

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: : CIVIL ACTION  
MEDIWORKS, INC., :  
Debtor Appellee, :  
 :  
v. :  
 :  
MICHAEL WARREN LASKY, :  
Appellant. : NO. 99-1290

M E M O R A N D U M

Padova, J.

August 26, 1999

Appellant Michael W. Lasky ("Appellant" or "Lasky") appeals from that part of the Bankruptcy Court's Order dated January 29, 1999, which found Appellant liable for defamation and awarded Appellee Mediaworks, Inc. \$1.00 in compensatory damages and \$500,000.00 in punitive damages. For the reasons discussed below the Court will vacate that part of the Bankruptcy Court's Order which entered judgment in favor of Appellee and awarded Appellee compensatory and punitive damages. The matter will be remanded to the Bankruptcy Court for further proceedings consistent with this Opinion.

**I. Factual Background<sup>1</sup>**

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<sup>1</sup>The Factual Background is taken substantially from the Bankruptcy Court's Opinion.

Mediaworks, Inc. ("Debtor" or "Appellee") is a Philadelphia based media company that, prior to filing for Chapter 11, was principally engaged in the business of buying media time and placing advertisements on behalf of its clients with television stations in various markets throughout the United States. Susan Goodrich ("Goodrich") was the Debtor's founder, president and controlling shareholder.

Inphomation Communications Inc. ("ICI"), the Debtor's largest client, was engaged in the direct response television marketing business, generally involving infomercials - extended commercial advertisements - and spot ads - 30 or 60 second commercials. Telephone numbers were displayed during the airing of both formats which allowed consumers to call and purchase the product or service being offered. ICI's best known service was the Psychic Friends Network ("PFN"), featuring the singer Dionne Warwick as the program host/product spokesperson. Lasky is the founder of ICI. He is presently the sole share holder, a member of the board of directors, and chief executive officer of ICI.

The relationship between the Debtor and ICI began in or about 1991 and had been largely successful for both parties until 1996 when difficulties began. Generally, the Debtor purchased television airtime from stations on behalf of ICI for the purpose of airing ICI's direct response ads. After booking airtime for ICI, the Debtor would notify ICI of a total amount due, which

included monies due the television stations and other vendors together with a commission for the Debtor's services. Prior to September 1996, the Debtor required that payments for both long and short format advertising be made in advance of the prospective air dates, because the television stations on which ICI's ads ran customarily required the Debtor to pay in advance for airtime. By January 1996, however, most stations had granted the Debtor credit terms for spot advertising purchases, allowing the Debtor to pay for spot time within thirty days after the broadcast month in which the ads had been aired. In May 1996 the Debtor sought to establish similar credit terms for program length ads as well.

From the beginning of their business relationship, the Debtor required advance payment from ICI for the amount of airtime that the Debtor had scheduled and expected to actually air, regardless of format. Both parties testified that Lasky had expressed a desire to obtain credit terms for all of ICI's media buys from the beginning of their dealings. Goodrich testified that despite the advance payment requirement, ICI had effectively achieved a kind of "de facto" credit status on its account. ICI had been routinely paying the Debtor's invoices late since 1995, such that by August 1996, ICI was about three weeks behind in its payments. In late August 1996, the Debtor agreed to formally grant credit terms to ICI for its spot advertising buys only.

From the beginning of their relationship, the Debtor also provided ICI with a substantial amount of accounting information relating to all of the media and vendor activity on its various advertising campaigns. According to testimony by ICI employees, the data sent by the Debtor on a daily, weekly, monthly and quarterly basis was always satisfactory with regard to the quantity and quality of the documentation.

The Debtor also routinely sent wire transfer request forms to ICI. Wire transfer requests were essentially billing statements sent in advance of airings for both spot ads and infomercials. The wire transfer request form included requests for payment, one week at a time, and included a history of spending that was updated and revised weekly to reflect the cost of time that had actually aired and cleared, rather than what was previously estimated. The Debtor never requested prepayment for the full amount of all airtime booked on behalf of ICI, but rather only for the amount of airtime that the Debtor estimated could be expected to clear and not be "preempted" or bumped by something else that the station might air in the proposed time slot. In calculating reductions to the wire transfer requests, the Debtor would take into account actual preemption data. Wire transfer funds to the Debtor were authorized only by Lasky or his daughter. In or about May of 1996 and at other times during their business relationship, the cost of scheduled airtime

requested on behalf of ICI was between \$600,000 and \$1,000,000 per week.

