

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

GEORGE BOCHETTO, and BOCHETTO & LENTZ, P.C.	:	APRIL TERM, 2000
	:	NO. 03732
Plaintiffs,	:	Control No. 040111
v.	:	
	:	
KEVIN WILLIAM GIBSON, and KASSAB, ARCHBOLD & O'BRIEN, LLC,	:	
	:	
Defendants.	:	

**ORDER**

**AND NOW**, this 27<sup>th</sup> day of July, 2006, upon consideration of defendants' Motion for Summary Judgment, plaintiffs' response and opposition, the briefs in support and opposition, all other matters of record, and in accord with the Opinion issued simultaneously, it is **ORDERED** that said Motion is **DENIED**.

**BY THE COURT,**

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**ALBERT W. SHEPPARD, JR., J.**

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KASSAB, ARCHBOLD & O'BRIEN,	:	
LLC,	:	
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Defendants.	:	

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**OPINION**

**Albert W. Sheppard, Jr., J. .... July 27, 2006**

Plaintiffs, George Bochetto, Esquire and the law firm of Bochetto & Lentz (collectively “Bochetto”), brought this defamation action against defendants, Kevin W. Gibson, Esquire and the law firm of Kassab, Archbold & O’Brien (collectively “Gibson”). Bochetto’s claims are based on certain communications Gibson made to a Legal Intelligencer reporter regarding a legal malpractice action (the “Malpractice Action”) that Gibson had filed against Bochetto on behalf of Gibson’s client (and Bochetto’s former client), Pickering Hunt (the “Hunt”). The Malpractice Action was based on a quiet title action brought against the Hunt by the owner of certain real property over which the Hunt claimed it had an easement (the “Quiet Title Action”). Bochetto had represented the Hunt in the Quiet Title Action. The Hunt did not prevail in that action. Bochetto prevailed against the Hunt in the Malpractice Action.

## **I. Procedural History Of This Action.**

In this action, Bochetto brought claims against Gibson based on four types of statements that Gibson allegedly published in connection with the Malpractice Action: 1) statements contained in a copy of the Complaint that Gibson transmitted to the reporter for the legal *Intelligencer* and which the reporter referenced in her article; 2) statements Gibson made to the reporter which were repeated in the article; 3) statements Gibson made in an e-mail to Bochetto's insurance carrier; and 4) statements Gibson made in a letter to Bochetto. This court granted Gibson's previous Motion for Summary Judgment with respect to all four categories of statements. In doing so, this court ruled that the statements in the Complaint that were cited in the article, the statements in the e-mail, and the statements in the letter were all absolutely privileged, and, therefore, they could not serve as the basis for Bochetto's claims. This court further held that the statements Gibson made to the reporter about the Malpractice Action were not privileged, but neither were they defamatory.

Bochetto appealed from this court's Order dismissing his claims. The Superior Court affirmed this court's dismissal. However, the Supreme Court reversed "the Superior Court's order insofar as it affirmed [this] court's order granting summary judgment in favor of Gibson on the basis that Gibson's act of transmitting the malpractice complaint to [the reporter] was protected by the judicial privilege." *See* Motion for Summary Judgment ("MSJ"), Ex. C, p. 8. Instead, the Supreme Court suggested that the transmittal of the Complaint might be conditionally privileged. *Id.* at p. 8, n. 15. The Supreme Court let stand the lower court's ruling with respect to the other statements complained of, so the claims based on those statements are no longer at issue in this action.<sup>1</sup>

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<sup>1</sup> "Bochetto conceded during oral argument that [this] court had properly determined that the judicial privilege protected [the] statements in the email and the letter." MSJ, Ex. C, p. 5, n. 11. This court's holding, that

## II. The Issues Presently Before the Court.

The allegations of the Malpractice Action Complaint that were repeated in the article in the Legal Intelligencer are the only allegedly defamatory statements that remain at issue in this action. Specifically, the article referenced the allegations of the Complaint as follows:

The club alleges that Bochetto told it that it had an easement, which could be sold for close to \$1 million. However, says the suit, Bochetto suppressed an expert's report, which said that the interest may not be an easement, but rather a reservation, which can be revoked by the owners.

\* \* \*

In its current complaint, the Hunt says that Pickering Hunt retained Bochetto to represent its interests in connection with a quiet title action. It says that Bochetto contacted West Chester realtor William Wood to provide a valuation of the Pickering Hunt rights in the property.

The complaint says that Bochetto advised the Pickering Hunt representatives that there was an easement over the land.

It also says that Bochetto requested that Wood value the interest as though it were an easement and not a reservation.

Wood's valuation, the complaint says, expressed concern that the interest may not be an easement, but a reservation. His report said that Pickering Hunt would have a 5 percent to 10 percent chance of prevailing in the underlying litigation.

