

08-1565-CD
Peter Swistock vs Connie Murphy

FILED

AUG 21 2008

0112206
William A. Shaw
Prothonotary/Clerk of Courts
No. 2008-1565-C0

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER SWISTOCK and
LEONA SWISTOCK,
Plaintiffs

vs

CONNIE MURPHY
Defendant

No. 2008-1565-C0

* Type of Case: Trespass

* Type of Pleading: Praecipe for
Writ of Summons

* Filed on Behalf of: Plaintiffs

* Counsel of Record for this Party:

* CHRIS A. PENTZ, Esquire
* Supreme Court J.D. # 39232
* 207 East Market Street
* P. O. Box 552
* Clearfield PA 16830
* 814 765-4000

* Filed by:

* Chris A. Pentz, Esquire
* 207 East Market Street
* P. O. Box 552
* Clearfield, PA 16830
* 814 765-4000

Date: 8-21-08

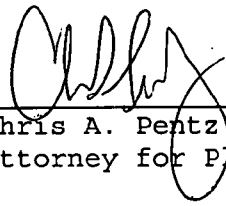
IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and	*	
LEONA M. SWISTOCK,	*	
Plaintiffs	*	
vs.	*	No.
	*	
CONNIE MURPHY,	*	
Defendant	*	

PRAECIPE FOR WRIT OF SUMMONS

Please issue a Writ of Summons against the following
individual:

Connie Murphy
1 Good Street
Houtzdale, PA 16651



Chris A. Pentz
Attorney for Plaintiffs

**IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY PENNSYLVANIA
CIVIL ACTION**

SUMMONS

**Peter Swistock
Leona Swistock**

Vs.

NO.: 2008-01565-CD

Connie Murphy

TO: CONNIE MURPHY

To the above named Defendant(s) you are hereby notified that the above named Plaintiff(s) has/have commenced a Civil Action against you.

Date: 8/21/2008

William A. Shaw
Prothonotary

Issuing Attorney:

Chris A. Pentz
P.O. Box 552
Clearfield, PA 16830

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

NO: 08-1565-CD

PETER R. SWISTOCK and LEONA M. SWISTOCK
vs
CONNIE MURPHY

SERVICE # 1 OF 1

SUMMONS

SERVE BY: 09/20/2008 HEARING: PAGE: 104556

DEFENDANT: CONNIE MURPHY
ADDRESS: 1 GOOD ST.
HOUTZDALE, PA 16651

ALTERNATE ADDRESS

SERVE AND LEAVE WITH: DEFENDANT/AAR

CIRCLE IF THIS HIGHLIGHTED ADDRESS IS: VACANT OCCUPIED

ATTEMPTS

SHERIFF'S RETURN

NOW, 8-27-08 AT 11:11 AM PM SERVED THE WITHIN

SUMMONS ON CONNIE MURPHY, DEFENDANT

BY HANDING TO Connie Murphy 1 Def.

A TRUE AND ATTESTED COPY OF THE ORIGINAL DOCUMENT AND MADE KNOW TO HIM (HER) THE CONTENTS THEREOF.

ADDRESS SERVED 1 Good St.
Houtzdale, Pa. 16651

NOW AT AM / PM POSTED THE WITHIN

SUMMONS FOR CONNIE MURPHY

AT (ADDRESS)

NOW AT AM / PM AFTER DILIGENT SEARCH IN MY BAILIWICK,

I MAKE RETURN OF NOT FOUND AS TO CONNIE MURPHY

REASON UNABLE TO LOCATE

SWORN TO BEFORE ME THIS

DAY OF 2008

So Answers: CHESTER A. HAWKINS, SHERIFF

BY:

James E. Davis
Deputy Signature

JAMES E. DAVIS
Print Deputy Name

FILED

AUG 29 2008

0/8:30/2

William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DOCKET # 104556
NO: 08-1565-CD
SERVICES 1
SUMMONS

PLAINTIFF: PETER R. SWISTOCK and LEONA M. SWISTOCK
vs.
DEFENDANT: CONNIE MURPHY

SHERIFF RETURN

RETURN COSTS

Description	Paid By	CHECK #	AMOUNT
SURCHARGE	PENTZ	3371	10.00
SHERIFF HAWKINS	PENTZ	3371	39.48

^S
FILED
01/31/2008
JAN 31 2008
William A. Shaver
Prothonotary/Clerk of Courts

Sworn to Before Me This

_____ Day of _____ 2008

So Answers,



Chester A. Hawkins
Sheriff

FILED

JAN 07 2009

William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK,
Plaintiffs,

v.

CONNIE MURPHY,
Defendant.

No. 08-1565-CD

Type of Case: Trespass

Type of Pleading:

Complaint

Filed on Behalf of:
Plaintiffs

Counsel of Record
for this Party:

CHRIS A. PENTZ, ESQUIRE
Supreme Court ID No.: 39232
207 East Market Street
PO Box 552
Clearfield, PA 16830
814-765-4000

Date: 6/9/09

FILED 300
01/10/50/01
JUN 10 2009 Amy Pentz
William A. Shaw
Prothonotary/Clerk of Courts (611)

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and	*	
LEONA M. SWISTOCK,	*	
Plaintiffs,	*	
	*	
v.	*	No. 08-1565-CD
	*	
CONNIE MURPHY,	*	
Defendant.	*	

NOTICE

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

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Court Administrator
Clearfield County Courthouse
230 East Market Street
Clearfield, PA 16830
814-765-2641

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK,
Plaintiffs,

v.

CONNIE MURPHY,
Defendant.

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No. 08-1565-CD

COMPLAINT

1. The Plaintiffs are Peter R. Swistock and Leona M. Swistock, husband and wife, who reside at 822 Grace Street, Houtzdale, Clearfield County, Pennsylvania, 16651.

2. The Defendant is Connie Murphy, who resides at One Good Street, Houtzdale, Clearfield County, Pennsylvania, 16651.

3. The relevant time period for this Complaint is from August 18, 2008, through and including the filing of this Complaint.

4. The Plaintiffs and Defendant reside on adjoining properties with Fawn Alley being located between properties.

5. The Plaintiffs do not have an adequate remedy at law to prevent further emotional distress and invasion of privacy.

COUNT I - Invasion of Privacy, Intentional

Infliction of Emotional Duress

Peter R. Swistock and Leona M. Swistock v.

Connie Murphy

6. Paragraphs 1 through 5 above are incorporated herein by reference as though set forth in full.

7. During the relevant time period, the Defendant has made noise without any purpose other than to inflict emotional distress upon and to invade the privacy of the Plaintiffs, including but not limited to the following:

- a. driving a 4-wheeler for extended periods of time at various hours along Plaintiffs' property causing dust to enter onto Plaintiffs' property causing an unsafe and offensive condition;
- b. operating a motor vehicle for extended periods of time at various hours along Plaintiffs' property causing dust to enter onto Plaintiffs' property causing an unsafe and offensive condition; and
- c. shouting obscenities at the Plaintiffs.

WHEREFORE, Plaintiffs respectfully request your Honorable Court to enter judgment in their favor and against the Defendant for the following:

- a. Money damages in excess of \$20,000.00;
- b. Interest and costs of the suit;
- c. Counsel fees;

- d. Punitive damages;
- e. Issue an Order enjoining the Defendants from further Intentional Infliction of Emotional Duress or Invasion of Privacy upon the Plaintiffs;
- f. Such other relief as the Court deems appropriate; and
- g. Jury trial demanded.

COUNT II- Trespass
Peter R. Swistock and Leona M. Swistock v.
Connie Murphy

8. Paragraphs 1 through 7 above are incorporated herein by reference as though set forth in full.

9. The Defendant has intentionally trespassed upon the property of the Plaintiffs by means of, including but not limited to the following:

- a. driving a 4-wheeler for extended periods of time at various hours along Plaintiffs' property causing dust to enter onto Plaintiffs' property causing an unsafe and offensive condition;
- b. operating a motor vehicle for extended periods of time at various hours along Plaintiffs' property causing dust to enter onto Plaintiffs' property causing an unsafe and offensive condition.

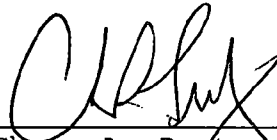
WHEREFORE, Plaintiffs respectfully request your Honorable Court to enter judgment in their favor and against the Defendant for the following:

- a. Money damages in excess of \$20,000.00;
- b. Interest and costs of the suit;
- c. Counsel fees;
- d. Punitive damages;
- e. Issue an Order enjoining the Defendant from further Trespass upon the property of the Plaintiffs;
- f. Such other relief as the Court deems appropriate;
and
- g. Jury trial demanded.

Date: _____

6-9-09


Respectfully submitted,



Chris A. Pentz,
Attorney for Plaintiffs

VERIFICATION

I, PETER R. SWISTOCK and verify that the statements made in this Complaint are true and correct. I understand that false statements herein are made subject to the penalties of Pa.C.S. § 4904 relating to unsworn falsification to authorities.


Peter R. Swistock

FILED

JUN 10 2009

William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK,
Plaintiffs,

v.

CONNIE MURPHY,
Defendant.

No. 08-1565-CD

Type of Case: Trespass

Type of Pleading:

Certificate of Service

Filed on Behalf of:
Plaintiffs

Counsel of Record
for this Party:

CHRIS A. PENTZ, ESQUIRE
Supreme Court ID No.: 39232
207 East Market Street
PO Box 552
Clearfield, PA 16830
814-765-4000

Date: 6/15/09

S **FILED** *no*
010538
JUN 15 2009 *cc*
William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK,
Plaintiffs,

v.

CONNIE MURPHY,
Defendant.

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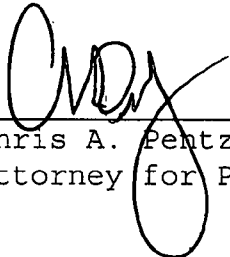
No. 08-1565-CD

CERTIFICATE OF SERVICE

I, Chris A. Pentz, Esquire, do hereby certify that a
certified copy of Complaint filed in the above-captioned action
was served on the following person and in the following manner
on the 15th day of June, 2009.

FIRST-CLASS MAIL, POSTAGE PREPAID

Connie Murphy
One Good Street
Houtzdale, PA 16651



Chris A. Pentz
Attorney for Plaintiffs

FILED

JUN 15 2009

William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK,

Plaintiffs,

v.

CONNIE MURPHY,

Defendant.

Docket No. 08-1565-CD

Type of Case:

Civil Action

Type of Pleading:

Praeipice for Entry of
Appearance

Filed on Behalf of Defendant

Counsel of Record for This Party

David B. Consiglio, Esquire
Campbell, Miller, Williams,
Benson, Etter & Consiglio, Inc.
720 S. Atherton Street
State College, PA 16801
(814) 234-1500

FILED

mlh:4381
JUL 1 2009

William A. Shaw
Prothonotary/Clerk of Courts

**IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PA
CIVIL DIVISION**

PETER R. SWISTOCK and
LEONA M. SWISTOCK,

Plaintiffs,

v.

CONNIE MURPHY,

Defendant.

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No. 08-1565-CD

ENTRY OF APPEARANCE

TO THE PROTHONOTARY:

Kindly enter the appearance of the undersigned counsel for Defendant, Connie
Murphy.

Respectfully submitted,

**CAMPBELL, MILLER, WILLIAMS,
BENSON, ETTER & CONSIGLIO, INC.**

By: 

David B. Consiglio, Esquire
I.D.# 72772
720 South Atherton Street
State College, PA 16801
(814) 234-1500

Date: July 13, 2009

**IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PA
CIVIL DIVISION**

PETER R. SWISTOCK and
LEONA M. SWISTOCK,

Plaintiffs,

v.

CONNIE MURPHY,

Defendant.

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No. 08-1565-CD

CERTIFICATE OF SERVICE

I, David B. Consiglio, Esquire, of Campbell, Miller, Williams, Benson, Etter & Consiglio, Inc., do hereby certify that on this 13th day of July, 2009, a true and correct copy of the foregoing document was served on the following person by depositing the same in the United States Mail, postage prepaid, addressed as follows:

Chris A. Pentz, Esquire
207 East Market Street
P.O. Box 552
Clearfield, PA 16830

**CAMPBELL, MILLER, WILLIAMS,
BENSON, ETTER, & CONSIGLIO, INC.**

By: _____

David B. Consiglio, Esquire

69

IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK,

Plaintiffs,

v.

CONNIE MURPHY,

Defendant.

