

BAILIWICK NEWS

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Weighing competing values: government secrecy, individual privacy and public accountability

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Part 5 in a series reporting on legal and political principles as prioritized by incumbent DA Stacy Parks Miller and challenger Bernie Cantorna. Both are running as Democrats; the primary election is May 16, 2017.

INTRODUCTION

This installment takes a closer look at the legal arguments between Centre County District Attorney Stacy Parks Miller and Centre County defense attorney Bernie Cantorna during Parks Miller's federal defamation suit.

The legal arguments are valuable because they provide insight into the candidates' views on how to weigh the conflicting values of government secrecy, privacy rights of public officials and private citizens, and the role of private citizens and public officials in maintaining the moral legitimacy of government entities.

RECAP

As reported in previous installments, Parks Miller interpreted the July 2015 report of the 37th Statewide Investigating Grand Jury as blanket exoneration on forgery and records-tampering allegations made against her by her former paralegal, Michelle Shutt even though – as reported previously – the grand jury did not evaluate the relevant evidence against the appropriate criminal statute.

Parks Miller responded by filing a retaliatory civil defamation lawsuit in late August 2015, against 11 individuals who participated in reporting the forgery incident and initiating the investigations, including county commissioners, a county solicitor, a county administrator, a sitting county judge, and several local defense attorneys, including Cantorna. She amended the complaint in mid-October 2015.

In her complaint, Parks Miller claimed that the defendants had breached fiduciary duties owed to Parks Miller; defamed her; placed her in a false light; published injurious falsehoods about her; engaged in malicious prosecution and common law abuse of process; committed negligent acts and acts of legal malpractice; intentionally or negligently inflicted emotional distress on her; engaged in concerted tortious conduct and conspiracy against her; and violated her Fourteenth Amendment due process

rights, her Fourth and Fourteenth Amendment privacy rights, and her First Amendment free speech rights.

During briefing rounds from late October 2015 through January 2016, the defendants moved for dismissal, arguing that Parks Miller had failed to state any valid cause of action and failed to provide factual evidence to support her claims, and that the defendants held various immunities to civil liability and their communications held various privileges.

The defendants, including Cantorna, made it clear that they didn't share Parks Miller interpretation of the legal significance of the grand jury's report; her confidence in the impartiality of the grand jury process; her expansive interpretation of her privacy rights as a public figure; or her narrow interpretation of the defendants' free speech rights as citizens and public officials.

In March 2016, US District Judge Matthew Brann held a hearing in Williamsport on Parks Miller's case. In May 2016, Judge Brann dismissed all of Parks Miller's claims against paralegal Michelle Shutt; Cantorna and the other defense attorneys; Centre County Court of Common Pleas Judge Pamela Ruest; and the Centre County government entity. On Sept. 1, after Parks Miller had filed an amended complaint against Centre County officials acting in their individual capacities, Judge Brann dismissed the remaining claims, ruling that probable cause for the search and seizure of Parks Miller's records existed.

On July 29, 2016, Shutt filed a defamation suit against Parks Miller in US District Court, also before Judge Brann, based on Parks Miller's public statements about Shutt (more on this case in a future report).

On Sept. 29, 2016, Parks Miller appealed Brann's dismissals to the US Court of Appeals for Third Circuit, where the appeal is pending.

PARKS MILLER v. CANTORNA

General Arguments

The defendants broadly argued that Parks Miller's lawsuit was an attempt to chill the First Amendment right of citizens to petition their government for the redress of wrongs, and their duty to report potential criminal acts to law enforcement authorities and testify fully and truthfully during criminal investigations. As such, several alleged that Parks Miller's suit was an example of "SLAPP" litigation – Strategic Litigation Against Public Participation.

Immunity to civil claims played a significant part in all the defendants' arguments. The legal definition of immunity is "Exemption from performing duties that the law generally requires other citizens to perform, or from a

penalty or burden that the law generally places upon other citizens.” (*Source*: legal-dictionary.thefreedictionary.com)

Immunity attaches to individual people such as grand jury witnesses and groups of people such as governmental bodies. The general principle behind immunity is to protect people who must testify or make decisions on behalf of society from being inhibited by the fear of civil liability if their actions negatively impact others.

