

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>JAQUELINE ROSSI, TIM BAURER, and</b>	:	<b>CIVIL ACTION</b>
<b>FIU FIU, L.L.C.,</b>	:	
<b>Plaintiffs,</b>	:	
<b>v.</b>	:	<b>NO. 07-3792</b>
	:	
<b>MARK SCHLARBAUM and JANET</b>	:	
<b>SCHLARBAUM,</b>	:	
<b>Defendants.</b>	:	

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**ORDER & MEMORANDUM**

**ORDER**

**AND NOW**, this 17th day of March, 2009, upon consideration of Defendant’s Motion for Certification of Interlocutory Appeal (Document No. 49, filed February 26, 2009); and Plaintiffs’ Opposition to Defendants’ Application for an Interlocutory Appeal (Document No. 51, filed March 13, 2009), for the reasons that follow in the attached Memorandum, **IT IS ORDERED** that Defendant’s Motion for Certification of Interlocutory Appeal is **DENIED**.

**MEMORANDUM**

**I. INTRODUCTION**

A detailed factual and procedural history is included in the Court’s Memorandum and Order of January 29, 2009 and is included in this Memorandum only insofar as necessary to address the issues raised by defendants’ motion. See Mem. & Order of Jan. 29, 2009, at 1–5; Rossi v. Schlarbaum, No. 07-CV-3792, 2009 WL 222418, at \*1–4 (E.D. Pa. Jan. 29, 2009).

On September 12, 2007, plaintiffs filed a Complaint naming as defendants Mark Schlarbaum; Janet Schlarbaum; Schlarbaum Capital Management, L.P.; and S&S Investment Partners, L.P. The Complaint alleged that defendants committed multiple torts. (Id.).

On October 24, 2007, defendants filed a Motion to Dismiss. By Order and Memorandum dated

February 20, 2008, the Court granted in part and denied in part defendants' motion. Order & Mem. of Feb. 20, 2008; Rossi v. Schlarbaum, No. 07-CV-3792, 2008 WL 483217 (E.D. Pa. Feb. 20, 2008). Following the Court's ruling, these counts remained: Count I (Negligence), as asserted by plaintiff Rossi against defendant Mark Schlarbaum; Count V (Tortious Interference with Contractual Relationship) (as pled); Count VI (Tortious Interference with Economic Advantage) (as pled); Count VII (Invasion of Privacy) (as pled); and Counts X through XII (Defamation, Slander, and Libel) (as pled).

On September 17, 2008, defendants filed a Motion for Summary Judgment on all remaining counts. The Court granted in part and denied in part the motion. Mem. & Order of Jan. 29, 2009; Rossi v. Schlarbaum, No. 07-CV-3792, 2009 WL 222418 (E.D. Pa. Jan. 29, 2009). Following the Court's ruling, these counts remained: Count V (Tortious Interference with Contractual Relationship) and Counts X and XI (Defamation and Slander) with respect to the statements made by Janet Schlarbaum during her telephone conversation with Regina Villareal, the statements made by Janet Schlarbaum during her telephone conversation with Alycia, and the statements made by Janet Schlarbaum during her two telephone conversations with Jennifer Nicole Lee.

On February 6, 2009, defendants filed a Motion for Reconsideration of Motion for Summary Judgment. By Order and Memorandum, the Court granted in part and denied in part defendants' motion. Order & Mem. of Feb. 20, 2009; Rossi v. Schlarbaum, 2009 WL 449161 (E.D. Pa. Feb. 20, 2009). With respect to the statements made by Mrs. Schlarbaum in her two conversations with Ms. Lee, the Court granted the motion to the extent that the Court will reconsider how the statements made during these conversations should be characterized—as defamatory statements or as evidence of the tortious interference with contractual relationship claim—after it hears all of the evidence in context at trial. The Court denied the motion in all other respects.

On February 26, 2009, defendants filed the instant Motion for Certification of Interlocutory Appeal. In the motion, pursuant to 28 U.S.C. § 1292(b), defendants seek to certify the three following issues for appeal:

(1) Whether the testimony of Ms. Lee that she altered her relationship with plaintiffs is sufficient to support a claim for tortious interference with contractual relations where there is no other evidence that actual legal damage was sustained;

(2) Whether alleged oral statements by Mrs. Schlarbaum that Ms. Rossi was a “prostitute” can support a claim for defamation when the evidence shows that the “gist” or “sting” of such statements was substantially true;<sup>1</sup>

(3) Whether alleged oral statements by Mrs. Schlarbaum to Ms. Lee that Ms. Rossi informed others that Ms. Lee had invested \$100,000 in her business is capable of defamatory meaning and whether statements to Ms. Lee that Ms. Rossi was pretty much a prostitute are substantially true.

