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

MONTGOMERY COUNTY, Plaintiff, v. MICROVOTE CORPORATION, CARSON MANUFACTURING COMPANY, INC., and WESTCHESTER FIRE INSURANCE COMPANY, Defendants.	:	CIVIL ACTION No. 97-6331

MEMORANDUM

ROBERT F. KELLY, J. FEBRUARY , 2000

This diversity case arose from the purchase by the Plaintiff Montgomery County, Pennsylvania ("the County") of electronic voting machines from Defendant Microvote Corporation ("Microvote"). The machines allegedly malfunctioned during several primary and general elections. Presently before the Court are the following Motions: (1) Microvote's "Request for Ruling on its Pending and Unopposed Motion for Summary Judgment and for an Order of Dismissal of Plaintiff's Complaint for Damages against Microvote," (2) the County's "Request for Dismissal for the Recovery of Public Funds because of Microvote's Argument that the County's Brief was Three Days Late," and (3) Motions for Summary Judgment of Microvote, Carson Manufacturing Company, Inc. ("Carson"), and Westchester Fire Insurance Company ("Westchester"). For the following reasons, Microvote's "Request

for Ruling on its Pending and Unopposed Motion for Summary Judgment and for an Order of Dismissal" is denied, the County's "Request for Dismissal for the Recovery of Public Funds because of Microvote's Argument that the County's Brief was Three Days Late" is denied, and the Summary Judgment Motions are granted in part and denied in part.

I. FACTS.

On November 2, 1993, the citizens of Montgomery County, in response to a ballot question, voted to replace their manual voting machines with electronic voting machines. On May 24, 1994, the County entered into a written contract with Microvote to purchase 900 Direct Electronic Voting Units ("DREs"). As a condition precedent to entering into the contract, the County required Microvote to post a performance bond. Accordingly, prior to entering into its contract with the County, Microvote, as principal, along with Westchester as surety, issued a joint and several performance bond in favor of the County as obligee. The County paid Microvote the full amount due under this contract, approximately $3.8 million.

The DREs were used in the 1994 and 1995 general elections and the 1995 primary election. In November, 1995, the County used the DREs county-wide for a multi-page ballot, and, according to the County, the machines malfunctioned during this election. When the voters scrolled the ballot, the DREs

sometimes shut down. These power failures caused long lines at the polling places and, according to the County, some voters waited for as long as two hours to vote and others left the polls without voting. In addition, after the polls closed, the software miscalculated the results, the wrong results were disseminated to the press and incorrect election winners were reported. After two days of recounting the votes, the County announced the real results of the election.

After that election, the County Commissioners requested additional help from Microvote to ensure that the April, 1996 election would run smoothly. The County also sought its own consultant to analyze past elections and make recommendations to secure properly functioning voting machines for upcoming elections. They ultimately retained Michael I. Shamos ("Shamos"), an attorney who also holds a Ph.D. in computer science, who worked for the Commonwealth of Pennsylvania certifying voting machines. Shamos was a partner in a private law firm ("Webb Law Firm"), and the County entered into a fee agreement with the Webb Law Firm on January 30, 1996.

On March 16, 1996, prior to the April, 1996 election, the County and Microvote executed an addendum ("the addendum") to the May 24, 1994 contract in which Microvote agreed to loan the County 390 additional DREs without cost. The original and loaned DREs experienced breakdowns and malfunctions in all the

elections. On June 28, 1996, after several disputes over the malfunctions of the DREs and Microvote's attempts to remedy the problems, the County commissioners decided to replace the DREs with machines from another manufacturer. The DREs were thereafter individually sold to various buyers across the United States. Prior to their sale, Microvote sued the County for breach of contract, specific performance and quantum meruit, claiming the County breached an oral agreement to purchase 350 DREs loaned under the addendum and failed to pay for support services provided by Microvote to the County during the April, 1996 election. Microvote's Complaint was dismissed based upon applicable Pennsylvania law which requires, in order to satisfy the statute of frauds, that "all contracts for services and personal property where the amount thereof exceeds the sum of ten thousand dollars ($10,000), shall be written." Microvote Corp. v. Montgomery County, No CIV.A. 96-4738, 1996 WL 548145, at *2 (E.D. Pa. Sept. 20, 1996), aff'd 124 F.3d 187 (3d Cir. 1997)(Bartle, J.)(citing 16 Pa. C.S.A. § 1802(a)). The equity claims were dismissed under Pennsylvania law because "there is no statutory authority permitting plaintiff to proceed on a theory or basis of quantum meruit." Id.(citation omitted). Microvote appealed the District Court's dismissal on the specific performance count, and the United States Court of Appeals for the Third Circuit ("Third Circuit") affirmed the lower court's

ruling.

Thereafter, the County filed this action on October 10, 1997, against Microvote, Carson and Westchester. In its Complaint, the County contends that both Microvote and Carson are liable to it for negligence (Count I), breach of warranty (Count II), and fraud (Count IV). In addition, County alleges that Microvote is solely liable for breach of contract (Count III) and wrongful use of civil proceedings (Count V). The final Count of the Complaint is an action by the County against Westchester under the performance bond (Count VI). All three Defendants have filed individual Motions for Summary Judgment seeking dismissal of the County's claims.

