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

GEORGE BOCHETTO, ESQUIRE BOCHETTO & LENTZ Plaintiffs	: APRIL TERM, 2000 : No. 3722
v.	: Commerce Case Program
KEVIN W. GIBSON, etal., Defendants	: : Control Nos. 010135 and 121655

O R D E R

AND NOW, this 13th day of March 2002, upon consideration of: (1) the Motion for Summary Judgment of defendants, Kevin William Gibson, Esquire and Kassab, Archbold & O'Brien, L.L.C., and the response in opposition, and (2) the Motion for Summary Judgment of plaintiffs, George Bochetto and Bochetto & Lentz, P.C., and the response in opposition, the respective memoranda and all other matters of record, and in accord with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** that:

1. The defendants' Motion for Summary Judgment is **Granted**, and the plaintiffs' claims are **Dismissed**,
2. The plaintiffs' Motion for Summary Judgment is **Granted**, and defendant Gibson's counterclaim is **Dismissed**, and
3. The matter shall be marked ended.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. .... March 13, 2002

Plaintiffs, George Bochetto ("Bochetto") and Bochetto & Lentz, P.C. ("B&L") and defendants, Kevin William Gibson ("Gibson") and Kassab, Archbold & O'Brien, L.L.C. ("K0AO") have filed Cross-Motions for Summary Judgment ("Motions"). For the reasons set forth, **both** Motions are granted, and this action is dismissed.

BACKGROUND

This case stems from certain statements made by Gibson, a former employee of KAO, and Bochetto in connection with a legal malpractice action Gibson had brought against Bochetto in Chester County ("Chester County Action")[1] on behalf of Pickering Hunt. Bochetto had previously represented Pickering Hunt in a number of legal actions, including an action related to Pickering Hunt's interest in certain real property and a legal malpractice action against Pickering Hunt's former attorney, Daniel P. Mannix ("Mannix").

Shortly after suit was commenced in Chester County, The Legal Intelligencer prepared and printed a story ("Article")[2] about the events underlying the Chester County Action. The Article was based primarily on a copy of the complaint in the Chester County Action that Gibson had voluntarily faxed to the Article's author and also included several comments by Gibson and Bochetto pertinent to the Chester County Action. The Article included the following allegedly defamatory statements made by Gibson or drawn from the Complaint Gibson filed:

- "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."

[1] Pickering Hunt v. Bochetto, No. 99-08337 (C.P. Chester).

[2] Donna Dudick, Fox Hunting Club Takes Aim at Former Attorney; Defendant Calls Action "Garbage," The Legal Intelligencer, Oct. 20, 1999, at S3.

- “In its current complaint, the Hunt says that . . . Bochetto contacted West Chester realtor William Wood to provide a valuation of the Pickering Hunt rights in the property.”
- “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.”
- “ The instant complaint alleges negligence and breach of duty against Bochetto.”
- “The club’s lawyer, Kevin Gibson, said lawyers have a duty to provide their clients with the information to allow them to make an ‘informed decision.’”
- “Gibson said that in the last two years, he has handled about 20 malpractice claims and lost only one at the preliminary objection stage. The others were resolved through settlements or court action.”
- “Said Gibson, ‘Over the years, it’s been my experience that the lawyers that yell the loudest about being sued are usually the most guilty.’”

- “Gibson, who said the vast majority of cases are referred to him by lawyers, also pointed to the irony of Bochetto’s statement against him, given that Bochetto represented the club in its suit against Mannix. ‘Is the pot calling the kettle black here?’”

Conversely, the alleged defamatory statement which is the basis of the Gibson counterclaim is:

- “Bochetto . . . took issue with Gibson, who is well-known as a plaintiffs’ lawyer in legal malpractice actions. ‘Kevin Gibson has used the press repeatedly to humiliate area lawyers in baseless claims,’ Bochetto said.”