In or about January 1996 an individual named Anthony Lobrano ("Lobrano") assumed an unofficial role at ICI as a consultant to the business. Lobrano owned a company called BCMI, an agency that provided some of the same services as the Debtor. Lasky and ICI began dealing with Lobrano's company because it had an exclusive agreement with Black Entertainment Television ("BET"), a cable television station. According to Lasky, BET was the best television station for ICI to advertise on, as it consistently generated a high level of response to ICI's ads. Any company that wanted to place ads on BET had to book the ads through Lobrano's company. A good relationship developed between Lasky and Lobrano both professionally and personally.

In January 1996, Lasky received an \$83,000,000 offer to sell ICI. Believing it to be worth more, Lobrano came on board to help Lasky sell the company for a higher price. According to testimony by Naresh Mirchandani ("Mirchandani"), ICI's corporate controller, around this time Lasky appeared to have lost interest in the business and Lobrano seemed to be running the company from that point on. Mirchandani explained that Lobrano began changing things at ICI. For example, he changed the company's health insurance and pension plans. According to Mirchandani, Lobrano's reign continued until about August or September 1996 when Lasky

reasserted himself into the management of ICI. Mirchandani further testified that during the time that Lobrano was running the company it appeared that Lasky believed everything that Lobrano told him.

Of particular importance, Lobrano advised Lasky that ICI had been overcharged by the Debtor by a very large amount. The precise details of what Lobrano told Lasky is not known, as he was not called as a witness. What is known however, is that Lasky believed that ICI had in fact been overcharged between \$13,000,000 - 14,000,000 by the Debtor, roughly 10% of ICI's overall booking through the Debtor since the inception of their relationship. Lasky testified that it was, and still is, his belief that the alleged overcharges were comprised of the following three elements: (1) preempted time that was not accurately reported and credited to ICI's account; (2) "free time" that he believed ICI was entitled to receive from the television stations based on the large volume of advertising time ICI bought, but which he contends the Debtor used for the benefit of its other clients; and (3) the value to ICI of credit terms for its massive purchases of airtime.

Sometime around April 1996, due to larger holdbacks from AT&T (ICI's "900" line provider<sup>2</sup>) increasing advertising costs,

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<sup>2</sup> Customers of PFN would call a 900 telephone number in order to speak with one of the psychics. The 900 number calls were usually billed at a rate of \$3.99 per minute and charged directly

growing competition in the 900 line psychic business, and the increased cost of employing psychics, ICI began to experience a strain on its monthly cash flow. As a result, ICI, at the suggestion of Goodrich, hiatused some of its scheduled advertising in the summer of 1996.

Going into the fall, for various reasons, things began to look hopeful again for both ICI and the Debtor. ICI's new credit terms went into effect for the broadcast month of September 1996. Unfortunately, it was not long before ICI was behind in its payments. Despite payments totaling approximately \$500,000 to the Debtor on September 25th and 26th, ICI still owed the Debtor approximately \$1,243,070 by the end of the month. The payments issued on September 25th and 26th were the last payments the Debtor received from ICI.

Goodrich testified that she first considered reducing spending on behalf of ICI on October 8, 1996. Despite attempts to discuss the situation with ICI through memoranda and telephone calls, Goodrich received no feedback. She stated in a letter to ICI:

...nor have I been given any reason to believe additional funds will arrive any time soon. Given the worsening situation, we seem to have no other choice

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to the customers monthly telephone bill. AT&T would then deduct its charges and forward the net payment to ICI. Holdbacks represented that portion of the caller revenue held back by AT&T for the purpose of, inter alia, reimbursing telephone customers for disputed charges.

but to hiatus or cancel whatever we could at this point. I think we have a better chance of getting backup on the stations if we are more straight forward and hiatus at this point, rather than just letting the 'shit hit the fan.'

As of October 28, 1996, ICI was effectively off the air.