II. STANDARD.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party has the burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The non-moving party cannot rest on the pleading, but must go beyond the pleadings and "set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); Celotex, 477 U.S. at 324. Summary judgment will not be granted "if the

evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In this case, the County, as the nonmoving party, is entitled to have all reasonable inferences drawn in its favor. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990), cert. denied, 499 U.S. 921 (1991).

III. DISCUSSION.

A. Counts I and IV.

The County opposes Carson's and Microvote's Motion for Summary Judgment with respect to negligence and fraud because both parties assert those theories as affirmative defenses against the County. (County's Consolidated Opp'n to Defs.' Mots. Summ. J. at 94.) The County labels the Defendants' use of these affirmative defenses "specious" and states that "[d]efendants cannot preclude Montgomery County from presenting to the jury evidence of the same claims that they themselves intend to present." Id. Affirmative defenses are raised because "[f]ailure to raise an affirmative defenses by responsive pleading or by appropriate motion generally results in waiver of that defense." Charpentier v. Godsil, 937 F.2d 859, 863 (3d Cir. 1991)(footnotes omitted.) An affirmative defense "is a matter which serves to excuse a defendant's conduct or otherwise avoids the plaintiff's cause of action but which is proven by facts extrinsic to the plaintiff's cause of action, in the sense that

liability is avoided without negating an element of the plaintiff's prima facie case." Donohoe v. American Suzuki Motors, Inc., 155 F.R.D. 515, 519 (M.D. Pa. 1994). Thus, whether or not the Court determines that the economic loss doctrine bars the County's claims, Defendants may still offer evidence to avoid liability without negating the County's case. An analysis of the Motions for Summary Judgment follows.

1. Count I - Negligence.

County's Complaint contains a claim for negligence against Microvote and Carson. Microvote and Carson argue that the County's negligence claim against them is precluded by the economic loss doctrine. The economic loss doctrine states, in general, that plaintiffs are prohibited "from recovering in tort economic losses to which their entitlement flows only from a contract." Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 618 (3d Cir. 1995); see also REM Coal Co., Inc. v. Clark Equip. Co., 563 A.2d 128, 134 (Pa. Super. 1989) (negligence and strict liability do not apply in action between two commercial enterprises where product malfunctioned and damaged only product itself). "Under Pennsylvania law, when the tort involves actions arising from a contractual relationship, the plaintiff is limited to an action under the contract." Philadelphia Elec. Co. v. General Elec. Power Generation Serv. Div., No. CIV.A.97-4840, 1999 WL 1244419, at *6 (E.D. Pa. Dec.

21, 1999)(citation omitted). This doctrine's rationale is that "tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement." Sun Co., Inc. v. Badger Design & Constructors, 939 F. Supp. 365, 371 (E.D. Pa. 1996)(citation omitted). A party cannot recover in negligence for failed commercial expectations that can be recovered in a contract action. Factory Mkt., Inc. v. Schuller Int'l Inc., 987 F. Supp. 387, 396-97 (E.D. Pa. 1997). Furthermore, "[t]ort law is intended to compensate individuals where the harm goes beyond failed expectations into personal and other property injury." Philadelphia Elec., 1999 WL 1244419, at *6 (quoting Sea-Land Serv., Inc. v. General Elec. Co., 134 F.3d 149, 155 (3d Cir. 1998)). "In order to recover in negligence, 'there must be a showing of harm above and beyond disappointed expectations evolving solely from a prior agreement.'" Sun Co., 939 F. Supp. at 371 (citation omitted).

"[T]he important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus." Philadelphia Elec., 1999 WL 124419, at *6 (citing Phico Ins. Co. v. Presbyterian Med. Servs., 663 A.2d 753, 757 (Pa. Super. 1995)).[1] "A claim ex

[1]Recent cases decided by the Superoir Court of Pennsylvania have determined that for a case "to be construed as a tort action, the wrong ascribed to the defendant must be the gist of

contractu cannot be converted to one in tort simply by alleging that the conduct in question was wantonly done." Philadelphia Elec., 1999 WL 1244419, at *6 (quoting Closed Circuit Corp. v.

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the action with the contract being collateral." Redevelopment Auth. of Cambria v. International Ins. Co., 685 A.2d 581, 590 (Pa. Super. 1996); see also Phico Ins. Co. v. Presbyterian Med. Servs., 663 A.2d 753, 757 (Pa. Super. 1995)(citing Bash v. Bell Tel. Co., 601 A.2d 825 (1992)).

Although the Pennsylvania Supreme Court has not yet determined whether the "gist of the action" test applies, "several courts in this District have chosen to adopt the gist of the action test in recent decisions." Northeastern PowerCo. V. Balcke-Durr, Inc., No. CIV.A.97-4836, 1999 WL 674332, at *8 (E.D. Pa. Aug. 23, 1999)(citations omitted). The Northeastern Power court found these cases persuasive because they followed the Pennsylvania Superior Court's reasoning which disapproved of the misfeasance/nonfeasance test. Id. The Northeastern Court found the following analysis convincing:

> If the misfeasance/nonfeasance rule applied, one of the parties to a contract could defeat the reasonable expectations of the parties, who may have specifically contracted to limit their liability, by bringing suit in tort to recover damages beyond that which was negotiated and agreed upon by the parties. The gist of the action test allows courts to review the actual dispute in question to determine whether, under the facts of that particular case, the claim should sound in tort or contract. Under this test, a party cannot disrupt the expectations of the parties by supplanting their agreement with a tort action that claims that the party misperformed the agreement in question.

