

PHILIP GODLEWSKI, MAURI B. KELLY IN THE COURT OF COMMON PLEAS  
LACKAWANNA COUNTY OF LACKAWANNA COUNTY, PA  
Plaintiff

v.

2023 MAR -2 P: 14 No: 2022-cv-2195

CHRIS KELLY et al.,

REC'D CIVIL DIVISION  
Defendants.

21  
JURY TRIAL DEMANDED

**PLAINTIFF'S PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW WITH RESPECT  
TO DEFENDANTS' SECOND AND THIRD  
MOTIONS FOR SANCTIONS**

**I. OVERVIEW**

In their Second and Third Motions for Sanctions, Defendants have raised various alleged shortcomings on the part of Plaintiff Philip Godlewski ("Godlewski") in responding to Defendants' numerous requests for discovery. These alleged shortcomings are often vague and generally seek to challenge the veracity of Godlewski's responses rather than the legal sufficiency of the responses. It appears, from how Defendants presented their evidence and arguments at the time of the hearing on the sanction's motions, that Defendants were attempting to prematurely obtain a summary judgment or hold a bench trial on the ultimate issues in this matter.

As the Court observed numerous times during the testimony, matters of credibility of the witnesses regarding the underlying facts of this matter were not the subject of the hearing. Instead, those issues are ultimately within the purview of a trier of fact, whether that trier is a jury or a judge at a bench trial. This Court is tasked with determining whether Godlewski provided legally sufficient responses to Defendants' discovery requests.

To assist the Court with this matter, Godlewski will first offer general findings of fact and conclusions of law applicable to discovery sanctions. Godlewski will then proceed to set forth findings of fact and conclusions of law relevant to each specific matter raised and conclude with the issue of counsel fees.

## II. GENERAL FINDINGS OF FACT

1. Defendants' Second Motion for Sanctions [Second Motion] alleges the following issues concerning Godlewski's response to various discovery requests:

A. Failure to comply with a June 8, 2021, preservation of evidence letter.

[Second Motion, ¶¶ 21-22]

B. The veracity of Godlewski's answers to Interrogatories 32 and 33 of Defendants First Set reading is as follows: [Second Motion, ¶¶ 26, 27].

32. Did the 15-year-old victim who was the subject of your 2010 criminal charges touch you in a sexual manner at any time during the years 2008-2010?

ANSWER: No.

33. Do you have any letters, e-mails or text messages to or from the 15-year-old girl?

ANSWER: None.

C. The veracity of Godlewski's response to Request 20 (erroneously identified at various places as 19) in Defendants' First Request for Production reading as follows: [Second Motion, ¶¶ 29-33]

19. Any documents sent to or from the 15-year-old girl referred to in the article attached to your Complaint.

None.

D. Godlewski's response to Request 7 in Defendant's Fourth Request for Production of Documents is as follows: [Second Motion, ¶¶ 35, 36]

7. Produce any text message between Phil Godlewski and [B.D.] between 1/1/2008 through the present date.

Answer: Plaintiff does not have any.

E. The veracity of Godlewski's denial of ever having a sexual relationship with Brienna DuBorgel as set forth in Godlewski's response to Interrogatory 7 to Defendants' Fourth Set. [Second Motion, ¶¶ 70-72]

2. Defendants have not filed a motion to compel concerning the matters raised in their Second Motion.

3. Defendants' Third Motion for Sanctions ("Third Motion") raises the issue of Godlewski's compliance with the Court's Order of November 14, 2022, directing Godlewski to produce various videos. [Third Motion, ¶ 1(b)]<sup>1</sup>

4. Defendants have demanded the following relief:

A. Dismissal with prejudice. [Third Motion, ad damnum clause (a)] [Second Motion ad damnum clause (d)]

B. Counsel fees [Third Motion, ad damnum clause (b)] in the amount of \$35,000.00 together with another \$35,000.00 for alleged "bad faith conduct." [Second Motion ad damnum clause (d)]

### **III. GENERAL CONCLUSIONS OF LAW**

1. Sanctions in discovery matters are governed by Pa.R.C.P. 4019.

2. The Rules of Civil Procedure that a court may, on motion, enter an appropriate order if (in relevant parts):

A. A party failed to serve answers to interrogatories. Pa.R.C.P. 4019 (a)(1)(i).

B. A party fails to produce or permit inspection of documents and things. Pa.R.C.P. 4019 (a)(1)(vii).

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<sup>1</sup> The Third Motion raised various other issues, but these have been disposed of by stipulation of the parties and the Court's Order signed January 30, 2023 and docketed February 1, 2023.

