

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Thomas J. Russo, Sr., Circuit Court Judge

Case No. 2012-CP-21-0301

Akim A. Anastopoulo.....Appellant,

v.

Edward R. Cole, Turner Padgett Graham and Laney P.A.,
and Nationwide Mutual Insurance Company.....Respondents.

FINAL BRIEF OF APPELLANT

Eric M. Poulin
S.C. Bar No.: 100209
2557 Ashley Phosphate Road
North Charleston, SC 29418
843-614-8888

Attorney for Appellant

RECEIVED

MAY 09 2013

SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities.....iii

Statement of Issues on Appeal 1

Statement of Jurisdiction 1

Statement of the Case.....1

Statement of Facts.....3

Standard of Review.....4

Argument.....5

I. BECAUSE RESPONDENT’S DEFAMATORY STATEMENTS ARE NOT PROTECTED BY THE JUDICIAL PROCEEDINGS PRIVILEGE, THE TRIAL COURT ERRED IN DISMISSING APPELLANT’S CAUSES OF ACTION.....5

 A. BECAUSE RESPONDENT’S DEFAMATORY STATEMENTS WERE NOT MADE IN PLEADINGS, THE TRIAL COURT ERRED IN FINDING THAT THEY ARE PROTECTED BY THE JUDICIAL PROCEEDINGS PRIVILEGE.....8

 B. BECAUSE RESPONDENT’S DEFAMATORY STATEMENTS WERE NOT RELEVANT TO THE UNDERLYING PROCEEDING, THE TRIAL COURT ERRED IN FINDING THAT THEY ARE PROTECTED BY THE JUDICIAL PROCEEDINGS PRIVILEGE.....10

 C. BECAUSE RESPONDENT’S DEFAMATORY STATEMENTS WERE MADE BY A NON-PARTY ATTORNEY, REGARDING ANOTHER NON-PARTY ATTORNEY, THE TRIAL COURT ERRED IN FINDING THAT THEY ARE PROTECTED BY THE JUDICIAL PROCEEDINGS PRIVILEGE.....13

D. BECAUSE RESPONDENT’S DEFAMATORY STATEMENTS FALL OUTSIDE OF THE LIMITS OF THE PUBLIC POLICY PURPOSE OF THE PRIVILEGE, THE TRIAL COURT ERRED IN FINDING THAT THEY ARE PROTECTED BY THE JUDICIAL PROCEEDINGS PRIVILEGE.....17

Conclusion.....19

Certificate of Counsel.....20

TABLE OF AUTHORITIES

Cases
(Authoritative)

Brazell v. Windsor, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (S.C. 2009).....5

Brown v. Leverette, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (S.C. 1987).....5

Corbin v. Washington Fire and Marine Ins. Co., 278 F. Supp. 393 (D.S.C. 1968).....9, 17

Cowart v. Poore, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999).....5

Cricket Cove, LLC v. Gilland, 390 S.C. 312, 701 S.E.2d 39 (Ct. App. 2010).....4, 5

Crowell v. Herring, 301 S.C. 424, 392 S.E.2d 464 (Ct. App. 1990).....6, 9, 14

FOC Lawshe Ltd. Partnership v. International Paper Co., 352 S.C. 408, 413,
574 S.E.2d 228, 230 (Ct. App. 2002).....5

Manley v. Manley, 291 S.C. 325, 353 S.E.2d 312 (Ct. App. 1987).....6

McKesson & Robbins, Inc. v. Newsome, 206 S.C. 269, 33 S.E.2d 585,
587 (S.C. 1945).....6, 7, 9, 14

Oliveros v. Henderson, 116 S.C. 77, 106 S.E. 855, 858 (S.C. 1921).....5, 17

Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 861
(Ct. App. 2002).....6, 9, 17, 18

Rodgers v. Wise, 193 S.C. 5, 7 S.E.2d 517 (S.C. 1940).....9

Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (S.C. 1991).....4

Sanders v. Rollinson, 33 S.C. Law (2 Stroboh. L.) 447 (S.C. 1848).....9

Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (S.C. 1987).....5

Texas Company v. C.W. Brewer & Co. et al., 180 S.C. 325, 185 S.E.623
(S.C. 1936).6, 7, 9, 10, 11, 14

Verenes v. Alvanos, 387 S.C. 11, 690 S.E.2d 771 (S.C. 2010).....5

Williams v. Condon, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001).....5

Woodward v. Weiss, 932 F.Supp. 723 (D.S.C. 1996).....9, 14

Cases
(Persuasive)

Bradley v. Hartford Accident & Indemnity Co., 30 Cal.App.3d 818, 826,
106 Cal.Rptr. 718, 723 (1973).....12, 13