Id. at *9 (citing Factory Mkt., Inc. v. Schuller Int'l Inc., 987 F. Supp. 387, 394 (E.D. Pa. 1997)). This Court, like the Northeastern court, will follow the majority of cases which have applied the gist of the action test in the context of contracts negotiated by sophisticated parties.

Jerrold Elecs. Corp., 426 F. Supp. 361, 364 (E.D. Pa. 1977) and citing Nirdlinger v. American Dist. Tel. Co., 91 A. 883, 886 (Pa. 1914)).

The County states that this case is an exception to the economic loss doctrine because it involves a matter of social policy. The County argues that "[n]o state, federal or any other court in this country has **ever** held that the Economic Loss Doctrine bars negligence or fraud claims concerning a defective voting system that damages the public's highest constitutional right to vote and the government's highest public duties." (County's Consolidated Opp'n to Defs.' Mots. Summ. J. at 90.)

The right to vote is a fundamental constitutional right. Ex parte Yarbrough, 110 U.S. 651 (1884). However, that right was not infringed in this case. In fact, this Court agrees with Microvote's statement that the County has not "alleged or claimed that it is seeking damages for any loss of right to vote." (Microvote's Reply Mem. Law in Supp. Mot. Summ J. at 14, n.10.) The United States Supreme Court has stated that:

> only two types of state voting practices could give rise to a constitutional claim. The first involves direct and outright deprivation of the right to vote, for example by means of a poll tax or literacy test. . . . The second type of unconstitutional practice is that which 'affects the political strength of various groups,' in violation of the Equal Protection Clause.

Shaw v. Reno, 509 U.S. 630, 659 (1993)(White, Blackmun & Stevens,

JJ., dissenting)(citing Guinn v. United States, 238 U.S. 347 (1915) and quoting Mobile v. Bolden, 446 U.S. 55, 83 (1980)). In this case, the County has not produced evidence which establishes that Microvote or Carson "damage[d] the public's highest constitutional right to vote and the government's highest public duties" because the elections were conducted to completion and no contest was brought either by any candidates or county residents for an infringement of voting rights.[2] Carson correctly argues that even if the social implications of this situation except it from the economic loss doctrine, the injured parties are the voters, not the County or some governmental entity. The County, therefore, lacks standing to bring this type of claim and no constitutional deprivation was implicated by the machine problems.[3] Carson also contends that the County's failure to

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[2]The former County Commissioners' deposition testimony is peppered with comments that they received complaints from election workers about machines breaking down, long waits for personnel to show up to fix the machines, and the amount of time it took them to get the machines running again. (Buckman Dep., 6/10/99, at 172-73.) They also testified that they received "complaints regarding long lines and the machines weren't working right" with the old manual machines, but more voter complaints after the Microvote machines were installed. (Fox Dep., 8/20/98, at 7-8.) However, none of the former Commissioners could recall specific individual constituent complaints.

[3]In contrast, this Court recognizes that several appellate courts have held that an election is a denial of substantive due process if it is conducted in a manner that is fundamentally unfair. Bennett v. Yoshina, 140 F.3d 1218, 1226 (9th Cir. 1998), cert. denied sub nom. Citizens for a Constitutional Convention v. Yoshina, ____ U.S. ____, 119 S.Ct. 868 (1999)(citation omitted). An election will not be invalid because of "mere fraud or

cite any cases in which a court either "award[ed] monetary damages to a governmental entity in a commercial context because an allegedly defective product interfered with the exercise of a constitutional right belonging to non-parties," . . . or "held the economic loss doctrine inapplicable because the plaintiff alleged that someone else's constitutional rights had been injured," (Carson's Reply Br. at 7,) indicates that the County should not be permitted this type of relief. This Court agrees that because neither the County's Complaint nor the County's discovery responses contained an allegation that the Defendants' negligence breached a public duty, causing injury to citizens' voting rights, the County should not now be entitled to claim this "late-breaking attempt to avoid summary judgment by disguising a straightforward breach of warranty claim as a constitutional tort." (Id. at 7.)

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mistake," but will be struck down on substantive due process grounds "if two elements are present: (1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and (2) significant disenfranchisement that results from a change in the election procedures." Id. at 1226-27.

A distinction has been made between "garden variety" election irregularities and pervasive errors that undermine the integrity of the vote. Id. at 1226. "Garden variety election irregularities do not generally violate the Due Process Clause, even if they control the outcome of the vote or election." Id. (citations omitted). But, "when election irregularities transcended garden variety problems, the election is invalid." Id. Here, even if there was no standing problem, the errors were at most garden variety problems.

In addressing this issue, this Court finds persuasive the reasoning of the United States Court of Appeals for the Seventh Circuit in Hennings v. Grafton, 523 F.2d 861 (7th Cir. 1975), affirming the lower court's rejection of the argument that a constitutional deprivation of voters' opportunities to cast their ballots occurred where long lines existed at polling places due to voting machine malfunctions. The court stated:

> [v]oting device malfunction, the failure of election officials to take statutorily prescribed steps to diminish what was at most a theoretical possibility that the devices might be tampered with, and the refusal of those officials after the election to conduct a retabulation, assuming these events to have occurred, fall far short of constitutional infractions, absent aggravating circumstances of fraud or other wilful conduct [by local election officials].