Around this time, Gibson communicated with the plaintiffs’ legal malpractice insurance carrier, Coregis and Westport Insurance Company (“Coregis”), and sent the following E-mail:

> Tony: an opportunity exists to mitigate the damage Pickering Hunt might incur as a result of the negligence I have alleged against George Bochetto. I believe it would be in the best interests of Bochetto and his insurer to have panel/assigned counsel contact me as soon as possible. There may be a way to negotiate a settlement of the underlying manner [sic] in such a way as to eliminate or compromise the claim for attorneys fees being leveled against Pickering Hunt. Please advise.

Compl. Ex. G.

Approximately one month later, Gibson wrote to the plaintiffs, Bochetto & B & L, renewing a request for the plaintiffs’ file on Pickering Hunt. This letter included the following paragraph:

> Your office is in dire violation of the Rules of Professional Conduct by not turning over the original file that belongs to Pickering Hunt. If forced to do so, I will file a Complaint with the Disciplinary Board, in that your office’s continued refusal to surrender the original file, which is the property of the client, is a continuing ethical violation.

Compl. Ex. H.

On the basis of these events, the plaintiffs have alleged claims for defamation, commercial disparagement and interference with contract, and Gibson has filed a counterclaim (“Counterclaim”) for

defamation against both plaintiffs.[3] In their Motion, the defendants assert that the statements attributed to Gibson are not defamatory and that privilege attaches to the statements. Likewise, in their Motion, the plaintiffs argue that the defamation claims in the Counterclaim must be dismissed.

DISCUSSION

Pennsylvania Rule of Civil Procedure 1035.2 allows a court to enter summary judgment "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action." A court must grant a motion for summary judgment when a non-moving party fails to "adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor." Ertel v. Patriot-News Co., 544 Pa. 93, 101-02, 674 A.2d 1038, 1042 (1996).

I. Neither Party's Defamation Claims are Sustainable

To sustain a claim for defamation,

> [A] plaintiff must prove: (1) the defamatory character of the communication; (2) publication by the defendant; (3) its application to the plaintiff; (4) understanding by the recipient of its defamatory meaning; (5) understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm to the plaintiff; and (7) abuse of a conditionally privileged occasion.

42 Pa. C.S. § 8343; Jones v. Snyder, 714 A.2d 453, 455 n.6 (Pa. Super. Ct. 1998). Although the parties' defamation claims suffer from different defects, each is without sufficient supporting evidence and is dismissed.

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[3] The Counterclaim includes three counts for defamation, all of which arise from Bochetto's statement that Gibson has brought "baseless claims" against local attorneys. The first count is brought against Bochetto individually, and the second and third counts are brought against B&L based on Bochetto's employment with and ownership of B&L.

A. The Plaintiffs Cannot Sustain Their Defamation Claims

The plaintiffs' defamation claims are based on four categories of statements or actions: (1) Gibson's alleged forwarding of the Chester County Action complaint to The Legal Intelligencer, (2) Gibson's statements to The Legal Intelligencer, (3) Gibson's statement in an E-mail to Coregis regarding the "negligence I have alleged against George Bochetto", and (4) the statement in Gibson's letter to the defendants that they are "in dire violation of the Rules of Professional Conduct" and that their "continued refusal to surrender the original file, which is the property of the client, is a continuing ethical violation." In confronting these claims, the defendants make two primary arguments: (1) they are entitled to an absolute judicial privilege in making the statements, and (2) the statements attributed to Gibson are not defamatory.

1. Most of the Allegedly Defamatory Comments Are Protected by Judicial Privilege

Pennsylvania courts have long upheld the principle of judicial privilege:

> The reasons for the absolute privilege are well recognized. A judge must be free to administer the law without fear of consequences. This independence would be impaired were he to be in daily apprehension of defamation suits. The privilege is also extended to parties to afford freedom of access to the courts, to witnesses to encourage their complete and unintimidated testimony in court, and to counsel to enable him to best represent his client's interests. Likewise, the privilege exists because the courts have other internal sanctions against defamatory statements, such as perjury or contempt proceedings.
>
> Thus, the privilege exists because there is a realm of communication essential to the exploration of legal claims that would be hindered were there not the protection afforded by the privilege. The essential realm of protected communication is not, however, without bounds. Rather, the protected realm has traditionally been regarded as composed only of those communications which are issued in the regular course of judicial proceedings and which are pertinent and material to the redress or relief sought.

