IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

STEVEN CONKLIN,	:	CIVIL ACTION AT LAW
Plaintiff	:	Case No. 1:05-CV-1707
	:	
v.	:	
	:	
WARRINGTON TOWNSHIP,	:	
Defendants	:	

MOTION TO STRIKE, VACATE AND RECONSIDER THE COURT'S MAY 16, 2006 ORDER

1). On May 16, 2006, the Court issued an Order dismissing in large part plaintiff's complaint in the above-captioned matter.

2). On page 2 of the Order appears footnote #2 which contains the following language:

> "It is unclear under what constitutional theory plaintiff is proceeding on this count. The complaint does not aver that plaintiff is a member of a minority class, and alludes only that Warrington Township enforced the ordinances at issue because "little children of color…came from urban areas to enjoy the outdoors at plaintiff's property." (Doc.1 ¶ 9.) See, Kelly v. Borough of Sayreville, 107 F.3d 1073, 1077 (3d Cir.1997) ("To establish a claim under 42 U.S.C. § 1983 a plaintiff must demonstrate a violation of a right secured by the Constitution…."); Dubois v. Vargas, 148 F.App'x 111,114 (3d Cir.2005) ([A] plaintiff alleging an injury…must allege that he has suffered an additional deprivation of a constitutional right in connection with the injury.")

3). Paragraph 14 of the plaintiff's complaint alleges a Monnell claim and further alleges that the township wrongfully applied unconstitutional ordinances in an unlawful manner to the plaintiff for racial purposes.

4). Paragraph 16 of the complaint alleges that "the ordinances…were used to deprive him of his rights…", referring to the plaintiff.

5). Although the complaint does not expressly identify any First Amendment or Equal Protection violations it does make out a First Amendment and an Equal Protection claim by plaintiff, as the court obviously observed.

6). The language in footnote #2 of the Court's May 16, 2006 Order erroneously indicates that the plaintiff made out no First or Fourteenth Amendment claims because he does not aver his membership in a minority class. Plaintiff indeed is white.

7). Plaintiff's suspect classification (i.e. race, ethnicity, national origin, religious preference political views, etc.) is irrelevant to the issue of whether the defendants violated his constitutional rights under the facts alleged, which are that the township ordinances were applied to him for

racial reasons (i.e. his associations with "people of color," more specifically, "little children of color)."

8). The case citations by the court either do not appropriately reflect the points made by the court in its order or they are so poorly applicable to the point made as to be misleading.

9). More specifically, the citation to Kelly v. Borough of Sayreville, 107 F.3d 1073, 1077 (3d Cir.1997) (actually citing to Mark v. Borough of Hatboro, 51 F.3d 1137, for the proposition that "To establish a claim under 42 U.S.C. §1983 a plaintiff must demonstrate a violation of a right secured by the Constitution…" is misleading at the very best. The Kelly case actually addresses the failure of a defamation claim (interest in reputation) to amount to a constitutional violation when standing alone. The implication that plaintiff alleged no constitutional violation is improperly left dangling by inference, while in actuality, albeit erroneously analyzing applicable law, the Court clearly identified factually, a First Amendment and/or Equal Protection claim being a violation of Conklin's right to associate with black children ("children of color") on his private property (if the Court finds Conklin was engaged in some commercial activity the Commerce Clause and other clauses of the Fourteenth Amendment might be implicated further).

10). And also, more specifically, the Court's citation to Dubois v. Vargas, 148 F.App'x 111 (3d Cir.2005) is even more inappropriately used in the opinion. In Vargas, the underlying facts once more were based on a claim of injury to a reputational right. The inference in the Court's opinion that plaintiff either alleged no injury, as a matter of fact, or that he must allege some stand alone injury, as a matter of law (in apparent excess to the compensable injuries occurring when a state actor violates a citizen's federally guaranteed rights) is not only erroneous as a matter of law, it misapprehends the facts in this case. Ironically, the court's opinion unwittingly buttresses the arguably racial nativity evidenced by the court's failure to see the obvious racism in allegations where state power is brought to bear on a citizen because he entertains children of color.

11). The court's opinion contains an apparently unintentional, scandalous, even arguably racist, misanalysis of federal law and should be stricken.

12). Further, the Court's Opinion fails to recognize the indigenous First Amendment claim and Fourteenth Amendment Equal Protection claims that are clearly included within the four corners of the complaint.

13.) Opposing counsel was consulted on this motion and he does not concur.

WHEREFORE, this Court is respectfully requested to strike its current Order and/or vacate and reconsider it and issue a corrected opinion consistent with federal law and the averments of this motion.

Respectfully submitted,

Don Bailey
Don Bailey, Esquire
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4311 N. Sixth Street
Harrisburg, PA 17110

CERTIFICATE OF CONCURRENCE/NON-CONCURRENCE

I, Don Bailey, personally consulted with opposing counsel, Rolf Kroll and he does not concur in this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Don Bailey, Esquire hereby certify that on this 24th day of May, 2006, I caused to be served the foregoing *MOTION TO STRIKE, VACATE AND RECONSIDER THE COURT'S MAY 16, 2006 ORDER* upon opposing counsel via electronic means addressed as follows:

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