After attempts to speak with Lasky and/or others at ICI, Goodrich sent the following memo, dated October 31, 1996, to Lasky:

As a result of the following:

1. Inphomation now owes stations close to \$2,000,000, and despite repeated promises by [ICI] that a wire would be sent each week, we have not received any funds for advertising in a month. . .
2. We have heard that another agency is asking for avails for Psychic Friends Network. . .
3. No one at Inphomation has returned my repeated calls this week. . . I have no choice but to release the remaining time that we still have booked on your behalf. As you know, per [ICI's] directions, we have hiatused spot and program time until more funds were forthcoming; at this point, I can only assume that this is not going to happen. Therefore, unless I hear from Inphomation today to the contrary, we will cancel our remaining 4Q schedules tomorrow.

Goodrich did not receive a response to the foregoing, and, as per her memo, canceled ICI's fourth quarter schedules.

The next communication Goodrich received pertaining to ICI was a letter from Robert Schulman ("Schulman"), who was both corporate counsel for ICI and personal counsel to Lasky. The letter, dated November 1, 1996, stated, inter alia,

...despite its long-term relationship with ICI, Mediaworks has never properly accounted for the media

buys, costs and expenses incurred by and on behalf of ICI. Mediaworks has collected millions of dollars from ICI and ICI does not know, in many respects, if the media ever ran as scheduled or was in fact, canceled or 'preempted.'

The letter went on to demand the Debtor produce a "complete and proper accounting, including, but not limited to, the submission of all books, records, and confirmations of the media purchased, airings, and revenue collected and paid over the various media sources for the last five years."

In a letter from Lasky to Goodrich dated November 4, 1996, Lasky formally terminated the relationship between ICI and the Debtor. In his letter he stated that Goodrich had taken advantage of their relationship by "having [ICI] pay in advance for [the Debtor's] . . . media placement services, when much of what [ICI] paid for was never broadcast, and by not providing a proper accounting of expenditures." He also stated that Goodrich had "left open substantial questions regarding how much money [the Debtor] owes [ICI] due to credits, which [ICI is] entitled to receive. Our calculations lead us to conclude that we may be entitled to \$13M to \$14M in credits."

Goodrich testified that the foregoing letters were the first notice she received from ICI concerning potential improprieties in the Debtor's handling of ICI as a client and of the alleged insufficiencies regarding the accounting information the Debtor previously sent to ICI. It is undisputed that prior to November

1, 1996, ICI did not inform the Debtor that it disputed the voluminous accounting documentation that the Debtor had provided. It is also undisputed that ICI did not receive any reports of problems or discrepancies from those employees within its organization who were responsible for the audit functions relating to the Debtor's monthly closeouts.

In a letter dated November 18, 1996, addressed "To Whom It May Concern," Schulman made the following statements relating to the Debtor:

It has been brought to the attention of Inphomation Communications, Inc. that its former advertising agency, Mediaworks of Philadelphia, Pennsylvania, has failed to pay the vendors/media for the advertising placed by Mediaworks of Baltimore, Maryland, despite Inphomation's payments to Mediaworks for the invoices which Mediaworks had been able to provide proper accounting. Inphomation strongly believes that it has paid Mediaworks the money that it properly owes and will aggressively pursue litigation against Mediaworks if Inphomation is harmed by Mediaworks' failure to properly discharge its duties and to timely pay the vendors.

It is undisputed that Schulman was authorized to execute the November 18, 1996, letter on ICI's behalf and that on or about the date of the letter, it was forwarded by ICI, or others acting on its behalf, to certain television stations, one of which was WPHL-TV in Philadelphia.

It is undisputed that ICI did not pay the Debtor all of the amounts requested in September and October 1996. In a form letter the Debtor sent to various television stations on or about

December 17, 1996, the Debtor notified the recipients that the Debtor and ICI had terminated their relationship, and provided a summary of the recipient station's transactions with ICI through November 30, 1996. The letter also stated that the Debtor had not received payment from ICI for any outstanding amounts shown on the summary, directed the recipient to collect the outstanding amounts directly from ICI, and provided contact information at ICI for the recipient.

WPHL filed suit against ICI and the Debtor in January 1997 to collect the money it was owed for the airtime booked by the Debtor on ICI's behalf.