Post v. Mendel, 510 Pa. 213, 221, 507 A.2d 351, 355 (1986) (quoting Binder v. Triangle Publications, Inc., 442 Pa. 319, 323-24, 275 A.2d 53, 56 (1971)). Any doubts as to whether a particular matter is

relevant, pertinent or material are to be "resolved in favor of relevancy and pertinency and materiality." Greenberg v. Aetna Ins. Co., 427 Pa. 511, 514-15, 235 A.2d 576, 577-78 (1967).

Plaintiffs argue that although judicial privilege may attach to the complaint in the Chester County Action when it was filed and available to the public,[4] it does not apply to Gibson's faxing a copy to individuals connected with The Legal Intelligencer. In presenting their argument, the plaintiffs rely on Post, quoted supra, and Barto v. Felix, 250 Pa. Super. 262, 378 A.2d 927 (1977). In Barto, counsel for a convicted murderer related the contents of his appellate brief, which contained defamatory remarks about police officers involved in the case, at a press conference. On appeal, our Superior Court found that the attorney was not entitled to judicial privilege because "judicial immunity does not extend to remarks made outside the judicial sphere." 250 Pa. Super. at 268, 378 A.2d at 930.

This court believes that Barto is substantially different from the instant case, at least with regard to Gibson's sending of the Chester Count Action Complaint to The Legal Intelligencer. Although the Opinion is silent on this point, it is likely that the attorney in Barto read aloud and commented on his brief at the press conference in question. In contrast, Gibson is accused of nothing more than sending a copy of a publicly filed document to a newspaper. Moreover, the Court cannot ignore the chilling effect that could result from effectively precluding attorneys from forwarding copies of the pleadings they have filed to the press. Accordingly, Gibson's actions in sending a copy of the Chester County Action complaint to The

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[4] Plaintiffs implicitly acknowledge that while the limits of judicial privilege are unclear under certain circumstances, it is beyond question that privilege applies to statements made in pleadings or in court. See Greenberg, 427 Pa. at 514, 235 A.2d at 577 ("When alleged libelous or defamatory matters, or statements, or allegations and averments in pleadings or in the trial or argument of a case are pertinent, relevant and material to any issue in a civil suit, there is no civil liability for making any of them.").

Legal Intelligencer fall within the scope of judicial privilege. See Robert D. Sack, Sack on Defamation (2001) § 8.2.1.3 n.26 ("Lawyers will often give copies of filed pleadings to news media representatives either as an accommodation or for public relations or legal strategy purposes. As a general rule, the communication is privileged."). Cf. Pelagatti v. Cohen, 370 Pa. Super. 422, 437, 536 A.2d 1337, 1344 (1987) ("[I]n the interests of keeping the public informed, newspaper articles are entitled to make fair and accurate report of judicial proceedings. . . .").

In contrast, Gibson's comments to The Legal Intelligencer are not protected by judicial privilege. Remarks about Gibson's practice, experience and legal views, as well as those about Bochetto individually, were not made in the regular course of judicial proceedings and are neither pertinent nor material to the redress or relief Gibson is seeking. Thus, the second set of statements in The Legal Intelligencer are not privileged.

It is much less clear whether judicial privilege applies to Gibson's remaining statements. In Post, the Pennsylvania Supreme Court addressed a letter sent by an attorney to opposing counsel that accused the attorney of lying, having violated the Canons of Ethics and of being a "piranha." The letter also stated that the author planned to notify the Disciplinary Board of the opposing attorney's conduct, and a copy of the letter was sent to both the judge hearing the matter and to the Disciplinary Board. After considering the policy underlying the existence of privilege, the Pennsylvania Supreme Court found that the letter was not protected by judicial privilege:

> We do not regard the alleged defamatory letter in the instant case as having been issued in the regular course of judicial proceedings as a communication pertinent and material to the redress sought. Although the letter made reference to matters which occurred in an ongoing trial, the letter was not directly relevant to the court proceedings. Accordingly, we do not believe issuance of the letter was within the sphere of activities which judicial

> immunity was designed to protect. The 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. Formal procedures are available to address the grievances which the writer of the letter perceived, without resort to extra-judicial defamation.
>
> The letter was not addressed to Judge Kelton, but rather a copy was merely sent to him. 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, William H. Simon, M.D., and to the Disciplinary Board of the Supreme Court of Pennsylvania 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. Thus, the policy of promoting an unfettered airing of issues at trial is not infringed by our holding that the letter published in this case was outside the ambit of judicial immunity.

510 Pa. at 221-22, 507 A.2d at 355-56. The Superior Court relied on this discussion from the Post decision in Preiser v. Rosenzweig, 418 Pa. Super. 341, 614 A.2d 303 (1992), aff'd, 538 Pa. 139, 646 A.2d 1166 (1994), when it rejected the argument that an attorney's communication to the non-compulsory Fee Dispute Committee of the Allegheny County Bar Association was privileged and specifically declined to "adopt a broad approach in which the application of judicial privilege is not limited to formal judicial proceedings." 418 Pa. Super. at 348, 614 A.2d at 306.

On the other hand, Pennsylvania courts have extended judicial privilege to numerous actions related to judicial proceedings and have not limited its application to statements made in the courtroom. See, e.g., Pawlowski v. Smorto, 403 Pa. Super. 71, 83, 588 A.2d 36, 42 (1991) (holding that absolute judicial privilege applies to private parties providing information to the proper authorities in connection with the suspected commission of a crime); Moses v. McWilliams, 379 Pa. Super. 150, 164-65, 549 A.2d 950,

957 (1988) (holding that witness's statements to attorney during pre-trial conference were subject to judicial privilege); Ganassi v. Buchanan Ingersoll, P.C., 373 Pa. Super. 9, 19-22, 540 A.2d 272, 278-79 (1988) (holding that affidavits filed in a bankruptcy action and letters in response to court's inquiries were subject to judicial privilege). Commentators have recognized this application of judicial privilege when the statement has some relation to a judicial proceeding:

> The privilege protects communications by an attorney with a potential adversary for the purpose of settling a disputed matter and avoiding litigation; hence, one of the requirements of the privilege is that the recipient of the communication be in some way interested in or connected with the contemplated proceeding, or at least reasonably perceived by the speaker to be so.

Sack § 8.2.1 (footnote omitted and emphasis added). See also Pawlowski, 403 Pa. Super. at 81, 588 A.2d at 41 (Judicial privilege "encompasses pleadings and even less formal communications such as preliminary conferences and correspondence between counsel in furtherance of the client's interest.").

The Court believes that the broader interpretation of judicial privilege holds here and that both Post and Preiser are distinguishable from this case. In each of those cases, the substance of the communication bore little to no relation to a judicial proceeding. In Preiser, the statement related to a voluntary proceeding before a panel that could not be construed as judicial in nature. Similarly, in Post, while the letter purported to be notice of the sender's intent to file a complaint with the disciplinary board, it was, in fact, not a complaint or other legal document, and was filled with invectives and characterizations that bore little or no relation to an action or proceeding based on professional misconduct. This is quite different from Gibson's communications to Bochetto and Coregis, which related to Bochetto's production of the Pickering Hunt file, apparently in connection with discovery in the Chester County Action, and to Gibson's attempts to negotiate a settlement in the Chester County Action. Because these statements were made in

the regular course of judicial proceedings and were pertinent and material to the advancement of Pickering Hunt's interests, they fall within the scope of judicial privilege and cannot serve as the basis for a defamation action.