The *Noerr-Pennington* doctrine further holds that private citizens are immune from liability derived from the act of petitioning their government to take action to right a wrong or adopt a new law. In their pleadings, Cantorna and other attorney defendants framed their Jan. 20, 2015 appearance at the Centre County commissioners meeting as petitioning the government to take corrective action on a matter of public importance: alleged law-breaking by the district attorney.

Parks Miller generally argued that the defendants didn’t have immunity, because they acted with intentional misconduct or actual malice, which strip immunity.

Privileged communications also played a significant role in the defendants’ motions to dismiss. Privilege is a “rule of evidence that allows the holder of the privilege to refuse to provide evidence about a certain subject or to bar such evidence from being disclosed or used in a judicial or other proceeding.” (*Source*: Wikipedia.org) Privilege attaches to communications, not to individuals.

Defendants claimed at least five types of privilege, including judicial privilege covering statements made by judges, attorneys, witnesses and parties in judicial proceedings; statements given to law enforcement officers to assist in investigations; grand jury testimony; statements made at public meetings of legislative bodies; and the “qualified fair report” privilege, covering public statements about what happened during a public meeting.

Parks Miller argued that the communications were not privileged, for a variety of technical reasons depending on which privilege the defendants claimed in which contexts.

Specific Arguments

Of the 13 total claims, Parks Miller made eight claims against Cantorna including breach of fiduciary duty; negligence; defamation and false light; injurious falsehood; common law abuse of process; intentional and/or negligent infliction of emotional distress; concerted tortious conduct; and conspiracy.

Breach of Fiduciary Duty and Negligence

Parks Miller based her fiduciary breach and negligence claims against Cantorna on the legal theory that, once he had seen copies of emails regarding the “fake” bail order and related sting operation, and realized they were confidential documents, Cantorna had a legal and ethical duty to notify Parks Miller of the confidentiality breach and return the documents to her, instead of pursuing police, disciplinary board or county commissioner investigations. She also claimed all the defendants had a

duty to investigate the matters themselves, before reporting the potential crimes to authorities for investigation, and that they failed to fulfill that duty.

Cantorna and the other defense attorneys denied having any fiduciary duty to Parks Miller, on the grounds that lawyers owe no duty to anyone other than their clients, and Parks Miller was not their client.

Cantorna further argued that the Rules of Professional Conduct ethics provisions regarding the return of confidential documents apply to inadvertently sent documents, not whistleblower documents, and that another RPC provision (8.3) requires lawyers with knowledge of ethical violations to report those to the appropriate professional authority, in this case, the PA Supreme Court Disciplinary Board.

Parks Miller replied that paralegal Michelle Shutt had a fiduciary duty because Shutt was in a “position of trust,” and that Cantorna aided and abetted Shutt’s breach and was therefore liable himself.

At oral arguments on March 3, 2016, Judge Brann asked Parks Miller’s attorney, Bruce Castor: “How many of the defendants accused of breach of fiduciary duty are agents of Stacy Parks Miller, and if any, how are they agents?” Brann later asked, on the negligence claims, “What duty do any of these individuals owe to Parks Miller?”

Castor answered that Shutt was an agent at the time she was working as a paralegal for Parks Miller, and breached her duty when she took the key documents – the disputed bail order and corroborating emails – by emailing them from her work account to her personal account.

Castor reiterated Parks Miller’s belief that Cantorna and the other defense attorneys had an ethical obligation to her, and that they demonstrated negligence because they didn’t conduct independent handwriting analyses; relied on Shutt’s affidavit as true; relied on Ruest’s comments to police investigators as substantiation; and didn’t recognize that the alleged forgery couldn’t have been a crime as a matter of law, because “the government is allowed to fool people” using tools including “fake” documents, and because Parks Miller lacked intent to injure. (*Source*: Author’s notes from March 3, 2016 oral arguments)

Defamation and False Light

Under defamation law, to protect robust debate on issues of public concern, there’s a higher bar for public figures: they have to prove the statements were made with “actual malice.” Defamation and false light claims are also subject to a statute of limitations of one year from the date of the public statement.

Parks Miller argued defendants published false statements alleging criminal and professional misconduct by reporting evidence of her alleged criminal acts to police and county commissioners for further investigation, knowing the information was false, or not caring whether it was false or true.

She claimed that the statements harmed her

reputation and standing in the legal community, the law enforcement community, the political community, and the community at large.