Id. at 864. There has been no allegation of election fraud brought by any Montgomery County voters; therefore, under the previously stated law, malfunctions of the DREs are not constitutional infractions.

The County, in its attempt to avoid summary judgment, states that "[a]pplication of Defendants' arguments concerning the economic loss doctrine would foreclose a plaintiff from ever pursuing contract and tort claims in the same case. This is plainly not the law." (County's Consolidated Opp'n Defs.' Mots. Summ. J. at 92.)(citations omitted) While the County's interpretation of the law is correct, this is a misstatement of

Carson's argument. Carson does not contend that a Plaintiff may never pursue contract and tort claims in the same case. (Carson's Reply Br. at 8.) Carson maintains, rather, that the economic loss doctrine applies because "'the alleged defect in the product only resulted in an impairment of the quality of the product itself,' . . . and the 'loss of the benefit of a bargain is the plaintiff's sole loss,'" (Id. at 8-9.)(citing New York State Elec. & Gas Corp., 564 A.2d 919, 925 (Pa. Super. 1989) and Duquesne Light Co., 66 F.3d 604, 618 (3d Cir. 1995)).

In Count I, the County claims that Microvote was negligent "because it breached its duties to train voters and poll workers, to provide service on the machines on election day, and to ensure that the software was properly installed and operative, specific to Montgomery County's needs." (Id. at 7.) (citing County's Consolidated Opp'n to Defs.' Mots. Summ. J. at 94.) The County also claims that one of Microvote's employees was negligent because he turned his pager and phone off the day after the November 1995 election, (Id. at 8,)(citing County's Consolidated Opp'n to Defs.' Mots. Summ. J. at 94-95), and that property damage other than that to the machines occurred in this case because the County had to build shelves in its warehouse to hold the Microvote machines. (Id.)(citing County's Consolidated Opp'n to Defs.' Mots. Summ. J. at 95 and Pl.'s Ans. To Carson's Third Interrog. No. 1). However, Carson correctly points out

that the claimed damages stem from breach of the contract and the County would have incurred these damages even if the machines had been perfect. (Id. at 8.) Further, there are no allegations in Count I that the Defendants inflicted harm beyond the County Commissioners' and voters' disappointed expectations and dissatisfaction with performance of the contract. This is, therefore, a case of failed commercial expectations and the County's recovery is in contract, not tort. See Factory Mkt., Inc., 987 F. Supp. at 396-97.

It is undisputed that the voting system was comprised of the machines along with a software vote tabulation package. The next issue which this Court must address is whether damage to the machine components, i.e. the software, excepts this case from the economic loss doctrine. "[D]amage to components of an integrated piece of machinery is not damage to 'other property' falling outside the economic loss rule." Philadelphia Elec., 1999 WL 1244419, at *7 (citing Saratoga Fishing Co. v. J.M. Martinac & Co., 117 S.Ct. 1783, 1788 (1997)). "Otherwise, there would be 'property damage' in virtually every case where a product damages itself." Id. The software was an integrated piece of the DRE machinery since it was necessary for tallying the votes. Here, as in Philadelphia Electric, the only damage was to the product itself, and "the commercial user stands to lose the value of the product, risks the displeasure of its

customers who find that the product does not meet their needs, or, . . . experiences increased costs in performing a service." Id. at *7 (quoting East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 871 (1986)). The machinery and software therefore come within the protection of the economic loss doctrine.

The County also alleges that Microvote was negligent because it breached its duties "to train voters and poll workers, to provide service on the machines on election day, and to ensure that the software was properly installed and operative, specific to Montgomery County's needs." (County's Consolidated Opp'n to Defs.' Mots. Summ. J. at 94.) Case law regarding the economic loss doctrine provides, however, that "[t]he prohibition against recovery for negligence regarding the defects . . . extends to any claim . . . for negligently providing advice and services." Philadelphia Elec., 1999 WL 1244419, at *7 (citing Lower Lake Dock Co. v. Messinger Bearing Corp., 577 A.2d 631, 635-36 (Pa. Super. 1990)(no tort recovery for negligence claim where product malfunctions but no personal injury or other property damage); Allied Fire & Safety Equip. Co. v. Dick Enterprises, Inc., 972 F. Supp. 922, 938 (E.D. Pa. 1997)(negligence claims barred by gist of action test and economic loss rule); Sun Co. v. Badger Design & Constructors, Inc., 939 F. Supp. 365, 373 (E.D. Pa. 1996)(economic loss rule does not apply only to product liability

cases)). Thus, the County cannot recover for Microvote's allegedly negligent advice or services.

2. Count IV - Fraud.

The county's claim for fraud appears to be a hybrid of two theories: intentional misrepresentation and negligent misrepresentation. Microvote and Carson argue that the economic loss doctrine bars County's fraud claims. This Court will address each fraud theory separately.

