NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

DONALD D. HARRISON,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
v.	:	
ALLEN J. BOTNICK, STEPHEN BARRETT, CHIROBASE AND QUACKWATCH,	:	
Appellee	:	No. 1482 EDA 2008

Appeal from the Order entered April 24, 2008
In the Court of Common Pleas of Lehigh County
Civil at No(s): No. 2006-C-2564

BEFORE: FORD ELLIOTT, P.J., STEVENS, and KELLY, JJ.

MEMORANDUM: **FILED MARCH 5, 2009**

This is an appeal from the orders entered in the Court of Common Pleas of Lehigh County granting Appellee Stephen Barrett's motion for judgment on the pleadings and sustaining Appellees Chirobase's and Quackwatch's preliminary objections.[1] Appellant's sole contention is that the trial court erred in granting Mr. Barrett's motion for judgment on the pleadings on the basis the statements set forth in Appellant's complaint are incapable of having a defamatory meaning. We affirm.

[1] As will be discussed *infra*, Appellant named Allen J. Botnick as a defendant in this matter, and since Mr. Botnick failed to respond to Appellant's complaint, Appellant filed a *praecipe* for the entry of default judgment against Mr. Botnick. However, after this appeal was filed, Appellant filed a *praecipe* to have the judgment entered against Mr. Botnick marked satisfied and for discontinuance of the action as to Mr. Botnick. Therefore, as all claims have now been resolved against all parties, we conclude we have jurisdiction and we shall proceed with this appeal. ***See*** Pa.R.A.P. 341.

The relevant facts and procedural history are as follows: On January 26, 2007, Appellant filed a complaint alleging that, in 1980, Appellant discovered a technique of chiropractic care known as Chiropractic Biophysics/Chiropractic Biomechanics of Posture (CBP), and in November of 2003, Allen J. Botnick wrote an article entitled "A Close Look at Chiropractic Biophysics," which was published on Chirobase's website. Appellant contended that the article presented numerous false statements about the manner in which Appellant conducted chiropractic care and defamed Appellant's character in that the statements falsely portrayed Appellant's chiropractic methods as unsafe, ineffective, over-priced, and misrepresenting his capabilities.

Appellant further averred that, on March 26, 2004, Appellant demanded that Mr. Botnick retract the subject article but Mr. Botnick initially refused to do so. However, on August 28, 2005, Mr. Botnick retracted the above-described statements in an open letter, which Mr. Botnick sent to Stephen Barrett.[2] Mr. Botnick requested that Mr. Barrett remove Mr. Botnick's article from the Chirobase website. Thereafter, sometime between August 28, 2005 to October 17, 2005, Mr. Barrett removed the Botnick article from the website, made changes to the article, and then posted on the Chirobase website a variation of the article, which named "Stephen Barrett, M.D.," as the author. Appellant averred the article continued to

[2] Mr. Barrett is a retired psychiatrist. There is no dispute that Mr. Barrett owns and/or controls the Chirobase and Quackwatch websites.

contain defamatory statements, which were previously retracted by Mr. Botnick.

Moreover, Appellant averred that, from October of 2005 to May 2006, after his retraction, Mr. Botnick made numerous malicious statements about Appellant and the Chiropractic Biophysics method in discussion forums on the Quackwatch and Chirobase websites. Appellant contends that, as a direct result of Messrs. Botnick's and Barrett's actions, insurance companies have denied coverage for patients receiving chiropractic care from Appellant. Appellant sought compensatory and punitive damages.

On March 12, 2007, Mr. Barrett filed an answer with new matter, and on July 17, 2007, Mr. Barrett filed a motion for judgment on the pleadings, to which Appellant filed a response. By order and opinion entered on December 19, 2007, the trial court denied the motion for judgment on the pleadings as to Count I of Appellant's complaint, which related to Mr. Botnick, but granted the motion for judgment on the pleadings as to Counts II and III of Appellant's complaint, which related to Mr. Barrett. The trial court indicated that it was entering judgment in favor of Mr. Barrett and dismissing Appellant's complaint against him with prejudice. The trial court specifically indicated that the claims against Mr. Botnick remained.