According to the complaint, Bochetto suppressed Wood's report to Steven K. Sandberg, president of the Pickering Hunt non-profit.

\* \* \*

The complaint also alleges that Bochetto called Wood and asked him to re-draft the report, eliminating any reference to the chances of success in court, and considering only the designation of the property interest as an easement.

In response to that request, the complaint says, Wood prepared a second report valuing the interest as an easement to be somewhere between \$831,000 and \$1,245,000. Bochetto then shared this second report with the Board of Governors of Pickering Hunt, the complaint says.

Gibson has now moved for summary judgment on Bochetto's remaining claim for defamation, which claim is based on the above quoted statements.

In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised: (1) The defamatory character of the communication; (2) Its

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the statements Gibson made to the reporter were not defamatory, was affirmed by the Superior Court. *Id.*, Ex. B, p.3. That issue was not included in the Supreme Court's grant of allocatur, so it has been fully and finally litigated. *See id.*, Ex. C, p. 5, n. 11.

publication by the defendant; (3) Its application to the plaintiff; (4) The understanding by the recipient of its defamatory meaning; (5) The understanding by the recipient of it as intended to be applied to the plaintiff; (6) Special harm resulting to the plaintiff from its publication; (7) Abuse of a conditionally privileged occasion. The defendant has the burden of proving, when the issue is properly raised: (1) The truth of the defamatory communication; (2) The privileged character of the occasion on which it was published; (3) The character of the subject matter of defamatory comment as of public concern.

42 Pa. C. S. § 8343. In this case, not all of these issues are disputed. Instead, Gibson asserts that he is entitled to summary judgment because the allegations of the Complaint that the reporter used in her article are not capable of defamatory meaning. In addition, he claims that his act of faxing the Complaint to the reporter is protected by a conditional privilege, so Bochetto's remaining claim for defamation must be dismissed. Finally, he argues that Bochetto is a public figure, so that different standards of proof apply to Bochetto's claim for defamation than if he were a private person.

**A. The Allegations in the Malpractice Complaint That Were Referenced In The Article Are Capable of Defamatory Meaning.**

Gibson argues that all, or at least most, of the allegations in the Complaint that were repeated in the Legal Intelligencer are innocuous and not defamatory.

It is the function of the trial court to determine whether a challenged publication is capable of a defamatory meaning. When making such an assessment, the court must consider the effect of the entire article and the impression it would engender in the minds of the average reader among whom it is circulated. A publication is defamatory if it tends to blacken a person's reputation or . . . injure him in his business or profession.

Green v. Minzer, 692 A.2d 169, 172 (Pa. Super. 1997).

[A] communication which ascribes to another conduct, character or a condition that would adversely affect his fitness for the proper conduct of his business, trade, or profession, is defamatory per se. . . . Clearly, statements to the effect that an attorney has committed improper, illegal actions within the context of his practice would tend to impugn his integrity and thereby blacken his business reputation.

Pelagetti v. Cohen, 370 Pa. Super. 422, 439, 536 A.2d 1337, 1345 (1987). The claim in the Malpractice Complaint, that Bochetto suppressed an expert report indicating that his client had little chance of succeeding on its claims in the Quiet Title Action, can be read as an allegation that Bochetto committed an improper act in the context of his professional practice. It could impugn his integrity and blacken his business reputation among his peers who read the Legal Intelligencer. Therefore, the allegations of the Complaint, which were repeated in the article, to the effect that Bochetto hid information from his client, are capable of defamatory meaning.

**B. Gibson Enjoys A Qualified Privilege To Publish The Complaint, But He May Have Abused That Privilege.**

Even if Gibson did publish defamatory statements regarding Bochetto, Gibson may still be immune from prosecution for defamation if he was privileged to make those statements. There are two types of privileges or immunities – absolute and conditional. The Supreme Court has held that Gibson may not claim the absolute privilege of judicial immunity in this case, so the question for this court is whether Gibson enjoyed a conditional privilege to transmit the Malpractice Action Complaint to the reporter for the Legal Intelligencer. *See Pelagetti v. Cohen*, 370 Pa. Super. 422, 435, 536 A.2d 1337, 1343 (1987) (“The existence of a privilege and the extent of that privilege are questions of law for the court.”).

