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Civil Procedure—Summary Judgment Granted to Privileged Communications

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actionable. The motion for nonsuit was denied and, after ruling that as a matter of law the work contained numerous errors, the court instructed the jury that: "The question of fact is this, whether the third edition would be understood by those who bought it to be the work of the plaintiff; for, if so, I think the errors are such as would be injurious to the plaintiff's reputation."[51]

The Court of Appeals held that, as in the *Archbold* decision, the crux of the claim advanced was that the title page was so worded as to convey to the reader the erroneous impression that the edition in question was the sole work of plaintiff since his name was the only name that appeared thereon. "While defendant had a right to state that plaintiff was the author of the original text, the purchase of the copyright did not carry with it a license to defame by impliedly misrepresenting plaintiff as reviser of an annual edition containing many inaccuracies for which he bore no responsibility.[52]"

SUMMARY JUDGMENT GRANTED TO PRIVILEGED COMMUNICATORS

A qualified privilege in an action for slander and libel confers its possessor with a presumption of immunity rebuttable only upon a showing of falsity and malice.[53]

The plaintiff in *Shapiro v. Health Insurance Plan of Greater New York*[54] was a surgeon and head of one of the non-profit defendant corporation's medical groups. He was denied membership renewal by the Control Board of the defendant membership corporation on the grounds of incompetency.[55] (Two officers of "Health Insurance Plan" were joined with it as defendants). The plaintiff alleged that oral and written defamatory statements were made during an investigation into his skill and training as a surgeon and his qualifications as a member of his partnership group. In addition, plaintiff points to the charges of the defendant officers made during the hearings before the Control Board that he had wilfully misrepresented to and witheld information from that Board.

To these charges of defamation, the defendants asserted a qualified privilege based upon their acting within their undisputed scope of authority. A communication made in good faith upon a subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty even though it contained matter which, without this privilege, would be slanderous

51. Id. at 227, 172 Eng. Rep. 950.
52. Supra note 48 at 192, 203 N.Y.S.2d 816 (1960).
53. Byam v. Collins, 111 N.Y. 143, 19 N.E. 75 (1888).
54. 7 N.Y.2d 56, 194 N.Y.S.2d 509 (1959).
55. This corporation was composed of thirty-two medical groups including the defendant's. Each contracted independently with the parent corporation, but the latter, through its control board, maintained standards and approved all appointments to the group.
The corporation operated under a plan of indemnifying its subscribers for medical expense incurred for services rendered by members of particular group.

and actionable; the duty does not have to be a legal one but only a moral or sound duty of imperfect obligation.[56]

It is qualified because it doesn't extend beyond such statements as the writer makes in the performance of such duty and in good faith believing them to be true.[57]

The defendant moved for summary judgment pleading this privilege and the plaintiff filed answering affidavits charging the defendants with malice and a desire to injure him in his profession. This rebuttal, in its attempt to lift the protective panelopy of the defendants, is founded upon certain alleged past disagreements between the parties over policy matters, mistatement by the defendants of the facts surrounding the plaintiff's dismissal from hospital staffs and lack of fairness in the administrative proceeding leading up to his removal from his medical group. He leveled charges of conspiracy and "a plot to get him" against the defendant officers and the plaintiff's insurer in an attempt to show that actual malice had destroyed the immunity of qualified privilege.

The trial court,[58] with the Appellate Division affirming,[59] denied the motion for summary judgment, stating that they could not hold as a matter of law that the answering affidavits had failed to present evidentiary facts sufficient to raise an inference of malice. Rule 113 of the Civil Practice Act requires that a motion for summary judgment be granted unless the answering affidavits show evidentiary facts sufficient to establish the existence of a triable issue.[60]

The Court of Appeals reversed and granted the motion. It ruled that the plaintiff had not met the burden of overcoming the presumption of privilege. They looked upon the fact recitation in the answering affidavits as being devoid of specific content and refused to accept conclusary allegations of malice as a substitute for the statutory requisite of a jury issue. The opinion indicates that "mere suspicion, surmise and accusations", characteristic of the instant case, suggesting a conspiracy to injure the plaintiff, are not sufficiently germane unless substantiated by particular facts setting forth a triable issue as to malice and bad faith.

LIBEL: SUFFICIENCY OF COMPLAINT

In *Drug Research Corporation v. Curtis Publishing Company*,[61] a libel action, plaintiff sought general damages for an article which appeared in the

56. Supra note 53, at 150, 19 N.E. 75 (1888).

57. More than a mere scintilla of evidence is required to overcome the qualified privilege. Ashcroft v. Hammond, 197 N.Y. 488, 90 N.E. 524 (1910); Hemmens v. Nelson, 138 N.Y. 517, 34 N.E. 424 (1893).

58. 12 Misc. 2d 1051, 173 N.Y.S.2d 74 (Sup. Ct. 1958).

59. 7 A.D.2d 733, 180 N.Y.S.2d 573 (2d Dep't 1958).

60. New York Rules Civ. Prac., Rule 113 § 2:
The motion shall be granted if upon all the papers and proof submitted the action or claim or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment . . . in favor of any party. (It) . . . shall be denied if any party shall show facts sufficient to require a trial of any issue of fact . . . other than the extent of damages.) . . .

61. 7 N.Y.2d 435, 199 N.Y.S.2d 33 (1960).