The first issue to be addressed is whether some or all of these claims are barred by the economic loss doctrine. In Duquesne Light Co., the Third Circuit specifically rejected the theory that a party could recover for negligent misrepresentation in situations where the parties are in contractual privity, opining that:

> where there is privity in contract between two parties, and where the policies behind tort law are not implicated, there is no need for an additional tort of negligent misrepresentation. Breach of contract, promissory estoppel, unjust enrichment, and other contract or quasi-contract remedies all protect parties who negotiate and reduce their agreement to writing.

Id., 66 F.3d at 620. Thus, the economic loss doctrine bars the County's claim for negligent misrepresentation.

As Carson notes, however, there is an apparent split of authority among Pennsylvania district courts whether the economic loss doctrine applies to claims of intentional fraud. Compare

Sunquest Info. Sys. v. Dean Witter Reynolds, 40 F. Supp.2d 644 (W.D. Pa. 1999) and Auger v. Stouffer Corp., No. CIV.A. 93-2529, 1993 WL 364622 (E.D. Pa. Aug. 31, 1993) with Sneberger v. BTI Americas, Inc., No. CIV.A. 98-932, 1998 WL 826992 (E.D. Pa. Nov. 30, 1998) and Sun Co., Inc. v. Badger Design & Constructors, Inc., 939 F. Supp. 365 (E.D. Pa. 1996); Cf. Factory Mkt., Inc. v. Schuller Int'l, Inc., 987 F. Supp. 387 (E.D. Pa. 1998). This Court finds persuasive the Sunquest language stating "a plaintiff cannot assert a fraud or negligent misrepresentation claim when that theory is 'merely another way of stating its breach of contract claim,' . . . or when its success 'would be wholly dependent upon the terms of the contracts.'" Sunquest, 40 F. Supp.2d at 651(citations omitted). Further, Auger and Factory Market are significant for their analysis of the "gist of the action" test. Here, the gist of the action is in contract, and the County's relief for its intentional fraud claim lies in contract damages. Thus, the economic loss doctrine bars the County's recovery for both negligent and intentional misrepresentation.

There is a split of authority with respect to whether the economic loss doctrine bars recovery for intentional misrepresentation. Therefore, the merits of the County's claim under this theory must be examined. Before this case is sent to

the jury, under Pennsylvania law[4] this Court must review the evidence of fraud and must "decide as a matter of law . . . whether plaintiffs' evidence attempting to prove fraud is sufficiently clear, precise, and convincing to make out a prima facie case." Northeastern Power Co. v. Balcke-Durr, Inc., No. CIV.A. 97-4836, 1999 WL 674332, at *12 (E.D. Pa. Aug. 23, 1999) (citing Mellon Bank v. First Union Real Estate Equity & Mortgage Invs., 951 F.2d 1399, 1409 (3d Cir. 1991)(quoting Beardshall v. Minutemen Press Int'l, Inc., 664 F.2d 23, 26 (3d Cir. 1981))).

The elements of intentional misrepresentation are as follows:

> (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.

Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994)(citations omitted).

Microvote notes that the County bases its fraud claims on the following four theories: (1) Microvote failed to disclose problems with the machines at Montgomery County and elsewhere; (2) Microvote misrepresented that the software was certified in Pennsylvania; (3) Microvote misrepresented that the County only

[4]The law of the forum state, Pennsylvania, applies in this diversity action.

needed one machine per 500 voters; and (4) Microvote misrepresented that it would take "action necessary" to cure the alleged problems with the voting machines. (Microvote's Reply Mem. Law in Supp. Mot. Summ. J. at 17.)(citing County's Consolidated Opp'n to Defs.' Mots. Summ. J. at 97, 100, 107). Microvote asks this Court to preclude the County from "changing the theory of its case after the discovery deadline has passed." Id.

The County, in turn, states that its Response Brief "describes Microvote's and Carson's persistent pattern and practice of fraud and cover-ups and pervasive plan to defraud," and that its "Response Brief does not address all of these misrepresentations but only the ones raised by Defendants in their Motions." (County's Consolidated Surreply to Defs.' Mots. Summ. J. at 23.) The County states:

> Carson also attempts to mislead the Court by improperly applying a 'clear and convincing' standard to summary judgment. The cases cited in Carson's brief are procedurally inapposite and are cases evaluating the standard a court must apply when deciding whether to enter judgment as a matter of law. Indeed, there simply is no requirement that evidence be 'clear and convincing' to survive summary judgment.

(Id. at 25-26, n.22.) Carson, in fact, sets forth the standard which the County must meet. As the party opposing summary judgment must come forth with "clear and convincing" evidence in order for the court to make a decision whether a genuine issue

exists and "a jury applying that evidentiary standard could reasonably find . . . for the plaintiff." (Carson's Reply Br. in Supp. Mot. Summ. J. at 10-11.)(citing Anderson, 477 U.S. at 255). Indeed, "[b]ald allegations that representations were false or misleading, without more, are insufficient to create an issue of material fact so as to preclude summary judgment." Kuehner v. Parsons, 527 A.2d 627, 629 (Pa. Cmwlth. 1987), appeal denied, Keuhner v. Lower Towamensing Twp., 538 A.2d 879 (Pa. 1988)(citing Cf. Estate of Gallagher, 400 A.2d 1312 (Pa. 1979)).

