STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1853

Jerrod M. Smith,
Appellant,

Jerrod M. Smith & Associates,
Plaintiff,

vs.

James Lindell, et al.,
Respondents.

Filed November 17, 2009
Affirmed
Worke, Judge

Hennepin County District Court
File Nos. 27-CV-07-21722, 27-CV-05-009096, 27-CV-07-21720

Jerrod M. Smith, 2501 Mount Gilead Boulevard, Richmond, VA 23235 (pro se appellant)

Kay N. Hunt, Barry A. O'Neil, Brett P. Clark, Lommen, Abdo, Cole, King & Stageberg, P.A., 2000 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402 (for respondents)

Considered and decided by Schellhas, Presiding Judge; Worke, Judge; and Ross, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant challenges the district court's grant of summary judgment in favor of respondents, arguing that genuine issues of material fact exist concerning his claims of breach of contract, tortious interference of contract, defamation, and tortious interference with prospective economic advantage. We affirm.

D E C I S I O N

When reviewing a grant of summary judgment, this court determines whether there are genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). A motion for summary judgment is appropriately granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citing Minn. R. Civ. P. 56.03). "We view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). Whether a genuine issue of material fact exists and whether the district court erred in its application of the law is reviewed de novo. *Id.* We may affirm a grant of summary judgment if it can be sustained on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 827 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

Breach of Contract

Appellant Jerrod M. Smith, an attorney previously licensed in this state, argues that the district court erred in granting summary judgment on his breach-of-contract claim. Appellant initially entered into a retainer agreement with Ruby Wilson in June 2001 to pursue a medical-malpractice claim. In September 2005, appellant wrote respondent attorneys James Lindell and James Lavoie a letter of association agreeing to joint representation of Wilson. Respondents were to assist in discovery and ultimately try the case. The letter of association provided:

> Ms. Wilson wants me to stay on and deal with her, however, it is a blessing that you have agreed to come onto the case . . . . We have a retainer agreement with Ms. Wilson in the amount of 40%. In our conversations we discussed that we would have a 60% to 40% split between our firms. Your firm would receive 60%, and our firm 40% of the attorney fees. Let this letter be our agreement for the association of the two firms.

Wilson eventually discharged appellant on October 20, 2006, and contemporaneously signed an exclusive retainer agreement with respondents. Appellant argued that respondents breached the letter of association by signing an exclusive retainer agreement with Wilson.

The district court found that the letter of association was a supplemental agreement to the initial retainer agreement between appellant and Wilson. Because the contract was supplemental to the initial retainer agreement, the district court determined that both the letter of association and the initial retainer were dissolved when Wilson discharged appellant. As such, the district court concluded that the letter of association

was no longer enforceable when respondents signed an exclusive retainer with Wilson the same day, and the court granted summary judgment in favor of respondents.

Review of the district court's grant of summary judgment on appellant's breach-of-contract claim requires two analyses: (1) whether the letter of association was supplemental to the retainer agreement, and (2) if the letter of association was supplemental to the retainer agreement, whether appellant's breach-of-contract claim is precluded by the termination of his representation rendering the letter of association unenforceable.

Supplemental Agreement

When a second contract refers to the terms or provisions of a prior contract, the prior contract may be considered part of the second to the extent of the reference to it. *Winter v. Liles*, 354 N.W.2d 70, 73 (Minn. App. 1984). Whether two contracts comprise one modified contract or two distinct contracts depends primarily on the intention of the parties, which is interpreted in light of their subsequent conduct. *Mulcahy v. Dieudonne*, 103 Minn. 352, 356, 115 N.W. 636, 638 (1908).

Here, the letter of association explicitly referred to appellant's retainer agreement with Wilson: "We have a retainer agreement with Ms. Wilson in the amount of 40%. In our conversations we discussed that we would have a 60% to 40% split between our firms." This language also alludes to previous conversations between the parties pertaining to the prospect of jointly representing Wilson, and the parties' joint-representation after signing the letter of association is undisputed. Accordingly, the record supports the district court's determination that the letter of association

supplemented appellant's retainer agreement with Wilson. As such, the district court did not err in concluding that the letter of association created an attorney-client relationship among Wilson and appellant and respondents alike, as opposed to a separate contractual relationship between appellant and respondents.

Breach of Attorney-Client Contract

Because the letter of association is supplemental to the retainer agreement, the next issue is whether the district court erred in concluding that appellant's breach-of-contract claim was legally precluded when he was discharged by Wilson. Appellant claims that respondents breached the letter of association by securing a new retainer agreement with Wilson after his termination.