Prior to trial, the Debtor hired a Certified Public Accountant ("CPA") to perform a forensic audit of its books and records. The CPA's report, marked into evidence at trial contained the following undisputed conclusions:

1. Testing of the accounting documents indicated that the Debtor's database accounting system reasonably reflects the transactions between the Debtor and ICI. Further, transactions between the Debtor and ICI were properly captured and recorded in the database accounting system;
2. All credits that were due to the Debtor's customers were properly accounted for and no additional credits due ICI were noted;
3. ICI timely paid its billings to the Debtor until early 1996, and although delinquent through most of 1996, ICI continued to pay its bills in full prior to September 1996; the balance due the Debtor represents wire transfer requests for September 1996 through the date of ICI's bankruptcy;

4. The amount due the Debtor from ICI, after due credit for station refunds that had been applied but not yet received, was approximately \$1.75 million as of December 1996;

5. The Debtor maintained practices and procedures to calculate and track preempted time and ensured on a continuous basis that ICI received credit for preempted airs as soon as the Debtor was able to determine that a preemption had occurred;

6. The CPA did not examine any evidence that the Debtor overcharged ICI or that ICI overpaid the Debtor after giving due consideration to the continuous posting of billing adjustments that occurred throughout the tracking process;

7. The Debtor tracked preempted time to assure that ICI received prompt credit, and subsequent wire transfer requests were reduced so that ICI received the immediate economic benefit of pending refunds and potential credits;

8. With the exception of the then pending credit balances reflected in the December 1996 accounting, there is no evidence to support the existence of large outstanding preemption credits, and those still outstanding in December 1996 were credited against station billing invoices then outstanding;

9. There is no support in the Debtor's records for a claim that funds paid by ICI are either missing or not properly accounted for.

In its Third Party Complaint the Debtor asserted five causes of action against Lasky. The Bankruptcy Court found in favor of Lasky on all but the Debtor's claim for defamation. As noted, the Bankruptcy Court awarded the Debtor \$1 in compensatory damages and \$500,000 in punitive damages. Lasky appeals the Bankruptcy Court's findings on this issue. Five questions have been presented on appeal: (1) Was Schulman's letter understood by

recipients as defamatory?; (2) Was Schulman's letter absolutely privileged?; (3) Was Schulman's letter published with actual malice?; (4) Is the award of punitive damages excessive under Pennsylvania Law?; and, (5) Does the award for punitive damages violate the U.S. Constitution? The Court will discuss these questions seriatim.

### III. LEGAL STANDARD

"[I]n bankruptcy cases, the district court sits as an appellate court." In re Cohn, 54 F.3d 1108, 1113 (3d Cir. 1995). "As a proceeding tried initially before the Bankruptcy Court for the Eastern District of Pennsylvania, the standard of review for the district court is governed by [Federal Bankruptcy Rule of Procedure] 8013." Id. Rule 8013 provides:

On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Fed. Bankr. R. P. 8013.

The district court "'applies a clearly erroneous standard to findings of fact, conducts plenary review of conclusions of law, and must break down mixed question of law and fact, applying the appropriate standard to each component.'" Meridian Bank v. Alten, 958 F.2d 1226, 1229 (3d Cir. 1992) (quoting, In re Sharon Steel

Corp., 871 F.2d 1217, 1222 (3d Cir. 1989)). De novo review requires the district court to make its own legal conclusions, "without deferential regard to those made by the bankruptcy court." Fleet Consumer Discount Co. v. Graves (In re Graves), 156 B.R. 949, 954 (E.D. Pa. 1993), aff'd, 33 F.3d 242 (3d Cir. 1994).

#### IV. DISCUSSION

##### A. General Principles of Defamation Law

In a defamation action, the plaintiff has the burden of proving: (1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) an understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of a conditionally privileged occasion. 42 PA. Cons. Stat. Ann. § 8343(a) (West 1998).

"It is for the court to determine, in the first instance, whether the statement of which the plaintiff complains is capable of a defamatory meaning; if the court decides that it is capable of a defamatory meaning, then it is for the jury to decide if the statement was so understood by the reader or listener." U.S. Healthcare v. Blue Cross of Greater Philadelphia, 898 F.2d 914,

923 (3d Cir. 1990). A statement is defamatory if it "tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Id.

Under Pennsylvania law, communications containing "words imputing (1) criminal offense, (2) loathsome disease, (3) business misconduct, or (4) serious sexual misconduct," are considered defamatory per se. Syngy, Inc. v. Scott-Levin, Inc., No. Civ. A. 97-CV-6109, 1999 WL 382833, at \*9 (E.D. Pa. June 4, 1999)(internal quotations omitted). A statement is defamatory per se as an accusation of business misconduct if it "ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business." Id. (internal quotations omitted). Whether the allegedly defamatory statements are defamatory per se is a question for the court. Id. (citing Fox v. Kahn, 221 A.2d 181 (Pa. 1966)).