This Court has performed an exhaustive search of the alleged misrepresentations in the County's Consolidated Response to the Defendants' Motions for Summary Judgment. The County's Consolidated Response contains more than forty-six allegations with citations to the record that Carson and Microvote acted separately or in concert to commit fraud through fraudulent omissions or fraudulent misrepresentations in their dealings with the County. Although not all of the allegations are supported by the record, there are genuine issues of material fact regarding the alleged fraudulent activity on the part of Microvote and Carson to allow this issue to go to a jury.

Microvote and Carson claim that the County has not proven that it relied on Microvote's and Carson's representations about the quality of their DREs. After the difficulties experienced in the November, 1995 election, County officials

decided “to retain someone to analyze past elections and make recommendations to secure properly functioning voting machines for upcoming elections.” Montgomery County v. Microvote Corp., 175 F.3d 296, 298 (3d Cir. 1999). According to the County Solicitor, the County was “looking for an expert who could evaluate the performance of the machines, tell [the County] what was wrong with them, tell [the County] whether it was fixable, and tell [the County] whether or not [the County] could use the machines if [the County] wanted to.” (County’s Consolidated Opp’n to Defs.’ Mots. Summ. J., App. Vol. I, Ex. 8, Waters Dep., 8/18/98 at 63-64.) Microvote alleges that, even if all the other aspects of negligent misrepresentation can be found, the County’s claims for fraud still fail because the County hired Shamos to provide guidance on the upcoming elections and cannot show that it justifiably relied on Microvote’s statements. Microvote also notes that the County Election Board Minutes from its February 1, 1996 meeting “confirm that Dr. Shamos was hired to ‘analyze and prepare recommendations to remedy the County’s electronic voting system difficulties’ and was hired to ‘eliminate future electronic voting system difficulties.’” (Microvote’s Mem. Law. in Supp. Mot. Summ. J. at 41.)(citing Mele Dep., Ex. 16 attached to Carson’s Mot.) The retention of Shamos’ law firm indicates that the County did not justifiably rely on Microvote’s representations in entering into the Addendum. Thus, with

respect to the April, 1996 election, the County's fraud claim fails. The surviving fraud claim pertains only to the fraudulent omissions and fraudulent misrepresentations allegedly made by the Defendants prior to execution of the fee agreement with the Webb Law Firm on January 30, 1996.

The County alleges that Microvote and Carson fraudulently concealed serious defects in the DREs. The alleged concealed facts are that both parties failed to disclose that they never performed proper testing on the DREs or their components. The County also points out that "Microvote and Carson both materially failed to disclose that Mecklenberg and other counties had the same problems." (County's Consolidated Opp'n to Defs.' Mots. Summ. J. at 103.)(citations omitted). The County further alleges that Microvote and Carson failed to disclose machine problems experienced by other counties. (County's Consolidated Opp'n to Defs.' Mots. Summ. J. at 100.) However, as the Third Circuit explained in Duquesne Light Co., 66 F.3d at 612, that there is no duty to speak "where the two parties are sophisticated business entities, with equal and ample access to legal representation." In the instant case, after the November, 1995 election, the County not only had legal representation, but also hired Shamos, an expert in voting systems to investigate and advise it. (County's Consolidated Opp'n to Defs.' Mots. Summ. J., App. Vol. I, Ex. 3, Hoeffel Dep.,

6/28/99, at 163-64; App. Vol. I, Ex. 6, Mele Dep., 6/9/99, Ex. 30.) Accordingly, the Defendants' Motions for Summary Judgment are therefore granted with respect to Count IV of the Complaint for fraud after the November, 1995 election, but are denied as to fraud prior to the November, 1995 election.

B. Counts II, III and VI - Breach of Warranty, Breach of Contract and Action Under the Performance Bond.

The County alleges Microvote breached the terms of their contract in Count III. At this time, it is unclear whether the County has failed to set forth genuine issues of material fact which preclude granting summary judgment. Therefore, Microvote's Motion for Summary Judgment is denied as to Count III.

Count VI, the action under the performance bond against Westchester, is a dependent claim to the breach of contract allegations contained in Count III. Because Count III survives the Motion for Summary Judgment, Westchester's Motion for Summary Judgment as to Count VI is also denied.

Count II of the Complaint contains claims for breach of warranty against both Microvote and Carson. These breach of warranty claims are for express warranties, implied warranties of merchantability and implied warranties of fitness for a particular purpose. The Third Circuit has stated that "in order [for a plaintiff] to prevail under Pennsylvania law on a claim for breach of either warranty of fitness for a particular purpose

or warranty of merchantability, a plaintiff must show that the product was defective." Petrucelli v. Bohringer & Ratzinger, 46 F.3d 1298, 1309 (3d Cir. 1995)(citing Altronics of Bethlehem, Inc. v. Repco, Inc., 957 F.2d 1102, 1105 (3d Cir. 1992)). Whether the DREs were defective is a disputed issue of material fact which precludes the entry of summary judgment on this claim since the County contends that the DREs were defective in their operation and the Defendants argue that the DREs performed substantially and they are therefore not liable for breach of contract or warranty. Consequently, the Motions for Summary Judgment are denied as to Count II of the Complaint.