Docket No. 08-1565-CD

Type of Case:

Civil Action

Type of Pleading:

**Defendant's Preliminary
Objections**

Filed on Behalf of Defendant

Counsel of Record for This Party

David B. Consiglio, Esquire
Campbell, Miller, Williams,
Benson, Etter & Consiglio, Inc.
720 S. Atherton Street
State College, PA 16801
(814) 234-1500

FILED NO
m110:4328 CC
JUL 17 2009 GK
William A. Shaw
Prothonotary/Clerk of Courts

**IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PA
CIVIL DIVISION**

PETER R. SWISTOCK and
LEONA M. SWISTOCK,

Plaintiffs,

v.

CONNIE MURPHY,

Defendant.

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No. 08-1565-CD

PRELIMINARY OBJECTIONS

NOW COMES, the Defendant Connie Murphy, by and through her counsel, David B. Consiglio and Campbell, Miller, Williams, Benson, Etter & Consiglio, Inc., and pursuant to Pa.R.C.P. 1028 interposes Preliminary Objections to the Complaint filed by Peter and Leona Swistock, of which the following is a statement in support thereof.

I. PRELIMINARY OBJECTION FIRST – 1028(a)(1) – Improper Service

1. On or about June 9, 2009, Plaintiffs filed a Complaint in the Court of Common Pleas of Clearfield County, Pennsylvania demanding, *inter alia*, money damages in excess of \$20,000.00, punitive damages, equitable relief, punitive damages, and attorney's fees.
2. Defendant received the Complaint via regular mail only.
3. Pa.R.C.P. 400 requires the Sheriff or other authorized representative to serve original process.

WHEREFORE, Defendant prays that this Honorable Court sustain her Preliminary Objection and require proper service or dismiss the Complaint.

II. PRELIMINARY OBJECTION SECOND – 1028(a)(4) - Demurrer to Count I

4. The Complaint's first Count sounds in the torts of intentional infliction of emotional distress and invasion of privacy.
5. While the Supreme Court has never expressly recognized the tort of "intentional infliction of emotional distress", it has cited Section 46 of the Restatement (Second) Torts as setting forth minimum requirements for the action. Taylor v. Albert Einstein Medical Center, 754 A.2d 650, 653 (Pa. 2000)(*"we have never expressly recognized a cause of action for intentional infliction of emotional distress, and thus have never formally adopted this section of the Restatement, we have cited the section as setting forth the minimum elements necessary to sustain such a cause of action."*).
6. Section 46 requires "extreme and outrageous conduct intentionally or recklessly [which] causes severe emotional distress to another...." Restatement (Second) Torts.
7. The Complaint merely alleges as facts that the Defendant has driven a 4-wheeler on a public alley for extended periods of time and shouted obscenities at Plaintiffs. (Complaint, ¶¶ 7(a)-(c)).

8. Pennsylvania law requires that, in order to state a claim, the actions complained of “must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.” Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998).
9. An example of the severity of the conduct necessary for a finding of Intentional Infliction of Emotional Distress can be found in the case of Banyas v. Lower Bucks Hospital, 437 A.2d 1236 (Pa. Super 1981), where the Defendants intentionally fabricated records to suggest that plaintiff had killed a third party which led to plaintiff being indicted for homicide.
10. The kicking up of dust on a public alleyway and the shouting of obscenities do not rise to the level of being “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.”
11. A plaintiff must suffer some type of resulting physical harm due to the defendant's outrageous conduct. Fewell v. Besner, 444 Pa.Super. 559, 664 A.2d 577, 582 (Pa.Super.1995); Reeves v. Middletown Athletic Association, 866 A.2d 1115, 1122 (Pa. Super 1994).
12. The tort of invasion of privacy has four species, none of which are identified in the Complaint.

13. The Superior Court has adopted the definition of one of the species promulgated by the Restatement (2nd) Torts §§ 652B-E. Harris v. Easton Publishing Co., 335 Pa.Superior Ct. 141, 153, 483 A.2d 1377, 1383 (1984).

14. Section 652B of the Restatement provides:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

15. Liability cannot attach unless the intrusion is *substantial* and *highly offensive* to a reasonable person. Harris v. Easton Publishing Co., *supra*, 483 A.2d at 1383-84; Restatement § 652B comment d.

16. The illustrative comments to the Restatement (Second) of Torts § 652B,

Intrusion upon Seclusion, provide as follows:

b. The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home. It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires. It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents. The

intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph or information outlined. Restatement (Second) of Torts, § 652B, comment B (1977).

17. The Complaint simply fails to set forth facts upon which relief could be granted under an invasion of privacy theory under Pennsylvania law.

WHEREFORE, Defendant prays that this Honorable Court sustain her Preliminary Objection and dismiss the Complaint with prejudice.

III. PRELIMINARY OBJECTIONS THIRD – 1028(a)(4) – Demurrer to Count II

18. The Second Count of the Complaint is entitled “Trespass” based upon mere allegations that the use of a 4-wheeler in a public alley caused dust to enter upon the Plaintiff’s property which abuts the alley.
19. The Superior Court has adopted the Restatement (Second) of Torts § 165 in addressing a “Trespass” claim in Karpiak v. Russo, 676 A.2d 270, 275 (Pa.Super. 1996):

One who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another or causes a thing or third person so to enter is subject to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor, or to a thing or a third person in whose security the possessor has a legally protected interest.

20. There is no identified or cognizable claim that the dust in question has caused any harm to anyone or anything.

WHEREFORE, Defendant prays that the Honorable Court sustain her preliminary objection and dismiss the Complaint with prejudice.

IV. PRELIMINARY OBJECTIONS FOURTH – Demurrer to Requests for Relief

21. The Complaint requests money damages in excess of \$20,000.00, counsel fees, punitive damages, and injunctive relief.
22. There is no basis in the Complaint for any monetary damages.
23. There is no basis in the Complaint for the assessment of attorney's fees.
24. Under Pennsylvania law, "a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties, or some other established exception." Snyder v. Snyder, 533 Pa. 203, 212, 620 A.2d 1133, 1138 (1993). This is commonly referred to as the "American" rule. Jones v. Muir, 511 Pa. 535, 541, 515 A.2d 855, 858 (1986).
25. The Complaint identifies no statutory or other basis for the award of counsel fees.
26. Since there is no trespass and since there is no basis for equitable relief on theories of intentional infliction of emotional distress or invasion of privacy, there is no basis for equitable relief.

WHEREFORE, Defendant prays that this honorable Court sustain her Preliminary Objections and dismiss the Complaint with prejudice or strike from the Complaint its requests for monetary damages, punitive damages, equitable relief and counsel fees.

Respectfully submitted,

**CAMPBELL, MILLER, WILLIAMS,
BENSON, ETTER & CONSIGLIO, INC.**

By: 

David B. Consiglio, Esquire
I.D.# 72772
720 South Atherton Street
State College, PA 16801
(814) 234-1500

Date: July 13, 2009

**IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PA
CIVIL DIVISION**

PETER R. SWISTOCK and
LEONA M. SWISTOCK,

Plaintiffs,

v.

CONNIE MURPHY,

Defendant.

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No. 08-1565-CD

CERTIFICATE OF SERVICE

I, David B. Consiglio, Esquire, of Campbell, Miller, Williams, Benson, Etter & Consiglio, Inc., do hereby certify that on this 13th day of July, 2009, a true and correct copy of the foregoing document was served on the following person by depositing the same in the United States Mail, postage prepaid, addressed as follows:

Chris A. Pentz, Esquire
207 East Market Street
P.O. Box 552
Clearfield, PA 16830

**CAMPBELL, MILLER, WILLIAMS,
BENSON, ETTER, & CONSIGLIO, INC.**

By: 

David B. Consiglio, Esquire

**IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PA
CIVIL DIVISION**

PETER R. SWISTOCK and
LEONA M. SWISTOCK,

Plaintiffs,

v.

CONNIE MURPHY,

Defendant.

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No. 08-1565-CD

ORDER

AND NOW this _____ day of _____, 2009, upon consideration of Defendant's Preliminary Objections, the Preliminary Objections are SUSTAINED and the Complaint is DISMISSED.

BY THE COURT,

_____, J.
Clearfield County Court of Common Pleas

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK,

Plaintiffs,

v.

CONNIE MURPHY,

Defendant.

No. 08-1565-CD

RULE

AND NOW, this 14th day of July, 2009, upon consideration of the Defendant's Preliminary Objections, a Rule is entered upon Plaintiff to Show Cause why Defendant's Preliminary Objections in the above-captioned matter should not be GRANTED.

RULE RETURNABLE this 3rd day of September, 2009, at 1:30 o'clock P.m. in Courtroom No. 1, in Clearfield County Courthouse, Clearfield, Pennsylvania.

BY THE COURT

Frederick J. Kummerman

, J.

Clearfield County Court of Common Pleas

FILED

014:0060
JUL 14 2009

Atty Consiglio

William A. Shaw
Prothonotary/Clerk of Courts

FILED

JUL 1 2009

William A. Shaw
Prothonotary/Clerk of Courts

DATE: 7/14/09

X You are responsible for serving all appropriate parties.

 The Prothonotary's office has provided service to the following parties:

 Plaintiff(s) Plaintiff(s) Attorney Other

 Defendant(s) Defendant(s) Attorney

 Special Instructions:

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK,
Plaintiffs,

v.

CONNIE MURPHY,
Defendant.

No. 08-1565-CD

Type of Case: Trespass

Type of Pleading:

Plaintiffs' Answers to
Defendant's Preliminary
Objections

Filed on Behalf of:
Plaintiffs

Counsel of Record
for this Party:

CHRIS A. PENTZ, ESQUIRE
Supreme Court ID No.: 39232
207 East Market Street
PO Box 552
Clearfield, PA 16830
814-765-4000

Date: 7/27/09

FILED

JUL 27 2009

William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and	*	
LEONA M. SWISTOCK,	*	
Plaintiffs,	*	
	*	
v.	*	No. 08-1565-CD
	*	
CONNIE MURPHY,	*	
Defendant.	*	

PLAINTIFFS' ANSWER TO DEFENDANT'S
PRELIMINARY OBJECTIONS

COUNT I - PRELIMINARY OBJECTION FIRST - 1028(a)(1)
IMPROPER SERVICE

1. Paragraph 1 is admitted.
2. Paragraph 2 is admitted.
3. Paragraph 3 is admitted.

WHEREFORE, Plaintiffs request your Honorable Court to
dismiss the Preliminary Objection set forth in Count I.

COUNT II - PRELIMINARY OBJECTION SECOND - 1028(a)(4)
DEMURRER TO COUNT I

4. Paragraph 4 is admitted.
5. No response required.
6. No response required.
7. Paragraph 7 is denied. Paragraphs 7a, b and c are
hereby incorporated by reference as if set forth in full.
8. No response required.
9. No response required.

10. Paragraph 10 is a conclusion of law to which no response is required.

11. No response required.

12. No response required.

13. No response required.

14. No response required.

15. No response required.

16. No response required.

17. Paragraph 17 is a conclusion of law to which no response is required.

WHEREFORE, Plaintiffs request your Honorable Court to dismiss the Preliminary Objection set forth in Count II.

**COUNT III - PRELIMINARY OBJECTION THIRD - 1028(a)(4)
DEMURRER TO COUNT II**

18. Paragraph 4 is denied. See Paragraphs 9a and b of the Complaint.

19. No response required.

20. Paragraph 20 is denied. The answer set forth in Paragraph 18, above, is hereby incorporated by reference as if set forth in full.

WHEREFORE, Plaintiffs request your Honorable Court to dismiss the Preliminary Objection set forth in Count III.

**COUNT IV - PRELIMINARY OBJECTION FOURTH
DEMURRER TO REQUESTS FOR RELIEF**

21. Paragraph 21 is admitted.

22. Paragraph 22 is a conclusion of law to which no response is required.

23. Paragraph 23 is a conclusion of law to which no response is required.

24. No response required.

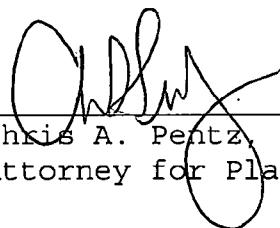
25. Paragraph 25 is admitted in part and denied in part. It is admitted that the Complaint does not cite any statutory authority. However, it is denied that the Complaint does not allege sufficient bases for the award of counsel fees.

26. Paragraph 26 is a conclusion of law to which no response is required.

WHEREFORE, Plaintiffs request your Honorable Court to dismiss the Preliminary Objection set forth in Count IV.