## **II. DISCUSSION**

The court may exercise its discretion to grant leave to file an interlocutory appeal under 28 U.S.C. § 1292(b) only if its order: (1) involves a “controlling question of law,” (2) offers “substantial ground for difference of opinion” as to its correctness, and (3) if appealed immediately, “materially advance[s] the ultimate termination of the litigation.” Katz v. Carte Blanche Corp., 496 F.2d 747, 754 (3d Cir. 1974). All of these conditions must be met before a court may certify an order for

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<sup>1</sup> Defendants phrase this issue slightly differently in the proposed order appended to their motion. The difference is immaterial as the Court concludes that neither phrasing addresses the issue actually presented: that allegedly Mrs. Schlarbaum, in addition to calling Ms. Rossi a prostitute, stated that Ms. Rossi had been arrested for prostitution. In the argument section of the motion, defendants acknowledge that the alleged statements at issue accused Ms. Rossi of having been arrested for prostitution but contend that the “gist” or “sting” of such statements was nevertheless true.

interlocutory appeal. Aparicio v. Swan Lake, 643 F.2d 1109, 1110 n.2 (5th Cir. 1981). Moreover, a court should certify decisions for interlocutory review only in exceptional circumstances. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 474–75 (1978); Milbert v. Bison Labs., Inc., 260 F.2d 431, 433 (3d Cir. 1958); Johnson v. Columbia Casualty Co., No. 03-CV-1552, 2006 WL 1805979, at \*1 (E.D. Pa. June 29, 2006).

With respect to the first factor, the Third Circuit has defined a “controlling question of law” to “encompass at the very least every order which, if erroneous, would be reversible error on final appeal.” Katz, 496 F.2d at 755. Defendants’ motion clearly satisfies this requirement. If erroneous, the Court’s decision to deny summary judgment in part would be reversible error. A ruling in defendants’ favor on appeal would also “materially advance the ultimate termination of the litigation,” as it would result in closing the case. Nevertheless, while defendants have satisfied two factors of § 1292(b), the Court concludes that defendants’ motion does not meet the remaining requirement—that the Court’s Orders offer “substantial ground for difference of opinion.”

With respect to issue (1), defendants argue that plaintiffs have failed to prove damages for their tortious interference with contractual relations claim to the required degree of “reasonable certainty.” (Defs.’ Mot. 3–6.) This argument and the case law cited in defendants’ motion reveal that defendants have conflated the evidentiary standards applicable on a motion for summary judgment and at trial. Under Pennsylvania law, to recover lost profits, a plaintiff must produce “‘evidence to establish the damages with reasonable certainty . . . .’” Brisbin v. Superior Valve Co., 398 F.3d 279, 289 (3d Cir. 2005) (citing Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 680 (3d Cir. 1991)) (further citation omitted). “Lost profits . . . ‘cannot be recovered where they are merely speculative.’” Id. (citing Delahanty v. First Pa. Bank, 464 A.2d 1243, 1258 (Pa. Super. Ct. 1983)). Yet this is the burden of proof that applies at trial, not at the summary judgment stage, as the cases cited by defendants

demonstrate. These cases apply the “reasonable certainty” standard to the damages evidence presented by plaintiffs *at trial*. See Brisbin, 398 F.3d at 282 (appeal from judgment entered following a bench trial); Jahanshahi v. Centura Dev. Co., 816 A.2d 1179, 1182 (Pa. Super. Ct. 2003) (appeal from judgment entered after a jury verdict); Shiner v. Moriarty, 706 A.2d 1228, 1238 (Pa. Super. Ct. 1998) (appeal from denial of motion for judgment notwithstanding the verdict); Merion Spring Co. v. Muelles Hnos. Garcia Torres, 462 A.2d 686, 692 (Pa. Super. Ct. 1983) (examination of the legal sufficiency of the evidence presented at trial).

Of course, the “inquiry involved in ruling on a motion for summary judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Accordingly, the Court is cognizant of the fact that, at trial, plaintiffs will be required to prove damages stemming from any tortious interference with contract with “reasonable certainty.” Nevertheless, a lesser quantum of evidence suffices to withstand a motion for summary judgment. Cf. Boyle v. County of Allegheny Pa., 139 F.3d 386, 393 (3d Cir. 1998) (holding that to defeat a motion for summary judgment when the burden at trial will be a preponderance of the evidence, the nonmoving party “simply must exceed the ‘mere scintilla’ standard”) (citations omitted); Jenkins v. KYW, 829 F.2d 403, 405 (3d Cir. 1987) (interpreting Anderson and holding that at summary judgment, the “need for a trial is . . . informed by the threshold determination of whether the factual issues may *reasonably* be resolved in favor of either party” (emphasis added)).

In the context of proving damages, “a jury may not award damages on the basis of speculation or conjecture” at trial. Carroll v. Phila. Hous. Auth., 650 A.2d 1097, 1100 (Pa. Commw. Ct. 1994) (citation omitted). At the summary judgment stage, however, “[d]amages are speculative if the uncertainty concerns the fact of damages not the amount.” Id. (citation omitted). “[S]ummary

judgment is improperly granted solely on the basis that the amount of damages is indefinite.”

