M E M O R A N D U M

TO: Jon D. Gould, Esquire

FROM: National Legal Research Group, Inc.
Amy G. Gore, Senior Attorney

RE: Connecticut/Torts/Libel And Slander/Privilege—Medical Report In Workers' Compensation Claim

FILE: 50-25605-115 August 11, 1998

YOUR
FILE: Scott Jones v. State of Connecticut

STATEMENT OF FACTS

Counsel represents Scott Jones, who sustained a work-related injury as a result of a power surge through electrical equipment on which he was working. Mr. Jones has suffered verifiable short-term memory loss and filed a claim for workers' compensation benefits. After the close of the evidence in the compensation claim, the state requested a new medical evaluation. The evaluation was performed by Dr. Edward Smith. Dr. Smith mischaracterized and misquoted other medical evidence concerning Mr. Jones's medical condition and treatment. For instance, Dr. Smith stated in his report that Mr. Jones underwent neuropsychological testing by Dr. Richard Brown and that

> Dr. Brown found no consistent or expected pattern for brain injury secondary to electrocution.

In fact, Dr. Brown stated that there are no general expected patterns for determining brain injury secondary to electrocution.

In his conclusions, Dr. Smith stated that he was "not convinced that he has any true memory loss" and that "I strongly suspect this is part of the total picture of fraudulent presentation."

Counsel has requested research to determine if a defamation claim may be asserted against Dr. Smith based on the statements contained in his medical evaluation of Mr. Jones.

ISSUES PRESENTED

1. Are the statements actionable statements of fact or nonactionable statements of opinion?

Conclusion

Dr. Smith disclosed some of the facts upon which his opinion was based. However, to the extent that the disclosed facts are incorrect or incomplete, and to the extent that Dr. Smith's assessment of the disclosed facts are erroneous, Dr. Smith's opinion may be characterized as implying a false assertion of fact and, therefore, actionable.

2. Are the statements privileged?

Conclusion

Yes. The statements were made at the request of one of the parties to the compensation claim and will be considered as statements arising out of a quasi-judicial proceeding. Under Connecticut law, the statements are absolutely privileged and free from civil liability. The fact that the statements were not made in good faith or that Dr. Smith may have had a personal as well as a professional bias will not entitle Mr. Jones to seek recourse in a civil action.

DISCUSSION OF AUTHORITY

I. Are The Statements Actionable Statements Of Fact Or Nonactionable Statements Of Opinion?

In order to be actionable, the statements uttered by Dr. Smith must be false statements of fact rather than mere opinions. *Dow v. New Haven Indep., Inc.*, 41 Conn. Supp. 31, 549 A.2d 683 (Super. Ct. 1987). Statements of opinion are granted constitutional protection from liability. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the United States Supreme Court concluded that to be actionable the statement "must be provable as false before there can be liability under state defamation laws." *Id.* at 18. Thus, to be actionable, the statements must be verifiable as false. *Lizotte v. Welker*, 45 Conn. Supp. 217, 709 A.2d 50 (Super. Ct. 1996); *Perruccio v. Arseneault*, 7 Conn. App. 389, 508 A.2d 831 (1986).

Phrasing the utterance in the form of an opinion will not shield the speaker from liability if the facts upon which the opinion is based are revealed. The *Milkovich* Court noted that "[e]ven if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." 497 U.S. at 18-19; *see also Murray v. Schlosser*, 41 Conn. Supp. 362, 574 A.2d 1339 (Super. Ct. 1990) (where utterances were found to be statements of conclusions, court found utterances to be actionable).

In the present claim, Dr. Smith was unquestionably offering his medical opinion concerning the claimant's physical condition. However, as the Connecticut court in *Lizotte* recognized, statements of mixed opinion are not entitled to constitutional protection from

civil liability. Dr. Smith revealed some of the facts on which his opinion was based. However, to the extent that Dr. Smith's assessment of those facts, including examinations by other health-care providers and reports pertaining thereto, are incorrect, the statements may still imply a false assertion of fact. For instance, if a reader were only to consider Dr. Smith's written report, he would clearly have an unfavorable opinion of Mr. Jones's claim. However, if a reader were also to examine the actual reports of Dr. Brown and Dr. Loude, the reader may form a different belief as to Mr. Jones's veracity.

To state an actionable claim of defamation, the plaintiff, as a private individual rather than as a public figure, need only show a "negligent misstatement of fact." *Miles v. Perry*, 11 Conn. App. 584, 529 A.2d 199, 203 (1987); *Lizotte v. Welker*. Therefore, the plaintiff is not required to show malice on the part of the defendant in order to state a cause of action. However, to avoid any anticipated motion to dismiss, counsel should anticipate specifying in the complaint the various ways in which Dr. Smith mischaracterized the reports of other health-care providers.

II. Are The Statements Privileged?

Assuming that the statements may be characterized as actionable statements of fact, the next issue to be considered is whether the statements are subject to a privilege based on the context in which they were uttered. Under Connecticut law, a privilege is an affirmative defense that must be specifically plead by the defendant. *Monczport v. Csongradi*, 102 Conn. 448, 129 A. 41 (1925); *Miles v. Perry*. The applicability of any privilege raises a question of law to be decided by the court. *Charles Parker Co. v. Silver City Crystal Co.*,

142 Conn. 605, 116 A.2d 440 (1955). However, whether a given privilege has been abused generally raises factual questions to be resolved by the trier of fact. *Flanagan v. McLane*, 87 Conn. 220, 88 A. 96 (1913).

