Dragonetti and Abuse of Process Claims Not Blocked by Application of Judicial Immunity

Avoiding Liability

By Jeffrey P. Lewis

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Judicial privilege, also known as judicial immunity, serves the goal of leaving "reasonably unobstructed the paths which lead to the ascertainment of truth and encourage witnesses with knowledge of facts relevant to judicial proceedings to give complete and unintimidated testimony." Based upon this concept, lawyers, judges, and even witnesses are rendered immune for what they say or do in the courtroom that would otherwise be actionable as defamatory. It has also been applied to attorneys for activities outside of the court. "Generally, an attorney is entitled to absolute immunity for action taken in the course of representing a client in judicial proceedings." The scope of that immunity has expanded over time to apply to torts other than libel and slander. But in the past, that immunity has not been judicially interpreted as all encompassing.

For example, in *Bochetto v. Gibson,* 580 Pa. 245, 860 A.2d 67 (2003), the Pennsylvania Supreme Court refused to apply judicial immunity to an attorney who forwarded to a reporter a copy of a complaint filed of record with the trial court. The original of that complaint and the copies sent to the other counsel of record in the case are subject to judicial immunity and, therefore, not actionable as defamatory. Notwithstanding, a copy of that complaint sent to the reporter by counsel involved in the case, although that reporter could have secured a copy directly from the prothonotary, would be actionable.

A three-judge panel of the Superior Court, in a precedential opinion, recently addressed the issue of whether judicial immunity is a defense for lawyers against claims for both the statutory claim of wrongful use of civil proceedings and the common-law claim for abuse and misuse of process. It held that judicial immunity is not a defense against either such claim.

In *Freundlich & Littman, LLC, et al, v. Feierstein, et al,* 2017 WL 712911, — A.3d — (Pa. Super. 2017), plaintiff law firm and one of its lawyers brought suit for the statutory tort of wrongful use of civil proceedings, 42 Pa.C.S. § 8351 *et seq*., known in the vernacular as the Dragonetti Act, and the common-law tort of abuse and misuse of process. Plaintiffs contended that a counterclaim asserted by defendants in a negligence action brought by plaintiffs against them "was completely meritless and procedurally improper" and was brought "not out of a genuine case strategy," but as retaliation for one of the "Appellants' brother's testifying as a key witness in an unrelated criminal trial against" one of the appellees. The trial court dismissed the counterclaim with prejudice in response to preliminary objections based upon the premise that the doctrine of judicial immunity is a defense to such claims as a matter of law.

The defendant's case in that action, who are plaintiffs in the present action, went to arbitration. They prevailed. Accordingly, plaintiffs in that action appealed, and then the case settled.

Based upon the premise that the allegedly improper counterclaim was not actionable under both Dragonetti and abuse and misuse of process theories, defendants in the current action filed preliminary objections. One of those objections was in the nature of a demurrer, asserting that plaintiffs' claims failed to state any cause of action because both the Dragonetti and abuse of process claims as against the plaintiff law firm and lawyer are precluded based upon application of the doctrine of judicial immunity. The trial court sustained the preliminary objections in the nature of a demurrer and dismissed both the Dragonetti and abuse and misuse of process claims, based exclusively upon judicial immunity. It explained that, "[g]enerally, an attorney is entitled to absolute immunity for actions taken in the course of representing a client in judicial proceedings." An appeal to the Superior Court followed.

Generally, an attorney is entitled to absolute immunity for action taken in the course of representing a client in judicial proceedings.

The Superior Court, in a unanimous opinion, reversed. Quoting case law, it noted that "[t]he privilege extends not only to communications made in open court, but also encompasses pleading and even less formal communications such as preliminary conferences and correspondence between counsel in furtherance of the client's interest." Quoting *Bochetto*, it also noted that "[t]he doctrine of judicial privilege provides 'absolute immunity for communication which are issued in the regular course of judicial proceedings and which are pertinent and material to the redress or relief sought.'" Quoting other case law, the court notes that it applies "even if the statements are made falsely or maliciously without reasonable and probable cause." Again quoting *Bochetto*, the court noted that "[judicial] privilege is based on the public policy, which permits all suiters(sic), 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."

Notwithstanding, the court held that the Dragonetti Act and abuse of process on the one hand are not mutually exclusive with the judicial immunity doctrine on the other hand. Noting the absence of any Pennsylvania state case law directly on this point of law, it held that the judicial privilege doctrine does not bar well-pled claims under the Dragonetti Act and abuse of process under common law. The court noted one abuse of process case in which a claim was asserted against an attorney and that the demurrer raised in preliminary objections was sustained — P*asson v. Spritzer*, 419 A.2d 1258, 1259 (Pa. 1980) — but observed that the judicial privilege doctrine was not addressed either by the trial court or on appeal.

