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Statements in Demand Letters Could Result in Defamation Liability in Pennsylvania if the Sender Does Not Intend To Sue

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The judicial privilege provides "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."[1] The privilege is well-established in Pennsylvania law and covers not only statements made in the litigation itself, but also "preliminary conferences and correspondence between counsel in furtherance of the client's interest" – for example, demand letters.[2] The purpose of the privilege is to ensure that all individuals have full access to the courts to seek legal redress, as without it, the mere filing of a complaint would often be answered by an immediate countersuit for defamation.

But does the judicial privilege protect a demand letter sent by an attorney that expressly references legal "claims" and demands a "settlement" if that attorney and his client do not actually intend to file a lawsuit? In a recent decision, the United States District Court for the Eastern District of Pennsylvania held that it does not.

BACKGROUND OF THE CASE

In *Ralston v. Garabedian*, 2021 U.S. Dist. LEXIS 244741 (E.D. Pa. 2021), an attorney issued two demand letters to a school alleging that his client, a former student, had been sexually abused by one of its teachers 25 years earlier. The attorney stated that the demand letters were "an attempt to settle and compromise claims involving" his client, and that his client's "demand for settlement" was $1 million. Based on those letters, the teacher identified as the alleged abuser sued the attorney and his client for defamation.

The attorney moved for summary judgment, arguing, among other things, that judicial privilege protected his demand letters. However, by the time the attorney had sent his letters in 2018, the statute of limitations had expired on his client's civil claims in connection with the purported sexual abuse. The accused teacher therefore argued that the judicial privilege was inapplicable.

THE COURT'S ANALYSIS

The District Court first examined the judicial privilege in some detail. It noted that the privilege is broad and generally protects not only statements made in legal filings or in open court, but also statements made outside of, or even before, the litigation as long as they are "pertinent and material" to seeking legal relief. But the Court also noted that the policy underlying the privilege is rooted in allowing persons involved in a "judicial proceeding . . . to speak frankly and argue freely without danger or concern that they may be required to defend their statements in a later defamation action."[3] Thus, in situations where a "declarant has no intention of initiating proceedings or otherwise obtaining a remedy," that policy is not served and the privilege will not apply.[4]

The Court then found that the attorney and his client failed to establish the privilege at the summary judgment stage of the case. The Court provided three reasons for its conclusion:

[1] *Bochetto v. Gibson*, 860 A.2d 67, 71 (Pa. 2004) (cleaned up).
[2] *Schanne v. Addis*, 121 A.3d 942, 947 (Pa. 2015) (cleaned up).
[3] *Smith v. Griffiths*, 476 A.2d 22, 24 (Pa. Super. Ct. 1984).
[4] *Schanne*, 121 A.3d at 949.

- First, the attorney's contingency agreement with his client expressly stated that he would not file a lawsuit because the statute of limitations had run. The attorney and his client also both stated on the record that they knew the statute of limitations had expired and that they could not bring a lawsuit against the school or the teacher.
- Second, although the attorney stated that he hoped that the state legislature would amend the statute of limitations in the future, the Court explained that "mere possibility" of a proceeding was insufficient absent some showing that the attorney was "seriously contemplating a judicial proceeding when he sent the 2018 letters."
- Finally, the Court held that the fact that the attorney intended to seek mediation or otherwise settle his client's claims was insufficient as the privilege does not extend to private grievance procedures.

That said, while the Court denied summary judgment based upon the existing record, it did leave open the possibility that the attorney might be able to prove at trial that he had a good faith belief that the limitations period was going to be amended when he sent the letters. The Court therefore stated that it might "revisit" the privilege issue after the close of evidence at a subsequent trial in the matter.

KEY TAKEAWAYS

The *Ralston* decision relied in large part on a prior Pennsylvania Supreme Court case, *Schanne v. Addis*, 121 A.3d 942 (Pa. 2015), that similarly held that the judicial privilege does not protect statements made without an actual intent to file suit. However, *Schanne* only involved statements made by the plaintiff herself, not her attorney. The *Ralston* case therefore goes further than *Schanne*, showing that even the retention of an attorney and issuance of a formal demand letter referencing legal "claims" and a "settlement" may not be enough to invoke the privilege's protection if one does not actually intend to file suit. While the *Ralston* case admittedly had some unique facts (for example, the attorney agreed *in writing* that he would not file suit), potential plaintiffs should still think twice before sending demand letters to third parties that include potentially defamatory statements if they do not seriously intend to initiate litigation. ◆

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