Carpenter v. Grimes Pass Placer Mining Co., 19 Idaho, 384, 114 Pac. 42, 45
(1911).....6, 11

Demopolis v. Peoples Nat. Bank of Washington, 59 Wash.App. 105, 796 P.2d 426
(Wash.App. 1990).....12, 13

Edelman, Combs and Latturmer v. Hinshaw and Culbertson, 338 Ill. App.3d 156,
273 Ill. Dec. 149, 788 N.E.2d 740 (2003).....14, 15, 16

Post v. Mendell, 510 Pa. 213, 221, 507 A.2d 351, 356. (Pa. 1986).....11, 12, 13

Richeson v. Kessler, 73 Idaho 548, 255 P.2d 707 (Idaho 1953).....15, 16, 17

Simons v. Potts, 33 Misc.2d 183, 225 N.Y.S.2d 690 (1962).....15, 16, 17

Sussman v. Damian, 355 So.2d 809, 811-812 (Fla. App. 1977).....11, 12

Statutes

S.C. Code Ann. § 14-3-330.....1

Rules

S.C. R. Civ. P. 5 (a).....9

S.C. R. Civ. P. 12(b)(6)..... 4, 8

S.C. R. Civ. P. 15.....16

S.C. App. Ct. R. 402(k).....18

Other Authorities

36 C.J. 1253.....6

17 R.C.L. 335.....6

STATEMENT OF JURISDICTION

This appeal arises out of an Order of the Trial Court granting Respondents' Motion to Dismiss Appellant's causes of action with prejudice.

The trial court's final judgment was entered on August 27, 2012, and disposed of all claims of all parties. Appellant filed a Notice of Appeal on September 24, 2012. This Court has jurisdiction to hear the appeal and correct errors of law pursuant to S.C. Code Ann. § 14-3-330.

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN DIMISSING APPELLANT'S CAUSES OF ACTION?

STATEMENT OF CASE

Appellant, Akim A. Anastopoulos (herein referred to as "Anastopoulos" and/or "Appellant"), has been defamed by Respondent, Edward R. Cole (herein referred to as "Respondent Cole" and/or "Respondent"), during the course of an underlying lawsuit where both men serve as opposing counsel. The underlying lawsuit is pending in the United States District Court, and concerns whether Respondent Cole's client, Nationwide Insurance Company (herein referred to as "Nationwide"), breached its contract and acted in bad faith toward Carlotta Motsinger, Appellant Anastopoulos's client in the underlying matter. The underlying action does not relate to Anastopoulos, he is not a party to the action, and his acts and/or omissions are not the subject of the litigation. Instead, he simply serves as attorney of record for one of parties.

This action arises out of Respondent Cole's use of defamatory and libelous language in referring to Anastopoulos published to the Court, parties in the underlying action, law clerks, and members of the public who have had access to the documents.

Following Respondent Cole's use of statements defaming Mr. Anastopoulo, Mr. Anastopoulo made several attempts to get Respondent Cole to cease making defamatory statements before filing suit, but was unsuccessful.

As a result, and as a last resort, Appellant filed this action on February 1, 2012, alleging defamation as to Respondent Cole and his law firm, and causes of action against Respondent Nationwide for their complicity in Respondent Cole's actions. The suit was subsequently served on all parties. Defendant Respondent's thereafter moved to dismiss Plaintiff's claims on the grounds that the allegedly defamatory statements were protected by judicial proceedings immunity.

Thereafter, the parties submitted briefs and a hearing was held August 15, 2012, on a variety of Motions including the Motion to Dismiss. By Order filed August 27, 2012, the Trial Court granted Respondents' Motion to Dismiss based on the assertion that the statements are absolutely privileged as a result of the judicial proceedings privilege under South Carolina law, and dismissed Appellant Anastopoulo's claims with prejudice.

It is from that Order that Appellant appeals. Appellant's Notice of Appeal was filed on September 24, 2012.

This matter now comes before the Court of Appeals presenting the novel issue in South Carolina of whether the impertinent defamatory statements of one attorney made about another attorney during the course of litigation, where neither are parties, are protected by the judicial proceedings immunity, and therefore whether dismissal was proper.

STATEMENT OF FACTS

The facts are largely undisputed. Over the period of about one year, Respondent Cole made several statements in writing regarding the character, personal motives and legal work of the Appellant. These statements were made in an email, in a motion, and in three memoranda in an underlying bad faith insurance lawsuit where Anastopoulo and Cole serve as opposing counsel. Appellant asserts that these statements amount to defamation and in some cases defamation *per se*.