Respectfully submitted,

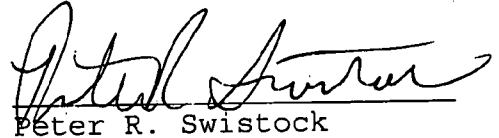
Date: 7/27/09



Chris A. Pentz
Attorney for Plaintiffs

VERIFICATION

I, **PETER R. SWISTOCK** and verify that the statements made in this Answer are true and correct. I understand that false statements herein are made subject to the penalties of Pa.C.S. § 4904 relating to unsworn falsification to authorities.


Peter R. Swistock

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK,
Plaintiffs,

v.

CONNIE MURPHY,
Defendant.

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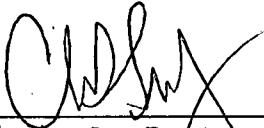
No. 08-1565-CD

CERTIFICATE OF SERVICE

I, Chris A. Pentz, Esquire, do hereby certify that a
certified copy of Plaintiffs' Answer to Preliminary Objections
to Complaint filed in the above-captioned action was served on
the following person and in the following manner on the 27th
day of July, 2009.

FIRST-CLASS MAIL, POSTAGE PREPAID

David B. Consiglio, Esquire
Miller, Kistler & Campbell
720 South Atherton Street
State College, PA 16801



Chris A. Pentz,
Attorney for Plaintiffs

CA

O R D E R

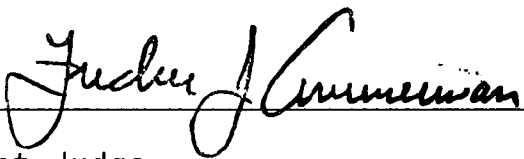
1. Preliminary Objections set forth in Roman Numeral No. 4 challenging the right to receive attorney's fees is hereby GRANTED. Any amended complaint that may be filed shall not include a request for attorney's fees.

FILED 2CC
01/31/09
SEP 08 2009
Atty: Pentz
Consiglio
William A. Shaw
Prothonotary/Clerk of Courts (610)

William A. Shaw
Prothonotary/Clerk of Courts

amended complaint pleading the averments consisting of
Count 1 and Count 2 with more specificity.

BY THE COURT,



President Judge

FILED

SEP 08 2009

William A. Shaw
Prothonotary/Clerk of Courts

DATE: 9/8/09

 You are responsible for serving all appropriate parties.

X The Prothonotary's office has provided service to the following parties:

 Plaintiff(s) X Plaintiff(s) Attorney Other

 Defendant(s) X Defendant(s) Attorney

 Special Instructions:

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK,
Plaintiffs,

v.

CONNIE MURPHY,
Defendant.

No. 08-1565-CD

Type of Case: Trespass

Type of Pleading:

First Amended Complaint

Filed on Behalf of:
Plaintiffs

Counsel of Record
for this Party:

CHRIS A. PENTZ, ESQUIRE
Supreme Court ID No.: 39232
207 East Market Street
PO Box 552
Clearfield, PA 16830
814-765-4000

5 FILED No CC
073498
OCT 23 2009
William A. Shaw
Prothonotary/Clerk of Courts

Date: 10-23-09

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK,
Plaintiffs,

v.

CONNIE MURPHY,
Defendant.

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No. 08-1565-CD

NOTICE

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

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Court Administrator
Clearfield County Courthouse
230 East Market Street
Clearfield, PA 16830
814-765-2641

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK,
Plaintiffs,

v.

CONNIE MURPHY,
Defendant.

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No. 08-1565-CD

FIRST AMENDED COMPLAINT

1. The Plaintiffs are Peter R. Swistock and Leona M. Swistock, husband and wife, who reside at 822 Grace Street, Houtzdale, Clearfield County, Pennsylvania, 16651.

2. The Defendant is Connie Murphy, who resides at One Good Street, Houtzdale, Clearfield County, Pennsylvania, 16651.

3. The relevant time period for this Complaint is from August 18, 2008, through and including the filing of this Complaint.

4. The Plaintiffs and Defendant reside on adjoining properties with Fawn Alley, a nonpublic roadway, being located between properties.

5. The Plaintiffs do not have an adequate remedy at law to prevent further emotional distress and invasion of privacy.

COUNT I - Invasion of Privacy, Intentional

Infliction of Emotional Duress

**Peter R. Swistock and Leona M. Swistock v.
Connie Murphy**

6. Paragraphs 1 through 5 above are incorporated herein by reference as though set forth in full.

7. During the relevant time period, the Defendant, or persons at her direction, has made noise without any purpose other than to inflict emotional distress upon and to invade the privacy of the Plaintiffs, including but not limited to the following:

- a. driving a 4-wheeler for extended periods of time at various hours along Plaintiffs' property causing dust to enter onto Plaintiffs' property causing an unsafe and offensive condition;
- b. operating a motor vehicle for extended periods of time at various hours along Plaintiffs' property causing dust to enter onto Plaintiffs' property causing an unsafe and offensive condition; and
- c. shouting obscenities at the Plaintiffs.

8. The Plaintiffs have prepared a journal of the events in question and is attached as Exhibit "A" and incorporated by reference.

WHEREFORE, Plaintiffs respectfully request your Honorable Court to enter judgment in their favor and against the Defendant for the following:

- a. Money damages in excess of \$20,000.00;
- b. Interest and costs of the suit;
- c. Punitive damages;
- d. Issue an Order enjoining the Defendants from further Intentional Infliction of Emotional Duress or Invasion of Privacy upon the Plaintiffs;
- e. Such other relief as the Court deems appropriate; and
- f. Jury trial demanded.

COUNT II- Trespass
Peter R. Swistock and Leona M. Swistock v.
Connie Murphy

9. Paragraphs 1 through 8 above are incorporated herein by reference as though set forth in full.

10. The Defendant, or persons at her direction, has intentionally trespassed upon the property of the Plaintiffs by means of, including but not limited to the following:

- a. driving a 4-wheeler for extended periods of time at various hours along Plaintiffs' property causing dust to enter onto Plaintiffs' property causing an unsafe and offensive condition;

b. operating a motor vehicle for extended periods of time at various hours along Plaintiffs' property causing dust to enter onto Plaintiffs' property causing an unsafe and offensive condition.

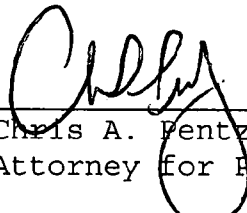
11. The Plaintiffs have prepared a journal of the events in question and is attached as Exhibit "A" and incorporated by reference.

WHEREFORE, Plaintiffs respectfully request your Honorable Court to enter judgment in their favor and against the Defendant for the following:

- a. Money damages in excess of \$20,000.00;
- b. Interest and costs of the suit;
- c. Punitive damages;
- e. Issue an Order enjoining the Defendant from further Trespass upon the property of the Plaintiffs;
- f. Such other relief as the Court deems appropriate;
- and
- g. Jury trial demanded.

Respectfully submitted,

Date: 10-23-09



Chris A. Pentz,
Attorney for Plaintiffs

August 18, 2008

Two - 4 wheelers from the garage at Murphy's and 2 boys (friends of Murphy tanagers) rode in a circle in the lot across from the back of our house.

They did this constantly for 20 to 30 minutes. It was very dry. They

did this until a cloud of dust covered our house. At one point, one of the

Murphy daughters yelled at us. She said they would have everyone in Hooty's place up here riding around. We have pictures a neighbor took of the dust.

That night, there was a constant stream of cars, trucks, vehicles riding around, speeding, loud mufflers, blaring music, etc. Lasted until 11 or 12 midnight.

Next four nights, ^{August} 19th, 20th, 21st, 22nd, 2008
now four wheeling in lot & raising dust. They come down & spin around corner & position 4 wheelers so dust thrown across alley. Also note these 4 wheelers all have something ~~done~~ done to the mufflers. They are extremely noisy. Also they keep revving the motors.

August 29, 2008

4:40 p.m.

Black Jeep - drive alley into Murphy
radio blaring

Sept. 01, 2008

11: A.M. - 1:30 p.m. radio left on in
garage. Door left wide open.

Sept. 01, 2008

2:40 p.m. - 4 wheels up alley & down
McAtker St. revving motor, etc.

2:45 p.m. - back up McAtker & across lot
to Murphy House

2:47 p.m. - black jeep - music blaring down
alley & pulls in Murphy back yard &
music blaring - no one in it

Two minutes later - black jeep speeding up
& down

Oct. 17, 2008

2:50 p.m. - 5 minutes - 4 wheeling
whopping & hollering, revving motor riding
& performing - doing wheelies.

2:55 p.m. - 3:00 p.m.

Seth Kitko to his truck in lot &
racing with the 4 wheelers.

3:55 p.m. - Back at it. Mr. Noel stops
Ivor Coleman. Seth Kitko still performing.
Quite down. Then 4:05 p.m. Bill Bein,
Kitko & Coleman perform some more
a lot of them, to hear old friends about.

August 21, 2008
4:40 p.m.

Black Jeep - down alley, into Murphy's
radio blaring

Sept. 01, 2008

11: A.M. - 1:30 p.m. radio left on in
garage. Door left wide open

Sept. 01, 2008

2:40 p.m. - 4 wheels up alley & down
McAtker St. revving motor, etc.

2:45 p.m. - back up McAtker & across lot
to Murphy House

2:47 p.m. - black jeep - music blaring down
alley & pulls in Murphy back yard &
music blaring - no one in it.

Five minutes later - black jeep speeding up
& down.

Oct. 17, 2008

2:50 p.m. - 5 minutes - 4 wheeling
whopping & hollering, revving motor riding
& performing - doing wheelies.

2:55 p.m. - 3:00 p.m.

Seth Kitko to his truck in lot &
racing with the 4 wheelers.

3:55 p.m. - Back at it. Mr. Noel stops
Ivor Coleman. Seth Kitko still performing.
Quite down. Then 4:05 p.m. Bill Bain,
Kitko & Coleman perform some more.
Bill then takes off down street.

August 29, 2008

4:40 p.m.

Black Jeep - down alley, into Murphy's
radio blaring

Sept. 01, 2008

11: A.M. - 1:30 p.m. radio left on in
garage. Door left wide open.

Sept. 01, 2008

2:40 p.m. - 4 wheels up alley & down
McAtker St. revving motor, etc.

2:45 p.m. - back up McAtker & across lot
to Murphy House

2:47 p.m. - black jeep - music blaring down
alley & pulls in Murphy's back yard &
music blaring - no one in it.

Few minutes later - black jeep speeding up
& down.

Oct. 17, 2008

2:50 p.m. - 5 minutes - 4 wheeling
whopping & hollering, revving motor riding
& performing - doing wheelies.

2:55 p.m. - 3:00 p.m.

Seth Kitko to his truck in lot &
racing with the 4 wheelers.

3:55 p.m. - Back at it. Mr. Noel stops
Ivor Coleman. Seth Kitko still performing.
Quite down. Then 4:05 p.m. Bill Bain,
Kitko & Coleman perform some more.

Oct. 29, 2008

4:00 p.m. - 1 4 wheeler racing
around in the lot - Silk Kitho?

6:00 p.m. - Two 4 wheelers racing
around lot.

Oct 30, 2008

9:25 p.m. - House egged -

a few minutes before this happened.

I saw a group of young people come
out of Murphy's house + head down
Good St.

Nov 13, 2008

9:30 p.m. - 4 wheeling in lot

Nov 14, 2008

12:15 p.m. - 4 wheeling on lot

Red laser light was shining in our
living room window

Nov 21, 2008

4:25 p.m. - 4 wheeling in lot

8:40 p.m. - 4 wheeling in lot

Nov. 21, 2008

4:25 p.m. - 4 wheeling in lot

8:40 p.m.

Nov. 22, 2008

10:52 a.m. - Seth Kisko - truck running around in lot in circles.

4:00 p.m. - 3-4 wheelers coming on in lot.

Jan. 9, 2009

7:30 p.m. - 8:30 p.m.

Two 4 wheelers in lot across alley stopped for a while. Then started up truck & car in back alley racing on ice. Not normal riding. They are gunning engines as usual, revving as they ride around in circles.

Jan. 12th & 13th, 2009 - More of the same

May 19, 2009 - on last page

July 11, 2009

12:00 A.M. - 5:00 A.M.

12: A.M. - Midnight - 4 wheelers - gunning them - left up the lot. about 4:00 a.m. returned to garage - in garage, talking loud, yelling, etc.

