

[J-61-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

GEORGE BOCHETTO, ESQUIRE AND	:	No. 47 EAP 2003
BOCHETTO & LENTZ, P.C.,	:	
	:	Appeal from the Order of the Superior
Appellants	:	Court entered on March 14, 2003, at No.
	:	1309 EDA 2002, affirming the Order of the
v.	:	Court of Common Pleas of Philadelphia
	:	County entered on March 13, 2002, at No.
	:	3732
KEVIN W. GIBSON, ESQUIRE AND	:	
KASSAB, ARCHBOLD & O'BRIEN,	:	
	:	
Appellees	:	ARGUED: April 13, 2004

OPINION OF THE COURT

MR. JUSTICE NIGRO

DECIDED: October 20, 2004

At issue in this appeal is whether an attorney is absolutely immune from liability on the basis of the judicial privilege when he faxes to a reporter a complaint that he has previously filed. For the reasons that follow, we hold that the judicial privilege does not protect an attorney from liability for such conduct.

In April 1997, Pickering Hunt ("Pickering"), a Pennsylvania non-profit corporation,¹ hired Appellant George Bochetto, Esquire, an employee, officer, and shareholder of the law firm of Bochetto & Lentz, P.C., to defend it in two lawsuits concerning real estate in Chester County.² These two lawsuits were consolidated for a nonjury trial, following which the trial

¹ Pickering is primarily an organization for persons who engage in fox hunting in Chester County, Pennsylvania.

² The first suit, John L. Sbarbaro, Jr., et al. v. Henry C. Biddle, Jr., et al., Chester C.P. No. 97-01365, was a quiet title action in which the plaintiffs sought a declaration from the court that the Sbarbaro family trust was entitled to exclusive use and quiet enjoyment of property in Chester County that was held in the trust's name. Pickering opposed the action, asserting that it had an easement over the property under the terms of the property's 1948 (continued...)

court found in favor of the plaintiffs and against Pickering.³ Pickering subsequently hired Appellee Kevin W. Gibson, Esquire, who was an employee of the law firm of Kassab, Archbold & O'Brien, to bring a legal malpractice claim on its behalf against Bochetto and his firm, Bochetto & Lentz.

On October 1, 1999, Gibson filed a malpractice complaint against Bochetto and Bochetto & Lentz on Pickering's behalf. The complaint alleged that Bochetto had breached his fiduciary duty to Pickering in connection with the Chester County real estate action when he failed to inform Pickering about an initial expert report he had received in which the expert opined that: (1) a court might find that Pickering did not have an easement over the land that was the subject of the litigation; (2) Pickering had only a 5 to 10 percent chance of prevailing in the litigation; and (3) the value of Pickering's interest in the land at issue was somewhere between \$64,500 and \$129,000.⁴ Moreover, the complaint alleged that Bochetto had instructed the expert to draft a second report without any reference to the possibility of a court finding that Pickering did not have an easement over the land or to

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deed. In the second suit, John L. Sbarbaro, Jr., et al. v. Henry C. Biddle, Jr., et al., Chester C.P. No. 97-02936, the plaintiffs sought specific performance of an alleged contract entered into between the trust and an officer of Pickering, in which the officer agreed to sell Pickering's rights to the property for \$5,000. Pickering argued that it was not bound by the alleged contract because the officer who agreed to the sale did not have authority to make such an agreement.

³ The trial court declared that the Sbarbaro family trust was entitled to exclusive use and quiet enjoyment of the property and that Pickering did not have any interest in the property. The trial court further found that Pickering was bound by the contract entered into between the trust and one of Pickering's officers and that pursuant to that contract, Pickering was required to execute a declaration renouncing any interest it may have had in the property. Finally, the trial court awarded the plaintiffs damages in the amount of \$288,874.

⁴ The complaint asserted that Bochetto & Lentz was liable for the acts of Bochetto under the doctrine of respondeat superior and Pennsylvania law governing partnerships.

Pickering's chance of success in the litigation. According to the complaint, the expert drafted such a second report,⁵ and Bochetto showed only that report to Pickering, causing Pickering to believe that it had a good chance of prevailing in the litigation.