C. Count V - Wrongful Use of Civil Proceedings.

Lastly, the County presents a claim against Microvote for wrongful use of civil proceedings in Count V. The prior proceeding upon which this claim is based is Microvote Corp., 1996 WL 548145, in which Microvote filed a Complaint against the County for breach of a separate contemporaneous oral agreement to purchase loaner machines.

In Pennsylvania, to prevail on a claim of wrongful use of civil proceedings, a plaintiff must prove that the defendant took part:

> in the procurement, initiation or continuation of civil proceedings against another by acting: '(1) . . . in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of

> parties or adjudication of the claim in which the proceedings are based; and (2) the proceedings have terminated in favor of the person against whom they are brought.'

42 Pa. C.S.A. § 8351(a). It is undisputed that the prior proceeding terminated in favor of the County. See section I, supra. Therefore, the Court must next determine if the prior lawsuit was instituted or continued without probable cause and primarily for a purpose other than to secure the proper discovery, joinder of the parties or adjudication of the claim in which the proceedings are based.

The County contends that Microvote lacked probable cause in the prior action and whether there was probable cause is a jury question. In support thereof, the County cites the standard for probable cause under the tort of malicious prosecution which states "[u]sually, the existence of probable cause is a question of law for the court rather than a jury question, but may be submitted to the jury when facts material to the issue of probable cause are in controversy." McKibben v. Schmotzer, 700 A.2d 484, 493 (Pa. Super. 1997)(citations omitted). The current action is one for wrongful use of civil proceedings, and the Pennsylvania legislature has set forth the statutory definition of probable cause for this action.

Pennsylvania statutorily defines probable cause for wrongful use of civil proceedings as a belief by a person who:

> reasonably believes in the existence of the facts

upon which his claim is based, and either:

1. reasonably believes that under those facts the claim may be valid under the existing or developing law;

2. believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information; or

3. believes as an attorney of record, in good faith, that his procurement, initiation or continuation of a civil cause is not intended to merely harass or maliciously injure the opposite party.

42 Pa. C.S.A. § 8352. "The notion of probable cause, as understood and applied in the common law tort of wrongful civil proceedings, requires the plaintiff to prove that the defendant lacked probable cause to institute an unsuccessful [prior] civil lawsuit and that the defendant pressed the action for an improper, malicious purpose." Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 62-63 (1993)(citations omitted). The County must therefore prove that Microvote lacked probable cause to bring its prior action.

To support its theory that Microvote lacked probable cause to bring its suit, the County states "[t]here was no basis in law or fact for Microvote's preemptive and specious lawsuit. It was filed solely for the purpose of extorting a settlement from Montgomery County and to increase costs of litigation." (County's Consolidated Opp'n Defs.' Mots. Summ. J. at 124.) The

County also cites a statement by Microvote's attorney that Microvote anticipated litigation by the County and Microvote "might want to try to beat them [the County] to the courthouse." (Id. at 123.) In addition, the County refers to a prior lawsuit in which "Microvote memorialized its bad faith to file a Rule 11 motion against an opponent so that it would 'serve to run . . . legal bills up.'" (Id. at 124, n.66.) Microvote's lack of probable cause to file a Rule 11 Motion in the prior lawsuit against another party does not indicate that Microvote lacked probable cause in its lawsuit against the County.

Microvote contends that it had probable cause and lacked malice because neither Judge Bartle nor the Third Circuit sanctioned Microvote for bringing the prior lawsuit. The County rejects this reasoning, stressing that Microvote lacked probable cause since Judge Bartle granted the County's Motion to Dismiss and Microvote lost its appeal. Judge Bartle did not state whether or not Microvote possessed probable cause to bring its case. See Microvote Corp., 1996 WL 548145, at *2. Rather, Judge Bartle dismissed the case under Pennsylvania law governing the the statute of frauds and unjust enrichment. Because Judge Bartle did not address the probable cause issue, dismissal of that case is not conclusive proof of a lack of probable cause.

The County also cites tape-recorded telephone conversations made by Microvote's special counsel speaking with

Microvote's local counsel as evidence of the bad faith motives of Microvote in bringing the prior action.[5] The County alleges that "[t]he jury may reasonably infer from this evidence that Microvote was conducting these sleazy and secret tape-recordings in bad faith and for use in litigation that it intended to file against Montgomery County as a preemptive strike." (County's Consolidated Sur-Reply Br. Defs.' Mots. Summ. J. at 35.) The County has produced a transcript of a tape-recorded statement between Microvote's special counsel and local counsel wherein they stated:

DEAN RICHARDS: And then get back with me if you would. My lord, I hate to even pass this on to Microvote.

FRED WENTZ: Well, I can. You realize you haft to do don't you?

DEAN RICHARDS: You think they're serious?

FRED WENTZ: Yeah [unintelligible]. Tom Waters and I have [. .] together for a lot of years [unintelligible]. Yeah, I, I think Tom, you know. [unintelligible]. And he will do it quietly. [..][..][..]. **If they sue us you probably can't win.** If they sue us [..][..] reputation [..][..]. I said, I understand the [unintelligible].

DEAN RICHARDS: Okay.

(County's Consolidated Surreply Br. at 36, Ex. F at 8-

[5]The tape recordings were part of an ongoing investigation of election fraud by the Federal Bureau of Investigation in Montgomery County and elsewhere.

9.)(emphasis added). Aside from the tape-recorded statement, the County provides no support for the contention that Microvote's lawyers acted for an improper purpose.