The court noted that the case law "previously recognized that the policy underlying judicial privilege is to 'leave reasonably unobstructed the paths that lead to the ascertainment of truth to encourage witnesses with knowledge of facts relevant to judicial proceedings to give complete and unintimidated testimony.'" In the court's view, applying the doctrine to preclude Dragonetti and abuse of process claims would not serve this policy. After all, a Dragonetti claim requires a showing that defendant had "act[ed] in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based." And "[a] buse of process…encompasses 'the improper use of process after it has been issued, that is, a perversion of it" and

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Simplify, Simplify, Simplify — The Art of Legal Writing

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ent the case to someone who doesn't know the facts. Whatever the lawyer can do to make the brief clarify what the points are and make sure those points aren't buried will help the case and the judge.

Hemingway said that's why she stresses clarity above all. Lawyers read many opinions, some written 100 years ago, so the writing doesn't reflect the writing conventions of the profession today. Emulating the writing style of judges from years ago

Clarity, clarity, clarity.
The Elements of Style
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sounds stodgy and affected. Lawyers learn to distinguish between words and phrases that are simply jargon and words and phrases that have special legal meaning. Hemingway and other legal writing experts advocate using the active voice so the court doesn't have to wonder what action took place and who took it.

Experts also recommend avoiding using flowery language, writing more like Ernest Hemingway and less like Charles Dickens.

Hemingway has been teaching at Widener since 1998 and is alert for trends that may be influenced by culture. "I don't know that social media has made a difference in how students write. If anything, they are writing more because of blogs, etc.," Hemingway said. "Legal writing is not like writing an email or a tweet, and you have to follow the rules of punctuation and grammar."

Never underestimate a comma

According to an article in *The New York Times*, a comma is the most misused and misunderstood mark in legal drafting. Legal history is replete with cases in which a comma made all the difference, such as a $1 million dispute between Canadian companies in 2006 or a very costly insertion of a comma in an 1872 tariff law.

In a more recent case, the lack of an Oxford (or serial) comma in the Maine state law could cost a dairy millions in overtime pay. Three truck drivers filed a class action suit against Oakhurst Dairy, seeking more than four years' worth of overtime pay they claim they were denied. Maine employment law requires companies to pay workers 1.5 times their normal rate for each hour worked beyond 40. But there are exceptions. The law says the overtime rules do not apply to:

> The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of: agricultural produce; meat and fish products; and perishable foods.

The lack of a comma after "shipment" makes it unclear if the law exempts the distribution of perishable foods. The U.S. Court of Appeals for the First Circuit reversed a lower court decision and said that absence produced enough uncertainty to rule in favor of the drivers.

Maine's Legislative Drafting Manual specifically instructs lawmakers NOT to use the Oxford comma. Pennsylvania's Legislative Drafting Manual has this to say about it:

> "The use of the comma before the conjunction connecting the last two members of a series is preferable, but the comma may be omitted unless required for clarity."

Hemingway said she doesn't know if lawyers follow the legislative drafting manual or another style guide such as the Chicago Manual of Style or the Associated Press Stylebook. In her quest for plain and perfect English writing, she said the bottom line is if the last comma can serve to resolve ambiguity, use it.

Avoid fancy words.
The Elements of Style
Third Edition
William Strunk Jr. and E.B. White

The Plain English Committee has numerous projects to promote clear and concise legal writing. It presents several CLE courses, and members write newsletter articles, especially for the Young Lawyers Division's "At Issue." It also highlights and honors people with the Clarity Award, created to recognize "those who have done the most to foster plain English in the legal field."

The 2016 recipient was Dauphin County Court of Common Pleas Judge Jeannine Turgeon. As a member of the Pennsylvania Supreme Court's Suggested Standard Civil Jury Instructions Committee, she encouraged the Supreme Court to permit jurors to take notes and receive written copies of jury instructions prior to deliberation. She convinced the committee to rewrite two volumes of jury instructions in plain English and influenced plain English revisions to numerous chapters in the instructions.

For more information about the Plain English Committee, go to www.pabar.org.

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"requires '[s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process…" In the court's view, immunizing such conduct does not serve the purpose of judicial immunity.

The court noted that the trial court never addressed the issue of whether the complaint stated a well-pled Dragonetti or abuse of process claim. Instead, it simply applied judicial immunity as the sole basis for sustaining the demurrer. Accordingly, the Superior Court remanded the case to the trial court so that it could determine whether such claims were well pled. What further complicates the jurisprudence in this area of the law is a case currently pending in the Supreme Court of Pennsylvania — *Villari v. Seibert.* Docket No. 66 MAP 1016 — in which a common pleas judge held that application of the Dragonetti statute is unconstitutional as applied against attorneys as an impermissible intrusion by the state legislature upon the Supreme Court's exclusive right to govern the practice of law under Article 5 of the state constitution. Oral argument in that case occurred in December 2016 and it remains pending as of the deadline of this edition.

The PBA Quality of Life/Balance Committee announced the establishment of the C. Dale McClain Quality of Life/Balance Award at the PBA Committee/Section Day on March 23. From left are Kathleen Misturak-Gingrich, co-vice chair; Francis X. O'Connor, committee member and former PBA president; C. Dale McClain, committee founder and former PBA president; Kathleen D. Wilkinson, co-vice chair; and Christopher G. Gvozdich, chair. The committee will accept nominations this summer.

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