Some time after he filed the malpractice complaint against Bochetto, Gibson faxed a copy of the complaint to Donna Dudick, a freelance reporter who regularly writes stories for The Legal Intelligencer, a daily legal publication serving the Philadelphia region. Thereafter, on October 20, 1999, The Legal Intelligencer published an article detailing the allegations in the complaint.⁶ See Donna Dudick, Fox Hunting Club Takes Aim at Former Attorney: Defendant Calls Action "Garbage", The Legal Intelligencer, October 20, 1999, at S3, S11. Bochetto and Bochetto & Lentz subsequently filed an action against Gibson and Kassab, Archbold & O'Brien in the Court of Common Pleas of Philadelphia County.⁷ In the complaint, Bochetto and Bochetto & Lentz alleged that the malpractice complaint filed by Gibson contained false and defamatory statements and that Gibson and his firm were therefore liable for defamation, commercial disparagement, and interference with contract for sending a copy of the complaint to Dudick.⁸ Thereafter, Gibson and his firm filed a

⁵ Notably, the expert's estimation of the value of Pickering's interest in the land at issue also significantly increased in the second report.

⁶ In addition to relating the contents of the complaint, the article included statements by both Bochetto and Gibson about the lawsuit.

⁷ Kassab, Archbold & O'Brien was named as a defendant on the theory that it was vicariously liable for acts in which Gibson engaged.

⁸ In the complaint, Bochetto and Bochetto & Lentz also alleged that Gibson was liable for defamation, commercial disparagement, and interference with contract for: (1) making defamatory statements to a reporter for The Legal Intelligencer that were published in the October 20th article; (2) sending an e-mail with defamatory comments to Bochetto's legal malpractice insurance carrier about negotiating a settlement; and (3) sending a letter to Bochetto & Lentz and others asserting that the firm was in violation of the Rules of (continued...)

motion for summary judgment, arguing, among other things, that the judicial privilege provided him with absolute immunity for his act of sending the malpractice complaint to Dudick.⁹

On March 13, 1999, the trial court entered an order granting the motion for summary judgment and thereby dismissing Bochetto's complaint. In its opinion accompanying its order, the trial court explained that it concluded that Gibson's act of sending Dudick the malpractice complaint was protected by the judicial privilege because the document had already been filed and was available to the public. In reaching this conclusion, the court reasoned that it could not "ignore the chilling effect that could result from effectively precluding attorneys from forwarding copies of the pleadings they have filed to the press."¹⁰ Bochetto v. Gibson, 2002 WL 434551, *4 (Pa.Com.Pl. March 13, 2002). Bochetto and his firm appealed from the trial court's order, and on March 14, 2003, the Superior Court entered an order and memorandum opinion affirming the trial court's order based on the reasoning expressed in the trial court's opinion. Judge Cavanaugh filed a dissenting

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Professional Conduct for failing to send Gibson one of Pickering's legal files as part of discovery.

⁹ Gibson and his firm also argued that he was entitled to summary judgment for his act of sending his malpractice complaint to Dudick because he was entitled to conditional or qualified immunity and because the allegations in the malpractice complaint were incapable of defamatory meaning. Gibson further sought summary judgment with respect to the other allegations in Bochetto's complaint, see supra n.8, claiming that those claims failed as a matter of law because he was entitled to either absolute immunity or conditional immunity, and because none of his statements at issue were defamatory.

¹⁰ The trial court also found that Gibson was not liable for: (1) his statements to the reporter for The Legal Intelligencer that were included in the October 20th article because those statements were not defamatory; and (2) his statements in the e-mail to Bochetto's malpractice insurance carrier and in the letter to Bochetto & Lentz because both of those documents were protected by the judicial privilege.

statement, in which he stated, without further explanation, that he disagreed with the trial court's decision to grant summary judgment in favor of Gibson and Kassab, Archbold & O'Brien.

