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Stuart J. Moskovitz, Esq.
819 Highway 33
Freehold, NJ 07728
(732) 431 1413
Pro Se

Township of Manalapan,

Plaintiff

vs.

Stuart Moskovitz, Esq., Jane Doe and/or John Doe, Esq. I-V (these names being fictitious as their true identities are presently unknown) and XYZ Corporation, I-V (these names being fictitious as their true corporate identities are currently unknown)

Defendants (s)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MONMOUTH COUNTY
DOCKET NO. MON-L-2893-07

CIVIL ACTION

BRIEF IN OPPOSITION TO PLAINTIFF'S APPLICATION (SIC) AND PLAINTIFF'S CROSS-APPLICATION

PRELIMINARY STATEMENT

We have already addressed the issues currently before this Court related to Plaintiff's Motion to Dismiss in our Reply Brief and won't repeat them here. The overwhelming majority of Mr. McCarthy's brief is a rehashing of the arguments made by Mr. Weeks.

The bulk of Mr. McCarthy's brief seems to focus on his absurd allegation that Defendant controls or has anything to do with a particular web site. This seems to be the foundation for much of his Brief and, as noted in Defendant's Certification in Opposition, the claim is false, outlandish, insupportable and sanctionable. Without the support of that nonsensical assertion of fact, Mr. McCarthy's Certification and Brief and the Application and Cross-Application they are intended to support fall of their own weight.

Where Mr. McCarthy's papers cover issues not addressed in Defendant's Motion, we will address them here.

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ARGUMENT

Once the portions of the Brief that are duplicative of the issues already addressed are removed, along with the portions resting upon Mr. McCarthy's scurrilous blog site allegations, there is little left in Mr. McCarthy's Brief to address. Accordingly, this Brief will be short and will not be broken down into different points.

On page 31 of his Brief, Mr. McCarthy begins his argument as to why the Township shouldn't indemnify Defendant. He argues that the Rules of Professional Conduct prohibit "an agreement prospectively limiting the lawyer's liability to a client for malpractice." Accurate, but irrelevant. Defendant is not relying on an agreement here. Defendant is relying on the law. Defendant is relying on a Township Ordinance, passed many years before Defendant ever became Township Attorney. Mr. McCarthy fails to explain his non-sequitur that a provision prohibiting a contract somehow or other precludes Defendant from relying on the law. Of course, this is consistent with Plaintiff's entire case – an action against the attorney who followed a Court Order, without naming as defendants the attorney and engineer responsible for formulating and executing the settlement order mandating the named attorney's actions.

In one of Mr. McCarthy's more creative stretches, he relies on N.J.S.A. 2A:13-4 which provides as a general rule that attorneys are liable for malpractice. This statute, passed in 1903, must be construed in a manner consistent with 59:3-2, passed in 1972. Of course attorneys are liable generally for malpractice, just as private citizens are liable for their negligence. Both attorneys and private citizens working for municipalities, however, are protected by the Tort Claims Act. The whole point of the Tort Claims Act is to allow officers of a government agency, whose actions reach a far broader array of potential pitfalls, to perform discretionary activities without the fear of litigation every time someone disagrees with their decision either because they

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are one of hundreds of thousands of people impacted by the municipal action, or, as is the case here, because of someone's political gripe. Frankly, if all officials, including Township Attorneys, did not have this protection, no one would risk taking a municipal position.

Imagine the precedent to be set by township attorneys learning that every decision they make can be challenged by a changing administration, smearing their name in the newspapers, accusing them of legal malpractice, dragging the case on for months and years, with the concomitant negative publicity affecting their private practice, and all without regard to the legitimacy of the charges. No attorney in their right mind would take a municipal position.