Minnesota recognizes and protects the right of a client to discharge an attorney at the client's complete discretion, with or without cause. *Krippner v. Matz*, 205 Minn. 497, 504, 287 N.W. 19, 23 (1939). Attorneys are consequently prevented from recovering on the theory of breach of contract based on a previously existing contingency-fee agreement. *Trenti, Saxhaug, Berger, Roche, Stephenson, Richards & Alvin, Ltd. v. Nartnik*, 439 N.W.2d 418, 420 (Minn. App. 1989), *review denied* (Minn. July 12, 1989). Although slightly more complex than a retainer agreement between one attorney and one client, the letter of association effectively joined respondents and appellant in representative capacities to Wilson and thus comports to these basic principles. Even if respondents did falsely inform Wilson that appellant had never tried a case, as appellant claims, and this was the reason why Wilson discharged appellant, she had the ultimate right to discharge appellant. Because the letter of association was supplemental to the

retainer agreement, the letter of association was rendered unenforceable when Wilson discharged appellant. Thus, any claim for breach of the letter of association originating after Wilson discharged appellant fails as a matter of law, and summary judgment was appropriately granted on this claim.

Finally, appellant argues that the district court erred in granting summary judgment on his breach claim because there are material facts in dispute, specifically whether respondents' contact with Wilson prior to his discharge constituted breach. Appellant argues that respondents' scope of representation was limited to managing discovery and, eventually, trying the case. Any conversations and interactions with Wilson were to be confined to these purposes, according to appellant, while he was to serve as lead counsel responsible for designing case strategies and serving as the primary liaison to Wilson for all attorney-client communications. Appellant concedes that these responsibilities are nowhere delineated in the letter of association, but appellant characterizes the agreement as patently ambiguous in this respect and thus argues that summary judgment was inappropriate because questions remain as to whether the nature of respondents' contact with Wilson constituted a breach of these supposed parameters of representation.

As respondents correctly point out, however, appellant did not raise the issue of patent ambiguity in district court. Appellant is therefore precluded from arguing this issue on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that issues not presented to the district court may not be argued for the first time on appeal).

Tortious Interference With a Contractual Relationship

Appellant next argues that the district court erred in granting summary judgment on his claim of tortious interference with a contractual relationship. Appellant must prove five elements to succeed on this claim: (1) the existence of a contract, (2) respondents' knowledge of the contract, (3) intentional procurement of its breach, (4) the lack of justification, and (5) damages. *Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn. 1994). The contract at issue was the original retainer agreement between appellant and Wilson. Appellant argues that respondents influenced Wilson to terminate his legal representation and sign an exclusive retainer agreement with them, thereby intentionally procuring the breach of the original retainer agreement. The district court reached only the third element of its analysis before deciding that respondents were entitled to summary judgment as a matter of law, largely for the same reason underlying the dismissal of the first claim: a client's discharge of an attorney cannot constitute a breach of contract. The district court concluded that since there could be no breach of the contract, there could be no intentional procurement of the breach by respondents.

Appellant cites to a Florida case, *Ferris v. S. Fl. Stadium Corp.*, to support the contention that tortious interference with a contractual relationship may occur in an attorney-client setting when a defendant perpetrates fraud or bad acts. 926 So. 2d 399, 402 (Fla. Dist. Ct. App. 2006). Not only is this case not binding on this court, it also lacks persuasive value as it assesses a fundamentally different rule of law. Instead of requiring an "intentional procurement of [a] breach [of contract]," s*ee Kjesbo,* 517 N.W.2d at 588, as an element of a claim for tortious interference with a contractual

relationship as Minnesota does, Florida requires only an "[i]ntentional interference with a business relationship." *Ferris*, 926 So. 2d at 401. Thus, reliance on this case is inappropriate, and appellant sets forth no additional grounds to overturn the district court's grant of summary judgment on this issue.

Alternatively, even if appellant's claim was not precluded by the longstanding rule that a client's discharge of an attorney cannot constitute a contractual breach, appellant's claim would still be barred as a matter of law. It is legally impossible for a party to interfere with its own contract under Minnesota law. *Nordling v. N. States Power Co.*, 478 N.W.2d 498, 505 (Minn. 1991) (citing *Bouten v. Richard Miller Homes, Inc.*, 321 N.W.2d 895, 901 (Minn. 1982)). Respondents became parties to the original retainer agreement between appellant and Wilson when the retainer agreement was incorporated into the letter of association between appellant and respondents. As a party to the original retainer agreement from which appellant seeks relief, respondents could not have intentionally procured the breach of this contract as a matter of law. Accordingly, the district court's grant of summary judgment in favor of respondents on the claim for tortious interference with a contractual relationship was appropriate.

Defamation

Appellant also argues that the district court erred in granting summary judgment on his defamation claim. There are three elements in a defamation claim: (1) "a false and defamatory statement made about the plaintiff"; (2) made "in an unprivileged publication to a third party"; and (3) "that harmed the plaintiff's reputation in the community." *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 673 (Minn. 2003). Appellant

argued that two independent defamatory actions occurred: the alleged exchange in which respondents told Wilson that appellant had never tried a case; and unspecified lies that respondents allegedly told to Wilson.[1] The district court granted summary judgment in favor of respondents, concluding that even if the statements were made, they qualify as absolutely privileged and therefore do not satisfy the second element of unprivileged publication to a third party.