2. Gibson's Remaining Comments Are Not Capable of Having a Defamatory Meaning

Gibson next argues that his statements to The Legal Intelligencer are incapable of being understood to have a defamatory meaning. The question of whether a statement is defamatory is initially a question of law. Kryeski v. Schott Glass Techs., 426 Pa. Super. 105, 116, 626 A.2d 595, 600 (1993). See also Maier v. Maretti, 448 Pa. Super. 276, 282, 671 A.2d 701, 704 (1995) ("If the court determines that the challenged publication is not capable of a defamatory meaning, there is no basis for the matter to proceed to trial; however, if there is an innocent interpretation and an alternate defamatory interpretation, the issue must proceed to the jury."). A communication is of a defamatory character

> [I]f it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. A communication is also defamatory if it ascribes to another conduct, character or a condition that would adversely affect his fitness for the proper conduct of his proper business, trade or profession. . . .
> . . . [W]hen determining whether a communication is defamatory, the court will consider what effect the statement would have on the minds of the average persons among whom the statement would circulate.

Rush v. Philadelphia Newspapers, Inc., 732 A.2d 648, 652 (Pa. Super. Ct. 1999) (citation omitted).

When examining an allegedly defamatory statement, a court may not look at the statement in a vacuum:

> [T]he court must view the statements in context, and determine whether the statement was maliciously written or published and tended to blacken a person's reputation or to expose him to public hatred, contempt, or ridicule, or to injure him in his business or profession.

> The test to be applied in evaluating any statement is the effect the article is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate. A critical factor in determining whether a communication is capable of defamatory meaning then is the nature of the audience hearing the remarks. Finally, opinion without more does not create a cause of action in libel. Instead, the allegedly libeled party must demonstrate that the communicated opinion may reasonably be understood to imply the existence of undisclosed defamatory facts justifying the opinion.

Baker v. Lafayette College, 516 Pa. 291, 296-97, 532 A.2d 399, 402 (1987) (citations and quotation marks omitted).

This Court believes that the remainder of Gibson's comments, when viewed in the context in which they were made, do not have the potential to be defamatory in nature. Two statements address an attorney's duty to provide clients with "information to allow them to make an 'informed decision,'" and Gibson's extensive experience and success in handling legal malpractice claims. Even when examined in the context of the entire Article, neither of these statements relates to either plaintiff in any way or has the potential to lower the reputation of the plaintiffs in the estimation of those reading the Article. Accordingly, neither of these statements may serve as the basis for a defamation action.

Similarly, the remaining statements cannot be understood to have a defamatory meaning because they are nothing more than opinion. It has been specifically held that statements of opinion can serve as the basis for a defamation claim only if they imply the existence of undisclosed defamatory facts:

> As indicated by the trial court, statements of opinion, without more, are not actionable. Communicated opinions are actionable, however, when they can be reasonably understood to imply the existence of undisclosed defamatory facts. Whether a particular statement is opinion or fact is a question of law for the trial court. However, in cases where a plausible innocent interpretation of the communication coexists with an alternative defamatory interpretation, the issue must proceed to a jury. To aid the court in its determination of whether something is strictly an opinion, Pennsylvania has adopted the

Restatement (Second) of Torts. Section 566 states:

> A defamatory communication may consist of a statement in the form of an opinion but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

Comment (c) of section 566 clarifies the distinction between a non-actionable "pure" opinion, and a potentially actionable "mixed" opinion. It states:

> A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently. The difference lies in the effect upon the recipient of the communication. In the first case, the communication itself indicates to him that there is no defamatory factual statement. In the second, it does not, and if the recipient draws the reasonable conclusion that the derogatory opinion expressed in the comment must have been based on undisclosed defamatory facts, the defendant is subject to liability.

Green v. Mizner, 692 A.2d 169, 174 (Pa. Super. Ct. 1997) (emphasis added and citations omitted). See also Baker v. Lafayette College, 350 Pa. Super. 68, 78, 504 A.2d 247, 252 (1986), aff'd, 516 Pa. 291, 532 A.2d 399 (1987) ("Statements of opinion without more are not actionable."); Kryeski, 426 Pa. Super. at 116, 626 A.2d at 600 (Statements that are "no more than rhetorical hyperbole or a vigorous epithet are not defamatory.").

