Plaintiffs further claim that before the Summer of 1999, Selig announced that he would "never do a deal with Richie Phillips," however, plaintiffs concede that Selig was required by law to bargain with whomever the appropriate umpire's union chose as its representative.

This is where plaintiffs' conspiracy claim[9] overlaps with their tortious interference claims, in that plaintiffs urge it was this "conspiracy" between the parties which caused the decertification election which ultimately led to the replacement of the MLUA as the umpires' union. Under Pennsylvania law, in order to establish conspiracy, a plaintiff must produce evidence that the substance of the communications demonstrated the unlawful agreement. Goldstein v. Phillip Morris, Inc., 2004 Pa. Super. 260, 854 A.2d 585 (2004). The mere fact that the July 22, 1999 phone calls took place, alone, is insufficient to establish a conspiracy. Plaintiffs have proffered no evidence - - other than the fact that the conversations indeed took place - - to support their claims. It is improper to infer an unlawful agreement based merely upon the existence and timing of a telephone call, absent other evidence of improper conduct. "The mere fact that two or more persons, each with the right to do a thing, happen to do that

9 Plaintiffs' conspiracy claim is discussed in further detail, *infra* at 10.

thing at the same time is not by itself an actionable conspiracy." Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 209, 412 A.2d 466, 471 (1979); Burnside v. Abbott Laboratories, 351 Pa. Super. 264, 505 A. 2d 973, 980 (1985). While this court concedes that direct evidence is not required to support a conspiracy or tortious interference claim, it is necessary that plaintiffs put forth evidence sufficient for a jury to infer that the content of the conversations was improper and conspiratorial. Goldstein, 854 A.2d at 585. Plaintiffs' contention that the timing of these calls demonstrates an illegal conspiracy is based on speculation. It does not constitute circumstantial evidence.

In addition to failing to prove a specific intent to harm, plaintiffs' claims are fatally flawed with respect to the issue of causation. Defendants can be held responsible for plaintiffs' alleged damages only if plaintiffs can prove that the alleged improper conduct caused the resulting injury. The record demonstrates that it was the decertification of the MLUA which resulted in payments being discontinued under the Retainer Agreement. The record is likewise clear that the decision to decertify the MLUA was made by the individual umpires exercising their own independent judgment in a secret ballot election administered, supervised and validated by the NLRB (the entity charged with such duties).

Plaintiffs have likewise failed to produce any evidence which demonstrates that the telephone conversations of July 22, 1999 resulted in any act or conduct on the part of the defendants in furtherance of the alleged conspiracy. Plaintiffs contend that following the telephone conversations, the League presidents were instructed to hire more permanent replacements with an intention to replace as many umpires as possible and to avoid encouraging the remaining umpires to rescind. However, even if this were so, this court fails to see how this demonstrates that the defendants were engaged in a conspiracy to tortuously interfere with the Retainer Agreement. Such a connection is unsupported by facts and too attenuated and

speculative to survive these motions.

In sum, then, this court finds that plaintiffs have failed to produce sufficient evidence to withstand summary judgment as to Counts I and II. Accordingly, these claims are dismissed.

C. Plaintiffs' Conspiracy Claim Fails As A Matter of Law

Count VIII purports to state a claim for conspiracy against the MLB Defendants and the Shapiro Defendants. To prove a claim of conspiracy, plaintiff must demonstrate: 1) a combination of two or more persons acting with a common purpose to do an unlawful act by unlawful means or for an unlawful purpose; 2) an overt act done in furtherance of the common purpose; and 3) actual legal damage. Baker v. Rangos, 229 Pa. Super. 333, 324 A.2d 498, 506 (1974). Proof of malice, or an intent to injure, is an "essential part" of this cause of action. GMH Assoc. v. Prudential Realty Group, 2000 Pa. Super. 59, 752 A.2d 889 (2000).

In Pennsylvania, proof of a conspiracy must be made by "full, clear and satisfactory evidence." Fife v. Great Atlantic & Pacific Tea Co., 356 Pa. 265, 267, 52 A.2d 24 39 (1947). As the two claims are quite similar, plaintiffs' conspiracy claim fails for the same reasons as its tortious interference claim. "[A]bsent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act." McKeeman v. Corestates Bank, N. A,, 2000 Pa. Super. 117, 751 A.2d 655, 660 (2000). Since plaintiffs have failed to demonstrate a "wrongful act" by defendants, their conspiracy claim fails as a matter of law.

III. Conclusion

For these reasons, defendants' separate Motions for Summary Judgment relative to plaintiffs' claims for interference with existing and prospective contractual relations (Counts I and II) and conspiracy (Count VIII) will be granted. The court will enter an Order consistent with this Opinion.

BY THE COURT:

ALBERT W. SHEPPARD, JR., J.