To the contrary, "an attorney is entitled to rely in good faith upon the statement of facts made to him by his client and is not under a duty to institute an inquiry for the purpose of verifying his statement before giving advice thereon." Meiksin v. Howard Hanna Co., 590 A.2d 1303, 1306 (Pa. Super. 1991)(citation omitted). Pennsylvania law provides that "[e]ven if an attorney lacked probable cause in filing a lawsuit on behalf of a client, he is not liable for wrongful use of civil proceedings unless he filed the lawsuit with an improper purpose." Broadwater v. Sentner, 725 A.2d 779 (Pa. Super. 1999)(citing 42 Pa. C.S.A. § 8351). The County has not shown an improper purpose by Microvote's counsel in this case; the evidence provided is insufficient to defeat summary judgment.

The County alternatively argues that Microvote lacked probable cause to file suit because its counsel should have known, after reasonable investigation of the existing law, that Microvote could not bring its action against the County. In the area of attorney liability for wrongful use of civil proceedings, the Pennsylvania Superior Court has followed the Restatement (Second) of Torts section 674 comment d (1977), which states:

> An attorney who initiates a civil proceeding on behalf of his client or one who takes any

> steps in the proceeding is not liable if he has probable cause for his action (see section 675); and even if he has no probable cause and is convinced that his client's claim is unfounded, he is still not liable if he acts primarily for the purpose of aiding his client in obtaining a proper adjudication of his claim. (See section 676). An attorney is not required or expected to prejudge his client's claim, and although he is fully aware that its chances of success are comparatively slight, it is his responsibility to present it to the court for adjudication if his client so insists after he has explained to the client the nature of the chances.
>
> If, however, the attorney acts without probable cause for belief in the possibility that the claim will succeed, and for an improper purpose, as, for example, to put pressure upon the person proceeded against in order to compel payment of another claim of his own or solely to harass the person proceeded against by bringing a claim known to be invalid, he is subject to the same liability as any other person.

Meiksin, 590 A.2d at 1305(citing Shaffer v. Stewart, 473 A.2d 1017, 1020 (Pa. Super. 1984)); see also Broadwater v. Sentner, 725 A.2d 779 (Pa. Super. 1999)(even if attorney lacked probable cause filing lawsuit on client's behalf, he is not liable for wrongful use of civil proceedings unless he filed lawsuit with improper purpose). Microvote's National Sales Director testified that he believed that Microvote and the County had "entered into a separate oral agreement, in which the County's Commissioners agreed that if the Microvote voting machines performed successfully during the April 1996 primary election, the County

would purchase 350 additional voting machines from Microvote." (County's Consolidated Opp'n to Defs.' Mots. Summ. J., App. Vol. 4, Ex. 25-C, Greenhalgh Dep., 7/17/99, at 687-91 and Greenhalgh Aff., Ex. 93.) Thus, a claim, albeit tenuous, could have been made against the County.[6]

Because the County has not shown that Microvote lacked the requisite probable cause to bring the prior lawsuit against the County, Count VI of the Complaint is dismissed.

IV. CONCLUSION.

The County has failed to present sufficient evidence to defeat Defendants' Motions with respect to the County's claims for negligence and wrongful use of civil proceedings. This Court finds, however, that sufficient disputed issues of material fact exist warranting a denial of Defendants' Motions on County's claims for fraud prior to the November, 1995 election, breach of warranty, breach of contract, and the action under the warranty bond.

An Order follows.

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[6]The final argument presented by Microvote on the issue of probable cause is that the County must have believed that Microvote had probable cause in the prior proceeding because it did not seek sanctions from either Judge Bartle or the Third Circuit against Microvote for lack of probable cause. (Microvote's Reply Mem. Law in Support Mot. Summ. J. at 39.) Although this claim appears persuasive, this does not indicate that Microvote lacked probable cause.

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

MONTGOMERY COUNTY, Plaintiff, v. MICROVOTE CORPORATION, et al., CARSON MANUFACTURING COMPANY, INC., and WESTCHESTER FIRE INSURANCE COMPANY, Defendants.	:	CIVIL ACTION No. 97-6331

O R D E R

AND NOW, this day of February, 2000, upon consideration of Microvote's "Request for Ruling on its Pending and Unopposed Motion for Summary Judgment and for an Order of Dismissal" and the County's Response thereto, the County's "Request for Dismissal for the Recovery of Public Funds because of Microvote's Argument that the County's Brief was Three Days Late" and Microvote's Response thereto, and Defendants' Motions for Summary Judgment and all responses thereto, it is hereby ORDERED that:

1. Microvote's "Request for Ruling on its Pending and Unopposed Motion for Summary Judgment and for an Order of Dismissal" is DENIED;

2. the County's "Request for Dismissal for the Recovery of Public Funds because of Microvote's Argument that the County's Brief was Three Days

Late" is DENIED; and

3. Defendants' Motions for Summary Judgment are GRANTED in part and DENIED in part. Summary Judgment on Counts I and VI of Plaintiff's Complaint is GRANTED and with respect to Counts II, III, IV (related to events prior to the November, 1995 election) and V of the Complaint, Summary Judgment is DENIED.

BY THE COURT:

_____

Robert F. Kelly, J.