STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1214

Richard J. Briguet,
Appellant,

vs.

Timothy J. Danielson, et al.,
Respondents.

Filed February 10, 2014
Reversed and remanded
Larkin, Judge

Dakota County District Court
File No. 19HA-CV-12-4164

William J. Krueger, William J. Krueger, P.A., New Brighton, Minnesota (for appellant)

Kip W. Kootz, Kootz & Associates, P.L.L.C., St. Paul, Minnesota (for respondents)

Considered and decided by Rodenberg, Presiding Judge; Larkin, Judge; and Chutich, Judge.

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

LARKIN, Judge

Appellant challenges the district court's summary dismissal of his defamation suit against respondents and denial of his motion to amend his complaint to include additional defamation allegations and a claim for punitive damages. Because the district court's

rulings are based on the erroneous conclusion that the alleged defamatory statements are absolutely privileged, we reverse and remand.

FACTS

Appellant Richard J. Briguet's father and respondent Timothy Danielson's grandfather were original shareholders in the Gopher Uranium, Mining, Refining and Royalty Corporation (Gopher), which was incorporated in North Dakota in 1955. Gopher was formed to produce, refine, store, supply, and distribute oil, gas, minerals, and other products. In 1961, Gopher shareholders voted to place the company in inactive, dormant status until industry activity warranted reactivation. Gopher was administratively and involuntarily dissolved in 1987 for failing to make necessary annual corporate filings.

Timothy Danielson's grandfather died in 1961 and left his Gopher shares to his wife, who passed them on to their children, including respondent Carl Danielson, Timothy Danielson's father. Appellant's father died in 1990 and left his shares to his wife and his children, including appellant. Gopher's corporate attorney appointed appellant as Gopher's treasurer in the late 1980s. In approximately 2007, appellant learned of a potential business opportunity for Gopher and hired a law firm to audit Gopher's shares. The Danielson family was suspicious of the audit's results.

On May 29, 2008, appellant petitioned a North Dakota state court to reinstate Gopher as a corporation, and that court did so on June 18. No one from the Danielson family attended a court-ordered meeting of the Gopher shareholders held on January 16, 2009, even though notice was provided. The only shareholders present at the meeting were appellant and one of his family members. They elected Briguet family members

and friends as Gopher officers and directors. Appellant is the president and chairman of the board. The shareholders held another meeting on June 5, and no one from the Danielson family attended.

Since the spring of 2009, the Danielson family has repeatedly requested corporate records to resolve their suspicions and complaints regarding how appellant gained control of Gopher. The Danielson family primarily has communicated through Timothy Danielson, who holds his father's power of attorney. On March 31, 2009, Timothy Danielson e-mailed appellant's attorney, Kristi Haugen, and asked whom he should contact to verify his ownership interest in Gopher and to obtain a copy of company documents. Haugen answered some of his questions in a letter and informed him that he should contact appellant for further information. In December 2009, Timothy Danielson's sister sent appellant a letter requesting copies of various documents including Gopher's articles of incorporation and bylaws; documents related to Gopher's reinstatement; letters regarding leasing mineral rights; shareholder meeting minutes; and quarterly statements. Appellant sent her copies of two different stock ledgers, Gopher's original bylaws, and a lease. Respondents contend that appellant refused to send copies of stock certificates or documents associated with the certificates because of the cost.

The Danielson family retained a law firm to help them acquire company documents. In a letter dated June 10, 2010, the firm requested corporate records from Gopher. Gopher sent some of the requested documents, but it did not send the stock-transfer records because those documents were "archived." Approximately one month later, Gopher sent two compact discs with scanned images of certain stock records which

were created using a hand-held scanner. In a letter dated September 22, respondents notified appellant that the Danielson family had terminated its relationship with the law firm and that the digital images were "illegible and not acceptable" to them.

In a May 31, 2011 letter to appellant and Haugen, Timothy Danielson alleged that appellant had ignored his fiduciary duties, conspired against Gopher shareholders and the Danielson family, purposefully suppressed stock certificates, and committed fraud against the court during the company's reinstatement process. He stated that his family "intend[ed] to reclaim our majority stock ownership position in 'Gopher' and [would] soon file notice in the courts of our pending lawsuit against the corporation." Later, Danielson sent the letter to another Gopher shareholder.