The first statement came from a memorandum in the underlying case on March 22, 2011. That statement accused Anastopoulo of “attempting to force ‘Nationwide into capitulation by bluster, threats, outright trickery, and ill-conceived lawsuit.’” (R. at 13). Appellant denies the veracity of this statement and Respondents have offered no proof to the contrary. Respondent Cole continued his course of conduct and on December 23, 2011, in an email referred to Anastopoulo’s legal work as “silly and juvenile.” (*Id.*)

Thereafter, Cole escalated the rhetoric and in “Defendant’s Response to Plaintiff’s Motion for Leave to Amend the Complaint” in the underlying action, Respondent Cole unleashed a series of defamatory attacks on the Appellant, referring to Anastopoulo’s pursuit as a “nefarious scheme,” a “sham proceeding” and referring to Anastopoulo, his law firm, and clients as a “villainous band of thieves.” (*Id.* at 10). Cole went on to refer to Anastopoulo’s legal work as a “blatant, shameful exercise in deceit,” and asserted that Anastopoulo “completely disregarded his professional obligations” through “duplicity” in a court proceeding. (*Id.*). Moreover, Respondent Cole made personal attacks against Mr. Anastopoulo asserting that he is “absurd,” “dishonest” and “nothing short of shameful.” (*Id.* at 10-11). Respondent Cole referred to Mr. Anastopoulo’s representation of clients

as engaging in a “sham legal proceeding’ with the ‘intention of misleading the Court’” and that he “blatantly attempted to use the fruit of that poisonous tree to bludgeon Nationwide.” (Id. at 11). In other statements, Respondent Cole refers to Mr. Anastopoulo as having created a “witches’ brew” and as a “perfidious” person intent on “harassing” and “oppressing” Nationwide in a “campaign of deceit and subterfuge’ to use Nationwide’s legal rights against it ‘as a club.’” (Id. at 12). Respondent Cole also asserted that “Anastopoulo intentionally misled the Family Court” in a Response in Opposition to Plaintiff’s Motion to Compel Discovery in United States District Court. (Id. at 14). In that same memorandum, Respondent Cole asserted that “[p]laintiff [apparently referring to Anastopoulo] has used ‘scurrilous conduct’ to ‘extort’ monies from a Defendant.” (Id.).

None of these statements were disputed by Respondents’ counsel in the defamation action, with his attorney at the hearing for the Rule 12(b)(6) motion stating “I’ll be the first to say I probably wouldn’t have written the memo like he did.” (Id. at 89).

STANDARD OF REVIEW

Dismissal of a claim is “considered to be a drastic procedure by our courts.” Cricket Cove, LLC v. Gilland, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (Ct. App. 2010) citing Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). It is only proper where the Complaint fails “to state facts sufficient to constitute a cause of action.” Rule 12(b)(6), South Carolina Rules of Civil Procedure. “The Trial Court must dispose of a motion for failure to state a cause of action **based solely** upon the allegations set forth on the face of the complaint.” Brown v. Leverette, 291 S.C. 364, 366, 353

S.E.2d 697, 698 (1987)(emphasis added). “The question to be considered is whether, in the light most favorable to the plaintiff, the pleadings articulate any valid claim for relief.” Williams v. Condon, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001) citing Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987); Cowart v. Poore, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999).

Moreover, “[a]ll properly pleaded factual allegations are deemed admitted for the purposes of considering a motion for judgment on the pleadings.” FOC Lawshe Ltd. Partnership v. International Paper Co., 352 S.C. 408, 413, 574 S.E.2d 228, 230 (Ct. App. 2002) citing Russell v. Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991).

In its review of a lower court decision, the Court of Appeals may decide questions of law with no particular deference to the lower court. Verenes v. Alvanos, 387 S.C. 11, 690 S.E.2d 771 (2010). “If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper.” Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (Ct. App. 2010) citing Brazell v. Windsor, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009). This Court therefore has the authority to review this question presented *De Novo*.

ARGUMENT

“[A] citizen is as much entitled to the protection of the court for his good name as for his property.” Oliveros v. Henderson, 116 S.C. 77, 106 S.E. 855, 858 (S.C. 1921).

I. BECAUSE RESPONDENT’S DEFAMATORY STATEMENTS ARE NOT PROTECTED BY THE JUDICIAL PROCEEDINGS PRIVILEGE, THE TRIAL COURT ERRED IN DISMISSING APPELLANT’S CAUSES OF ACTION.

