IN THE COURT OF COMMON PLEAS OF
LYCOMING COUNTY, PA

BARBARA L. REESE,	:	
Plaintiff	:	NO: 10-02343
	:	
vs.	:	
	:	
MICHAEL P. NESTARICK, an individual	:	
and NESTARICK APPRAISAL &	:	CIVIL ACTION
CONSULTING, INC., a Pennsylvania	:	
Corporation,	:	
Defendants	:	

O P I N I O N

On October 22, 2010 the Plaintiff filed a Complaint against the Defendants seeking damages for defamation, injurious falsehood, negligent interference with business relations, intentional interference with business relations and wrongful use of civil proceedings. According to the Complaint, the Plaintiff received a letter and Order to Show Cause on or about August 4, 2008, from Jacquelyn E. Pfusich, a prosecuting attorney for the Commonwealth of Pennsylvania, Department of State. The Order to Show Cause related to an appraisal report completed by the Plaintiff in 2005, on property situated at 47 South Main Street, Muncy, Pennsylvania. The Defendant, Michael Nestarick, is also a Real Estate Appraiser. Mr. Nestarick was consulted as an expert by Jacquelyn Pfusich to evaluate the Plaintiff's professional appraisal of the Main Street Property and prepare a report of his findings. The report was prepared and submitted to the Department of State to be used in administrative license proceedings against the Plaintiff.

The Plaintiff's claims in the case at bar, relate to Mr. Nestarick's preparation of his report. The Plaintiff claims that in preparing the report the Defendant failed to disclose that he was the Plaintiff's supervisor during her initial training as an appraisal trainee, and that he filed a civil action against her when she opened her own appraisal business. The Plaintiff alleges that an independent review of the Defendants' report revealed instances in which the Defendant violated Uniform Standards of Professional Appraisal Practice in preparing his report and instances in which he falsely accused the Plaintiff of violating the Uniform Standards of Professional Appraisal Practice.

On November 23, 2010 the Defendant filed Preliminary Objections and an Amended Complaint was filed on December 10, 2010 which merged the negligence and intentional interference with business relationship counts into a single count for interference with business relations. On January 4, 2011, the Defendants filed Preliminary Objections to Plaintiff's Amended Complaint. The crux of the Defendants' Preliminary Objections relate to the issue of whether the Defendant is entitled to absolute immunity because the review appraisal was issued in the regular course of judicial proceedings. The parties agree that Restatement of Torts 2d, Section 588 applies.

Restatement of Torts 2d, § 588 provides as follows:

> A witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as part of a judicial proceeding in which he is testifying, if it has some relation to the proceeding.

The complaint reveals that the report was prepared in the regular course of judicial proceedings, and the Defendant asserts that it is a privileged communication entitled to absolute immunity.

The Plaintiff asserts that an absolute privilege should not apply because the Defendant's motives in offering his report were improper and, as such, the communications were not related to the judicial proceedings. Whether a privilege exists or applies in a given context is a question of law for the court. Agriss v. Roadway Express, Inc., 483 A.2d 456, 463 (Pa.Super. 1984).

The Plaintiff relies upon Baird v. Dunn & Bradstreet, Inc., 285 A.2d 166 (Pa. 1971), Rankin v. Phillippe, 211 A.2d 56 (Pa.Super. 1965) and LLMD of Michigan, Inc. v. Jackson-Cross, 740 A.2d 186 (Pa. 1999).

In Baird v. Dunn & Bradstreet, *supra*, the plaintiffs filed an action against Dun & Bradstreet when Dun & Bradstreet sent its subscribers a credit report which indicated that one of the plaintiffs, George Baird, was indicted for adultery and other plaintiffs were charged with embezzlement. The issue before the court was whether a conditional privilege applied. In analyzing this issue, the Court held, "once it is shown, as D & B has in the instant case, that a credit reporting agency is in the business of reporting financial information to subscribers who request such service, the reports are prima facie privileged and the plaintiff has the burden of proving abuse of that privilege." Id. at 170. As Baird dealt with the application of a conditional privilege to a report issued by a credit report agency, and not an absolute privilege which is extended to judicial matters, the facts of Baird are not relevant to the facts presented in the case at bar.

Similarly in Rankin, *supra*, the report at issue was issued by an elder board appointed by a church and governing church body to investigate certain controversies within the church. Accordingly, the question of privilege was not analyzed in the context of absolute immunity as it applies to judicial proceedings, but in the context of whether a conditional privilege applied under the specific circumstances presented.