According to the Article, Gibson stated that, "Over the years, it's been my experience that the lawyers that yell the loudest about being sued are usually the most guilty," and that Bochetto's criticism of him was an example of "the pot calling the kettle black." Both of these statements are nothing more than opinion. Moreover, neither one is based on undisclosed facts: the first statement is based on Gibson's alleged extensive experience with legal malpractice claims, as revealed elsewhere in the Article, while the

second is based on the plaintiffs' representation of Pickering Hunt in its legal malpractice action against Mannix. Accordingly, none of the allegedly defamatory statements is capable of having a defamatory meaning. Thus, plaintiffs' defamation claim must be dismissed.[5]

B. Gibson Cannot Sustain His Defamation Claims

The plaintiffs' Motion is based on Gibson's failure to produce evidence that he suffered damages as a result of Bochetto's statement regarding Gibson's supposed propensity for filing "baseless claims" against local attorneys. Gibson responds not by presenting evidence of damages, but rather by asserting that he need not show special damages. Even if this is true, Gibson's failure to demonstrate damages of any kind fatally undermines his defamation claims.

As stated supra, an essential element of a defamation claim is the existence of special harm to the plaintiff. These "special damages" have been defined as "monetary or out-of-pocket loss borne by the defamation," and have been contrasted with "general damages," which include "proof that one's reputation was actually affected by the slander, or that she suffered personal humiliation, or both." Walker v. Grand Central Sanitation, Inc., 430 Pa. Super. 236, 245-46, 634 A.2d 237, 241-42 (1993). See also Brinich v. Jencka, 757 A.2d 388, 397 (Pa. Super. Ct. 2000) (equating general damages and "actual harm," including impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering).

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[5] Gibson also contends that all of his statements are true and that "proof of the truth of the words by the defendant is a complete and absolute defense" in a defamation action. Hepps v. Philadelphia Newspapers, Inc., 506 Pa. 304, 313, 485 A.2d 374, 379 (1984), rev'd on other grounds, 475 U.S. 767 (1986) (citations omitted). However, because the statements cannot be interpreted as having a defamatory character, the court did not reach this issue.

When confronted with defamation per se, including words of business misconduct, a plaintiff need not establish special damages. Chicarella v. Passant, 343 Pa. Super. 330, 341 n.5, 494 A.2d 1109, 1115 n.5 (1985). However, this does not entirely excuse a plaintiff from establishing that he or she suffered damages as a result of the defamatory statement. In Walker, our Superior Court adopted the rationale in Restatement (Second) of Torts § 366, which requires a victim of slander per se to make some showing of general damages. The court stated that the only difference between defamation and defamation per se is that in defamation per se cases a plaintiff need not establish pecuniary or economic loss:

> Requiring the plaintiff to prove general damages in cases of slander per se accommodates the plaintiff's interest in recovering for damage to reputation without specifically identifying a pecuniary loss as well as the court's interest in maintaining some type of control over the amount a jury should be entitled to compensate an injured person. On one hand, a slander per se plaintiff is relieved of the burden to actually prove pecuniary loss as the result of the defamation; yet on the other hand, a jury will have some basis upon which to compensate her. Allowing the plaintiff to submit a claim for redress upon the presumption that she was damaged, especially in a case such as this, where the record is patently clear that no harm was suffered, requires the court to blindly follow a rule of law without regard to the reality of the situation presented. We cannot sanction, nor can we find that our Supreme Court has ever intended to sanction, such a rule.

430 Pa. Super. at 251, 634 A.2d at 244. See also Synygy, Inc. v. Scott-Levin, Inc., 51 F. Supp. 2d 570, 581 (E.D. Pa. 1999) (holding that a showing of defamation per se would relieve plaintiff of burden of proving special damages, but that plaintiff's claim would still fail because it did not show general damages).

Here, Gibson has failed to produce evidence that he suffered any damage, whether special, general or otherwise. In sum, his claims for defamation must fail and are dismissed.

C. Practical Considerations Militate Against A Finding That The Comments Were Defamatory.

This court submits that, as a practical matter viewed within the context of everyday litigation in Philadelphia County, the statements at issue would not be viewed as defamatory.