On December 28, 2007, Chirobase and Quackwatch filed preliminary objections to Appellant's complaint indicating that they are internet service

providers and, pursuant to 47 U.S.C. § 230,[3] which pre-empts state law, they are immunized from Appellant's defamation claims. Chirobase and Quackwatch subsequently filed supplemental preliminary objections indicating that Appellant otherwise failed to state a cause of action for defamation. Appellant filed an answer and supplemental answer to the preliminary objections.[4]

On January 26, 2008, Appellant filed a notice of intent to enter a default judgment against Mr. Botnick, who failed to respond to Appellant's complaint, and on February 13, 2008, Appellant filed a *praecipe* seeking the entry of default judgment against Mr. Botnick and in favor of Appellant. No dollar amount was determined at this time. On April 24, 2008, the trial court sustained Chirobase's and Quackwatch's preliminary objections and dismissed Appellant's claims against them with prejudice. The trial court

[3] 47 U.S.C. § 230(c)(1) provides that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

[4] On January 15, 2008, Appellant filed a notice of appeal from the trial court's December 19, 2007 order, and the appeal was docketed in this Court at 676 EDA 2008. On January 22, 2008, Appellant filed in the trial court a motion requesting permission to appeal the trial court's December 19, 2007 order on the basis the order involved a "controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter." The trial court did not rule on Appellant's request for permission to appeal and did not certify that this case involves a controlling question of law or that an immediate appeal would materially advance the ultimate termination of the matter. Therefore, by order entered on April 14, 2008, this Court quashed the appeal since claims against three defendants were still pending, and we denied Appellant's motion for permission to appeal.

overruled Chirobase's and Quackwatch's supplemental preliminary objections as moot.

On May 21, 2008, Appellant filed a notice of appeal from the "orders entered in this matter on the 19th of December, 2007, and the 24th of April 2008," as well as a contemporaneous Pa.R.A.P. 1925(b) statement. On June 2, 2008, the trial court filed a Pa.R.A.P. 1925(a) opinion addressing the merits of the issues presented in Appellant's statement.

After Appellant filed his notice of appeal, on June 26, 2008, Mr. Botnick filed a petition to open and/or strike the default judgment entered against him. However, on July 16, 2008, Appellant filed a *praecipe* for the entry of satisfaction of the judgment against Mr. Botnick and specifically discontinued the action as to Mr. Botnick.

Appellant's sole issue on appeal is that the trial court erred in granting Mr. Barrett's motion for judgment on the pleadings on the basis the statements set forth in Appellant's complaint are incapable of having a defamatory meaning. Mr. Barrett counters the trial court properly granted his motion since all of the statements at issue are merely expressions of opinion, which are not actionable.[5]

[5] We note that, although Appellant has indicated in his notice of appeal that he is appealing the trial court's April 24, 2008 order, which sustained Chirobase's and Quackwatch's preliminary objections on the basis they were immune from liability under 47 U.S.C. § 230, Appellant has developed no argument on appeal regarding this order. Therefore, we conclude any issue with regard thereto is waived.

> Our standard of review over an Order granting a motion for judgment on the pleadings requires us to determine whether the trial court erred as a matter of law or disregarded issues of fact which should have been submitted to the jury. Our scope of review is plenary. In applying this standard and scope, we must accept all of the non-moving party's well-pled facts as true. Conversely, we may only consider facts that would undermine the non-moving party's position when the non-moving party has admitted such facts. In conducting our inquiry, we confine ourselves to the pleadings and any properly attached documents or exhibits. We will affirm the grant of a motion for judgment on the pleadings only when a case is 'free and clear from doubt such that a trial would prove fruitless.'

In re Estate of Slomski v. Thermoclad Co., 956 A.2d 438, 440 (Pa.Super. 2008) (quotation omitted).

> In an action 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 plaintiff; (6) special harm to the plaintiff; and (7) abuse of a conditionally privileged occasion.

Pellegrino Food Products Co, Inc. v. The Valley Voice, 875 A.2d 1161, 1164-65 (Pa.Super. 2005) (citations, quotations, and quotation marks omitted). ***See Reardon v. Allegheny College***, 926 A.2d 477 (Pa.Super. 2007).

With regard to the first prong:

> In an action for defamation, the plaintiff has the burden of proving…[t]he defamatory character of the communication. It is the function of the court to determine whether the challenged publication is capable of a defamatory meaning. 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.

> To determine whether a statement is capable of a defamatory meaning, we consider whether the statement tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third parties from associating or dealing with him. Libel is the malicious publication of printed or written matter which tends to blacken a person's reputation and expose him to public hatred, contempt or ridicule. The court must view the statements in context.
>
> > [W]ords which standing alone may reasonably be understood as defamatory may be so explained or qualified by their context as to make such an interpretation unreasonable. Thus, we must consider the full context of the article to determine 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.
>
> It is not enough that the victim of the [statements]…be embarrassed or annoyed, he must have suffered the kind of harm which has grievously fractured his standing in the community of respectable society.

Tucker v. Philadelphia Daily News, 577 Pa. 598, 614-15, 848 A.2d 113, 123-24 (2004) (quotations marks, quotations, and citations omitted).

Moreover, although offensive to the subject, certain types of communications are not actionable. Generally, a statement that is merely an expression of opinion is not defamatory. ***Green v. Mizner***, 692 A.2d 169 (Pa.Super. 1997).