In LLMD of Michigan, Inc. v. Jackson-Cross, *supra*, LLMD of Michigan, Inc., a general partner trading as Wintoll Associated Limited Partnership (hereinafter "Wintoll") commenced an action in federal court against Marine Midland Realty Corporation and USLife Life Insurance Company, alleging breach of contract arising out of the defendants' failure to provide financing for the purchase and rehabilitation of an industrial facility in Springfield, Michigan. After the lawsuit was filed, Robert Swift, Wintoll's attorney, contacted Charles Seymour, chairman of Jackson-Cross, to engage Seymour's services as Wintoll's expert on the issue of lost profits suffered as a result of the defendant's breach of their financing commitment for the industrial rehabilitation project. Wintoll was subsequently provided with a calculation of the lost profits, which Jackson-Cross estimated to be $6 million. The calculation was prepared by David Anderson, an employee of Jackson-Cross. On cross-examination at trial, defense counsel established that the lost profits calculation contained a mathematical error that completely undermined the basis for the Jackson-Cross calculation of Wintoll's damages. Seymour conceded that the calculation was wrong because of the error that was made. Because Seymour had not performed the calculations himself, he was unable to explain the error or to recalculate the lost profits by correcting the error while on the stand. Defense counsel requested that

Seymour's opinion be stricken from the record. The trial judge granted the motion and instructed the jury to completely disregard the testimony. Wintoll subsequently filed a civil action against Jackson-Cross, asserting causes of action for breach of contract and professional malpractice. In its answer and new matter, Jackson-Cross asserted that Wintoll's causes of action were barred by the doctrine of witness immunity. The immunity issue was then raised by Jackson-Cross through summary judgment which was granted. On appeal, the Superior Court concluded that the doctrine of witness immunity barred Wintoll's action against Jackson-Cross. Following a review of the relevant case law including the Superior Court's decision in Panitz v. Behrend, 632 A.2d 562 (Pa.Super. 1993), in which the Court held that an expert was immune from liability for the testimony which she gave at trial, the Supreme Court distinguished the facts of Panitz v. Behrend, *supra*, and held that the witness immunity doctrine did not bar Wintoll's professional malpractice action against Jackson-Cross. Although the Plaintiff argues that the holding in LLMD of Michigan, Inc. v. Jackson-Cross, supports a cause of action against an expert witness at trial, the Supreme Court in LLMD carefully limited the scope of its holding as follows:

> We caution, however, that our holding that the witness immunity doctrine does not preclude claims against an expert witness for professional malpractice has limited application. An expert witness may not be held liable merely because his or her opinion is challenged by another expert or authoritative source. In those circumstances, the judicial process is enhanced by the presentation of different views. Differences of opinion will not suffice to establish liability of an expert witness for professional negligence. Id. at 191.

Although the Supreme Court held that expert witnesses can be sued by their own counsel for failing to exercise due care in the preparation of expert reports, the Supreme Court was careful to distinguish these facts from those in which an expert witness is sued for the **substance** of his or her expert opinions. In reaching its holding, the Supreme Court stated:

> It is imperative that an expert witness not be subjected to litigation because the party who retained the expert is dissatisfied with the substance of the opinion rendered by the expert. An expert witness must be able to articulate the basis for his or her opinion without fear that a verdict unfavorable to the client will result in litigation, even where the party who has retained the expert contends that the expert's opinion was not fully explained prior to trial. Application of the witness immunity doctrine in Panitz was consistent, therefore, with the two-fold policy of the doctrine: to ensure that the path to the truth is left as free and unobstructed as possible and to protect the judicial process.
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> We are unpersuaded, however, that those policy concerns are furthered by extending the witness immunity doctrine to professional negligence actions which are brought against an expert witness when the allegations of negligence are not premised on the substance of the expert's opinion. We perceive a significant difference between Panitz and Wintoll's claim in this case that Jackson-Cross had been negligence in performing the mathematical calculations required to determine lost profits. The goal of ensuring that the path to truth is unobstructed and the judicial process is protected, by fostering an atmosphere where the expert witness will be forthright and candid in stating his or her opinion, is not advanced by immunizing an expert witness from his or her negligence in formulating that opinion. The judicial process will be enhanced only by requiring that an expert witness render services to the degree of care, skill and proficiency commonly exercised by the ordinarily skillful, careful and prudent members of their profession. Id. at 191.