July 14, 2009 - 9:30 p.m. Pounding in garage

May 19, 2009

Bill Bain was on our property & started yelling at us because we told him to get off our property. ^{one} I was working in the ~~shrub~~ shrubs & Murphy's dogs came in our yard & started barking at me. Bill came to get dog, but was not leaving. He just stood in our yard. When Pete told him to get the dog & leave. He started yelling at us.

Numerous times there was 4 wheelers left Murphy's garage and rode in circles at 10:00PM - midnight and 1:00AM - 3:AM -

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK,
Plaintiffs,

v.

CONNIE MURPHY,
Defendant.

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No. 08-1565-CD

VERIFICATION

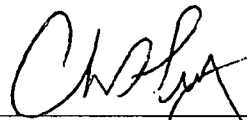
I, Chris A. Pentz, have read the foregoing First Amended Complaint of the Plaintiffs, Peter R. Swistock and Leona M. Swistock. The statements therein are correct to the best of my personal knowledge or information and belief.

This statement and verification is made subject to penalties of 18 Pa. C.S. §4904 relating to unsworn falsifications to authorities, which provides that if I knowingly make false averments, I may be subject to criminal penalties.

I am authorized to make this verification on behalf of Plaintiffs because of my position as counsel of record.

Date:

10-23-09



Chris A. Pentz
207 East Market Street
Clearfield PA 16830
814 765-4000
I. D. # 39232

FILED

OCT 23 2009

William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK,
Plaintiffs,

v.

CONNIE MURPHY,
Defendant.

No. 08-1565-CD

Type of Case: Trespass

Type of Pleading:

Certificate of Service

Filed on Behalf of:
Plaintiffs

Counsel of Record
for this Party:

CHRIS A. PENTZ, ESQUIRE
Supreme Court ID No.: 39232
207 East Market Street
PO Box 552
Clearfield, PA 16830
814-765-4000

Date: 10/28/09

FILED

OCT 28 2009

0/3:45 (60)
William A. Shaw
Prothonotary/Clerk of Courts
No C/L

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK,
Plaintiffs,

v.

CONNIE MURPHY,
Defendant.

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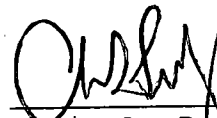
No. 08-1565-CD

CERTIFICATE OF SERVICE

I, Chris A. Pentz, Esquire, do hereby certify that a
certified copy of First Amended Complaint filed in the above-
captioned action was served on the following person and in the
following manner on the 28th day of October, 2009.

FIRST-CLASS MAIL, POSTAGE PREPAID

David B. Consiglio, Esquire
Miller, Kistler & Campbell
720 South Atherton Street
State College, PA 16801



Chris A. Pentz
Attorney for Plaintiffs

FILED

OCT 28 2004

**William A. Shaw
Prothonotary/Clerk of Courts**

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK

Plaintiffs,

v.

CONNIE MURPHY

Defendant.

No. 08-1565-CD

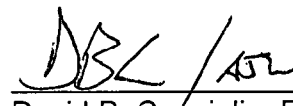
CERTIFICATE OF SERVICE

I, David B. Consiglio, Esquire, of Campbell, Miller, Williams, Benson, Etter & Consiglio, Inc., do hereby certify that on this 20th day of November, 2009, a true and correct copy of the foregoing document was served on the following person by depositing the same in the United States Mail, postage prepaid, addressed as follows:

Chris A. Pentz, Esquire
207 East Market Street
P.O. Box 552
Clearfield, PA 16830

**CAMPBELL, MILLER, WILLIAMS,
BENSON, ETTER & CONSIGLIO, INC.**

By:


David B. Consiglio, Esquire

5
FILED
mtg/10/20/09
NOV 23 2009
William A. Shaw
Prothonotary/Clerk of Courts

FILED

NOV 23 2009

William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK

Plaintiffs,

v.

CONNIE MURPHY

Defendant.

Docket No. 08-1565-CD

Type of Case:

Civil Action

Type of Pleading:

**Defendant's Preliminary
Objections to Plaintiffs'
First Amended Complaint**

Filed on Behalf of Defendant

Counsel of Record for this Party

David B. Consiglio, Esquire
Campbell, Miller, Williams,
Benson, Etter & Consiglio, Inc.
720 S. Atherton Street
State College, PA 16801
(814) 234-1500

FILED

NOV 23 2009

William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK

Plaintiffs,

v.

CONNIE MURPHY

Defendant.

No. 08-1565-CD

PRELIMINARY OBJECTIONS TO PLAINTIFFS' FIRST AMENDED COMPLAINT

NOW COMES the Defendant Connie Murphy, by and through her counsel, David B. Consiglio and Campbell, Miller, Williams, Benson, Etter & Consiglio, Inc., and pursuant to Pa.R.C.P. 1028 interposes these Preliminary Objections to Plaintiffs' First Amended Complaint, and states as follows in support thereof:

1. In their First Amended Complaint, Plaintiffs Peter R. Swistock and Leona M. Swistock allege that Defendant Connie Murphy or persons at her direction invaded Plaintiffs' privacy and intentionally inflicted emotional distress upon Plaintiffs, and that Defendant or persons at her direction additionally trespassed on Plaintiffs' property. In an attempt to substantiate their claims, Plaintiffs attached to their First Amended Complaint several journal pages describing alleged incidents.

2. Plaintiffs' First Amended Complaint and its attached journal pages are devoid of factual allegations to support Plaintiffs' claims. Indeed, as examples of behavior that allegedly invaded plaintiffs' privacy, inflicted emotional distress, and constituted trespass on plaintiffs' property, plaintiffs' journal alleges such incidents as:

August 29, 2008

4:40 p.m.

Black Jeep – down alley, into Murphys radio blaring

Sept. 01, 2008¹

11: AM – 1:30 p.m.

radio left on in garage. Door left wide open.

Sept. 01, 2008

2:40 p.m. – 4 wheeler up alley + down McAlteer St. revving motor, etc.

2:45 p.m. – back up McAlteer + across lot² to Murphy House

2:47 p.m. – black jeep – music blaring down alley + pulls in Murphys back yard + music blaring – no one in it.

Two minutes later – black jeep speeding up + down.

Oct. 17, 2008

2:50 p.m. – 5 minutes – 4 wheeling whopping [sic] + hollering, revving motor riding + performing – doing wheelies.

2:55 p.m. – 3:00 p.m.

Seth Kitko to his truck in lot + racing with the 4 wheelers.

3:55 p.m. – Back at it. Mr. Noel stops Trevor Coleman. Seth Kitko still performing. Quiets down. Then 4:05 p.m. Bill Bair Kitko + Coleman perform some more Bill then takes off down street.

(Plaintiffs' Journal, attached as Exhibit "A" to Plaintiffs' First Amended Complaint, page 2 in entirety)(footnote references added).

3. Most of the alleged incidents listed in plaintiffs' journal take place during the daytime.³ As alleged in Plaintiffs' attached journal, only once did an individual enter onto the real property of plaintiffs, in order to retrieve a dog which had strayed into Plaintiffs' yard. (Plaintiffs' Journal, attached as Exhibit "A" to Plaintiffs' First Amended Complaint, entry dated May 19, 2009.)

¹ It should be noted that Monday, September 1, 2008 was Labor Day.

² The lot referenced here is not owned by Plaintiffs.

³ Houtzdale has no nighttime noise ordinances, and allows the burning of trash except on Sundays.

4. Plaintiffs' First Amended Complaint asserts the following causes of action against Defendant Connie Murphy: Invasion of Privacy, Intentional and Infliction of Emotional Duress (Count I), and Trespass (Count II).

5. The *ad damnum* clause in Plaintiffs' Prayer for Relief seeks money damages in excess of \$20,000.00, punitive damages, and injunctive relief.

I. DEMURRERS

A. The Complaint Fails To State A Claim Upon Which Relief Can Be Granted For Intentional Infliction of Emotional Distress and Invasion of Privacy (Count I).

6. Defendant Connie Murphy incorporates by reference herein the allegations contained in paragraphs 1 through 5 of these Preliminary Objections as though set forth in full.

7. The First Amended Complaint's first Count sounds in the torts of intentional infliction of emotional distress and invasion of privacy.

8. While the Supreme Court has never expressly recognized the tort of "intentional infliction of emotional distress," it has cited Section 46 of the Restatement (Second) of Torts as setting forth minimum requirements for the action. Taylor v. Albert Einstein Medical Center, 754 A.2d 650, 653 (Pa. 2000) ("we have never expressly recognized a cause of action for intentional infliction of emotional distress, and thus have never formally adopted this section of the Restatement, we have cited the section as setting forth the minimum elements necessary to sustain such a cause of action.").

9. Section 46 requires "extreme and outrageous conduct intentionally or recklessly [which] causes severe emotional distress to another" (Restatement (Second) of Torts § 46).

10. The First Amended Complaint alleges, inter alia, that individuals have operated 4-wheelers and trucks on a public alley as well as a lot owned by Defendant; that persons shouted obscenities at Plaintiffs; that persons played music, worked, and/or gathered in a garage on Defendant's property several times, mostly during daylight hours; that persons burned pallets on Defendant's property in one instance; that Plaintiffs' house was egged, although Plaintiffs fail to allege that Defendant or persons under her direction or control did this act; and that in one instance an individual entered onto the real property of plaintiffs, in order to retrieve a dog which had strayed into Plaintiffs' yard. (First Amended Complaint, ¶¶7-8; Plaintiffs' Journal, attached as Exhibit "A" to Plaintiffs' First Amended Complaint).

11. Pennsylvania law requires that, in order to state a claim, the actions complained of "must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998).

Described another way, "[i]t has not been enough that the defendant has acted with intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that this conduct has been characterized by 'malice,' or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort."

Hoy v. Angelone, 720 A.2d at 754, quoting Restatement (Second) of Torts §46, comment d.

12. An example of the severity of the conduct necessary for a finding of Intentional Infliction of Emotional Distress can be found in the case of Banyas v. Lower Bucks Hospital, 437 A.2d 1236 (Pa. Super. 1981), where the Defendants intentionally fabricated records to suggest that plaintiff had killed a third party which led to plaintiff being indicted for homicide.

13. In another case involving the conduct of neighboring property owners, Wiltz v. Pazzalia, 71 Pa. D. & C.4th 427 (Pa.Com.Pl. (Lackawanna) 2004), preliminary objections to a count of intentional infliction of emotional distress were sustained where a neighbor allegedly entered onto the real property of a property owner; dug holes; moved and placed boulders on property, including paved areas; and allegedly damaged the property owner's vehicle.

In the instant action, the plaintiffs present insufficient evidence to establish any "outrageous" conduct on the part of the defendant. At best, they have indicated that the defendant's activities rise to the level of intentional, annoying or obnoxious, but not outrageous. Further, there is a total absence of severe emotional distress; no physical symptoms evidenced by medical documentation have been produced.

Wiltz v. Pazzalia, 71 Pa. D. & C.4th 427, 437 (Pa.Com.Pl. (Lackawanna) 2004).

14. The incidents alleged in Plaintiffs' First Amended Complaint and its attached journal do not rise to the level of being "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society."

15. A plaintiff must suffer some type of resulting physical harm due to the defendant's outrageous conduct. Fewell v. Bensner, 664 A.2d 577, 582 (Pa. Super.

1994); Reeves v. Middletown Athletic Association, 866 A.2d 1115, 1122 (Pa. Super. 1994).

16. The tort of invasion of privacy has four species, none of which are identified in the First Amended Complaint.

17. The Superior Court has adopted the definition of one of the species promulgated by the Restatement (Second) of Torts §§ 652B-E. Harris v. Easton Publishing Co., 483 A.2d 1377, 1383 (Pa. Super. 1984).

18. Section 652B of the Restatement provides;

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Restatement (Second) of Torts § 652B.

19. Liability cannot attach unless the intrusion is *substantial* and *highly offensive* to a reasonable person. Harris v. Easton Publishing Co., *supra*, 483 A.2d at 1383-84; Restatement (Second) of Torts § 652B, comment d.

20. The illustrative comments to the Restatement (Second) of Torts § 652B, **Intrusion upon Seclusion**, provide as follows:

b. The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home. It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires. It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a

forged court order to permit an inspection of his personal documents. The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph or information outlined.

Restatement (Second) of Torts § 652B, comment b.

21. The First Amended Complaint simply fails to set forth facts upon which relief could be granted under an invasion of privacy theory under Pennsylvania law.

