[J-196-1998]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

LLMD OF MICHIGAN, INC., GENERAL PARTNER T/A WINTOLL ASSOCIATES LIMITED PARTNERSHIP	:	No. 59 E.D. Appeal Docket 1997
v.	:	Appeal from the Judgment of the Superior Court entered on June 30, 1997 at 294PHL96 affirming the Order dated July 30, 1996 in the Court of Common Pleads, Philadelphia County, Civil Division at 1349 January Term, 1993.
JACKSON-CROSS COMPANY	:	
v.	:	
ROBERT A. SWIFT, ESQUIRE and KOHN, NAST & GRAF, P.C.	:	ARGUED: October 19, 1998
APPEAL OF: LLMD OF MICHIGAN, INC., GENERAL PARTNER T/A WINTOLL ASSOCIATES LIMITED PARTNERSHIP	:	

DISSENTING OPINION

MR. JUSTICE CAPPY **DECIDED: October 26, 1999**

The majority premises its opinion largely on its conclusion that the situation presented in the matter sub judice is distinguishable from that with which the Superior Court was faced in Panitz v. Behrend, 632 A.2d 562 (Pa.Super.Ct. 1993). The majority categorizes the suit filed against the expert witness in Panitz as one which attacked the "substance" of the expert's opinion; in contrast, the majority asserts that the suit in the matter presently before the court is premised on the allegation that the expert was "negligen[t] in formulating [his] opinion." Majority slip op. at 10. The majority finds this distinction to be crucial. It concludes that while a suit may not be filed on the basis that the "substance" of an expert witness' testimony was unacceptable, an expert witness may be

sued on the basis that the expert was negligent in formulating the opinion tendered at trial. In my opinion, the majority's attempts to distinguish Panitz ring hollow. Furthermore, I believe that the distinction formulated by the majority is an unworkable and radical departure from our accepted law regarding witness immunity. I therefore am compelled to dissent.

In the underlying lawsuit in Panitz, the expert witness, Elaine Panitz ("Panitz"), tendered her medical opinion on direct examination in favor of the plaintiffs; this was in accord with her pre-trial communications with the Behrend firm which represented the plaintiffs in the underlying lawsuit. On cross-examination, however, Panitz conceded that her opinion was inconsistent with the available scientific data. After trial, Panitz admitted that she had realized prior to trial that her pro-plaintiffs medical opinion was inaccurate; yet Panitz had failed to inform the Behrend firm that she had changed her opinion.

Contrary to the majority's characterization of Panitz, I believe that the lawsuit filed against Panitz was premised on the allegation that she had been negligent in formulating her opinion, and was not an attack on the substance of the opinion she offered on cross-examination. In fact, there is a lengthy discussion in the Superior Court opinion concerning the contention by the Behrend firm in its suit against Panitz that "it was not the in-court testimony that caused the loss but the pre-trial representations about what the in-court testimony would be." Panitz, 632 A.2d at 565. Clearly, the Behrend firm sued Panitz premised upon Panitz's negligent failure to inform them that she had changed her opinion prior to trial; I see nothing in Panitz which would indicate that the Behrend firm sued Panitz on the basis that they somehow disagreed with the substance of her opinion.

Furthermore, I find that the test proposed by the majority is simply unworkable. In my opinion, there is no bright line between what constitutes an attack on the "substance" of an expert's opinion and what constitutes a challenge premised on the expert's negligence in formulating that opinion. I believe that there is a great gray area which lies

between these two points, and distinguishing between them will be quite difficult. This difficulty has, in my opinion, been amply illustrated by the varying analyses of Panitz offered by the majority and by this author in the matter sub judice. I fear that by establishing this unworkable distinction, we will be sowing confusion in the lower courts and the practicing bar.

Rather than adopting such a test, I would continue to adhere to our established rule that there is no civil liability for statements made by witnesses in a legal proceeding. This straightforward rule advances the laudable and long-recognized policy goal of "encourag[ing] [the witness'] complete and unintimidated testimony in court . . . ." Binder v. Triangle Publications, Inc., 275 A.2d 53, 56 (Pa. 1971). Furthermore, I agree with the position as ably stated by the Superior Court in Panitz that there "is no reason for refusing to apply the privilege to friendly experts hired by a party." Panitz, 632 A.2d at 565. "To allow a party to litigation to contract with an expert witness and thereby obligate the witness to testify only in a manner favorable to the party, on threat of civil liability, would be contrary to public policy." Id. at 565-66.

For the foregoing reasons, I respectfully dissent.

Mr. Justice Castille joins this dissenting opinion.