She argued that the January 2015 statements were false because a statewide investigating grand jury issued a report in July 2015 asserting that Judge Ruest had signed the disputed bail order.

Parks Miller also argued that even if she, and not Ruest, had signed the disputed bail order, it couldn't have been a crime "as a matter of law" because Parks Miller claimed she didn't intend for anyone to rely on the order or to harm anyone.

Parks Miller argued that – because the statements accused her of a crime and were published with actual malice, they were defamatory *per se* (in themselves) and put her in a false light.

In response, Cantorna and the other defendants argued forcefully that the question of whether a District Attorney has broken the law is a matter of legitimate and significant public importance, not a private matter, and was – in Parks Miller's case – already under public discussion by January 2015.

The defendants also maintained that their statements were true, supported by credible evidence, and that the grand jury process may have been compromised, rendering the July 2015 report unreliable for establishing facts.

Some argued that their statements were opinion statements, expressing their opinion that evidence suggested the DA had forged and filed false documents. Several noted that Parks Miller provided no specific information about when, where and to whom the allegedly defamatory statements were made, and pointed out that reports given to police, county commissioners and ethics board members are protected under the First Amendment as legitimate criticisms of a public official, and under other laws protecting statements made in particular contexts.

Parks Miller countered that she was seeking relief under a provision covering publicity given to private or public matters that are false, but also those "that are true but selectively publicized in a manner creating a false impression." To the extent that the defendants' comments were opinion statements, she raised an exception to the rule, allowing opinion statements that suggest the existence of undisclosed underlying facts justifying the opinion to be considered potentially defamatory.

Parks Miller further argued that her defamation claims against Cantorna arose, *not* from his recorded statements at the Jan. 20, 2015 Centre County commissioners' meeting, but from his probable but unidentified comments to press and other community members; from his Right-to-Know requests for phone and text records that suggested inappropriate relationships existed between DA staff members and judges; and from his motions for Parks Miller's recusal in criminal cases, which also suggested inappropriate DA-judge relationships.

Parks Miller said Cantorna demonstrated actual malice and must have known his statements were false, because the context surrounding the disputed bail order

showed Parks Miller lacked intent to defraud, even if she did sign the disputed bail order; because Parks Miller believed the signature was visibly Ruest's, even to a non-expert eye; and because Shutt was not a credible source of information, since she disclosed confidential documents to Philip Masorti, another local defense attorney and named defendant in Parks Miller's defamation suit.

Parks Miller also rejected the notion that statements at the commissioners' meeting were "petitioning the government," since the topic did not appear on the meeting agenda, and the commission was not engaged in legislative fact-finding; no one was placed under oath and the statements were voluntary, not compulsory.

During oral arguments in March 2016, Judge Brann asked Castor, "Does Parks Miller concede she is a public figure?" Castor said Parks Miller concedes she is.

Injurious Falsehood

Parks Miller's argued that her professional reputation as District Attorney – an elected official and an attorney – is her business, and that the statements made by the defendants (rather than the acts the defendants were commenting on) tarnished her reputation. She claimed the defendants knew their statements were false, or made them with reckless disregard for their truth or falsity, and that they should have known that publishing the false statements would cause her monetary losses.

In making these claims, she again leaned heavily on the July 2015 findings of the statewide investigating grand jury, calling the report's conclusions "facts."

In response, Cantorna argued that injurious falsehood claims are not applicable to a person, only goods or property, and that reputation is not property.

Cantorna and other defendants argued they believed their statements were true; had evidence to support their beliefs; and had no intent to harm: their intent was to report evidence of wrongdoing to authorities for investigation. They claimed that Parks Miller could not suffer a monetary loss, since the DA is an elected public servant running a governmental legal department, and is prohibited from running a private law practice. They also indicated a lack of faith in the impartiality of the grand jury investigation.

Parks Miller countered that injurious falsehood is not limited to goods or property, but can apply to statements that "cast doubt upon the quality of another's land, chattels or intangible things." The DA's "professional reputation as a lawyer" is her business, an intangible thing. And, she argued, since she had spent money trying to clear her name, she had suffered pecuniary loss.

Judge Brann followed up with Castor during March 16 oral arguments, asking: "What pecuniary loss did Parks Miller suffer?"