WHEREFORE, Defendant Connie Murphy demurs to the claim for intentional infliction of emotional distress and invasion of privacy asserted by Plaintiffs and prays that Count I of the First Amended Complaint be dismissed, with prejudice.

**B. The Complaint Fails To State Any Claim
Upon Which Relief Can Be Granted For Trespass (Count II).**

22. Defendant Connie Murphy incorporates by reference herein the allegations contained in paragraphs 1 through 21 of these Preliminary Objections as though set forth in full.

23. The Second Count of Plaintiffs' First Amended Complaint is entitled "Trespass" based upon allegations 1) that the operation of vehicles on a public alley and on Defendant's property caused dust to enter upon the Plaintiffs' property which abuts the alley and 2) that in one instance an individual entered onto Plaintiffs' property to retrieve a dog which had strayed into Plaintiffs' yard.

24. The Superior Court has adopted the Restatement (Second) of Torts §165 in addressing a "Trespass" claim in Karpiak v. Russo, 676 A.2d 270, 275 (Pa.Super. 1996):

One who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another or causes a thing or third person so to enter is subject

to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor, or to a thing or a third person in whose security the possessor has a legally protected interest.

Karpiak v. Russo, 676 A.2d at 275.

25. There is no identified or cognizable claim that the incidents alleged in Plaintiffs' First Amended Complaint and its attached journal have caused harm to anyone or anything.

WHEREFORE, Defendant Connie Murphy demurs to the claim for trespass contained in Count II of Plaintiffs' First Amended Complaint, and prays that Count II of the First Amended Complaint be dismissed, with prejudice.

II. MOTIONS TO STRIKE

A. Motion to Strike Prayer For Recovery of Specified Dollar Amount

26. Defendant Connie Murphy incorporates by reference herein the allegations contained in paragraphs 1 through 25 of these Preliminary Objections as though set forth in full.

27. In Plaintiffs' Prayer for Relief, Plaintiffs request, *inter alia*, money damages in excess of \$20,000.00.

28. The Pennsylvania Rules of Civil Procedure include the following rules for pleading claims for relief in a civil complaint:

Rule 1021.Claim for Relief Determination Of Amount In Controversary

* * *

(b) Any pleading demanding relief for unliquidated damages shall not claim any specific sum.

(c) In counties having rules governing compulsory arbitration, the plaintiff shall state whether the amount claimed does or does not exceed the jurisdictional amount requiring arbitration referral by local rule.

* * *

Pa.R.Civ.P. 1021.

29. Preliminary objections in the form of demurrer or a motion to strike are an appropriate means through which to challenge an erroneous prayer for damages.

Hudock v. Donegal Mutual Insurance Co., 438 Pa. 272, 264 A.2d 668, 671 (1970).

30. Because Plaintiffs' First Amended Complaint seeks recovery for which "Plaintiffs do not have an adequate remedy at law," (First Amended Complaint, ¶5), and for which Plaintiffs have alleged no specific damage to any property or injuries to any persons, Plaintiffs have failed to allege what is represented by their prayer for money damages in excess of \$20,000.00. While Plaintiffs' First Amended Complaint fails to substantiate any money damages to which they are entitled, if Plaintiffs would be entitled to any money damages, such amount would be unliquidated, thus rendering the prayer for relief in a specific dollar amount, improper.

WHEREFORE, Defendant Connie Murphy moves to strike the prayer for recovery of a specified dollar amount as set forth in Plaintiffs' Prayer for Relief.

B. Motion To Strike Claim for Punitive Damages

31. Defendant Connie Murphy incorporates by reference herein the allegations contained in paragraphs 1 through 30 of these Preliminary Objections as though set forth in full.

32. In their Prayer for Relief, Plaintiffs demand judgment against Connie Murphy for "punitive damages." The Complaint is otherwise devoid of any reference to punitive damages, lacks any separate count seeking the recovery of punitive damages and alleging the factual basis therefore; and otherwise fails to plead facts which if proven, would be sufficient to support an award for punitive damages against Connie Murphy.

33. Pennsylvania has adopted the Restatement (Second) of Torts §908(a), which provides that "punitive damages may be award for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to others." Feld v. Merriam, 506 Pa. 383, 485 A.2d 742, 747 (1984).

34. Punitive damages are proper only when the facts establish that an individual's actions are of such an outrageous nature as to demonstrate intentional, willful, wanton, or reckless conduct such that an award will deter that person from such conduct.

35. Because Plaintiffs' First Amended Complaint fails to allege any requisite facts to establish the elements for a cause of action to recover punitive damages against Connie Murphy based upon the events alleged in the First Amended Complaint, Connie Murphy moves to strike the unsupported prayer for punitive damages contained in Plaintiffs' Prayer for Relief.

WHEREFORE, Defendant Connie Murphy moves to strike Plaintiffs prayer for punitive damages contained in Plaintiffs' Prayer for Relief.

C. Motion To Strike Prayer For Injunctive Relief

36. Defendant Connie Murphy incorporates by reference herein the allegations contained in paragraphs 1 through 35 of these Preliminary Objections as though set forth in full.

32. In Plaintiffs' Prayer for Relief, Plaintiffs seek injunctive relief.

33. Since there is no ongoing trespass and since there is no basis for equitable relief on theories of intentional infliction of emotional distress or invasion of privacy, there is no basis for equitable relief.

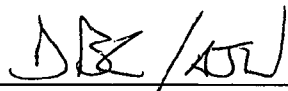
34. Because the First Amended Complaint fails to plead any facts which, if proven, would entitle Plaintiffs to injunctive relief, there is no basis for injunctive relief under Pennsylvania law.

WHEREFORE, Defendant Connie Murphy prays that this honorable Court sustain her Preliminary Objections and dismiss the First Amended Complaint with prejudice or strike from the First Amended Complaint its requests for money damages, punitive damages, and equitable relief.

Respectfully submitted,

**CAMPBELL, MILLER, WILLIAMS,
BENSON, ETTER & CONSIGLIO, INC.**

By:



David B. Consiglio, Esquire
I.D.# 72772
Adam J. Witmer, Esquire
I.D.# 92280
720 South Atherton Street
State College, PA 16801
(814) 234-1500

Counsel for Defendant
Connie Murphy

Dated: November 20, 2009

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK

Plaintiffs,

v.

CONNIE MURPHY

Defendant.

No. 08-1565-CD

ORDER

AND NOW this _____ day of _____, 2009, upon
consideration of Defendant's Preliminary Objections, the Preliminary Objections are
SUSTAINED and Plaintiffs' First Amended Complaint is DISMISSED.

BY THE COURT,

_____, J.
Clearfield County Court of Common Pleas

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK

Plaintiffs,

v.

CONNIE MURPHY

Defendant.

No. 08-1565-CD

FILED

NOV 30 2009

William A. Shaw
Prothonotary/Clerk of Courts

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01/11/10/2cc atty Consiglio

RULE

AND NOW, this 25th day of November, 2009, upon
consideration of the Defendant's Preliminary Objections to Plaintiffs' First Amended
Complaint, a Rule is entered upon Plaintiff to Show Cause why Defendant's Preliminary
Objections in the above-captioned matter should not be GRANTED.

RULE RETURNABLE this 7th day of January, 2010, at
2:00 o'clock P. m. in Courtroom No. 1, in Clearfield County Courthouse,
Clearfield, Pennsylvania.

BY THE COURT,

Justice J. Commeyan
J.

Clearfield County Court of Common Pleas

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK,
Plaintiffs,

v.

CONNIE MURPHY,
Defendant.

No. 08-1565-CD

Type of Case: Trespass

Type of Pleading:

Second Amended Complaint

Filed on Behalf of:
Plaintiffs

Counsel of Record
for this Party:

CHRIS A. PENTZ, ESQUIRE
Supreme Court ID No.: 39232
207 East Market Street
PO Box 552
Clearfield, PA 16830
814-765-4000

Date: 12-10-09

FILED

DEC 10 2009

William A. Shaw
Prothonotary/Clerk of Courts

3cc
Amy Pentz

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK,
Plaintiffs,

v.

CONNIE MURPHY,
Defendant.

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No. 08-1565-CD

NOTICE

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

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Court Administrator
Clearfield County Courthouse
230 East Market Street
Clearfield, PA 16830
814-765-2641

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and	*	
LEONA M. SWISTOCK,	*	
Plaintiffs,	*	
	*	
v.	*	No. 08-1565-CD
	*	
CONNIE MURPHY,	*	
Defendant.	*	

SECOND AMENDED COMPLAINT

1. The Plaintiffs are Peter R. Swistock and Leona M. Swistock, husband and wife, who reside at 822 Grace Street, Houtzdale, Clearfield County, Pennsylvania, 16651.

2. The Defendant is Connie Murphy, who resides at One Good Street, Houtzdale, Clearfield County, Pennsylvania, 16651.

3. The relevant time period for this Complaint is from August 18, 2008, through and including the filing of this Complaint.

4. The Plaintiffs and Defendant reside on adjoining properties with Fawn Alley, a nonpublic roadway, being located between properties.

5. The Plaintiffs do not have an adequate remedy at law to prevent further emotional distress and invasion of privacy.

COUNT I - Invasion of Privacy, Intentional
Infliction of Emotional Duress
Peter R. Swistock and Leona M. Swistock v.
Connie Murphy

6. Paragraphs 1 through 5 above are incorporated herein by reference as though set forth in full.

7. During the relevant time period, the Defendant, or persons at her direction, has made noise without any purpose other than to inflict emotional distress upon and to invade the privacy of the Plaintiffs, including but not limited to the following:

a. driving a 4-wheeler for extended periods of time at various hours along Plaintiffs' property causing dust to enter onto Plaintiffs' property causing an unsafe and offensive condition;

b. operating a motor vehicle for extended periods of time at various hours along Plaintiffs' property causing dust to enter onto Plaintiffs' property causing an unsafe and offensive condition; and

c. shouting obscenities at the Plaintiffs.

d. August 18, 2008 6:00 PM - 1:00 AM operation of 4-wheeler.

e. August 19, 2008 4:30 PM - 9:00 PM operation of 4-wheeler.

- f. August 20, 2008 5:00 PM - 9:00 PM operation of 4-wheeler.
- g. August 21, 2008 5:00 PM - 9:00 PM operation of 4-wheeler.
- h. August 22, 2008 5:00 PM - 9:00 PM operation of 4-wheeler.
- i. August 29, 2008 4:40 PM - 7:30 PM operation of 4-wheeler.
- j. September 1, 2008 11:00 AM - 1:30 PM and 2:40 PM - 3:00 PM operation of 4-wheeler.
- k. October 17, 2008 2:50 PM - 7:30 PM operation of 4-wheeler.
- l. October 29, 2008 4:00 PM - 6:00 PM operation of 4-wheeler.
- m. November 13, 2008 9:30 PM - 10:30 PM operation of 4-wheeler.
- n. November 14, 2008 9:30 PM - 10:00 PM operation of 4-wheeler.
- o. November 15, 2008 12:15 AM - 1:45 AM operation of 4-wheeler.
- p. November 21, 2008 4:15 PM - 5:15 PM and at 8:40 PM operation of 4-wheeler.
- q. November 22, 2008 4:00 PM operation of 4-wheeler.

r. January 9, 2009 7:30 PM - 8:30 PM operation of 4-wheeler.

s. January 12, 2009 operation of 4-wheeler.

t. January 13, 2009 operation of 4-wheeler.

u. July 11, 2009 12:00 AM - 5:00 AM operation of 4-wheeler with yelling.

v. July 12, 2009 9:30 PM noise originating from garage.

8. The above actions have caused the Plaintiff Leona M. Swistock to suffer insomnia, fatigue, nervousness, depression, elevated blood pressure, and pain to her chest, arms and stomach.

WHEREFORE, Plaintiffs respectfully request your Honorable Court to enter judgment in their favor and against the Defendant for the following:

- a. Money damages in excess of \$20,000.00;
 - b. Interest and costs of the suit;
 - c. Punitive damages;
 - d. Issue an Order enjoining the Defendant from further Intentional Infliction of Emotional Duress or Invasion of Privacy upon the Plaintiffs;
 - e. Such other relief as the Court deems appropriate;
- and

f. Jury trial demanded.

COUNT II- Trespass
Peter R. Swistock and Leona M. Swistock v.
Connie Murphy

9. Paragraphs 1 through 8 above are incorporated herein by reference as though set forth in full.

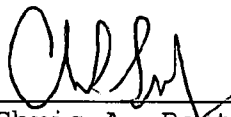
10. The Defendant, or persons at her direction, has intentionally trespassed upon the property of the Plaintiffs by means of the actions set forth above.