As it is, in Manalapan, as the result of the poisonous political atmosphere, none of the nine attorneys who served the Township as Township Attorney in the nine years from 1999 through 2006 put in an application or agreed to accept the position of Township Attorney for 2007. The result was that the Township was forced to hire an individual four years out of law school who was never named as a Township Attorney anywhere else, to provide legal advice in a municipality with a $30 million budget. What is the likelihood that this year's Township Attorney's law firm would allow her to take this position again if she were not protected by the Tort Claims Act from having to send frivolous lawsuits to her malpractice insurance carrier for no reason other than that the political power structure changed in the Township.

Were Mr. McCarthy's argument correct that N.J.S.A. 2A:13-4 overrides all other statutes, the statute providing for a limitations on professional negligence would not be applicable to attorneys, the requirements of an affidavit of merit for professional negligence would not be applicable to attorneys, and a whole list of other statutes impacting cases against attorneys would not be applicable, despite no stated legislative intent to that end.

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Mr. McCarthy also argues, on page 32 of his Brief, that the indemnification ordinance does not apply to "misconduct." Of course, Mr. McCarthy neglects to mention that there is no allegation of misconduct in this case. Misconduct is an affirmative act. To interpret every alleged error of negligence as misconduct would negate any potential use of the ordinance by anyone. Moreover, Mr. McCarthy intentionally takes this language out of context. What is excluded is not "misconduct" but "willful fraud, malice and misconduct." In other words, intentional torts are excluded, not negligence.

On page 33 of his Brief, Mr. McCarthy makes yet another head scratching argument, that the Tort Claims act permits the attorney general to refuse to defend in any case where the representation would create a conflict of interest between the state and an employee. That's correct, and understandable, but irrelevant. The ordinance in question, Manalapan's Ordinance §9-2 expressly covers this situation, providing that:

> When the Township Attorney is unable to participate in that defense, the official, officer, employee or board member shall have the name of the person of his or her choice submitted to the Township for approval and agreement as to the cost of services.

Finally, on page 34, we get to Mr. McCarthy's real interest in this litigation, the public smear campaign. Mr. McCarthy pleads with this Court to not infringe on the "municipality's first amendment right" to unjustifiably smear the reputation of a former township attorney. Plaintiff has failed to show any harm to the Township by not being permitted to try this case in the press. Plaintiff also fails to provide any case that establishes that a municipality has any first amendment rights.

His first amendment argument becomes interesting, however, when we get to page 41 of his Brief where immediately after claiming that the municipality's first amendment rights are being restricted, Mr. McCarthy proposes to impede the first

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amendment rights of the Defendant, a private citizen. Mr. McCarthy cites RPC 4.2, for the proposition that Defendant may not communicate with the elected Township Committeemen, erroneously ignoring the comments of Judge Pressler, the ABA, the New Jersey Bar Association and virtually every other Bar Association that recognized that lawyers as private citizens have a right to communicate with their elected officials about *any* matter, including the subject matter of the litigation.

Mr. McCarthy actually quotes this language on page 42, "the constitutional right to petition and the public policy of ensuring a citizen's right of access to government decision makers, may permit a lawyer representing a private party in a controversy with the government *to communicate about the matter with government officials who have authority to take or recommend action in the matter." (emphasis added).* Then, remarkably he interprets that as restricting Defendant's access to government officials. It is understandable why Mr. McCarthy would take such an untenable position. As this Court is aware, Mr. McCarthy is acting without a client. He has not been authorized by any resolution to participate in this litigation; there is no authority for this litigation to begin with; this action was brought without knowledge of the governing body; and Defendant's communication to the governing body pointing all of this out was necessarily embarrassing to Mr. McCarthy.

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CONCLUSION

In light of the Tort Claims Act and in light of *Borough of Franklin Lakes v. Mutzberg, supra*, which expressly holds that the Tort Claims Act indeed applies to public employees sued by their municipalities, this action should be immediately terminated. That would render Plaintiff's application and cross-application moot. Even if that were not the case, Plaintiff has failed to establish any entitlement to the remedies it seeks.

August 12, 2007

Stuart J. Moskovitz
819 Highway 33
Freehold, NJ 07728
Attorney for Plaintiff