C. A party fails to make discovery or to obey an order of court respecting discovery. Pa.R.C.P. 4019 (a)(1)(viii).

3. The Rules of Civil Procedure empower courts to enter orders providing the following relief (in relevant parts) by way of sanctions:

A. Orders that matters be taken as established in accord with the claim of the party obtaining the order. Pa.R.C.P. 4019 (c)(1).

B. Orders refusing to allow a party to support or oppose designated claims or defenses or to prevent introduction of evidence. Pa.R.C.P. 4019 (c)(2).

C. Orders striking pleadings or entering judgment. Pa.R.C.P. 4019 (c)(3).

D. Such other orders as are just. Pa.R.C.P. 4019 (c)(5).

4. The Rules of Civil Procedure provide that a motion for sanctions must be filed after a motion to compel. Pa.R.C.P. 4019 (g)(1). This two-step process is mandatory. Pa.R.C.P. 4019 (g)(1) 1978 Explanatory Comment.

5. Defendants' Second Motion is dismissed as Defendants have not previously filed any motion to compel concerning the matters complained of in the Second Motion, nor has the Court entered any previous order concerning the matters complained of in the Second Motion.

6. Pa.R.C.P. 4019 provides no mechanism for challenging the legal sufficiency of responses to discovery requests on the basis that the responses provided vary from the statements of other witnesses.

7. Defendants' Second Motion is dismissed to the extent that it raises issues of material fact as to which there is a disagreement in the testimony of various witnesses. The Court notes that a trier of fact will ultimately decide these matters.

8. In considering the imposition of sanctions, "the sanction must be appropriate when compared to the violation of the discovery rules." Reilly v. Ernst & Young, LLP, 929 A.2d 1193, 1200 (Pa.Super. 2007) (citing Steinfurth v. LaManna, 404 Pa.Super. 384, 590 A.2d 1286, 1288 (1991)).

9. The following factors must be considered when deciding a motion for discovery sanctions:

- A. Prejudice resulting to the opposing party.
- B. Whether the prejudice can be cured.
- C. Willfulness or bad faith in failing to comply with the discovery order.
- D. The number of discovery violations.
- E. The importance of the precluded evidence in the light of the failure.

Id.

10. A "trial court can impose no more 'severe sanction' than dismissing the lawsuit." The trial court can impose no more "severe sanction" than dismissing the lawsuit. Philadelphia Contributionship Insurance Co. v. Shapiro, 798 A.2d 781, 784 Croydon Plastics, Inc. v. Lower Bucks Cooling & Heating, 698 A.2d 625, 629 (Pa.Super.1997).

11. Defendants' requests for dismissal of this case are denied.

#### IV. DEFENDANTS' SPECIFIC ISSUES

##### A. June 8, 2021 PRESERVATION OF EVIDENCE LETTER - FINDINGS OF FACT

1. On or about June 8, 2021 Defendants sent a preservation of evidence letter to Godlewski. [Second Motion, Ex. E]

2. The June 8, 2021 letter established as the scope of its preservation notice the following:

I am hereby requesting that Philip Godlewski (hereafter "you") preserve, and not alter in any way, any evidence (including documents and all electronically stored information ("ESI")) about the lawsuit, the Defendants, the article attached to Plaintiff's Complaint filed in Case No. 21-CV-2195, any criminal charges ever filed against Philip Godlewski, Philip Godlewski's employment or affiliation with ERA One Source Realty and his termination from ERA One Source Realty, Philip Godlewski's separation from his wife, the events at the U.S. Capital on January 6, 2021, any IRS or PA Department of Revenue Liens against Philip Godlewski, any loans made to him by Sunita Arora, Philip Godlewski's videos posted on YouTube or other social networking platforms, all posts and communications on Give Send Go, Facebook, Telegram, Twitter or Instagram made by him. In general, preserve any electronic or documentary evidence in your possession or control relating to these subjects.

[Second Motion, Ex. E, p. 2]

3. Defendants questioned Godlewski concerning numerous text messages between Godlewski and Brienna DuBorgel a few days before Godlewski provided responses to various discovery requests. [NT 105: 17-25].

4. Godlewski admits to having engaged in the text conversations. [TR 105: 17-25]

5. Godlewski admitted that he deleted the text conversations. [TR 106: 11-13]

6. Godlewski testified that he deleted the conversations out of concern that someone would grab or hack his phone. [TR 106: 20-25].

7. Godlewski testified that he deleted the conversations due to privacy concerns. [TR 107: 6-7].

8. Godlewski believed that the text messages had no evidentiary value in the case. [TR 108: 2-3]

9. Defendants were able to recover all of the text messages from the cell phone of Brienna DuBorgel using Cellebrite software and the services of Dennis Cheng. [TR 169-176].

