

[J-42-2015]
UNDER SEAL

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 145 MAP 2014
BY KATHLEEN KANE, ATTORNEY	:	
GENERAL	:	Appeal from the Order of the
	:	Commonwealth Court at No. 36 MD
Appellant	:	2014 dated 4/30/14 (clarification order
	:	filed 9/11/14 which was modified on
	:	10/10/14)
v.	:	
	:	
NEW FOUNDATIONS, INC., A	:	SUBMITTED: May 7, 2015
NONPROFIT CORPORATION;	:	
FIRETREE, LTD, A NONPROFIT	:	
CORPORATION; ORANGE STONES,	:	
CO., A NONPROFIT CORPORATION,	:	
ALLEN E. ERTEL, INDIVIDUALLY;	:	
EDWARD ERTEL, INDIVIDUALLY; AMY	:	
ERTEL, INDIVIDUALLY; AND WILLIAM C.	:	
BROWN, INDIVIDUALLY,	:	
	:	
Appellees	:	

ORDER

PER CURIAM

DECIDED: June 15, 2015

AND NOW, this 15th day of June, 2015, this Court having discerned multiple material errors in the Commonwealth Court's opinion dated April 30, 2014, it is hereby ORDERED that such opinion and the accompanying order are VACATED, and the matter is REMANDED for further proceedings consistent with this Order.

Among the noted errors are the following:

The Commonwealth Court incorrectly indicated that an attorney for a non-profit corporation also represented its

board of directors. To the contrary, an attorney for a corporation represents the organizational entity, albeit corollary duties may arise through interactions with organizational constituents. See Pa.R.P.C. 1.13 & Explanatory Comment.

The Commonwealth Court inappropriately conflated an attorney's ethical obligations with evidentiary privilege -- in this case, the attorney-client privilege -- in issuing pretrial rulings screening personnel of the Office of Attorney General from a broad array of documents and communications and dismissing the complaint unless conforming amendments are filed. See Pa.R.P.C., Scope ¶[19] (“[N]othing in the Rules should be deemed to augment . . . the extra disciplinary consequences of violating such a duty.”).

The Commonwealth Court appears to have questionably couched information as attorney “work-product,” when much of the relevant information seems to have nothing to do with preparation for litigation on behalf of the former client. See Pa.R.C.P. No. 4003.3.

The Commonwealth Court stated that an attorney had not set forth a single instance of her services being used to commit wrongdoing, when various of the attorney's accusations overtly indicate that multiple such instances occurred. See, e.g., R.R. 0070-0086; N.T., Jan. 3, 2014, at 23, 42, 46-47 (deposition of the attorney in question).

The Commonwealth Court inappropriately relied on decisions involving private litigants -- most prominently In re Potash Antitrust Litigation, 1993 WL 543013 (D. Minn. 1993) -- in substantially restricting the Attorney General from proceeding, in a parens patriae capacity, to redress asserted violations of the law impacting on the public interest. These and the qui tam decisions cited by the parties, including United States ex rel. Fair Laboratory Practices Associates v. Quest Diagnostics Inc., 734 F.3d 154 (2d Cir. 2013), and United States v. X Corp., 862 F. Supp. 1502 (E.D. Va. 1994), would appear to be more directly relevant to the whistleblower action pending in the Lycoming County court of common pleas, which the Attorney General incorporated into her complaint in the present matter.

The Commonwealth Court erroneously applied a remedial fruit-of-the-poisonous-tree approach, as against the Attorney General, to a lawyer's purported ethical violations. See, e.g., United States v. Marashi, 913 F.2d 724, 731 n. 11 (9th Cir.1990) (explaining that "no court has ever applied [the fruit-of-the-poisonous-tree doctrine] to any evidentiary privilege"); *accord* United States v. Warshak, 631 F.3d 266, 294 (6th Cir. 2010); United States v. Squillacote, 221 F.3d 542, 560 (4th Cir. 2000); Nickel v. Hannigan, 97 F.3d 403, 408-09 (10th Cir. 1996); United States v. Schwartz, 925 F. Supp. 2d 663, 683 n.14 (E.D. Pa. 2013). See generally Trammel v. United States, 445 U.S. 40, 51 (1980) (explaining that testimonial privileges must be balanced against "the need for probative evidence in the administration of criminal justice").

On remand, the Attorney General is to file an amended complaint eliminating the specific and direct connection between the present litigation and the whistleblower litigation pending in Lycoming County (the Attorney General is not required, however, to screen any attorneys or agents from her office from the litigation or to disassociate the litigation entirely from the plaintiff in that action and/or materials or documents which she may have provided). If the matter ultimately proceeds to trial, the Commonwealth Court is to assess the admissibility of evidence based on established evidentiary principles and not the broader Code of Professional Conduct. Furthermore, the Commonwealth Court is to prepare an opinion setting forth its rationale in implementing a blanket seal in connection with the underlying litigation (as opposed to redacting or sealing only documents which reveal specific attorney-client confidences).

To the degree that provisions of this Order are beyond the matters affirmatively raised by the parties to this appeal, this Court invokes its King's Bench powers, in view of the severity of the Attorney General's allegation that non-profit organizations soliciting and accepting donations from the public engaged in a prolonged course of conduct

entailing unlawfully diverting corporate assets and resources to serve the interests of insider individuals.