One of the requirements under the Pennsylvania defamation statute is that the plaintiff prove that it suffered special harm. Syngy, Inc., 1999 WL 382833, at \*9. Special harm requires proof of a specific monetary or out-of-pocket loss as a result of the defamation. Id. (citing Restatement (Second) of Torts, § 575 (1976 Main Vol.)). In Pennsylvania, a plaintiff who pleads and proves defamation per se need not prove special

damages in order to recover. See Walker v. Grand central Sanitation, Inc., 430 Pa. Super. 236, 242 (Pa. Super. 1993). However, although a plaintiff need not prove actual pecuniary loss to recover for defamation per se, Plaintiff "must show 'general damages': proof that one's reputation was actually affected by the defamatory statement, or that she suffered personal humiliation, or both," in order to be compensated. Walker, 430 Pa. Super. at 246.

Furthermore, "in order to recover damages, the plaintiff must demonstrate that the statement results from fault, amounting to at least negligence, on the part of the defendant." U.S. Healthcare, 898 F.2d at 923. To recover punitive damages for defamation, under Pennsylvania law the plaintiff must prove that defendant acted with actual malice, which is defined as knowledge of or recklessness as to the falsity of the publication. Geyer v. Steinbronn, 351 Pa. Super. 536, 562 (Pa. Super. 1986).

B. Was Schulman's letter understood by recipients as defamatory?

The Bankruptcy Court determined that Schulman's letter was "as a matter of law, quite capable of defamatory meaning . . . and conclud[ed] that the impression the [letter] would naturally engender in the minds of recipients is that the Debtor is at the very least dishonest or untrustworthy in its business dealings . . ." (Op. at 33.) The court further held that because the

statements clearly imputed to the Debtor business misconduct, the letter was defamatory per se, and therefore proof of special harm is unnecessary to in order to support a recovery. Id.

Appellant argues that the Bankruptcy Court erred in failing to find that the recipients of Schulman's letter understood its defamatory meaning. Appellant asserts that this is a crucial factual determination and that because the Bankruptcy Court failed to expressly find, or to point to evidence in the record to support that Schulman's letter was, in fact, understood by its recipients to be defamatory, it committed reversible error. Moreover, Appellant argues that there is no evidence in the record to support that the letter's recipients understood the letter as defamatory.

The Debtor argues that although the Bankruptcy Court failed to make a specific finding of fact, there is sufficient evidence in the record to support that the Schulman letter was understood as defamatory by its recipients. In that regard, it points to the testimony of Bruce Wietlisbach ("Wietlisbach"), chief financial officer of WPHL-TV. Wietlisbach testified that when he received Schulman's letter it immediately "threw up a red flag," and further testified that as a result of that letter he took a different approach towards Mediaworks. (Tr. 7/27/98 at 139.) The Debtor argues that this testimony is sufficient evidence to

support that the recipients of the letter understood the statements as defamatory.

A finding that the recipient of the defamatory communication understood its defamatory meaning is a necessary element of the tort. 42 Pa. Con. Stat. Ann. § 8343(a)(4). This is a factual determination, which is generally in the jury's province. See U.S. Healthcare, 898 F.2d at 923. Because the Bankruptcy Court made no determination whatsoever with respect to this element of the tort in its Opinion, this Court must remand the case for further proceedings. See In re Cohn, 54 F.3d 1108, 1118 (3d. Cir. 1995)(holding that where the bankruptcy court has failed to make sufficient factual findings the proper response is to remand).

In an effort to instruct the Bankruptcy Court on remand this Court makes special note of the following.

In its Opinion, the Bankruptcy Court misstated and consequently misapplied Pennsylvania defamation law in cases involving defamation per se. A plaintiff who has proven the publication of statements which are defamatory per se has not by so doing also proven that the recipients understood the statements as defamatory. Proving that the recipients understood the statements as defamatory in a defamation per se case is essential because it establishes general damages, i.e., "proof

that one's reputation was actually affected by the [defamation]." See Walker, 430 Pa. Super. at 246.