Castor answered that Parks Miller was treated medically for stress related to her loss of status in the community. Brann suggested that loss of status didn't seem to be a monetary loss. Castor replied that it was a jury question, as to how much her career was worth before

her reputation was damaged, citing *Sprague v. Walter* (1995) for the notion that “but for” the defendants’ actions, Parks Miller would have continued serving fully as DA, rather than having to hire outside counsel to handle many of her cases, and could have gone on to serve as a senator, governor or other high public office. (Source: Author’s notes from March 3, 2016 oral arguments).

Common Law Abuse of Process

Parks Miller alleged that defendants, including Cantorna, used legal proceedings in an attempt to discredit her. She argued that defendants had no factual or legal justification for their actions and that they were undertaken with malice to harass and discredit her.

Cantorna responded that Parks Miller had failed to demonstrate that Cantorna used any legal process against her at all, arguing that his suggestion to commissioners on Jan. 20 that Parks Miller be investigated for the crimes of forgery and tampering with public records was an exercise of his First Amendment rights.

Parks Miller retorted that Cantorna had abused Right to Know requests and motions seeking her recusal in criminal cases, and she construed both to be harassing litigation tactics.

Intentional and Negligent Infliction of Emotional Distress

For the IIED claim, Parks Miller argued that all the defendants – including Cantorna – engaged in the “extreme and outrageous conduct” of alleging that the DA had committed a crime. For the NIED claim, she argued that all but Ruest either owed her a fiduciary duty and breached it, or assisted someone with a fiduciary duty in breaching it.

She claimed that the DA’s office is so important in a county that the person holding it must maintain the highest level of public trust. Therefore, she said, any allegation affecting public perception of the integrity of the District Attorney – and through the DA, the entire county criminal justice system – “weighs heavily on the mind of the DA,” such that she suffered emotional distress and physical harm “not only for herself, but as the symbol of law enforcement as a whole in the County.”

Cantorna and the other attorney defendants argued, on both claims, that Parks Miller failed to demonstrate the necessary legal elements and provide the necessary factual support, specifically what physical harm she suffered.

In reply, for both IIED and NIED claims, Parks Miller said that details about the “severe physical, mental, and emotional toll” she suffered were not required at the complaint stage, but that she would provide details during discovery.

On her IIED claims, Parks Miller further argued that “In Pennsylvania, the intentional propagation of a falsehood that leads to one being accused of a crime is sufficiently outrageous conduct to state a claim for IIED.” *Banyas v. Lower Bucks Hosp.* (1981). She claimed that the defendants intentionally propagated the falsehood that she

had committed forgery, publicly defamed her, called for her resignation, illegally appointed a special prosecutor and coerced the police to illegally raid her office, knowing that she lacked the intent aspect of the crime of forgery.

---Note: As reported previously, prosecutors only need to prove intent to convict a defendant for violations of 18 Pa.C.S. §4104: “Tampering with records or identification.” Before his short-lived investigation was derailed by the statewide investigating grand jury, Bellefonte Detective Robert Ruggiero was investigating Parks Miller for violation of Pa.C.S. §4911, “Tampering with Public Records or Information,” which is a second degree misdemeanor without proof of intent, and a third degree felony with proof of intent.

Further, Parks Miller has stated, in planning emails and pleadings, that the purpose of filing the “fake” bail order in the public record was to give public readers of the record the false impression that an inmate had been released on bail, when in fact he was imprisoned under a false name, providing clear evidence of her intent that that the fake bail order “be taken as a genuine part of [public] information or records.” Pa.C.S. §4911(2)---

On her NIED claims, Parks Miller argued that there are four scenarios (not two) permitting recovery, including “(1) situations where the defendant had a contractual or fiduciary duty toward the plaintiff...” Parks Miller repeated her assertion that Shutt owed her a fiduciary duty, which she breached, with the help of Cantorna and the other defendants.

Concerted Tortious Conduct & Conspiracy

Parks Miller claimed all the defendants engaged in a series of tortious acts resulting in harm to her: primarily defamation and breach of fiduciary duties. Further, she argued that the defendants worked together in a conspiracy whose common purpose was to illegally prosecute her, remove her from office, and ruin her reputation. She alleged that the defendants were motivated by malice toward her because she had been tough on crime, had won cases, and had had policy disagreements with the county commissioners.