Bochetto and his firm subsequently filed a petition for allowance of appeal with this Court, arguing that the lower courts erred in, among other things, finding that Gibson's act of sending the malpractice complaint to Dudick was protected by the judicial privilege. We granted allocatur to address this issue and now hold that the lower courts did err in concluding that the act of sending the complaint was within the scope of the judicial privilege.¹¹

Pursuant to the judicial privilege, a person is entitled to absolute immunity for "communications which are issued in the regular course of judicial proceedings and which are pertinent and material to the redress or relief sought."¹² Post v. Mendel, 507 A.2d 351, 355 (Pa. 1986) (emphasis in original). This privilege is based on the "public policy which permits all suiters, however bold and wicked, however virtuous and timid, to secure access to the courts of justice to present whatever claims, true or false, real or fictitious, they seek to adjudicate." Id. As we explained in Post, "[t]o assure that such claims are justly resolved, it is essential that pertinent issues be aired in a manner that is unfettered by the

¹¹ Bochetto and his firm also argued in their petition for allowance of appeal that the lower courts erred in finding that Gibson's statements in the e-mail to Bochetto's legal malpractice insurance carrier and in the letter to Bochetto & Lentz were protected by the judicial privilege. See supra n.10. Although we granted allocatur to consider these issues in addition to the application of the judicial privilege to Gibson's act of sending the complaint to Dudick, Bochetto conceded during oral argument that the lower courts had properly determined that the judicial privilege protected these statements in the e-mail and the letter. Therefore, we see no need to consider these issues further. See In re: Gross, 382 A.2d 116, 119 (Pa. 1978) (court will generally only decide issues if an actual controversy regarding the issue exists).

¹² A person who is entitled to absolute immunity cannot be liable for his communication regardless of his intent. See Barto v. Felix, 378 A.2d 927, 929 n.2 (Pa. Super. 1977).

threat of libel or slander suits being filed." Id. Notably, this privilege is extended not only to parties so that they are not deterred from using the courts, but also to judges so that they may "administer the law without fear of consequences," "to witnesses to encourage their complete and unintimidated testimony in court, and to counsel to enable him to best represent his client's interests." Binder v. Triangle Publications, Inc., 275 A.2d 53, 56 (Pa. 1971).

In Post, this Court was asked to decide whether the judicial privilege protected an attorney from liability for statements he made in a letter detailing alleged acts of misconduct by his opposing attorney, which was not only sent to the opposing attorney, but was also sent as copies to the judge trying the case, the Disciplinary Board of this Court, and the attorney's client. Although we found that the letter had been issued during the course of the trial and referred to matters that occurred during the trial, we nevertheless concluded that it was not: (1) issued as a matter of regular course of the proceedings; or (2) pertinent and material to the proceedings.¹³ Accordingly, because the letter did not satisfy these two significant criteria for application of the judicial privilege, we held that it was not "within the sphere of [communications] which judicial immunity was designed to protect" and that the attorney was not absolutely immune from liability for his statements in the letter. Post, 507

¹³ In finding that the letter did not satisfy these two criteria, we explained as follows:

The letter did not state or argue any legal position, and it did not request any ruling or action by the court. Nor did the communication request that anything contained in it should even be considered by the court. The letter was clearly not a part of the judicial proceedings to which it made reference, and merely forwarding a copy of the letter to the court did not make it a part of those proceedings. Likewise, forwarding copies of the letter to plaintiff's alleged client . . . and to the Disciplinary Board . . . did not render the letter a part of the trial proceedings, and transmittal of those copies would not logically have been expected to affect the course of trial.

Post, 507 A.2d at 356.

A.2d at 356 (the judicial privilege "is not a license for extra-judicial defamation, and there is unnecessary potential for abuse if letters of the sort written in this case are published with impunity").