Although the traditional rule was that in a defamation per se case damages were presumed and did not need to be proven, in Walker the Pennsylvania Superior Court ("Superior Court") modified that rule. The Superior Court held that in order to recover in a defamation per se action, the plaintiff "must show 'general damages'. Id. The Superior Court reasoned,

Requiring the plaintiff to prove general damages in cases of [defamation] per se accommodates the plaintiff's interest in recovering for damage to reputation without specifically identifying a pecuniary loss as well as the court's interest in maintaining some type of control over the amount a jury should be entitled to compensate an injured person. On one hand, a [defamation] per se plaintiff is relieved of the burden to actually prove pecuniary loss as the result of the defamation; yet on the other hand, a jury will have some basis upon which to compensate her.

Id. at 244.

On remand, the Bankruptcy Court must consider whether or not there is proof in the record to establish that the recipients of the letter understood it as defamatory. If no recipient of the letter understood it as defamatory, then Plaintiff has failed to show any harm to its reputation and therefore cannot recover.

See Walker, 430 Pa. Super. at 244-245; SNA, Inc. v. Array, Civ. A. Nos. 97-7158, 97-3793, 1999 WL 376044, at \*7-\*8 (E.D. Pa. June 9, 1999)(discussing Walker).

The Bankruptcy Court's misapprehension of this aspect of Pennsylvania defamation law is evidenced by the court's discussion of compensatory damages. The court states, "Since these statements constitute defamation per se, it is not necessary for the Debtor to prove actual loss resulting from such harm in order to recover damages. Rather, the existence of compensable injury is presumed as a matter of law." (Op. at 37.) As discussed above, this is the traditional rule and not Pennsylvania law. As the Superior Court held in Walker, a defendant who publishes a statement which can be considered defamation per se is only liable for the proven, actual harm the publication causes. Id. at 250.

C. Was Schulman's letter absolutely privileged?

Because this Court must remand this case for further proceedings, it need not address Appellant's argument that the Bankruptcy Court erred in not finding the statements at issue were protected by absolute judicial privilege. However, in the interests of judicial economy the Court notes the following.

The Bankruptcy Court found that Schulman's letter was conditionally privileged, because it "concerned allegations of serious wrongdoing by the Debtor as agent for ICI which, if true, could have effected the interests of the stations to which the letter was sent." (Op. at 33.) "[A] conditional privilege

arises where: (1) an interest of the publisher of the defamatory statement is involved; (2) an interest of some third party or the recipient is involved; or (3) a recognized interest of the public is involved." Meade v. Anderson, No. Civ. A. 97-CV-365, 1999 WL 58640, at \*4 (E.D. Pa. Jan. 28, 1999) (citing Miketic v. Baron, 450 Pa. Super. 91 (Pa. Super. 1996)).

Appellant argues that the Bankruptcy Court committed reversible error in failing to find that Schulman's letter was protected by an absolute judicial privilege because the communication was made by an attorney and it related to proposed or pending litigation. Appellant further asserts that absolute judicial privilege does not attach only to formal or structured proceedings, but rather is broad enough to include "preliminary demands, as well as informal conferences and negotiations conducted after litigation has been commenced or when litigation is seriously contemplated." Smiths v. Griffiths, 327 Pa. Super. 418, 424 (Pa. Super. 1984).

Appellee argues that while "statements made by judges, attorneys, witnesses and parties in the course of or pertinent to any stage of judicial proceedings are absolutely privileged," Pawlowski v. Smorto, 403 Pa. Super. 71, 80 (Pa. Super. 1991), the privilege is limited to "those communications which are issued in the regular course of judicial proceedings and which are pertinent and material to the redress or relief sought." Id. at

81. Appellee argues that there is no evidence that Schulman's letter, addressed "To Whom It May Concern," was part of communications between interested counsel involved in negotiations or in the course of or anticipation of judicial proceedings. Instead, the letter was sent to unidentified parties at the television stations, to be read, presumably, by persons such as Wietlisbach, who are not attorneys.

The Court finds that Schulman's "To Whom It May Concern" letter is not the type of communication protected by absolute privilege under the case law. Judicial 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. The essential realm of protected communication is not, however, without bounds. Rather, the protected realm . . . [is] composed only of those communications which are issued in the regular course of judicial proceedings and which are pertinent and material to the redress or relief sought . . . with respect to communications made prior to the institution of proceedings, the protected communication would need to have been pertinent and material and would need to have been issued in the regular course of preparing for contemplated proceedings.