Broadly, the judicial proceedings privilege in South Carolina states that “Defamatory matter contained in pleadings filed according to law in a court having jurisdiction, if relevant and pertinent to the issues in the case, is absolutely privileged.” Texas Company v. C.W. Brewer & Co. et al., 180 S.C. 325, 327, 185 S.E.623 (S.C. 1936) citing 36 C.J. 1253 see also 17 R.C.L. 335. The Court in Texas Co. went on to quote a case relied upon in creating South Carolina’s privilege to explain “allowing litigants to freely plead any pertinent or material matter in a judicial proceeding to which they are parties, holding them accountable only for defamatory matter which is neither pertinent nor material to the subject under inquiry.” Texas Co., 180 S.C. 325 citing Carpenter v. Grimes Pass Placer Mining Co., 19 Idaho, 384, 114 P. 42, 45 (1911).

The South Carolina Supreme Court narrowed this privilege in Mckesson, holding it applies only to “libelous or defamatory statements in pleadings, when pertinent or material or relevant to the real issues involved.” McKesson & Robbins, Inc. v. Newsome, 206 S.C. 269, 33 S.E.2d 585, 587 (1945) citing Texas Company v. C.W. Brewer & Co. et al., 180 S.C. 325, 185 S.E.623 (1936); See also Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002) (pleadings absolutely privileged only “if they are relevant and legitimately related to the issues and inquiry at trial”); Crowell v. Herring, 301 S.C. 424, 432, 392 S.E.2d 464, 468 (Ct. App. 1990) (statements absolutely privileged only where “pertinent and reasonably related” to the litigation); Manley v. Manley, 291 S.C. 325, 353 S.E.2d 312 (Ct. App. 1987) (defamatory matter in pleadings absolutely privileged only “if relevant and pertinent to the issues in the case”).

Importantly, in both Texas Co. and McKesson the court was examining defamation actions arising out of allegations made in the complaint in an underlying action. In Texas Co., the underlying issue involved the buying and selling of goods where an underlying action had Texas Co. suing C.W. Brewer & Co. for payment in the transaction. The defamation action arose out of Brewer's denial that money was owed, and allegation that the complaint requesting relief for the same was "false and libelous and intended to hold [C.W. Brewer] up to public ridicule and scorn." Texas Co., 180 S.C. 325. In McKesson the defamation cause of action was actually pled as a counterclaim in the answer on roughly the same facts as Texas Co., whereby the defendant retail merchant (Newsome), alleged that her business had been impacted by the filing of the lawsuit itself, and the impact of the same "on her good reputation and credit." McKesson, 33 S.E.2d 585, 586. Therefore, the alleged defamatory statements were contained in pleadings, were relevant by virtue of concerning the litigants themselves and the underlying matter at issue, and were within the bounds of the public policy the judicial proceeding privilege protects: free access to the judicial system for litigants. The foundation for South Carolina's judicial proceedings privilege was thereby set.

In the present case, all of the defamatory statements were made in an email, a motion and three separate memoranda in the underlying bad faith insurance suit: Defendant's Response to Plaintiff's Motion for Leave to Amend Complaint, Defendant's Motion for Protective Order, Memorandum in Support of Motion by Defendants, et al. to Dismiss Amended Complaint, or Alternatively, to Drop or Sever Claims Against Mary Alice Johnson from Claims Against These Defendants, and Defendant's Response in

Opposition to Plaintiff's Motion to Compel Discovery. In its Order the Trial Court held that although "as counsel for [Cole] acknowledge, while Defendant Cole may well have expressed his client's position in a different manner in the memoranda, his characterizations regarding the plaintiff's alleged handling of the litigation were pertinent and germane and therefore relevant to the proceedings." (R. at 152). The Court held then, without addressing the statements made in the motion or the email, that the defamatory statements were not actionable because of the judicial proceedings privilege. However, in so doing, the Trial Court erred in misinterpreting and misapplying the law related to defamation in South Carolina.

In the present case, the privilege does not extend to the specific facts because the statements were not made in pleadings, were not relevant to the underlying matter which they are alleged to concern, and are outside of the bounds of what is acceptable by public policy concerning the judicial proceedings privilege. Moreover, even if they were, Appellant did not need to **prove** that Respondent's statements were unprivileged to successfully defeat the 12(b)(6) motion to dismiss. Instead, Appellant's burden was merely to allege facts which, when viewed in the light most favorable to Appellant, show that Respondent Cole's statements are not privileged. The Appellant met this burden. In paragraph fifteen of the Complaint, Appellant alleged that "the defamatory and libelous statements complained about . . . are not relevant or pertinent to the issues in the case." (Id. at 8). Thus, on its face the Complaint states a claim for which relief may be granted under the laws of this state, and the Order of the Trial Court should be reversed.