The most applicable privilege that may be asserted by the defendant in the present claim is that of a judicial privilege applicable to statements made by a witness in a judicial or quasi-judicial proceeding. Connecticut recognizes an absolute privilege from liability for statements made in a judicial proceeding. *Petyan v. Ellis*, 200 Conn. 243, 510 A.2d 1337 (1986); *Blakeslee & Sons v. Carroll*, 64 Conn. 223, 29 A. 473 (1894).

The privilege clearly extends to statements made in a court of law and has also been extended to other types of proceedings involving a hearing before a tribunal performing a judicial function. Thus, it is generally recognized that the judicial privilege attaches to administrative proceedings that are quasi-judicial in nature. *Mock v. Chicago, Rock Island & Pacific Railroad*, 454 F.2d 131 (8th Cir. 1972). Connecticut has recognized the application of the judicial privilege to a proceeding establishing a right to unemployment compensation. *Magnan v. Anaconda Industries, Inc.*, 37 Conn. Supp. 42, 429 A.2d 492 (Super. Ct. 1980), *rev'd on other grounds*, 193 Conn. 558, 479 A.2d 781 (1984); *Kelley v. Bonney*, 221 Conn. 549, 606 A.2d 693 (1992) (absolute privilege attached to statements contained in petition and complaints by students and parents concerning teacher that were forwarded to school board); *Fink v. Magner*, 988 F. Supp. 74 (D. Conn. 1997) (recognizing absolute privilege attaching to statements in furtherance of quasi-judicial proceedings); *see also* Annotation, *Libel and Slander: Privilege Applicable to Judicial Proceedings as Extending to Administrative Proceedings*, 45 A.L.R.2d 1296 (1956 & Later Case Service).

In *Petyan*, the court enumerated several factors that would determine whether a particular proceeding was quasi-judicial in character so as to warrant the application of an absolute privilege. The court focused on whether the administrative body had the power to determine questions of fact and whether the body was charged with the obligation of applying the appropriate law to the facts. *Petyan*, 510 A.2d at 1339. The *Petyan* court also took note of the fact that in the case before it the administrative body had subpoena power and that pleadings filed by the claimants were certified as true. *See also* Restatement (Second) of Torts § 585 cmts. c, f (1977).

Given the general recognition of the privilege to quasi-judicial administrative proceedings, there appears no reasonable basis to assert that it would not be applicable to a workers' compensation hearing. *See Seidel v. Hill*, 264 So. 2d 81 (Fla. Dist. Ct. App. 1972) (judicial privilege applicable to workers' compensation proceeding); *Tallman v. Hanssen*, 427 N.W.2d 868 (Iowa 1988) (privilege applicable to workers' compensation proceeding).

Once it is determined that the proceeding is quasi-judicial in nature, the absolute privilege will "'extend to every step of the proceeding until final disposition.'" *Kelley v. Bonney*, 221 Conn. 549, 606 A.2d 693 (1992) (quoting *Petyan v. Ellis*, 510 A.2d at 1339). Therefore, the mere fact that the statements currently under consideration were not made during an evidentiary hearing may not be sufficient to avoid the absolute privilege. In *Petyan*, the absolute privilege was extended to statements made by an employer on a "fact-finding supplement" form for the employment security division. The statements were made at the request of the employment security division, in lieu of live testimony, in an effort to

determine the reasons for the termination of the claimant's employment and were therefore requested for the official use of the division.

Although no Connecticut authority was located that addressed the application of an absolute privilege to facts analogous to those of the present dispute, a strong argument can be formulated by the physician that his statements in the letter to the Attorney General are entitled to an absolute privilege. The purpose for Dr. Smith's examination and his letter was to facilitate the factfinding process of the compensation claim. Dr. Smith's opinion was requested apparently by the Attorney General's office. The fact that the statements were not made or that the opinion letter was not introduced during an actual hearing would not preclude an absolute privilege from attaching to the statements.

Assuming *arguendo* that an absolute privilege would attach to Dr. Smith's statements, the fact that the statements were false or malicious will not waive the privilege. *Petyan*, 510 A.2d at 1338. The only good-faith limitation recognized in the area of judicial privilege involves statements made preliminarily to a judicial proceeding, where the judicial proceeding is being contemplated in good faith. Restatement (Second) of Torts § 588 cmt. e; *Sacco v. High Country Indep. Press, Inc.*, 271 Mont. 209, 896 P.2d 411 (1995).

Some jurisdictions have expressed an unwillingness to apply a judicial privilege to certain statements. Specifically, if the individual was not an actual or potential witness, then that individual's unsolicited statements may not be entitled to a privilege. *Allen v. Ortez*, 802 P.2d 1307 (Utah 1990) (where social worker was not an identified witness and her opinion had not been solicited by either side, statements contained in a letter accusing one parent of child abuse were not entitled to a common-law absolute privilege). Since Dr. Smith's opinion

was requested by one side of the workers' compensation dispute, it is likely that the statements would be entitled to an absolute immunity from civil liability.

SPADE SHEET

OUR FILE: 50-25605-115

GOVERNING JURISDICTION

1. Digests

Conn. Digest, "Libel and Slander" 1-6, 19, 30, 38-40, 42(2), 44, 45, 50 to 710 A.2d 1296 (7-17-98)

NATIONAL

1. A.L.R.

Annotation, *Libel and Slander: Privilege Applicable to Judicial Proceedings as Extending to Administrative Proceedings*, 45 A.L.R.2d 1296

2. Treatises

Rodney A. Smolla, *Law of Defamation* § 8.03

3. Restatements

Restatement (Second) of Torts §§ 585, 588 and annotations

ALL CASES SHEPARDIZED