Post v. Mendel, 510 Pa. 213, 221 -223 (1986). Furthermore, "even if litigation is seriously considered, the attorney is permitted to send a defamatory communication only to persons with a direct interest in the proposed proceeding." Buschel v. Metrocorp, 957 F. Supp. 595, 598 (E.D. Pa. 1996)(citing Post v. Mendel, 510 Pa. at 221).

The communication at issue was not directly related to any proposed litigation between the television stations to which the letter was sent and ICI. Rather, the letter was an exculpatory attempt by ICI to maintain relations with the television stations to which the letter was sent. The litigation threatened in the letter related to ICI and the Debtor, and the letter was not sent to the Debtor. That the television station ultimately chose to bring suit against the Debtor and ICI does not make the communication one relating to a judicial proceeding. Therefore, a finding of absolute privilege is not warranted and the Bankruptcy Court's finding of a conditional privilege was proper.

D. Was Schulman's Letter Published with Actual Malice Warranting Punitive Damages?

Although this Court need not discuss punitive damages because the issue may never be reached on remand, it does so because the Bankruptcy Court's application of the law in its finding of actual malice was in error.

The Bankruptcy Court found, upon examination of the record, that Schulman's letter abused the conditional privilege. The court stated:

At bottom, both of the key assertions expressed in the letter - 1) that ICI had already paid the debtor for the airtime billed by the stations but that the Debtor failed to remit those monies to the stations; and b)[sic] that the Debtor failed to properly account for monies paid by ICI - were utterly lacking in foundation at the time they were made. Although Lasky contends

that he believed that ICI had been overcharged by the Debtor for the advertising that the debtor had placed on its behalf, and that the Debtor owed ICI between \$13,000,000 and \$14,000,000, . . . his belief rested completely on verbal assertions that were apparently provided by Lobrano, which were not only lacking in any reasonable investigation, but also ran counter to his own experience, and that of the employees of the ICI, in conducting business with the Debtor for nearly five years.

(Op. at 35.) The court explained that the evidence showed that "at the point in time when Schulman's letter to the stations containing defamatory statements about the Debtor was issued, Lasky, and those under his direction, lacked any reasonable basis for making such statements." (Op. at 37(emphasis in original).) The court concluded that "[i]n light of this, the statements [could] not be viewed as being necessary for the accomplishment of an accepted purpose for which the privilege was granted . . . [and] [c]onsequently, the publication . . . constituted an abuse of the privilege." (Op. at 37.) The court then erroneously stated that, for these same reasons, the publication of Schulman's letter constituted actual malice. Id.

In a defamation context, actual malice means "that the publication was made either with knowledge that it was false or with reckless disregard of whether it was false." Banas v. Matthews Int'l Corp., 348 Pa. Super. 464, 470 (Pa. Super. 1985); Geyer, 351 Pa. Super. at 562. "The burden of proving 'actual malice' requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his

statement was false or that he subjectively entertained serious doubt as to the truth of the statement. . . . There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." Reiter v. Manna, 456 Pa. Super. 192, 196-197 (Pa. Super. 1994)(internal quotations and citations omitted).

The Bankruptcy Court explained that "[i]n light of [its] findings that Lasky lacked a reasonable basis to conclude that the assertions made in the Schulman letter were true, and in fact completely ignored data that ICI had in its possession that would have properly informed him that such allegations were baseless . . . Lasky authorized the Schulman letter with reckless disregard as to whether the statements contained therein were true or not . . . [and] therefore, . . . acted with actual malice." (Op. at 41-42.)

In finding actual malice, the Bankruptcy Court's application of the law was in error. First, the Bankruptcy Court found as fact that Lasky believed that the Debtor owed ICI a substantial amount of money. (Op. at 10.) Lasky's testimony at trial supports this finding. (Tr. 7/24/98 at 139-141, 144, 145-148, 152-153, 154, 156.) The Bankruptcy Court, having had the benefit of observing Lasky's demeanor and assessing his credibility, while finding him generally "to be a glib and unconvincing witness," did not discredit his testimony regarding his

subjective belief that the Debtor owed ICI as much as \$14,000,000. (Op. at 42.) After finding that Lasky believed that the Debtor owed ICI roughly \$14,000,000, the court then applied the wrong legal standard in assessing whether the publication was made with actual malice.