A. BECAUSE RESPONDENT'S DEFAMATORY STATEMENTS WERE NOT MADE IN PLEADINGS, THE TRIAL COURT ERRED IN FINDING THAT THEY ARE PROTECTED BY THE JUDICIAL PROCEEDINGS PRIVILEGE.

“South Carolina has long recognized that relevant pleadings, even if defamatory, are absolutely privileged.” Pond Place Partners Inc. v. Poole, 351 S.C. 1, 24, 567 S.E.2d 881, 893 (Ct. App. 2002) citing McKesson & Robbins v. Newsome, 206 S.C. 269, 33 S.E.2d 585 (1945); Texas Co. v. C.W. Brewer & Co., 180 S.C. 325, 185 S.E. 623 (1936); Rodgers v. Wise, 193 S.C. 5, 7 S.E.2d 517 (1940); Sanders v. Rollinson, 33 S.C. Law (2 Strobb. L.) 447 (1848). The two foundational cases involving judicial proceedings privilege explicitly involve complaints filed in the underlying matter. Texas Co., 180 S.C. 325 (1936); McKesson, 206 S.C. 269 (1945). These cases established that statements made in “pleadings” would be subject to the judicial proceedings privilege for purposes of defamation analysis. Id. South Carolina, in its rules of court, explicitly recognize pleadings to include “the original summons and complaint, which includes answers, counterclaims, cross claims, replies and amended complaints” but identifies “written motions,” and presumably their memoranda, as a separate form of document. S.C. R. Civ. P., Rule 5(a). Likewise, emails are not pleadings.

In recent cases South Carolina courts have allowed the privilege to be extended to statements repeating the charges made in pleadings, and to documents necessary to the filing of the pleadings including: statements of facts and arguments made to a board of arbitrators concerning the underlying matter, statements at a court-martial by Defendant regarding another party and their misapplication of profits, and expert reports in the underlying action where one expert questioned the medical treatment plan of the other. See respectively Corbin v. Washington Fire and Marine Ins. Co., 278 F. Supp. 393 (D.S.C. 1968); Crowell v. Herring, 301 S.C. 424, 392 S.E.2d 464 (Ct. App. 1990); Woodward v. Weiss, 932 F.Supp. 723 (D.S.C. 1996). These cases effectively protect

pleadings for purposes of libel, and oral statements made in court or court proceedings for purposes of slander.

In the present case, all of the statements were made in an email, motion and three memoranda in the underlying case. The email, memoranda and motion are not considered pleadings under existing case law, and are explicitly excluded under South Carolina rules of court from the definition of pleading. Therefore, the judicial proceedings immunity applying to libelous statements made in “pleadings” does not apply to the facts of this case, and the statements are not absolutely privileged.

Moreover, Appellant pled in his Complaint “[t]hat the defamatory and libelous statements complained about herein are not contained in any pleadings.” (R. at 8). Therefore, and taking the facts in the most favorable light to Appellant, along with the allegations of the Complaint and above authorities, dismissal was improper.

B. BECAUSE RESPONDENT’S DEFAMATORY STATEMENTS WERE NOT RELEVANT TO THE UNDELRYING PROCEEDING, THE TRIAL COURT ERRED IN FINDING THAT THEY ARE PROTECTED BY THE JUDICIAL PROCEEDINGS PRIVILEGE.

Even if this Court were willing to extend the absolute privilege to statements made in the email, motions, or memoranda, Respondent’s statements would still not be afforded absolute privilege because they were not relevant or necessary to the proceeding.

South Carolina has long held, along with “the weight of American authority...that the privilege is absolute when, **and only when**, the matter tendered is pertinent or material or relevant.” Texas Co. v. C.W. Brewer & Co., 180 S.C. 325, 186 S.E. 623 (1936) (emphasis added). In establishing the judicial privilege, South Carolina aimed to give citizens access to the courts without fear that the causes of action pled may give rise

to liability on the basis of an unsuccessful outcome in the underlying suit. But South Carolina also recognized that litigants and, perhaps most particularly, their **lawyers** **“cannot be allowed to avail themselves of the protection of the courts to assail and besmirch the reputation of their adversaries, or to there find protection, and thence sally forth in the guise of a pleading to assassinate character and belie virtue.** The privilege must be exercised in good faith.” Texas Co., 180 S.C. 325 citing Carpenter v. Grimes Pass Placer Mining Co., 19 Idaho, 384, 114 P. 42, 45. (1911)(emphasis added).