WHEREFORE, Plaintiffs respectfully request your Honorable Court to enter judgment in their favor and against the Defendant for the following:

- a. Money damages in excess of \$20,000.00;
- b. Interest and costs of the suit;
- c. Punitive damages;
- e. Issue an Order enjoining the Defendant from further Trespass upon the property of the Plaintiffs;
- f. Such other relief as the Court deems appropriate;
- and
- g. Jury trial demanded.

Respectfully submitted,

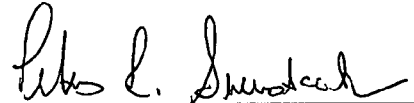
Date: December 10, 2009



Chris A. Pentz,
Attorney for Plaintiffs

VERIFICATION

I, **PETER R. SWISTOCK** and verify that the statements made in this Complaint are true and correct. I understand that false statements herein are made subject to the penalties of Pa.C.S. § 4904 relating to unsworn falsification to authorities.

A handwritten signature in cursive script, appearing to read "Peter R. Swistock", is written above a horizontal line.

Peter R. Swistock by
Chris A. Pentz, Attorney

FILED

DEC 10 2009

William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK,
Plaintiffs,

v.

CONNIE MURPHY,
Defendant.

No. 08-1565-CD

Type of Case: Trespass

Type of Pleading:

Certificate of Service

Filed on Behalf of:
Plaintiffs

Counsel of Record
for this Party:

CHRIS A. PENTZ, ESQUIRE
Supreme Court ID No.: 39232
207 East Market Street
PO Box 552
Clearfield, PA 16830
814-765-4000

Date: 12-14-09

FILED
9/10/59/62
DEC 15 2009
William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK,
Plaintiffs,

v.

CONNIE MURPHY,
Defendant.

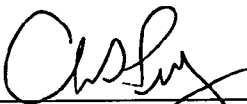
*
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* No. 08-1565-CD
*
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*

CERTIFICATE OF SERVICE

I, Chris A. Pentz, Esquire, do hereby certify that a certified copy of Plaintiffs' Second Amended Complaint filed in the above-captioned action was served on the following person and in the following manner on the 14th day of December, 2009.

FIRST-CLASS MAIL, POSTAGE PREPAID

David B. Consiglio, Esquire
Miller, Kistler & Campbell
720 South Atherton Street
State College, PA 16801



Chris A. Pentz
Attorney for Plaintiffs

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK

Plaintiffs,

v.

CONNIE MURPHY

Defendant.

Docket No. 08-1565-CD

Type of Case:

Civil Action

Type of Pleading:

**Defendant's Preliminary
Objections to Plaintiffs'
Second Amended Complaint**

Filed on Behalf of Defendant

Counsel of Record for this Party

David B. Consiglio, Esquire
Adam J. Witmer, Esquire
Campbell, Miller, Williams,
Benson, Etter & Consiglio, Inc.
720 S. Atherton Street
State College, PA 16801
(814) 234-1500

FILED

DEC 30 2009

William A. Shaw
Prothonotary/Clerk of Courts

PETER R. SWISTOCK and
LEONA M. SWISTOCK

V.

Defendant.

No. 08-1565-CD

NOW COMES the Defendant Connie Murphy, by and through her counsel,
David B. Consiglio and Campbell, Miller, Williams, Benson, Etter & Consiglio, Inc., and
pursuant to Pa.R.C.P. 1028 interposes these Preliminary Objections to Plaintiffs'
Second Amended Complaint, and states as follows in support thereof:

2. Plaintiffs' Second Amended Complaint is devoid of factual allegations necessary to support Plaintiffs' claims. Indeed, as examples of behavior that allegedly invaded plaintiffs' privacy, inflicted emotional distress, and constituted trespass on plaintiffs' property, Plaintiffs allege only nineteen specific incidents of 4-wheeler operation and other activities solely on neighboring property or an alleyway over a span of approximately eleven months, from August 18, 2008 to July 12, 2009. Plaintiffs

allege only six such incidents to have occurred fully or partially after 9:00 p.m., in a municipality with no nighttime noise ordinance.

3. Plaintiffs' Second Amended Complaint asserts the following causes of action against Defendant Connie Murphy: Invasion of Privacy and Intentional Infliction of Emotional Distress (Count I), and Trespass (Count II).

4. The *ad damnum* clause in Plaintiffs' Prayer for Relief seeks money damages in excess of \$20,000.00, punitive damages, and injunctive relief.

I. DEMURRERS

A. The Complaint Fails To State A Claim Upon Which Relief Can Be Granted For Intentional Infliction of Emotional Distress and Invasion of Privacy (Count I).

5. Defendant Connie Murphy incorporates by reference herein the allegations contained in paragraphs 1 through 4 of these Preliminary Objections as though set forth in full.

6. The Second Amended Complaint's first Count sounds in the torts of intentional infliction of emotional distress and invasion of privacy.

7. While the Supreme Court has never expressly recognized the tort of "intentional infliction of emotional distress," it has cited Section 46 of the Restatement (Second) of Torts as setting forth minimum requirements for the action. Taylor v. Albert Einstein Medical Center, 754 A.2d 650, 653 (Pa. 2000)

8. Section 46 requires "extreme and outrageous conduct intentionally or recklessly [which] causes severe emotional distress to another" (Restatement (Second) of Torts § 46).

9. The Second Amended Complaint alleges that Plaintiffs' property and Defendant's property adjoin along an alleyway, and that individuals have operated 4-wheelers "along Plaintiff's property," evidently in said alleyway. (Second Amended Complaint, ¶ 7(a – b)). The only other activities alleged are an undated allegation of individuals "shouting obscenities at the Plaintiffs." (Second Amended Complaint, ¶ 7(c)), and one instance of "noise originating from the garage" at 9:30 p.m. (Second Amended Complaint, ¶ 7(v)), evidently from a garage on Defendant's property.

10. Pennsylvania law requires that, in order to state a claim, the actions complained of "must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998).

11. An example of the severity of the conduct necessary for a finding of Intentional Infliction of Emotional Distress can be found in the case of Banyas v. Lower Bucks Hospital, 437 A.2d 1236 (Pa. Super. 1981), where the Defendants intentionally fabricated records to suggest that plaintiff had killed a third party which led to plaintiff being indicted for homicide.

12. In another case involving the conduct of neighboring property owners, Wiltz v. Pazzalia, 71 Pa. D. & C.4th 427 (Pa.Com.Pl. (Lackawanna) 2004), preliminary objections to a count of intentional infliction of emotional distress were sustained despite allegations that a neighbor allegedly entered onto the real property of a property owner; dug holes; moved and placed boulders on property, including paved areas; and

allegedly damaged the property owner's vehicle. Wiltz v. Pazzalia, 71 Pa. D. & C.4th 427, 437 (Pa.Com.Pl. (Lackawanna) 2004).

13. The incidents alleged in Plaintiffs' Second Amended Complaint and its attached journal do not rise to the level of being "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society."

14. The tort of invasion of privacy has four species, none of which are identified in the Second Amended Complaint.

15. The Superior Court has adopted the definition of one of the species promulgated by the Restatement (Second) of Torts §§ 652B-E. Harris v. Easton Publishing Co., 483 A.2d 1377, 1383 (Pa. Super. 1984).

16. Section 652B of the Restatement provides;

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Restatement (Second) of Torts § 652B.

17. Liability cannot attach unless the intrusion is *substantial* and *highly offensive* to a reasonable person. Harris v. Easton Publishing Co., *supra*, 483 A.2d at 1383-84; Restatement (Second) of Torts § 652B, comment d.

18. The illustrative comments to the Restatement (Second) of Torts § 652B, **Intrusion upon Seclusion**, provide as follows:

b. The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over

the plaintiff's objection in entering his home. It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires. It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents. The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph or information outlined.

Restatement (Second) of Torts § 652B, comment b.

19. The Second Amended Complaint simply fails to set forth facts upon which relief could be granted under an invasion of privacy theory under Pennsylvania law.

WHEREFORE, Defendant Connie Murphy demurs to the claim for intentional infliction of emotional distress and invasion of privacy asserted by Plaintiffs and prays that Count I of the Second Amended Complaint be dismissed, with prejudice.

**B. The Complaint Fails To State Any Claim
Upon Which Relief Can Be Granted For Trespass (Count II).**

20. Defendant Connie Murphy incorporates by reference herein the allegations contained in paragraphs 1 through 19 of these Preliminary Objections as though set forth in full.

21. The Second Count of Plaintiffs' Second Amended Complaint is entitled "Trespass," and is based upon the allegation that the operation of vehicles on an alleyway between Plaintiffs' and Defendant's property caused dust and noise to enter upon the Plaintiffs' property.

22. The Superior Court has adopted the Restatement (Second) of Torts §165 in addressing a "Trespass" claim in Karpiak v. Russo, 676 A.2d 270, 275 (Pa.Super. 1996):

One who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another or causes a thing or third person so to enter is subject to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor, or to a thing or a third person in whose security the possessor has a legally protected interest.

Karpiak v. Russo, 676 A.2d at 275.

23. Although Plaintiffs allege that "the above actions have caused the Plaintiff Leona M. Swistock to suffer insomnia, fatigue, nervousness, depression, elevated blood pressure, and pain to her chest, arms, and stomach," Plaintiffs have not alleged how or why intermittent dust and noise could do so, nor have plaintiffs alleged an absence of other causes for Mrs. Swistock's alleged maladies.

WHEREFORE, Defendant Connie Murphy demurs to the claim for trespass contained in Count II of Plaintiffs' Second Amended Complaint, and prays that Count II of the First Amended Complaint be dismissed, with prejudice.

II. MOTIONS TO STRIKE

A. Motion to Strike Prayer For Recovery of Specified Dollar Amount

24. Defendant Connie Murphy incorporates by reference herein the allegations contained in paragraphs 1 through 23 of these Preliminary Objections as though set forth in full.

25. In Plaintiffs' Prayer for Relief, Plaintiffs request, *inter alia*, money damages in excess of \$20,000.00.

26. The Pennsylvania Rules of Civil Procedure include the following rules for pleading claims for relief in a civil complaint:

Rule 1021.Claim for Relief Determination Of Amount In Controversary

* * *

(b) Any pleading demanding relief for unliquidated damages shall not claim any specific sum.

(c) In counties having rules governing compulsory arbitration, the plaintiff shall state whether the amount claimed does or does not exceed the jurisdictional amount requiring arbitration referral by local rule.

* * *

Pa.R.Civ.P. 1021.

27. Preliminary objections in the form of demurrer or a motion to strike are an appropriate means through which to challenge an erroneous prayer for damages.

Hudock v. Donegal Mutual Insurance Co., 438 Pa. 272, 264 A.2d 668, 671 (1970).

28. Plaintiffs' Second Amended Complaint seeks recovery for which "Plaintiffs do not have an adequate remedy at law," (Second Amended Complaint, ¶15); Plaintiffs have failed to allege why they are then entitled to money damages in excess of \$20,000.00. The Prayer for Relief, therefore, serves no other purpose than to attempt to satisfy the jurisdictional threshold in order to avoid compulsory arbitration; this attempt is improper, given that Plaintiffs have admitted they have no remedy at law.

WHEREFORE, Defendant Connie Murphy moves to strike the prayer for recovery of a specified dollar amount as set forth in Plaintiffs' Prayer for Relief.

B. Motion To Strike Claim for Punitive Damages

29. Defendant Connie Murphy incorporates by reference herein the allegations contained in paragraphs 1 through 28 of these Preliminary Objections as though set forth in full.

30. In their Prayer for Relief, Plaintiffs demand judgment against Connie Murphy for "punitive damages." The Second Amended Complaint is otherwise devoid of any reference to punitive damages; lacks any separate count seeking the recovery of punitive damages and alleging the factual basis therefore; and otherwise fails to plead facts which if proven, would be sufficient to support an award for punitive damages against Connie Murphy.

31. Pennsylvania has adopted the Restatement (Second) of Torts §908(a), which provides that "punitive damages may be award for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to others." Feld v. Merriam, 506 Pa. 383, 485 A.2d 742, 747 (1984).

32. Punitive damages are proper only when the facts establish that an individual's actions are of such an outrageous nature as to demonstrate intentional, willful, wanton, or reckless conduct such that an award will deter that person from such conduct.

33. Because Plaintiffs' Second Amended Complaint fails to allege any requisite facts to establish the elements for a cause of action to recover punitive damages against Connie Murphy based upon the events alleged in the Second

Amended Complaint, Connie Murphy moves to strike the unsupported prayer for punitive damages contained in Plaintiffs' Prayer for Relief.