Rather than applying the standard of "reckless disregard" applicable in a defamation context - i.e., that the defendant in fact entertained serious doubt as to the truth of his published statement, or that the defendant actually had a high degree of awareness of the probable falsity of the statement, see Harte-Hanks Communications, 491 U.S. at 688, 109 S. Ct. at 2696 - the Bankruptcy Court applied what appears to be a rational basis standard. The court stated that because "Lasky lacked a reasonable basis to conclude that the assertions made in the Schulman letter were true, and in fact completely ignored data that ICI had in its possession that would have properly informed him that such allegations were baseless," that he acted with actual malice. (Op. at 41-42.) The Bankruptcy Court's conclusion is erroneous as a matter of law. As noted, "[t]he standard for 'reckless disregard' is a subjective one." City of Rome v. Glanton, 958 F. Supp. 1026, 1042 (E.D. Pa. 1997). The determination of actual malice does not turn on whether Lasky had a rational basis for his subjective belief. The controlling inquiry is whether he actually subjectively entertained serious

doubts as to the truth of the statements published in Schulman's letter - the Bankruptcy Court found as fact that he did not.

Furthermore, the Bankruptcy Court's reasoning, that Lasky acted with actual malice because he "ignored data . . . that would have properly informed him" that the allegations in the letter were baseless, is akin to those cases which discuss a publisher's failure to investigate his facts before publishing. These cases make clear that, "while it arguably may be negligent not to check independently the veracity of information before publication, this fault does not rise to the level of actual malice." Oweida v. Tribune-Review Publishing Company, 410 Pa. Super. 112, 137 (Pa. Super. 1991) (internal quotation omitted). Therefore, Lasky's failure to personally review the accounting statements sent to ICI and fully investigate whether or not the Debtor in fact owed ICI \$14,000,000 does not constitute actual malice.

On remand, if the Bankruptcy Court reaches this issue, it must apply the proper legal standard in determining actual malice.

#### E. The Amount of Punitive Damages

If on remand the Bankruptcy Court determines that punitive damages are available, it should pay close attention to both the Pennsylvania standard for the measurement of punitive damage

awards and the federal constitutional standard and make specific findings related thereto.

"The standard under which punitive damages are measured in Pennsylvania requires analysis of the following factors: (1) the character of the act; (2) the nature and extent of the harm; and (3) the wealth of the defendant." Kirkbride v. Lisbon Contractors, Inc., 521 Pa. 97, 102 (1989).

The federal standard was established in BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589 (1996). In Gore the Court established three guideposts for reviewing a punitive damages award. These guideposts are: (1) the degree of reprehensibility of defendant's conduct, (2) the ratio of the punitive damage award to the actual harm inflicted on the plaintiff, and (3) a comparison of civil and criminal sanctions for comparable conduct. Id. at 575-584, 1599-1603.

This Court would also point the Bankruptcy Court to Judge Robreno's opinion in McDermott v. Party City Corp., 11 F. Supp.2d 612 (E.D. Pa. 1998), in which he discusses the interplay between the Pennsylvania and the federal standards.

#### **IV. CONCLUSION**

For the foregoing reasons, this Court will vacate the Bankruptcy Court's Order and remand this case to the Bankruptcy Court for further proceedings consistent with this Opinion.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: : CIVIL ACTION  
MEDIWORKS, INC., :  
Debtor Appellee, :  
 :  
v. :  
 :  
MICHAEL WARREN LASKY, :  
Appellant. : NO. 99-1290

O R D E R

**AND NOW**, this 26th day of August, 1999, upon consideration of Appellant's Opening Brief (Doc. No. 6), Appellee's Response thereto (Doc. No. 7), Appellant's Reply (Doc. No. 8) and Oral Argument heard before this Court on August 11, 1999, **IT IS HEREBY ORDERED** that that part of the Bankruptcy Court's Order dated January 29, 1999, entering judgment in favor of Appellee and awarding Appellee compensatory and punitive damages is **VACATED**. The remainder of the Bankruptcy Court's Order is undisturbed. This matter is **REMANDED** to the Bankruptcy Court for further proceedings consistent with this Opinion.

BY THE COURT:

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JOHN R. PADOVA, J.