Although this State has not directly confronted the issue of whether defamatory statements made about one attorney by another attorney, in a case where neither are parties, should be considered relevant and necessary, and therefore absolutely privileged, the question has developed and can be persuasively seen in the jurisprudence from a number of other jurisdictions. In other cases, courts have held that statements made about an attorney of record by another attorney of record in an underlying matter relating to that attorney’s “professional integrity” is not absolutely privileged since it is “in no sense relevant or material to the cause at hand” even when the conversation “involved the prior court hearing on the pending lawsuit.” Sussman v. Damian, 355 So.2d 809, 811-812 (Fla.App. 1977). In another case where an attorney wrote a letter disparaging the other’s integrity and professionalism in conducting the ongoing trial in an underlying matter, it was held that the absolute privilege did not apply because the statements were not “pertinent and material to the redress sought.” Post v. Mendell, 510 Pa. 213, 221, 507 A.2d 351, 356. (Pa. 1986). The court went on to note that “[t]he privilege is not a license for extra-judicial defamation, and there is unnecessary potential for abuse if letters of the sort written in this case are published with impunity. Formal procedures are available to

address the grievances which the writer of the letter perceived, without resort to extra-judicial defamation.” Id., at 356. Another court refused to apply absolute privilege where an attorney made a defamatory statement regarding the credibility of a witness during the course of trial, but while the witness was not on the stand. Demopolis v. Peoples Nat. Bank of Washington, 59 Wash. App. 105, 796 P.2d 426 (Wash. App. 1990). That court, citing other authority, found that “special emphasis must be laid on the requirement that it [statement] be made in furtherance of the litigation and to promote the interest of justice.” Id., at 430 citing Bradley v. Hartford Accident & Indemnity Co., 30 Cal. App.3d 818, 826, 106 Cal. Rptr. 718, 723 (1973).

As in, Sussman, although Respondent’s statements were surrounded by others that were relevant to the underlying suit, the statements themselves were not. In Sussman the statements “involved the prior court hearing,” and in this case, Respondent Cole’s statements were surrounded by others that involved the underlying action addressed in the memoranda. However, Respondent Cole’s statements addressing the “witches’ brew” allegedly created by Appellant, and the defamatory assertions of Appellant’s “double-dealing” “campaign of deceit and subterfuge,” “perfidious conduct” and his alleged nature to “completely disregard his professional obligations” in pursuit of his alleged “nefarious schemes” and using this “scurrilous conduct” to “extort” money were “in no sense relevant or material to the cause at hand.” Id. Moreover, these, and the other previously referenced statements by Respondent Cole are of the exact nature that the Post court found the privilege to not be applicable. In fact, the statements contained in the letter between attorneys in that case used some of the very same language as the statements at issue in this case. In the subject letter where Mendel defamed Post as

“deceptive,” “nefarious” and acting in a manner “calculated to deceive the Court and mislead the jury,” thereby acting in “violation of the four Canons.” Post, 510 Pa. at 216. Here, Respondent Cole referred to Anastopoulo as engaging in a “campaign of deceit” and using a “nefarious scheme” with the “intention of misleading the Court” thereby “completely disregard[ing] his professional obligations.” (R. at 10-12). These statements made by Respondent Cole and others, are more of the nature of those in cases where courts have held that the absolute privilege should not apply, even though the statements were made during judicial proceedings, because they were made inappropriately, and without the bounds of relevancy and the public policy for which the privilege was established. See generally Demopolis, 59 Wash. App. 105; Bradley, 30 Cal. App.3d 818.

Finally, considering Appellant’s Complaint, irrelevancy was alleged (“That the defamatory and libelous statements complained about herein...are not relevant or pertinent to the issues in the [underlying suit].” (R. at 8). As a result, and taking the facts pled in the complaint in the light most favorable to Appellant, the dismissal of Appellant’s suit for failure to state a claim was improper.

C. BECAUSE RESPONDENT’S DEFAMATORY STATEMENTS WERE MADE BY A NON-PARTY ATTORNEY, REGARDING ANOTHER NON-PARTY ATTORNEY THE TRIAL COURT ERRED IN FINDING THAT THEY ARE PROTECTED BY THE JUDICIAL PROCEEDINGS PRIVILEGE.

Whether or not the judicial proceedings privilege should extend to defamatory statements made by an attorney against another attorney when neither are parties to a lawsuit, or otherwise personally engaged in litigation against one another, is an issue of first impression in South Carolina. However, the case law that does exist in the state on similar issues suggest that the answer is no.