**B. June 8, 2021 PRESERVATION OF EVIDENCE LETTER –  
CONCLUSIONS OF LAW**

1. The text messages are outside the scope of materials set forth in the June 8, 2021, preservation letter.

2. Godlewski has not violated the terms of the June 8, 2021, preservation letter, and Defendants' request for sanctions on that issue is denied.

3. In the alternative, assuming the text messages are within the scope of evidence whose preservation was requested by the June 8, 2021 letter, the Court finds that:

A. Defendants are not prejudiced by deletion of the text messages as they retrieved the text messages in their entirety from the cell phone of Brienna DuBorgel.

B. Godlewski's deletion of the text messages was not a willful violation of a court order since no order prohibiting the deletion existed then.

C. The Court will decline to impose sanctions.

**C. INTERROGATORIES 32 AND 33 OF THE FIRST SET - FINDINGS OF  
FACT**

1. Defendants issued a first set of interrogatories to Godlewski, which, combined with Godlewski's answers, contained the following text:

32. Did the 15-year-old victim who was the subject of your 2010 criminal charges touch you in a sexual manner at any time during the years 2008-2010?

ANSWER: No.

33. Do you have any letters, e-mails or text messages to or from the 15-year-old girl?

ANSWER: None.

2. Concerning interrogatory 32, Brienna DuBorgel testified that Godlewski had a sexual relationship with DuBorgel while DuBorgel was in ninth grade. [TR 19: 1-10]

3. DuBorgel testified that Godlewski was 24 or 25 at the time. [TR 19: 11-13]

4. Godlweski denied and continues to deny that he had a sexual relationship with DuBorgel while Duborgel was a minor.

5. Concerning interrogatory 33, Godlewski understood the question about the 15-year-old girl to refer to DuBorgel. [TR 88: 17-19]

6. Godlewski took the question to apply to communications with DuBorgel when she was fifteen. [TR 88: 25, 89: 1-6].

7. Godlewski testified that he had no contact with messages when Ms. DuBorgel was fifteen. [TR 89: 8-13]

8. Godlweski testified that he did not understand "fifteen-year-old girl" as a means of privacy protection rather than a temporal qualifier, as Defendants used BD to identify DuBorgel in other discovery requests. [TR 89: 16-24]

**D. INTERROGATORIES 32 AND 33 OF THE FIRST SET - CONCLUSIONS OF LAW**

1. With the exception of the provisions of Pa.R.C.P. 4019 (d)(1-4) (denials of requested admissions where the subject matter is proven at trial), the Pennsylvania Rules of Civil Procedure provides no mechanism for sanctioning discovery responses on the basis that the responses contradict other testimony or evidence offered.

2. By way of analogy, the Court notes that in the context of a motion for summary judgment, oral testimony alone, either through testimonial affidavits or depositions of the moving party or the moving party's witnesses, even if uncontradicted, is generally insufficient to establish the absence of a genuine issue of material fact. See Nanty-Glo v. American Surety Co., 163 A. 523 (Pa. 1932); Penn Center House, Inc. v. Hoffman, 553 A.2d 900 (Pa. 1989). In that context, the case must proceed to a finder of fact.



3. In this matter, Defendants would have the Court adopt their account of relations between Godlewski and DuBorgel based upon the oral testimony of Defendants' witnesses.

4. The Court is not in a position presently to judge the credibility of the parties' testimony concerning the facts of this matter, which underlie the ultimate issues. That is the province of a jury or judge (in the case of a bench trial) after a full trial.

5. Accordingly, the Court will deny the motion for sanctions with respect to interrogatory 32 of Defendants' First Set.

6. Concerning interrogatory 33, the Court finds that Godlewski did not willfully fail to answer that interrogatory 33 requested communications specifically from "the fifteen-year-old girl," which was reasonably interpreted as a temporal qualifier to the information sought.

7. In the alternative, the Court finds that Defendants were not prejudiced by Godlewski's non-disclosure of the text messages as Defendants obtained the messages directly from DuBorgel.

8. Accordingly, the Court will deny the motion for sanctions with respect to interrogatory 33 of Defendants' First Set.

**E. INTERROGATORY 20 OF THE FIRST SET - FINDINGS OF FACT**

1. Defendants issued a first set of interrogatories to Godlewski, which, combined with Godlewski's answers, contained the following text:

**19. Any documents sent to or from the 15-year-old girl referred to in the article attached to your Complaint.**

**None.**

2. The findings of fact with respect to Interrogatory 20 are identical to those found by the Court concerning Interrogatories 32 and 33. Those findings of fact are incorporated herein.