In general, the defendants pointed out that “liability cannot be imposed for inducing legislative, administrative or judicial action” even where parties have acted in a concerted manner, citing *Brownsville Golden Age Nursing Home, Inc. v. Wells* (1988) which upheld an absolute privilege to petition government in its executive, administrative, legislative and judicial capacities.

Further, the defendants cited *Bell Atlantic v. Twombly* (2007) to argue that their mutually reinforcing actions were examples of “lawful and un-choreographed behavior” exhibited by multiple individuals in response to a single set of circumstances: the fake bail order and its effects on the credibility of the criminal justice system and courts in Centre County.

JUDGE BRANN'S DISMISSAL

In dismissing Parks Miller's claims against Cantorna and the other defense attorneys, Brann ruled that the defense attorneys did not owe Parks Miller any fiduciary duty or duty of care; they didn't "aid and abet" Shutt in any breach, because Shutt did nothing wrong (there was probable cause supporting the forgery allegations, and the emails related to the bail order scheme were not confidential); the attorneys didn't make any defamatory statements when they publicly expressed disapproving opinions of Parks Miller, a public figure; they didn't make any false or misleading statements; and that since they didn't do anything wrong, there was no claim against them for concerted tortious conduct or conspiracy.

CRITICAL ANALYSIS

Parks Miller's arguments – indeed, the mere fact that she filed an expensive, time-consuming federal case to attack specific public actions of individual critics – bespeak a certain sense of entitlement and infallibility. They demonstrate a brittleness of character, and self-absorption (to the exclusion of the concerns of others) at odds with a career in purported public service.

It's a brilliant and effective legal and political tactic. Parks Miller has a strong record of taking rapid and varied action to push opponents in and outside the courtroom off balance, forcing them into reactive postures.

And so far, it's been excellent for her career.

But it comes at a high public cost. She appears to be too ego-fragile to take in robust criticism and respond substantively to challenges to her personal judgment calls.

For example, given her hard-earned and well-deserved reputation for disproportionate retaliation against those who question her judgment, it's hard to imagine any assistant district attorney in Parks Miller's office feeling safe enough to question the wisdom of her original sting operation plan and the "fake" bail order, or any similar plans she may have undertaken since.

Preemptive intimidation of subordinates and bystanders has left her without meaningful access to constructive feedback, let alone the cognitive and social tools to correct identified problems.

In contrast, Cantorna's arguments in defense of his own actions (and the related actions of his co-defendants) demonstrate a sense of outrage at the probable-cause-supported appearance of Centre County courthouse corruption, and indignation at the injustice inherent when concerned citizens engage in the public affairs of their community to uphold the principles of a credible, fair and open justice system, only to find themselves dragged into federal court by their community's chief law enforcement officer.

Note to Readers and Subscribers:

Thank you for reading and financially supporting independent reporting in Centre County.

From the launch on Sept. 2, 2016, my long-term goal has been to develop a reader-supported newspaper publishing business that provides public accountability journalism services to citizens, and a decent wage to me and a handful of staff reporters.

For the first several months, I aimed to publish three to four issues per month and attend about a dozen public meetings each month.

However, partly because progress toward the financial sustainability goal has been slow, I've taken a part-time paid position with a private employer. The job as structured now is a 15-20 hour per week position.

While I hold down that job, I'll be scaling back my publishing target to one or two issues per month and only attending specific public meetings as needed to supplement document-based reporting.

Upcoming issues will include a wrap-up of the Slab Cabin Run water and farmland protection series and further coverage of the Centre County District Attorney primary race through a piece on Parks Miller's and Cantorna's divergent views on public access to information through the PA Right to Know Law, and a piece providing as much coverage as possible (given the court-imposed secrecy) of the McClure and Grove texting cases now on appeal to Superior Court.

I'm also planning coverage of the structure of Centre Region and Centre County political systems and on the proposed expansion of the beneficial reuse sewage management program, alongside the history of the Regional Growth Boundary, Sewer Service Area and implementation of the Centre Region Comprehensive Plan.

And I'm planning coverage the State College zoning code overhaul process, particularly as it relates to public safety, air quality, water quality, high-rise/high density student housing and Penn State enrollment policies.

That list will probably comprise all of the reporting I'll be able to draft and publish over the next six months.

Bailiwick News is an independent newspaper offering reporting and critical analysis of Centre County public affairs.

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