In applying the above principles from Post to the instant case, we initially note that Gibson's publication of the complaint to the trial court was clearly protected by the privilege as it was not only (1) issued as a regular part of the legal proceedings, but was also (2) pertinent and material to the proceedings. See Greenberg v. Aetna Ins. Co., 235 A.2d 576, 577-78 (Pa. 1967) (allegations in answer to complaint were protected by judicial privilege). However, the fact that the privilege protects this first publication does not necessarily mean that it also protects Gibson's later act of republishing the complaint to Dudick. See Pawlowski v. Smorto, 588 A.2d 36, 41 n.3 (Pa. Super. 1991) ("[E]ven an absolute privilege may be lost through overpublication In the case of the judicial privilege, overpublication may be found where a statement initially privileged because made in the regular course of judicial proceedings is later republished to another audience outside of the proceedings."); Barto v. Felix, 378 A.2d 927, 930 (Pa. Super. 1977) (although allegations in attorney's brief were protected by judicial privilege, attorney's remarks concerning contents of brief during press conference were not likewise protected by privilege).¹⁴ Indeed, this later act may only be protected by the judicial privilege if it meets

¹⁴ Notably, the trial court distinguished Barto from the instant case on the basis that "it [was] likely that the attorney in Barto read aloud and commented on his brief at the press conference in question." Bochetto, 2002 WL 434551, *4. However, the opinions in Barto appear to contradict this finding. For example, after stating its holding, the majority quoted a case for the proposition that "[t]he republishing of a libel, in circumstances where the initial publication is privileged, is generally unprotected." Barto, 378 A.2d at 930 (citation omitted; emphasis added). Moreover, the dissenting judges specifically recognized that the case involved only the attorney's restatement of what was contained in the brief. See id. at 936 (Spaeth, J., dissenting) ("The lower court has found in its opinion, and it is not disputed by [the police officers], that the statements '(were) no more than a reiteration of the contents of [the attorney's brief].").

the two elements that we held in Post are critical for the privilege to apply, *i.e.*, (1) it was issued during the regular course of the judicial proceedings; and (2) it was pertinent and material to those proceedings. As Gibson's act of sending the complaint to Dudick was an extrajudicial act that occurred outside of the regular course of the judicial proceedings and was not relevant in any way to those proceedings, it is plain that it was not protected by the judicial privilege.^{15 16} Compare Post, 507 A.2d at 221; Binder, 275 A.2d at 56 (holding that newspaper article describing trial was not protected by judicial privilege); Barto, 378 A.2d at 930. We therefore reverse the Superior Court's order insofar as it affirmed the trial court's order granting summary judgment in favor of Gibson on the basis that Gibson's act of transmitting the malpractice complaint to Dudick was protected by the judicial privilege.

¹⁵ While Gibson is not absolutely immune from liability for his act of sending the complaint to Dudick, he nevertheless may be entitled to qualified immunity. See Green v. Mizner, 692 A.2d 169, 175 (Pa. Super. 1997); Pelagatti v. Cohen, 536 A.2d 1337, 1343 (Pa. Super. 1988); Barto, 378 A.2d at 930; see also Restatement (Second) of Torts §§ 600, 611 (1977).

¹⁶ As noted above, in finding that Gibson's act was protected by the privilege, the trial court reasoned that a chilling effect would result if attorneys were not protected by the privilege for "forwarding copies of the pleadings they have filed to the press." Bochetto, 2002 WL 434551, *4. However, contrary to the apparent findings of the trial court, the privilege is not meant to promote the airing of pleadings to the media. Rather, the privilege is only meant to promote the airing of issues and facts during judicial proceedings. See Post, 507 A.2d at 355-56. Thus, although the failure to apply the judicial privilege to an attorney's communication with the media may inhibit the ability of the media to access the documents filed in a case, that problem is not one that the judicial privilege was designed to remedy. We also point out, however, that the media is not unduly hindered by our holding today as it may generally obtain copies of unsealed pleadings from the clerks of court where the pleadings have been filed. See Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978) (recognizing the "general right to inspect and copy public records and documents . . . including judicial records and documents"). Moreover, we feel compelled to note that the clerks of court cannot be held civilly liable for distributing such documents so long as they act in accordance with the law.

Madame Justice Newman did not participate in the consideration or decision of this case.

Mr. Justice Castille files a dissenting opinion in which Mr. Justice Baer joins.