In Post v. Mendel, 507 A.2d 351 (Pa. 1985) the Supreme Court analyzed the scope of absolute privilege within the context of judicial proceedings. Although the Court found that a defamatory letter fell outside of the scope of the privilege because the letter was not relevant to the court proceedings but merely referenced matters

occurring in the ongoing trial, the Court explained the application and purpose of the privilege as follows:

> The instant case differs from the bulk of those heretofore decided by this Court in that the alleged defamation did not in this instance occur in the pleadings or in the actual trial or argument of a case. Rather, the defamation took the form of an extra-judicial communication which was issued during the course of trial.
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> In deciding whether the privilege extends to the type of extra-judicial communication which this case presents, it is necessary first to consider the policy underlying the existence of the privilege. In *Greenberg v. Aetna Insurance Co.*, 427 Pa. at 515-516, 235 A.2d at 578, this Court noted that the privilege is an integral part of a public policy which permits all suitors, 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. To assure that such claims are justly resolved, it is essential that pertinent issues be aired in a manner that is unfettered by the threat of libel or slander suits being filed. As stated in *Greenberg*, 427 Pa. at 516, 235 A.2d at 578 (quoting *Kemper v. Fort*, 219 Pa. at 94, 67 A. at 994),
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> > Justice can be administered only when parties are permitted to plead freely in the courts and to aver whatever ought to be known without fear of consequences, if a material and pertinent averment should not be sustained. Wrong may at times be done to a defamed party, but it is damnum absque injuria. The inconvenience of the individual must yield to a rule for the good of the general public.
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> The justifications for the privilege were further explained in *Binder v. Triangle Publications, Inc.*, 442 Pa. 319, 323-324, 275 A.2d 53, 56 (1971), where this Court stated,
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> > 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.
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> 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. Id. at 355.

See also Bochetto v. Gibson, 860 A.2d 67 (Pa. 2004)(A person who is entitled to absolute immunity cannot be liable for his communication regardless of intent); Agriss v. Roadway Express, Inc., 483 A.2d 456 (Pa.Super. 1984) ("One who publishes defamatory matter within the scope of an absolute privilege is immune from liability regardless of occasion or motive. Id. at 463, *citing* Sciandra v. Lynett, 187 A.2d 586 (Pa. 1963)).

Following a review of the Amended Complaint and applicable law, this Court finds that the Plaintiff has no cause of action against the Defendant. Restatement of Torts, 2d § 588 is directly on point, clear and unambiguous. Witnesses in judicial proceedings are absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as a part of a judicial proceeding in which he is testifying, if it has some relation to the proceeding. As the expert report prepared by the Defendant was issued as a regular part of legal proceedings, and pertinent and material to those proceedings, it is protected by judicial privilege.

In LLMD of Michigan, Inc. v. Jackson-Cross, *supra*, the Superior Court additionally held:

> The witness immunity doctrine has been applied by the Superior Court in actions other than for defamation when the court has determined that the extension of immunity is in furtherance of the policy underlying the doctrine. See Clodgo v. Bowman, 601 A.2d 342, 345 (Pa.Super. 1992)…('The form of the cause of action is not relevant to application of the privilege. Regardless of the tort contained in the complaint, if the communication was made in connection with a judicial proceedings [sic] and was material and relevant to it, the privilege applies.') Moses v. McWilliams, 549 A.2d 950, 957 (Pa.Super. 1988)('While it is true that immunity from civil liability in judicial proceedings has been applied most frequently in defamation actions, many

courts, including those in Pennsylvania, have extended the immunity from civil liability to other alleged torts when they occur in connection with judicial proceedings.') Id. at 189-190.

As the extension of immunity to the Plaintiff's various causes of action is in furtherance of the policy underlying the doctrine, the Defendants' demurrer as to all counts of Plaintiff's Amended Complaint is granted. Moreover, this court finds that bias is a proper matter for cross-examination and consideration by the Court or jury as to the weight, if any, to be given to the testimony of an expert witness. To permit expert witnesses who submit reports in judicial proceedings to be sued would encourage the filing of such suits and simultaneously discourage expert witnesses from becoming involved in lawsuits and administrative proceedings such as this case.

O R D E R

AND NOW, this 28th day of February, 2011, the Defendants' Demurrer to Counts I – IV of Plaintiff's Amended Complaint is hereby GRANTED and the Plaintiff's Amended Complaint is DISMISSED.

BY THE COURT,

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Richard A. Gray, J.

cc: Michael J. Zicolello, Esquire
Robert A. Seiferth, Esquire
Gary Weber, Esquire