> 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….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.

Restatement (Second) of Torts § 566.

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, 692 A.2d at 175 (citations omitted).

In the case *sub judice*, Appellant contends the article, which was authored by Mr. Barrett and appeared on his Chirobase website, contains five statements, which are capable of a defamatory meaning.

The first statement is "Harrison clearly subscribes to a version of chiropractic dogma that most human disease is caused by biomechanical problems of the spine." Appellant's Brief at 11. We conclude that this statement is nothing more than Mr. Barrett's opinion, and as such, cannot constitute libel as a matter of law. ***See Reardon***, ***supra***. Moreover, we

conclude the statement does not have a defamatory character in that it does not tend to blacken Appellant's reputation and expose him to public hatred, contempt or ridicule. ***See Tucker***, ***supra***.

The second statement is "CBP chiropractors commonly tell patients that any deviation from the Harrison Spinal Model ideal value will inevitably lead to degenerative disease process that will adversely affect their health by impairing joint position sense, causing osteoarthritis, herniating spinal dis[c]s, and/or putting tension on the spinal cord and nerve roots." Appellant's Brief at 11. We conclude this statement is an expression of Mr. Barrett's opinion, which is based on the disclosed writings of Appellant. ***See Green***, ***supra***. Specifically, in making this opinion, Mr. Barrett cited to three of Appellant's own articles.

The third statement is "CBP analysis can accurately and reliably describe a patient's posture. However, its practitioners use this information to make questionable diagnoses of shortened ligaments and proprioceptive problems that require prolonged and expensive treatments." Appellant's Brief at 11. We conclude the first sentence of this statement is not capable of a defamatory meaning in that it positively characterizes the CBP method. ***See Tucker***, ***supra*** (indicating libel tends to blacken a person's reputation and expose him to public hatred, contempt or ridicule). Regarding the second sentence of the statement, we conclude this statement is an expression of Mr. Barrett's opinion, which is based on the disclosed writings

of Appellant and two other medical professionals. Specifically, when read in context, after making the aforementioned statement, Mr. Barrett indicates "CBP analysis does not appear to adequately consider underlying causes of postural problems such as pregnancy, obesity, ligament instability, foot pronation[19], muscle shortening, and malformation of the vertebrae[20, 21]." In rendering these opinions, Mr. Barrett cites to medical articles written by A. Rothbart, CK Peterson, and Appellant. Therefore, we conclude the challenged statement is not capable of a defamatory meaning. ***See Green***, ***supra***.

The fourth statement is "None of the listed studies demonstrate that patients treated with CBP felt or functioned better as a result of anything unique to CBP treatment." Appellant's Brief at 11. We conclude this statement is an expression of Mr. Barrett's opinion, which is based on the disclosed medical writing of Appellant. That is, after reviewing medical studies, which Appellant wrote about, Mr. Barrett noted that CBP patients did not report feeling or functioning better because of anything unique to CBP treatment. As such, the statement cannot constitute defamation as a matter of law. ***See Reardon***, ***supra***.

The fifth statement is "Patients visiting CBP offices typically receive boilerplate examinations to determine whether their spinal curvature is 'ideal.' They are also advised to have x-ray examinations of their entire spine even if they have no symptoms justifying such tests. Patients may

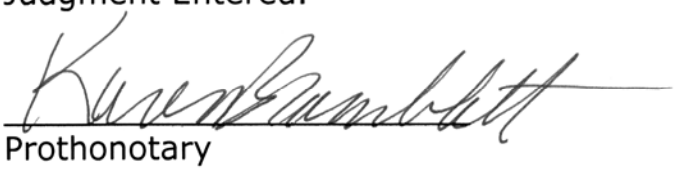
expend considerable time and money for treatment that has not been shown to be more effective than a few manipulations to the areas related to their symptoms. And some will wind up with unnecessary long-term care that includes excessive exposure to radiation." Appellant's Brief at 11-12. An examination of the subject article reveals that this group of statements appear in the conclusion portion of the article and constitute a summary of Mr. Barrett's opinion based on a review of Appellant's and other professionals medical-based articles. Since the statements are an expression of Mr. Barrett's opinion, which is based on the disclosed writings of Appellant and other medical professionals, we conclude they cannot constitute defamation as a matter of law. ***See Green***, ***supra***.

Finally, Appellant suggests Mr. Barrett defamed him by including CBP on the "Index of Questionable Treatments" on the Quackwatch website. We conclude that Mr. Barrett labeling CBP "questionable" is nothing more than Mr. Barrett's opinion, and therefore, cannot constitute libel as a matter of law. ***See Reardon***, ***supra***.

For all of the aforementioned reasons, we affirm.

Affirmed.

Judgment Entered.



Prothonotary

Date:_____