In July 2012, appellant sued respondents for defamation, based on the May 2011 letter. Respondents moved the district court for summary judgment. Appellant moved the district court for leave to amend its complaint to include additional defamation allegations and a request for punitive damages. The district court granted respondents' motion for summary judgment, concluding that "[t]he May Letter constitutes a statement in contemplation of litigation and is absolutely privileged." The district court also denied appellant's motion for leave to amend his complaint, reasoning that "the claims are based on the May Letter which is absolutely privileged" and the additional materials "do not refer to [appellant], lack the specificity to support a claim of libel or defamation and appear to be statements in contemplation of litigation." This appeal follows.

D E C I S I O N

I.

"A motion for summary judgment shall be 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 a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "[Appellate courts] review a district court's summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). "On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio*, 504 N.W.2d at 761.

"Defamation is a statement that (1) is false, (2) communicated to someone other than the plaintiff, and (3) harms the plaintiff's reputation or esteem in the community." *Mahoney & Hagberg v. Newgard*, 729 N.W.2d 302, 310 (Minn. 2007). The fundamental basis of a defamation claim is that "one is liable for an unprivileged communication or publication of false and defamatory matter which injures the reputation of another." *Matthis v. Kennedy*, 243 Minn. 219, 222-23, 67 N.W.2d 413, 416 (1954). Statements, even if defamatory, may be protected if covered by an absolute or qualified privilege. *Id.* at 227-28, 67 N.W.2d at 419. Whether an allegedly defamatory communication is privileged is a question of law reviewed de novo. *Kittler v. Eckberg*, 535 N.W.2d 653,

655 (Minn. App. 1995), *review denied* (Minn. Oct. 10, 1995). "An individual claiming absolute privilege bears the burden of proof." *Mahoney*, 729 N.W.2d at 306.

"Absolute privilege means that immunity is given even for intentionally false statements, coupled with malice, while a qualified or conditional privilege grants immunity only if the privilege is not abused and defamatory statements are publicized in good faith and without malice." *Matthis*, 243 Minn. at 223, 67 N.W.2d at 416. A statement may be protected by an absolute privilege when (1) the statement was made by a litigant, attorney, judge, juror, or witness, (2) in communications preliminary to, or in the course of, a judicial proceeding, (3) the statement was related to the subject matter of the litigation, and (4) the administration of justice requires complete immunity. *Id*. at 223-29, 67 N.W.2d at 417-20; *see also Mahoney*, 729 N.W.2d at 306.

Here, our focus is on the second factor: whether the challenged statements were made in communications preliminary to, or during, a judicial proceeding. *See Matthis*, 243 Minn. at 223, 67 N.W.2d at 417 (explaining that it is "the occasion on which the communication of the defamatory words was made which determines the privilege"). "Absolute privilege extends to statements published prior to the judicial proceeding." *Mahoney*, 729 N.W.2d at 306. More specifically, absolute privilege extends to "communications preliminary to a proposed judicial proceeding . . . when the communication has some relation to a proceeding that is contemplated in good faith and under serious consideration." *Kittler*, 535 N.W.2d at 655 (quotation omitted). But "[t]he bare possibility that the proceeding might be instituted is not to be used as a cloak to

provide immunity for defamation when the possibility is not seriously considered." *Id.* (quotation omitted).

When Timothy Danielson sent the May 2011 letter, respondents were no longer represented by counsel, they had not initiated a lawsuit, and no legal proceeding was pending. In fact, respondents concede that they "[have] not yet commenced a legal proceeding." We are not aware of precedent applying the absolute privilege under the circumstances here. Indeed, the majority of relevant, precedential authority involves cases in which lawsuits were initiated before the alleged defamatory statements were made. *See Mahoney*, 729 N.W.2d at 304 (concluding that "[s]tatements by a law firm secretary, made in an affidavit [during a lawsuit] brought by a third party against the law firm" were absolutely privileged); *Matthis*, 243 Minn. at 219-20, 67 N.W.2d at 415 (stating that defamatory statements made during a proceeding in probate court were absolutely privileged); *Cole v. Star Tribune*, 581 N.W.2d 364, 366 (Minn. App. 1998) ("A crime victim's statement to the Minnesota Board of Pardons that is possibly pertinent or relevant to the proceedings is absolutely privileged."); *McGovern v. Cargill, Inc.*, 463 N.W.2d 556, 557 (Minn. App. 1990) ("Allegedly defamatory material disclosed by a potential impeachment witness to counsel for use in [a pending criminal trial] is absolutely privileged as a communication made in the course of a judicial proceeding.").