Appellant argues that even if the statements that respondents made to Wilson were privileged, they should be considered a qualified privilege and subject to liability for defamation if actual malice is shown. Because malice is a question of fact almost inherently in dispute, appellant argues that summary judgment on this claim should be reversed. Although the district court noted that appellant produced no evidence that respondents told Wilson that he had no trial experience, reviewing courts must analyze a grant of summary judgment "in the light most favorable to the party against whom judgment was granted." *Fabio*, 504 N.W.2d at 761. Accordingly, this claim appropriately turns on whether the alleged statements were entitled to absolute privilege.

The Minnesota Supreme Court adopted the definition of absolute privilege in a judicial proceeding provided by the Restatement of Torts § 586 (1938) in *Matthis v. Kennedy*:

> An attorney at law is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding, or in the

[1] The district court noted that appellant failed to provide any details as to the nature or substance of the alleged lies. As such, the district court analyzed only the statement pertaining to appellant's trial experience. Our analysis is therefore similarly confined.

> institution of, or during the course and as a part of a judicial proceeding in which he participates as counsel, if it has some relation thereto.

243 Minn. 219, 227-28, 67 N.W.2d 413, 419 (1954) (quotation omitted). Attorneys are therefore immune from liability for defamation if the speech allegedly spoken is about or relevant to a judicial proceeding, and "even the presence of express malice does not destroy the privilege" provided "the administration of justice requires complete immunity." *Id*. at 223, 67 N.W.2d at 417. The supreme court later expounded on its holding in *Matthis*, articulating a four-part test to determine whether absolute privilege exists in a judicial proceeding. *Mahoney & Hagberg v. Newgard*, 729 N.W.2d 302, 306 (Minn. 2007). For a statement to be protected by absolute privilege, it must have been (1) made by a participating attorney, judge, judicial officer, or witness; (2) made during a judicial or quasi-judicial proceeding; (3) relevant to the litigated subject matter; and (4) protected in the interest of the administration of justice. *Id.*

Assuming that respondents did falsely inform Wilson that appellant had never tried a case, this statement likely satisfies the first three of these elements: the statement was made by a participating attorney; the statement was made to a client in preparation for a judicial proceeding; and the statement was relevant to the litigated subject matter because it was made in reference to competing views over whether to dismiss certain defendants and claims contained in the original complaint. The decisive issue, therefore, is whether justice requires this statement to be insulated from liability in a defamation action.

As the supreme court noted in *Matthis*, the purpose of extending absolute privilege into the realm of judicial proceedings is to allow "counsel full freedom of speech in conducting causes and advocating the rights of the parties they represent." 243 Minn. at 225, 67 N.W.2d at 418. Here, Wilson was jointly represented by appellant and respondents. The parties disagreed over significant issues pertaining to the prosecution of Wilson's claims. Any statements made regarding appellant's experience would have been motivated by respondents' insistence upon their case strategy and, as the district court surmised, done in the performance of their ethical duties as her attorneys. Thus, whether respondents' motives amount to actual malice is irrelevant as the statement was entitled to absolute privilege and shielded from liability in a defamation action. The district court was correct in granting respondents' summary-judgment motion on the defamation claim.

Tortious Interference with Prospective Economic Advantage

Finally, appellant argues that the district court erred in granting summary judgment on appellant's claim of tortious interference with prospective economic advantage. To succeed on a claim of tortious interference with prospective economic advantage, a plaintiff must show that: (1) the defendant "intentionally and improperly interfered with [the] prospective contractual relation"; (2) the interference caused "pecuniary harm resulting from loss of the benefits of the relation"; and (3) the interference either (a) induced or otherwise caused a third person "not to enter into or continue the prospective relation" or (b) prevented the continuance of the prospective relation. *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 633 (Minn. 1982).

Appellant's amended complaint alleged that respondents wrongly dismissed certain claims and physicians named as defendants in Wilson's original complaint, thereby causing the dismissed defendants not to enter into a prospective contractual relationship in the form of a settlement and ultimately reducing the final settlement amount. The district court concluded that this claim failed on several grounds, most notably because the court considered appellant to be the incorrect party to bring a claim for tortious interference with prospective economic advantage under the circumstances of this case.

The decision in *United Wild Rice* requires that an individual asserting the claim of tortious interference with prospective economic advantage be privy to the prospective contract at issue. *Id*. at 632. The contract underlying appellant's claim was the settlement agreement entered into by Wilson's estate and the defendant in her medical-malpractice suit, Allina Health Systems. Because appellant was discharged well before the settlement, he was not privy to the settlement agreement. Furthermore, allowing appellant to proceed with a claim for tortious interference with prospective economic advantage after he was terminated would also contradict the general rule that a discharged attorney is only entitled to quantum meruit and cannot sue for breach-of-contract in an attempt to recover a previously existing contingency fee. *See Trenti*, 439 N.W.2d at 420. Finally, the district court record is devoid of any proof posited by appellant that a more favorable settlement was available to Wilson, or that respondents' case strategy adversely affected the ultimate settlement. Accordingly, appellant's claim for tortious interference with prospective economic advantage fails as a matter of law,

and the district court appropriately granted respondents' summary-judgment motion on that claim.

Affirmed.