In the foundational cases establishing the judicial proceedings privilege in the state, the statements complained of related directly to the parties in the underlying suit. McKesson, 33 S.E.2d 585; Texas Co., 180 S.C. 325. In fact, in those cases the statements complained of were allegedly defamatory as to the defendants in the underlying suit, and taken directly from the complaints. McKesson, 33 S.E.2d 585; Texas Co., 180 S.C. 325. Other cases have allowed the privilege to apply to individuals other than the parties, however, for reasons that were necessary to the furtherance of the litigation itself. See Woodward v. Weiss, 932 F.Supp. 723 (D.S.C. 1996) (applying absolute privilege to medical consultant report required to file suit as to statements made about treatment of treating physician); Crowell v. Herring, 301 S.C. 424, 392 S.E.2d 464 (Ct. App. 1990)(applying absolute privilege to statements made in testimony at the court-martial hearing regarding the accused). However, no South Carolina case directly addresses the issue of defamatory statements made in a legal memoranda, or motions, particularly when those statements are regarding another attorney, rather than the parties in the suit, or the underlying matter, which the motion is due to address in the first instance. However, in one Illinois case involving the publication of legal memoranda defaming the litigation style and accusing opposing attorneys of concealment, the Illinois Supreme Court held that the communication was not absolutely privileged because it was published and available to individuals not concerned with the litigation, and the statements and their publication to those individuals did not serve any interest to the defaming attorney's client. Edelman, Combs and Lattuner v. Hinshaw and Culbertson, 338 Ill. App.3d 156, 273 Ill. Dec. 149, 788 N.E.2d 740 (2003). In short, because the

statements were made about an opposing attorney and not the parties, or witnesses, or experts for purposes of credibility, they were not protected by the judicial privilege. Id.

There is, however, some older case law from other jurisdictions that incorporated other determinations to address communications between non-party attorneys with regard to the extension of the judicial proceedings privilege. Among them is a 1953 case decided by the Idaho Supreme Court where it was held that the judicial proceedings privilege extended to an allegedly libelous letter written to a Judge asking that a brief be retracted because “many of the assertions made therein are untrue. Others are grossly misleading...[and] Portions of said brief are malicious and scurrilous...” Richeson v. Kessler, 73 Idaho 548, 550, 255 P.2d 707, 708 (Idaho 1953). There the court based its holding that the statements were privileged on the fact that the letter “was written with reference and relation to the subject matter of the cause being litigated; and was, in effect, an objection or counter-showing to the subject matter of the brief.” Richeson, 73 Idaho, at 551. In another case, the New York Court of Appeals held that a letter from one attorney to another that alleged unethical conduct, namely the refusal of the attorney to release an original agreement relating to ownership of the horse in question, was pertinent to the probate proceedings it concerned. Simons v. Potts, 33 Misc.2d 183, 185, 225 N.Y.S.2d 690, 690 (1962). As a result, the Court held the letter was absolutely privileged and since the complainant attorney had not pled lack of pertinence in his Complaint, the case should be dismissed. Id., at 190.

Here, the facts are more similar to those in the cases finding lack of privilege, than those finding an absolute privilege and Appellant would urge this Court to adopt the holding in this case, that the privilege should not apply. In fact, there is no relationship

between the subject matter of the litigation (email, memoranda, and motion) and the defamatory statements Respondent made therein as to Appellant. By way of example, the bulk of Respondent's defamatory remarks were made in a memorandum responding to a Motion for Leave to Amend the Complaint in the underlying action. However, and according to S.C. R. Civ. P., Rule 15 the only pertinent issues relating to amendment of a pleading, and therefore to the memorandum written by Respondent, would be whether service has been completed, and if the case has been placed upon a trial roster. In the event, both have occurred, the Rule requires "leave shall be freely given when justice so requires and does not prejudice any other party" making that the only other potentially pertinent issue. S.C. R. Civ. P., Rule 15. There is no other pertinent issue under the Rule relating to the amendment of a complaint, not especially the content of the defamatory statements Respondent made in this case. For instance, it would be difficult to relate Respondent's allegations that Appellant was attempting to "extort" money from Nationwide, and his practice of law as a "sorry, and shameful course of conduct" asserting he "intentionally misled the Family Court" as relevant or pertinent in a Response in Opposition to a Motion to Compel, as Respondent did in this case. (R. at 13-14). Therefore, this set of facts falls squarely within those analyzed by the Edelman court where "the statements and their publication" do "not serve any interest to the defaming attorney's client," and fall squarely without the factual analysis in either Richeson or Simons. Edelman, 338 Ill. App.3d 156; Richeson, 73 Idaho 548; Simons, 225 N.Y.S.2d 690. These facts are easily distinguishable from Richeson since the letter addressed to the judge in that case dealt entirely with the subject matter of the brief itself, rather than its writer. 73 Idaho, at 550. Here, Respondent Cole's statements in a memorandum

opposing leave to amend a complaint addressed the other attorney, not the subject matter of the issue at hand, as did the other memoranda, email, and Motion for Protective Order.