This court has approved application of absolute privilege to statements made prior to initiation of a lawsuit. In *Kittler*, an attorney sent 56 former corporate shareholders a letter "regarding the possibility of bringing an action" against the corporation's officers and directors for "theft of corporate property, fraud and misrepresentation, and breach of

fiduciary duty as an officer." *Kittler*, 535 N.W.2d at 654. The corporate officers sued for defamation. *Id*. The district court concluded that the attorney's statements were protected by the absolute-privilege rule. *Id*. at 655. This court agreed, concluding that "the letter was a communication related to a judicial proceeding that was contemplated in good faith and under serious consideration." *Id*. at 656. We reasoned that the case involved statements made during "an initial step in the litigation process: contacting all potential plaintiffs." *Id*. at 657.

Respondents argue that *Kittler* is "directly on point." We are not persuaded. The defamatory letter in *Kittler* was sent by a law firm that had been contacted regarding the possibility of filing a class-action lawsuit. The letter solicited potential clients, a necessary step when initiating a class-action lawsuit. The facts in this case are easily distinguishable. Here, the defamatory letter was not sent by a lawyer soliciting plaintiffs for a proposed class-action lawsuit. The only reference to a potential lawsuit in the 20-page letter is Timothy Danielson's statement that the Danielson family intended "to reclaim [their] majority stock ownership in 'Gopher' and [would] soon file notice in the courts of [their] pending lawsuit against the corporation." But it is undisputed that respondents had not initiated a lawsuit, and they concede that they "arguably could not proceed on many of their claims if they were to bring an action."

Nonetheless, the district court reasoned that respondents "consulted with attorneys [and] attempted to gather evidence, collect information, identify potential witnesses and examine records. There is no indication that they were not seriously contemplating litigation." We disagree. The Danielson family began requesting corporate documents

more than two years before Timothy Danielson sent the May 2011 letter, and there is no evidence that they communicated intent to sue during that time. Moreover, respondents terminated their relationship with their legal counsel approximately eight months before Timothy Danielson sent the letter. There is no indication that they retained other counsel to pursue a lawsuit. Thus, respondents' attempt to collect information and examine records is reasonably viewed as an attempt to determine the family's ownership rights in Gopher. Although it could also show that respondents were considering a lawsuit, those individuals "claiming absolute privilege bear[] the burden of proof." *Mahoney*, 729 N.W.2d at 306.

Appellant accurately summarizes the potential expansion of absolute privilege in this case as follows: to avoid being liable for defamation under the judicial-proceedings privilege, individuals "need not bring a claim, they need not hire a lawyer, and they need not take any actual steps to sue, [they] only [need to] allege it in a letter." Such an expansion is not supported by precedent. We therefore conclude that the record does not satisfy respondents' burden of proving that they contemplated a legal proceeding in good faith or that one was under serious consideration. *See id.* ("An individual claiming absolute privilege bears the burden of proof."). Thus, the occasion on which the communication was made does not warrant application of absolute privilege. *See Matthis*, 243 Minn. at 223, 67 N.W.2d at 417 (stating that "[t]he recognized class of occasions where the publication of defamatory matter is absolutely privileged is confined within narrow limits"). The district court therefore erred by applying the privilege in this case and granting respondents' motion for summary judgment.

II.

The district court denied appellant's motion for leave to amend his complaint, concluding that the proposed amended complaint could not survive summary judgment. "Ordinarily, amendments to pleadings should be freely granted except when prejudice would result to the other party." *Rhee v. Golden Home Builders, Inc*., 617 N.W.2d 618, 621 (Minn. App. 2000). However, "[a] motion to amend a complaint is properly denied when the additional claim could not survive summary judgment." *Bebo v. Delander*, 632 N.W.2d 732, 740 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001). "The decision whether to permit a party to amend the pleadings is within the district court's discretion, and we will not disturb that decision absent a clear abuse of that discretion." *Id*.

Appellant sought leave to amend the complaint to include, among other things, additional e-mails and punitive damages. The district court concluded that "[b]ecause the additional alleged defamatory statements identified in the Amended Complaint are absolutely privileged and/or not specific enough to support a claim for defamation, the proposed Amended Complaint would not survive summary judgment." As to punitive damages, the district court stated that

> the alleged defamatory statements were made in contemplation of litigation and are absolutely privileged. Subjecting individuals to punitive damages for statements that are otherwise protected by public policy in favor of assuring litigants access to the courts would undermine the purpose of the immunity they are otherwise afforded. As a result, [appellant's] motion to amend to include punitive damages must be denied.

We have determined that absolute privilege is inapplicable in this case. The district court therefore erred by denying appellant's motion for leave to amend based on the privilege. *See Pechovnik v. Pechovnik*, 765 N.W.2d 94, 98 (Minn. App. 2009) (stating that the district court abuses its discretion if it misapplies the law). We reverse and remand for consideration of the proposed amendments without application of the privilege.

Reversed and remanded.