WHEREFORE, Defendant Connie Murphy moves to strike Plaintiffs prayer for punitive damages contained in Plaintiffs' Prayer for Relief.

C. Motion To Strike Prayer For Injunctive Relief

34. Defendant Connie Murphy incorporates by reference herein the allegations contained in paragraphs 1 through 33 of these Preliminary Objections as though set forth in full.

35. In Plaintiffs' Prayer for Relief, Plaintiffs seek injunctive relief.


36. Since there is no ongoing trespass and since there is no basis for equitable relief on theories of intentional infliction of emotional distress or invasion of privacy, there is no basis for equitable relief.

37. Because the Second Amended Complaint fails to plead any facts which, if proven, would entitle Plaintiffs to injunctive relief, there is no basis for injunctive relief under Pennsylvania law.

WHEREFORE, Defendant Connie Murphy prays that this honorable Court sustain her Preliminary Objections and dismiss the Second Amended Complaint with prejudice or strike from the Second Amended Complaint its requests for money damages, punitive damages, and equitable relief.

Respectfully submitted,

**CAMPBELL, MILLER, WILLIAMS,
BENSON, ETTER & CONSIGLIO, INC.**

By: 
David B. Consiglio, Esquire
I.D.# 72772
Adam J. Witmer, Esquire
I.D.# 92280
720 South Atherton Street
State College, PA 16801
(814) 234-1500

Counsel for Defendant
Connie Murphy

Dated: December 29, 2009

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK

Plaintiffs,

v.

CONNIE MURPHY

Defendant.

No. 08-1565-CD

CERTIFICATE OF SERVICE

I, Adam J. Witmer, Esquire, of Campbell, Miller, Williams, Benson, Etter & Consiglio, Inc., do hereby certify that on this 29th day of December, a true and correct copy of the foregoing document was served on the following person by depositing the same in the United States Mail, postage prepaid, addressed as follows:

Chris A. Pentz, Esquire
207 East Market Street
P.O. Box 552
Clearfield, PA 16830

**CAMPBELL, MILLER, WILLIAMS,
BENSON, ETTER & CONSIGLIO, INC.**

By:


Adam J. Witmer, Esquire

PETER R. SWISTOCK and
LEONA M. SWISTOCK

v.

Defendant.

No. 08-1565-CD

, J.

Clearfield County Court of Common Pleas

6A

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK

Plaintiffs,

v.

CONNIE MURPHY

Defendant.

No. 08-1565-CD

RULE

AND NOW, this 5 day of January, 2010, upon
consideration of the Defendant's Preliminary Objections to Plaintiffs' Second Amended
Complaint, a Rule is entered upon Plaintiff to Show Cause why Defendant's Preliminary
Objections in the above-captioned matter should not be GRANTED.

RULE RETURNABLE this 29th day of March, 2010, at
1:30 o'clock p. m. in Courtroom No. 1, in Clearfield County Courthouse,
Clearfield, Pennsylvania.

BY THE COURT,


_____, J.
Clearfield County Court of Common Pleas

FILED

01/06/2010
JAN 06 2010

William A. Shaw
Prothonotary/Clerk of Courts

ICC
Amy Witmer

(210)

FILED

JAN 06 2010

William A. Shaw
Prothonotary/Clerk of Courts

DATE: 1/6/2010

- ☒ You are responsible for serving all appropriate parties
- ☐ The Prothonotary's office has provided service to the following parties:
 - ☐ Plaintiff(s)
 - ☐ Plaintiff(s) Attorney
 - ☐ Defendant(s)
 - ☐ Defendant(s) Attorney
 - ☐ Other
- ☐ Special Instructions:

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,
PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK,
Plaintiffs

vs.

NO. 08-1565-CD

CONNIE MURPHY,
Defendant

FILED 2ccA45:
012:42/07 Pentz
APR 05 2010 Consiglio
William A. Shaw
Prothonotary/Clerk of Courts
ICC: D. Mikesell
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OPINION

On August 21, 2008, Peter R. Swistock and Leona M. Swistock, (hereinafter “Plaintiffs”), filed a Praecipe for Writ of Summons in a Trespass action against Connie Murphy, (hereinafter “Defendant”). Plaintiffs’ filed their Second Amended Complaint on December 10, 2009, setting forth two (2) counts: *Count I*- Invasion of Privacy, Intentional Infliction of Emotional Duress and *Count II*- Trespass. On December 30, 2009, Defendant filed Preliminary Objections to Plaintiffs’ Second Amended Complaint, setting forth two (2) counts, each with sub-parts: *Count I*- Demurrers: (A) Failure to State a Claim Upon which Relief can be Granted for Intentional Infliction of Emotional Distress and Invasion of Privacy; (B) Failure to State a Claim Upon which Relief can be Granted for Trespass and *Count II*- Motions to Strike: (A) Motion to Strike Prayer for Recovery of Specified Dollar Amount; (B) Motion to Strike Claim for Punitive Damages; and (C) Motion to Strike Prayer for Injunctive Relief. The Court will address each of the Defendant’s Preliminary Objections as set forth above.

I. Demurrers

Count I of Defendant’s Preliminary Objections is in the form of a demurrer. Under PA.R.C.P. 1028(a)(4), any party may file preliminary objections to any pleading for legal insufficiency of pleading (demurrer). On a preliminary objection in the nature

of a demurrer, the material facts set forth in the pleading and all inferences reasonably deducible therefrom must be admitted as true. *Cooper v. Frankford Health Care System, Inc.*, 960 A.2d 134 (Pa. Super. Ct. 2008), *appeal denied* 601 Pa. 679, 970 A.2d 431 (2009). Preliminary objections in the nature of a demurrer should be sustained only if, assuming the averments of the complaint to be true, the plaintiff has failed to assert a legally cognizable cause of action. *Lerner v. Lerner*, 954 A.2d 1229 (Pa. Super. Ct. 2008).

A. Invasion of Privacy; Intentional Infliction of Emotional Distress

An action for invasion of privacy is comprised of four distinct torts: (1) intrusion upon seclusion, (2) appropriation of name or likeness, (3) publicity given to private life and (4) publicity placing the person in a false light. *Marks v. Bell Tel. Co. of Pa.*, 460 Pa. 73, 331 A.2d 424 (1975). Plaintiffs' claim of invasion of privacy can more specifically be categorized as intrusion upon seclusion. Section 652B of the RESTATEMENT (SECOND) OF TORTS states:

[O]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

An action pursuant to this section does not depend upon any publicity given to the person whose interest is invaded or to his affairs. RESTATEMENT (SECOND) OF TORTS § 652B, comment a. The invasion may be (1) by physical intrusion into a place where the plaintiff has secluded himself, (2) by use of the defendant's senses to oversee or overhear the plaintiff's private affairs, or (3) some other form of investigation or examination into plaintiff's private concerns. *Id.*, comment b.

The Court finds that Plaintiffs' have failed to show that Defendant's actions or actions of those persons at her direction intentionally intruded, physically or otherwise,

upon the solitude or seclusion of their private affairs or concerns. Moreover the Court finds that although Defendant allegedly caused dust to go onto Plaintiffs' property and made other noise, such conduct would not be highly offensive to a reasonable person. The Court finds that Plaintiffs' claim is legally insufficient to be entitled to relief.

To state a cause of action for intentional infliction of emotional distress, the allegations of the complaint must be able to support a finding that the defendant's conduct was both extreme and outrageous, or "extremely outrageous." *Field v. Philadelphia Elec. Co.*, 565 A.2d 1170 (Pa. Super. Ct. 1989). It is not enough to allege that the defendant acted with tortious or criminal intent, intent to inflict emotional distress, or malice. *Id.* The conduct complained of must be so outrageous in character, and so extreme in degree as to go beyond all possible bounds of decency, and be regarded as atrocious and utterly intolerable in a civilized community. *Hoy v. Angelone*, 554 Pa. 134, 151, 720 A.2d 745, 754 (1998)(citing *Buczek v. First National Bank of Mifflintown*, 531 A.2d 1122, 1125 (Pa. Super. Ct. 1987)).

Described another way, "[i]t has not been enough that the defendant has acted with intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort." Restatement (Second) of Torts §46, comment d; *Daughen v. Fox*, 539 A.2d 858, 861 (Pa. Super. Ct. 1988)). Liability does not extend to mere insults, indignities, or threats. *Field v. Philadelphia Elec. Co.*, 565 A.2d 1170 (Pa. Super. Ct. 1989). A complaint fails to state a cause of action where the facts averred do not show that the defendants' conduct was extreme and outrageous because the language used by the defendants was in no way capable of producing, or intended to produce, any extraordinary mental

distress. *Jones v. Nissenbaum, Rudolph and Seidner*, 368 A.2d 770 (Pa. Super. Ct. 1976).

The Court finds that the incidents alleged in Plaintiffs' Second Amended Complaint and its attached journal do not rise to the level of being "so outrageous in character, and so extreme in degree as to go beyond all possible bounds of decency, and be regarded as atrocious and utterly intolerable in a civilized community." Although Defendant's behavior or the behavior of persons at her direction may be inconsiderate and inconvenient, it does not rise to the level necessary to accord relief. Even if deemed to be true, mere riding of 4-wheelers and other motor vehicles, noise emanating from a garage and shouting of obscenities does not support a claim of intentional infliction of emotional distress.

B. Trespass

To maintain an action for trespass, there must be in the plaintiff either actual possession or the right to immediate possession flowing from the right of property; and he must have been deprived of it by the tortious act of another". *Florig v. Estate of O'Hara*, 912 A.2d 318 (Pa. Super. Ct. 2006)(citations omitted); *see also*, RESTATEMENT (SECOND) OF TORTS, Chapter 7. The Court in *Karpiak v. Russo* stated:

[O]ne who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another or causes a thing or third person so to enter is subject to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor, or to a thing or a third person in whose security the possessor has a legally protected interest.

676 A.2d 270, 275 (Pa. Super. Ct. 1996)(citing RESTATEMENT (SECOND) OF TORTS § 165).

In the present matter, the Court finds that Plaintiffs' claim of trespass is legally insufficient. Plaintiffs' merely claim that Defendant has caused dust to go onto their

property and has created general noise, however Plaintiffs claim no actual harm to the land or harm to themselves. Plaintiff has not set forth any claim that Defendant or persons at her direction physically intruded onto their land beyond causing dust to fall onto their property. Plaintiffs' claim is insufficient to be entitled to the relief sought.

II. Motions to Strike


Having found that the Plaintiffs' claims for relief, *Count I-* Invasion of Privacy, Intentional Infliction of Emotional Duress and *Count II-* Trespass, were legally insufficient the Court does not find it necessary to assess Defendant's Motions to Strike.

ORDER

AND NOW, this 5th day of April 2010, it is the ORDER of this Court as follows:

1. Defendant's Preliminary Objections to Counts I and II of Plaintiffs' Second Amended Complaint are GRANTED.
2. Plaintiffs' Second Amended Complaint *Count I-* Invasion of Privacy, Intentional Infliction of Emotional Duress and *Count II-* Trespass are hereby DISMISSED, pursuant to Pennsylvania Rules of Civil Procedure 1028(a)(4) for legal insufficiency.

BY THE COURT,


FREDRIC J. AMMERMAN
President Judge

FILED

APR 05 2010

William A. Shew
Prothonotary/Clerk of Courts

DATE: 4/5/10

☒ You are responsible for serving all appropriate parties.

☒ The Prothonotary's office has provided service to the following parties:

☐ Plaintiff(s) ☒ Plaintiff(s) Attorney ☐ Other

☐ Defendant(s) ☒ Defendant(s) Attorney

☐ Special Instructions:

ORIGINAL

**IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION**

PETER R. SWISTOCK and
LEONA M. SWISTOCK

Plaintiffs,

v.

CONNIE MURPHY

Defendant.

No. 08-1565-CD

FILED

APR 30 2010

William A. Shaw
Prothonotary/Clerk of Courts
1 SENT TO ATTY

PRAECIPE TO ENTER JUDGMENT

TO THE PROTHONOTARY OF SAID COURT:

Kindly enter judgment in favor of Defendant Connie Murphy and against
Plaintiffs, Peter R. Swistock and Leona M. Swistock in the above-captioned matter.



David B. Consiglio, Esquire
Adam J. Witmer, Esquire

MILLER KISTLER & CAMPBELL
124 North Allegheny Street
Bellefonte, PA 16823
(814) 355-5474

Counsel for Defendant
Connie Murphy

Dated: April 29, 2010

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK

Plaintiffs,

v.