As noted,[6] the Rush court instructed that the court should consider what effect the statement would have on the minds of the average persons among whom the statement would circulate. Further, the Baker court teaches that a critical factor in determining whether a communication is capable of defamatory meaning then is the nature of the audience hearing the remarks. Here, the statements appeared in a publication intended, primarily, for the legal community. This audience is well aware of the penchant of many litigators to rely on hyperbole and an acerbic tongue rather than reasoned debate to make a point. Indeed, an unfortunate number of litigators come with a cause and not a case, and resort to conduct which constitutes an abandonment of those attributes of civilization that it has taken our ancestors five thousand years to develop.[7] Conduct which, sometimes, is euphemistically termed "going for the jugular."

In summary then, this court does not believe that the recipients of the statements would have attached a defamatory meaning to those statements. Rather, they would have smiled knowingly at the prospect of two litigators with heightened hormones "going at it".

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[6] Supra., page 12.

[7] Even our Supreme Court found it worthwhile to promulgate Rules of Civility.

II. The Plaintiffs Cannot Sustain Their Commercial Disparagement and Intentional Interference with Contractual Relations

Pennsylvania law defines commercial disparagement as follows:

> [T]he publication of a disparaging statement concerning the business of another is actionable where: (1) the statement is false; (2) the publisher either intends the publication to cause pecuniary loss or reasonably should recognize that publication will result in pecuniary loss; (3) pecuniary loss does in fact result; and (4) the publisher either knows that the statement is false or acts in reckless disregard of its truth or falsity.

Pro Gold Mfg., Inc. v. Tribune Review Newspaper Co., 761 A.2d 553, 555-56 (Pa. Super. Ct. 2000) (citing Restatement (Second) of Torts § 623(A) (1977) and distinguishing between commercial disparagement and defamation). A successful claim for intentional interference with contractual relations must satisfy four elements:

> (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct.

Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa. Super. Ct. 1997) (citation omitted). Pennsylvania law permits an intentional interference action based on both existing and prospective contractual relationships. Glenn v. Point Park College, 441 Pa. 474, 477-78, 272 A.2d 895, 897 (1971); Glazer v. Chandler, 414 Pa. 304, 308, 200 A.2d 416, 418 (1964).

The defendants first assert that judicial privilege protects them against the plaintiffs' commercial disparagement and intentional interference claims, as it did in the context of the plaintiffs' defamation claim. Indeed, "the absolute privilege accorded an attorney in representation of a client in judicial proceedings is not limited to protection against defamation actions" and applies equally to intentional interference and other

tort claims. Brown v. Delaware Valley Transplant Program, 372 Pa. Super. 629, 633-34, 539 A.2d 1372, 1374-75 (1988) (citations omitted). Thus, those statements protected by judicial privilege in a defamation context are similarly protected in an intentional interference and commercial disparagement setting.

Gibson's remaining statements are also an inappropriate basis for either an intentional interference or a commercial disparagement claim. As part of their commercial disparagement claim, the plaintiffs bear the burden of establishing that Gibson's comments to The Legal Intelligencer are false, but no evidence has been produced that would support such a conclusion. Moreover, given the fact that Gibson's comments were either opinion or incapable of having a defamatory nature, there is nothing to show that Gibson acted improperly, as would be required for an intentional interference claim. Cloverleaf Dev., Inc. v. Horizon Fin. F.A., 347 Pa. Super. 75, 83, 500 A.2d 163, 167 (quoting Yaindl v. Ingersoll-Rand Co. Standard Pump-Aldrich Div., 281 Pa. Super. 560, 581 n.11, 422 A.2d 611, 622 n.11 (1980)). Accordingly, the plaintiffs' intentional interference and commercial disparagement claims are dismissed.

CONCLUSION

For the reasons discussed, this court finds that each of the Parties' claims is unsupported by sufficient evidence. The Cross-Motions for Summary Judgment are being granted and all claims are being dismissed. This court will enter a contemporaneous Order in accord with this Opinion.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J