“In the interests of keeping the public informed, newspaper articles are entitled to make fair and accurate report of judicial proceedings, and involved parties, witnesses, and counsel are permitted to make remarks to the press relative to proceedings.” Pelagetti, 370 Pa. Super. at 437, 536 A.2d at 1344. Furthermore, an attorney enjoys a qualified immunity to publish information relative to a judicial proceeding. *See Barto v. Felix*, 250 Pa. Super. 262, 268, 378 A.2d 927, 930 (1977). *See also Green v. Minzer*, 692 A.2d 169, 175 (Pa. Super. 1997) (“statements made about the pleadings outside of the judicial proceedings are subject to a

qualified privilege.”) Therefore, Gibson may claim qualified immunity from prosecution for transmitting the Complaint to the reporter.<sup>2</sup> However, despite this conditional privilege, if Bochetto can prove that Gibson abused that privilege, then Bochetto may prevail on his defamation claim against Gibson. *See* 42 Pa. C. S. § 8343 (plaintiff must prove abuse of privilege).

If Gibson knew the allegations of the Complaint to be false or Gibson acted in reckless disregard of the truth of those allegations, then Gibson abused his conditional privilege to disclose such allegations, and he cannot claim immunity. *See Green*, 692 A.2d at 175; Restatement (Second) Torts § 600 (1977). Furthermore, if Gibson’s “defamatory communications to the press were made for an improper or malicious motive, the qualified privilege is lost.” *Pelagetti*, 370 Pa. Super. at 437, 536 A.2d at 1344. *See also Green v. Minzer*, 692 A.2d at 175; Restatement (Second) Torts § 603 (1977).

Bochetto has proffered evidence that Gibson knew, or should have known, at the time that he transmitted the Complaint to the reporter, that the allegation that Bochetto had hidden the expert report from his client was not true. Specifically, Bochetto points to the testimony of Wood, the expert whose report Bochetto allegedly suppressed, in which Wood claims that he informed the Hunt of the slim chances it had of prevailing in the Quiet Title Action.<sup>3</sup> *See* Response to MSJ, Ex. F, p. 26. More importantly, Wood also claims that he told Gibson that Wood’s assessment of the Hunt’s slim chances of prevailing was not hidden from the Hunt during the Quiet Title Action. *See id.*, pp. 44-6. Although the proffered testimony is less than

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<sup>2</sup> Gibson also claims the fair report privilege. In Pennsylvania, that privilege is given to members of the press, but it has not been extended to private persons. *See Binder v. Triangle Publications, Inc.*, 442 Pa. 319, 275 A.2d 53 (1971)

<sup>3</sup> Furthermore, a representative of the Hunt testified that she was made aware of the contents of Wood’s original expert report around the time that it was written. *See* Response to MSJ, Ex. L, p. 60.

clear on the subject, it is sufficient to create a genuine issue of material fact as to whether Gibson abused his qualified privilege by publishing a Complaint that he knew contained false allegations of malpractice against Bochetto.<sup>4</sup>

**C. Bochetto Is Not A Public Figure For Purposes of This Action.**

Gibson argues that Bochetto is a public figure and, therefore, that Bochetto has the burden of proving that Gibson acted with malice in publishing the Malpractice Action Complaint to the reporter. Whether Bochetto is an all purpose public figure, or a limited public figure, or a private person is a question of law for the court. *See Rutt v. Bethlehems' Globe Pub. Co.*, 335 Pa. Super. 163, 177, 484 A.2d 72, 78 (1984).

Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life.

*Id.*, 335 Pa. Super. at 179, 484 A.2d. at 80. In this case, it appears that Bochetto's principal claims to fame are as follows: he is an attorney active in the Philadelphia legal community; he ran for Mayor of Philadelphia; he served as Pennsylvania Boxing Commissioner for 6 years; he advertises on billboards in Philadelphia; and he was a member of the Pennsylvania Republican State Committee. Such limited involvement in public affairs does not make him an all purpose public figure or celebrity. *See id.* Instead, he may be a limited public figure in some instances.

An individual can become a public figure for a limited range of issues by voluntarily injecting himself or becoming drawn into a particular public controversy. . . . In determining whether a plaintiff in a defamation action has become a limited purpose public figure, a court should reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

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<sup>4</sup> Gibson argues that he relied upon the Hunt's verification of the allegations in the Complaint as establishing their truth. However, Gibson could not reasonably rely upon his client's verification of the Complaint, which Gibson drafted, if, as Bochetto claims, Gibson had independent knowledge that the verified allegations were not true.

*Id.*, 335 Pa. Super. at 180-1, 484 A.2d at 80-1. In this case, the particular controversy giving rise to the defamation claim was a private lawsuit brought against Bochetto by his former client. That Malpractice Action does “not involve a matter of public controversy with foreseeable and substantial ramifications for the members of the general public.” *Id.* Since the Malpractice Action against Bochetto does not rise to the level of a public controversy, it does not implicate Bochetto as a public figure, and he is a private person for purposes of this litigation.

### **CONCLUSION**

Based on these reasons, Gibson’s Motion for Summary Judgment on Bochetto’s remaining claim is denied.

**BY THE COURT,**

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**ALBERT W. SHEPPARD, JR., J.**