CONNIE MURPHY

Defendant.

No. 08-1565-CD

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Praecept to Enter Judgment**, was hereby served by depositing the same within the custody of the United States Postal Service, First Class, postage prepaid, addressed as follows:

Chris A. Pentz, Esquire
207 East Market Street
P.O. Box 552
Clearfield, PA 16830

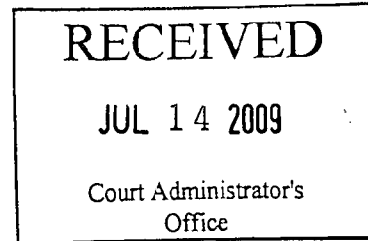
MILLER KISTLER & CAMPBELL

By: 

Adam J. Witmer, Esq.

Dated: April 29, 2010

9/3
1:30
pm



**IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PA
CIVIL DIVISION**

PETER R. SWISTOCK and
LEONA M. SWISTOCK,

Plaintiffs,

v.

CONNIE MURPHY,

Defendant.

*wave objections
on lack of service -*

Docket No. 08-1565-CD

Type of Case:

Civil Action

Type of Pleading:

**Defendant's Brief in Support of
Preliminary Objections**

Filed on Behalf of Defendant

Counsel of Record for This Party

David B. Consiglio, Esquire
Campbell, Miller, Williams,
Benson, Etter & Consiglio, Inc.
720 S. Atherton Street
State College, PA 16801
(814) 234-1500

**IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PA
CIVIL DIVISION**

PETER R. SWISTOCK and
LEONA M. SWISTOCK,

Plaintiffs,

v.

CONNIE MURPHY,

Defendant.

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No. 08-1565-CD

BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS

I. BACKGROUND

A Complaint was filed in the Court of Common Pleas of Clearfield County by Peter R. and Leona M. Swistock on or about June 9, 2009. The Complaint consists of two Counts; Intentional Infliction of Emotional Distress/Invasion of Privacy and Trespass. The Complaint seeks money damages in excess of \$20,000.00, punitive damages, injunctive relief, and counsel fees. The Complaint was received by Defendant via U.S. Mail only.

II. ARGUMENT

A. Improper Service

Rule 400 of the Rules of Civil procedure states that “[e]xcept as provided in subdivisions (b) and (c) and in Rules 400.1 and 1930.4, *original process shall be served within the Commonwealth only by the sheriff*. Pa.R.C.P. 400 (emphasis added). In this case, no Sheriff service was provided to the best information of the Defendant who maintains receipt of the Complaint via regular mail.

The Pennsylvania Supreme Court has held that the rules relating to service of process must be strictly followed, and jurisdiction of the court over the person of the defendant is dependent upon proper service having been made.” Azzarrelli v. City of Scranton 655 A.2d 648, 650 (Pa. Cmwlth. 1995).

B. Count I Fails to State a Claim

The Complaint’s first Count sounds in the torts of intentional infliction of emotional distress and invasion of privacy, but neither of those theories are supported by the facts alleged in the Complaint.

1. Intentional Infliction of Emotional Distress

While the Supreme Court has never expressly recognized the tort of “intentional infliction of emotional distress”, it has cited Section 46 of the Restatement (Second) Torts as setting forth minimum requirements for the action. Taylor v. Albert Einstein Medical Center, 754 A.2d 650, 653 (Pa. 2000)(“*we have never expressly recognized a cause of action for intentional infliction of emotional distress, and thus have never formally adopted this section of the Restatement, we have cited the section as setting forth the minimum elements necessary to sustain such a cause of action*”).

Section 46 requires “extreme and outrageous conduct intentionally or recklessly [which] causes severe emotional distress to another....” Restatement (Second) Torts § 46. Pennsylvania law requires that, in order to state a claim, the actions complained of “must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of

decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.” Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998).

The Complaint merely alleges as facts that the Defendant has driven a 4-wheeler on a public alley for extended periods of time and shouted obscenities at Plaintiffs. (Complaint, ¶¶ 7(a)-(c)). If every persons whose property abutted an alley or a public thoroughfare could legitimately institute an action for dust being sprayed on their property, either the legal process or motor vehicle traffic would cease. Defendant finds no case directly on point, (perhaps because the Complaint is based upon a novel theory at best), and thus must argue by comparison and analogy to other cases.

An example of the severity of the conduct necessary for a finding of Intentional Infliction of Emotional Distress can be found in the case of Banyas v. Lower Bucks Hospital, 437 A.2d 1236 (Pa. Super 1981), where the Defendants intentionally fabricated records to suggest that plaintiff had killed a third party which led to plaintiff being indicted for homicide.

The making of obscenities and stirring up of dust from an alley can hardly be said to be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.” Indeed, the other neighbors to Defendant have apparently not joined the Plaintiff’s action and their absence demonstrates that from an objective standard, the Complaint fails to allege the type of outrageous misconduct that the law requires.

In Swisher v. Pits, the Superior Court listed several cases which exemplify the type of egregious misconduct which justifies an action for IIED:

Cases which have found a sufficient basis for a cause of action of intentional infliction of emotional distress have had presented only the most egregious conduct. *See e.g., Papieves v. Lawrence*, 437 Pa. 373, 263 A.2d 118 (1970) (defendant, after striking and killing plaintiff's son with automobile, and after failing to notify authorities or seek medical assistance, buried body in a field where discovered two months later and returned to parents (recognizing but not adopting section 46)); Banyas v. Lower Bucks Hospital, 293 Pa.Super. 122, 437 A.2d 1236 (1981) (defendants intentionally fabricated records to suggest that plaintiff had killed a third party which led to plaintiff being indicted for homicide); Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d Cir.1979) (defendant's team physician released to press information that plaintiff was suffering from fatal disease, when physician knew such information was false). Swisher v. Pits, 868 A.2d 1228, 1231 (Pa.Super. 2005)(citing, Hoy, supra 720 A.2d at 754).

Quite simply, the facts alleged in the instant Complaint do not even make a close case for IIED.

As an independent basis to sustain these Preliminary Objections, the Superior Court has noted that a plaintiff must suffer some type of resulting physical harm due to the defendant's outrageous conduct in order to state a viable claim for IIED. *See, Swisher v. Pits, supra, citing Fewell v. Besner*, 444 Pa.Super. 559, 664 A.2d 577, 582 (Pa.Super.1995); Reeves v. Middletown Athletic Association, 866 A.2d 1115, 1122 (Pa. Super 1994). Again there is no such allegation in the Complaint and none in good faith could be made.

2. *Invasion of Privacy*

Although not identified in the Complaint the only form of invasion of privacy that could remotely be imagined on the face of the Complaint is intrusion upon seclusion. The Superior Court has adopted the definition of one of the species promulgated by the Restatement (Second) Torts §§ 652B-E. Harris v. Easton Publishing Co., 335 Pa. Superior Ct. 141, 153, 483 A.2d 1377, 1383 (1984). Section 652B of the Restatement provides:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

No claim can be made unless the intrusion is *substantial* and *highly offensive* to a reasonable person. Harris v. Easton Publishing Co., *supra*, 483 A.2d at 1383-84; Restatement § 652B comment d. Again, because research reveals no case on point, the Court must look to illustrations for disposition of this Count. The comments to the Restatement (Second) of Torts § 652B, **Intrusion upon Seclusion**, provide examples of forces one's way into the plaintiff's room in a hotel; barging into a plaintiff's home over the plaintiff's objection; looking into plaintiff's upstairs windows with binoculars or tapping his telephone wires; opening private and personal mail, searching a safe or wallet; examining a private bank account. Restatement (Second) of Torts, § 652B, comment B (1977). Certainly riding a 4-wheeler on a public alley cannot suffice to state a claim.

C. Count II Fails to State A Claim

The Second Count of the Complaint is entitled “Trespass” and based upon mere allegations that the use of a 4-wheeler in a public alley caused dust to enter upon the Plaintiff’s property which abuts the alley. The Superior Court has adopted the Restatement (Second) of Torts § 165 in addressing a “Trespass” claim in Karpiak v. Russo, 676 A.2d 270, 275 (Pa.Super. 1996):

One who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another or causes a thing or third person so to enter is subject to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor, or to a thing or a third person in whose security the possessor has a legally protected interest.

In this case, the Complaint is devoid of any cognizable allegation that the dust allegedly caused by the 4-wheeling in question has caused any harm to anyone or anything. Certainly, any individual is able to use a public alley without being haled into Court to answer for the dust that a vehicle may stir up which may come to rest on abutting properties.

D. Plaintiff’s Requests for Relief Fail to State A Claim

The Complaint requests money damages in excess of \$20,000.00, counsel fees, punitive damages, and injunctive relief. For the reason set forth above, Plaintiffs are entitled to no relief of any kind since they have failed to set forth valid claims under Pennsylvania law. However, should this Honorable Court allow the action to proceed, certainly the relief requested must be narrowed or eliminated based on the law.

1. *Monetary Damages*

The Complaint requests money damages in excess of \$20,000.00 yet fails utterly to state facts upon which any damages could be based. There is no basis in the Complaint for any monetary damages.

2. *Counsel Fees*

Under Pennsylvania law, “a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties, or some other established exception.” Snyder v. Synder, 533 Pa. 203, 212, 620 A.2d 1133, 1138 (1993). This is commonly referred to as the “American” rule. Jones v. Muir, 511 Pa. 535, 541, 515 A.2d 855, 858 (1986). The complaint does not even attempt to articulate a basis for its request for counsel fees. It is respectfully suggested that the only party which may be entitled to counsel fees may be Defendant since the Complaint does not appear to be based on any viable theory of law.

3. *No Basis for Equitable Relief*

Since there is no trespass action which is properly advanced in this case, there can be no basis for equitable relief. Research reveals no cases which stand for the proposition that such relief is proper even where a proper action for IIED is laid out. Likewise, simply because there is no monetary damage provable does not mean that equity lies. Equity lies where monetary relief is *insufficient*, not where monetary relief cannot be awarded.

4. No Basis for Punitive Damages

Punitive damages may be awarded for conduct that is outrageous. Feld v. Merriam, 506 Pa. 383, 395, 485 A.2d 742, 747-48 (1984). Punitive damages can be found where the evidence shows the defendant knows, or has reason to know, of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act in conscious disregard of that risk. Martin v. Johns-Manville Corp., 508 Pa. 154, 494 A.2d 1097 (1985). A claim for punitive damages must plead facts sufficient to summarize and support the claim, including facts tending to cast the alleged actions in a light justifying the label of outrageous conduct. Smith v. Brown, 283 Pa. Super. 116, 423 A.2d 743 (1980).

In this case, the Complaint does not, and in good faith could not, allege outrageous misconduct. Moreover, there is no risk of physical harm to the Plaintiffs and none is alleged. The facts alleged by the Plaintiffs are weak, even if one must, for purposes of these Objections only, take them as being accurate (which in fact they are not). One could categorize the allegations in the Complaint as sad, misdirected, and unfortunate, but certainly not capable of permitting a finding of punitive damages.

III. CONCLUSION

For all the foregoing reasons, Defendant prays for the dismissal of the Complaint with prejudice.

Respectfully submitted,

**CAMPBELL, MILLER, WILLIAMS,
BENSON, ETTER & CONSIGLIO, INC.**

By: 

David B. Consiglio, Esquire

I.D.# 72772

720 South Atherton Street

State College, PA 16801

(814) 234-1500

Date: July 13, 2009

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PA
CIVIL DIVISION

PETER R. SWISTOCK and
LEONA M. SWISTOCK,

Plaintiffs,

v.

CONNIE MURPHY,

Defendant.

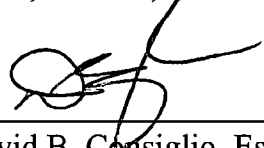
No. 08-1565-CD

CERTIFICATE OF SERVICE

I, David B. Consiglio, Esquire, of Campbell, Miller, Williams, Benson, Etter & Consiglio, Inc., do hereby certify that on this 13th day of July, 2009, a true and correct copy of the foregoing document was served on the following person by depositing the same in the United States Mail, postage prepaid, addressed as follows:

Chris A. Pentz, Esquire
207 East Market Street
P.O. Box 552
Clearfield, PA 16830

**CAMPBELL, MILLER, WILLIAMS,
BENSON, ETTER, & CONSIGLIO, INC.**

By: 
David B. Consiglio, Esquire