**F. INTERROGATORY 20 OF THE FIRST SET - CONCLUSIONS OF LAW**

1. The Court restates its conclusions of law concerning Interrogatories 32 and 33.
2. Accordingly, the Court denies Defendants' motion for sanctions with respect to Interrogatory 20.

**G. REQUEST 7 OF THE FOURTH SET - FINDINGS OF FACT**

1. Defendants issued a fourth set of requests for the production of documents to Godlewski, which, combined with Godlewski's answers, contained the following text:

7. Produce any text message between Phil Godlewski and [B.D.] between 1/1/2008 through the present date.

Answer: Plaintiff does not have any.

2. The findings of fact with respect to Request 7 are identical to those found by the Court concerning Interrogatories 32 and 33. Those findings of fact are incorporated herein.

**H. REQUEST 7 OF THE FOURTH SET - CONCLUSIONS OF LAW**

1. The Court restates its conclusions of law concerning Interrogatories 32 and 33.
2. Accordingly, the Court denies Defendants' motion for sanctions with respect to Interrogatory 20.

**I. INTERROGATORY 7 OF THE FOURTH SET - FINDINGS OF FACT**

1. Defendants take issue with the Godlewski's answer to Interrogatory 7 of Defendants' Fourth Set in that Godlewski denies ever having a sexual relationship with DuBorgel.
2. Godlewski testified that he misunderstood the question due to its context. [TR 81: 19-20]
3. Godlewski testified that he understood the question to ask whether he had a sexual relationship with DuBorgel when she was fifteen due to the use of that age reference in previous sets of interrogatories. [TR 82: 1-8]

4. Godlewski testified that he had a sexual relationship with DuBorgel in approximately 2015 or 2016. [TR 84: 21-22]

**J. INTERROGATORY 7 OF THE FOURTH SET - CONCLUSIONS OF LAW**

1. The Court restates its previous observations that the function of a discovery sanctions hearing is not to establish findings of fact as to the ultimate issue in a case.

2. Godlewski did not willfully disobey any court order, as none had been issued, concerning Interrogatory 7.

3. Defendants have suffered no prejudice due to Godlewski's answer to Interrogatory 7.

4. The Court denies Defendants' Motion for Sanctions concerning Interrogatory 7.

**V. PRODUCTION OF VIDEOS PER THIS COURT'S ORDER OF NOVEMBER 14, 2022 - FINDINGS OF FACT**

1. On November 14, 2022, this Court entered an Order compelling Godlewski to produce specific videos of Godlewski's broadcasts using social media.

2. Defendants played a video in which Godlewski referenced "digital files that I keep in my safe..." [TR 144: 6-7]

3. Godlewski testified that the safe comment was used out of context. [TR 147: 2-3]

4. Godlewski testified that his Facebook account was suspended and deleted on or about January 20, 2021. [TR 147: 9-11]

5. Godlewski testified that he transitioned to YouTube and that YouTube had encryption software that YouTube referred to as a digital safe. [TR 147: 15-23]

6. YouTube deleted Godlewski's account. [TR 148: 6-7]

7. All of Godlewski's live-stream videos are available on Rumble to anyone for free. [TR 149: 5-12]

**VI. PRODUCTION OF VIDEOS PER THIS COURT'S ORDER OF NOVEMBER 14, 2022 - CONCLUSIONS OF LAW**

1. Godlewski has complied with the Court's Order of November 14, 2022, concerning providing specific videos by identifying the website where all responsive, live-stream videos, other than those deleted by social media channels beyond Godlewski's control, may be downloaded for free.

2. In the alternative, Defendants are not prejudiced by Godlewski's failure to provide the live stream videos as they are available to Defendants to download for free.

3. The Court dismisses the motion for sanctions concerning the Court's Order of November 14, 2022.

**VII. COUNSEL FEES**

1. Pa.R.C.P. 4019 contains no provision authorizing the payment of double counsel fees as a sanction.

2. Defendants' request for double counsel fees is denied.

3. The Rules of Civil Procedure provide that a court may award counsel fees to a party seeking compliance with a discovery order if that party prevails. Pa.R.C.P. 4019 (g)(1).

4. Defendants have not prevailed on their motions for sanctions, and Defendants' request for counsel fees is denied.

5. The Rules of Civil Procedure provide that a court shall award counsel fees to the non-moving party if the non-moving party prevails.

6. As Defendants' motions for sanctions have been denied *in toto*, Godlewski is the prevailing party.

7. Godlewski is directed to file, within 14 days, a statement of costs and fees incurred in defending against the motions for sanctions.

8. The Court will hold a hearing on Godlewski's statement of costs and fees at the next available date.

Respectfully submitted,

**KOLMAN LAW, PC**

DATE: February 27, 2023

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