Id. (citation omitted); accord Aircraft Guar. Corp. v. Strato-Lift, Inc., 991 F. Supp. 735, 737 (E.D. Pa. 1998). Thus, a motion for summary judgment may be granted on the basis that the nonmoving party has failed to present sufficient evidence as to the *fact* of damages but not as to the *amount*. See, e.g., Paraxel Int’l Corp. v. Feliciano, No. 04-CV-3798, 2008 WL 2704569, at \*4 (E.D. Pa. July 3, 2008) (granting defendant’s motion for summary judgment when plaintiff presented *no* evidence that it had suffered damages).

In light of the aforementioned authority demonstrating that a lesser burden of proof applies at the summary judgment stage, the Court concludes that there is not “substantial ground for difference of opinion” with respect to the question of whether plaintiffs have presented sufficient evidence of damages to withstand summary judgment. Moreover, the Court’s decision to deny defendants’ motion paid heed to the Supreme Court’s instruction that the trial courts should “act with caution in granting summary judgment” and that trial courts may deny summary judgment “where there is reason to believe that the better course would be to proceed to a full trial.” Anderson, 477 U.S. at 255 (citation omitted). Accordingly, the Court declines to certify this issue for interlocutory appeal.

With respect to issue (2), defendants argue that Mrs. Schlarbaum’s alleged statements to two strip club employees that Ms. Rossi was a prostitute and had been arrested for prostitution are not defamatory because they are “substantially true.” (Defs.’ Mot. 7.) They further argue that whether the “gist” or the “sting” of a statement is substantially true can be decided as a matter of law on a motion for summary judgment. (Id.) As the Court has previously stated on two occasions, it is unnecessary to rule on whether the statement that Ms. Rossi was a prostitute is “substantially true” as defendants have presented no evidence supporting their defense of truth with respect to the other portion of Mrs. Schlarbaum’s alleged statements—that Ms. Rossi was *arrested* for prostitution. In fact, in the instant

motion, defendants describe the statements at issue as Mrs. Schlarbaum's "statements to two strip club employees that [Ms.] Rossi was arrested for prostitution." (Id.) Yet defendants decline to proffer a single argument that addresses the "arrest" portion of Mrs. Schlarbaum's alleged statements. Without evidence or argument regarding the truth of the alleged statement that Ms. Rossi was arrested for prostitution, defendants have failed to demonstrate that the Court's decision offers "substantial ground for difference of opinion." Accordingly, the Court declines to certify this issue for interlocutory appeal.

With respect to issue (3), defendants argue that, contrary to the Memorandum and Order of February 20, 2009, there is no need for the Court to reconsider how Mrs. Schlarbaum's statements to Ms. Lee should be characterized—as evidence of the tortious interference with contractual relationship claim or as defamatory statements—after hearing all of the evidence at trial. (Defs.' Mot. 10.) Defendants contend that as plaintiffs have failed to show actual legal damages, the tortious interference claim "is completely without merit" and considering whether these statements "constitute more evidence . . . would be a fruitless exercise." (Id.) As discussed *supra*, the Court concludes that plaintiffs have produced sufficient evidence of the fact of damages to withstand a motion for summary judgment. Accordingly, plaintiffs are entitled, at trial, to present evidence of tortious interference with contractual relationship.

Defendants further argue that the statements at issue are not capable of bearing defamatory meaning. During their conversations, Mrs. Schlarbaum allegedly told Ms. Lee that Ms. Rossi was involved in sexual activity in hotel rooms, leading Ms. Lee to believe that Ms. Rossi was "pretty much a prostitute." (Id.) According to defendants, the substantial truth of Mrs. Schlarbaum's statements precludes them from being defamatory. (Id.) Mrs. Schlarbaum also allegedly revealed to Ms. Lee that Ms. Rossi was disclosing to other individuals that Ms. Lee had invested \$100,000 in Fiu Fiu.

Defendants argue that such a statement, while perhaps annoying or embarrassing, was not defamatory. (Id. at 10–11.)

Although, as the Court noted in its Memorandum and Order of February 20, 2009, the question of whether these statements are defamatory is close, the Court concludes that there is no “substantial ground for difference of opinion” as to whether the statements would be admissible at trial. Moreover, even if the Third Circuit determined on appeal that the statements were not capable of bearing defamatory meaning, such a ruling would not “materially advance the ultimate termination of the litigation” as the statements would nevertheless serve as evidence of the tortious interference claim. Accordingly, the Court declines to certify this issue for interlocutory appeal.

Finally, the Court recognizes that leave to file an interlocutory appeal should be granted sparingly. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 474–75 (1978). Defendants have not demonstrated that the circumstances of this case are so extraordinary as to overcome the presumption against piecemeal litigation. Nor have defendants established that there is substantial ground for difference of opinion. Accordingly, for all of the aforementioned reasons, the Court denies defendants’ Motion for Certification of Interlocutory Appeal.

**BY THE COURT:**

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**JAN E. DUBOIS, J.**