Finally, and unlike in Simons, Appellant's Complaint in the defamation suit did allege that the statements Respondent Cole made were not pertinent or relevant, therefore making dismissal improper. (R. at 8). As a result, and taking the allegations in the complaint as true, and the facts in a light most favorable to Appellant, dismissal was improper and the Circuit Court's Order should be reversed.

D. BECAUSE RESPONDENT'S DEFAMATORY STATEMENTS FALL OUTSIDE OF THE LIMITS OF THE PUBLIC POLICY PURPOSE OF THE PRIVILEGE, THE TRIAL COURT ERRED IN FINDING THAT THEY ARE PROTECTED BY THE JUDICIAL PROCEEDINGS PRIVILEGE.

"[A] citizen is as much entitled to the protection of the court for his good name as for his property." Oliveros v. Henderson, 116 S.C. 77, 106 S.E. 855, 858 (S.C. 1921). That entitlement is as much relevant to an attorney as to any other citizen excepted only by the absolute privilege of judicial proceedings privilege if it applies. But, importantly "its limits are fixed rather by considerations of public policy." Corbin v. Washington Fire and Marine Ins. Co., 278 F. Supp. 393, 396 (D.S.C. 1968). The public policy underlying the judicial proceedings privilege is meant to provide "a shield to the one who in a legal proceeding publishes a libel, not because it wishes to encourage libel, **but because if men were afraid to set forth their rights in legal proceedings for fear of liability to libel suits greater harm would result, in the suppression of the truth.**" Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 861, 892 (Ct. App. 2002)(emphasis in original).

The present case also implicates the public policy issues involved with lawyer civility. South Carolina has a civility oath which states “To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communication.” S.C. App. Ct. R. 402(k) South Carolina Lawyer’s Oath.

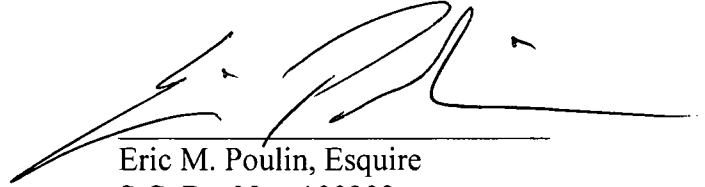
Here, Respondent Cole moved beyond the limits fixed by the considerations of public policy underlying the judicial proceedings privilege. The defamatory statements made against Appellant did not set forth any rights of Respondent Cole’s clients nor were they instrumental in advancing the rights of his clients. There has been no demonstration of or explanation as to how referring to Appellant’s legal work as “silly and juvenile” in the email in question, and asserting his engagement in a “nefarious scheme” as part of a “villainous band of thieves” that is “perfidious” and has created a “witches’ brew” as part of a “campaign of deceit and subterfuge” in any way advanced the rights of Nationwide in the underlying suit. (R. at 10, 12-1). In fact, they were wholly irrelevant to the issues addressed by the Motion, the other Motions for which the memoranda were filed, and the email referring to the Motions filed by Appellant on behalf of his client. Moreover, Appellant gave Respondent several opportunities to withdraw his statements and/or cease making further defamatory comments, to which Respondent refused and not only encouraged but engaged in and continued to make the series of libelous statements complained of by Appellant. As a result, Respondent’s conduct seemingly falls outside the bounds of the civility oath he took to practice law as violative of “fairness, integrity, and civility...in all written and oral communications” when Respondent made the defamatory statements and engaged in the type of speech not protected by the shield of

the judicial proceedings privilege by way of its very nature and lack of justification as setting forth any particular rights of his client.

CONCLUSION

For the reasons stated above, this Court should reverse the dismissal of the trial court.

May 6, 2013



Eric M. Poulin, Esquire
S.C. Bar No.: 100209
Anastopoulo Law Firm, LLC
2557 Ashley Phosphate Rd.
North Charleston, SC 29418
(843) 614-8888
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Thomas J. Russo, Sr., Circuit Court Judge

Case No. 2012-CP-21-0301

RECEIVED
MAY 09 2013
SC Court of Appeals

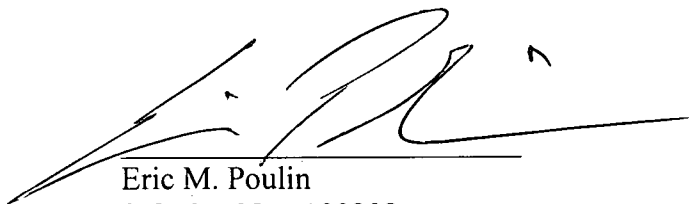
Akim A. Anastopoulo.....Appellant,

v.

Edward R. Cole, Turner Padget Graham and Laney P.A.,
and Nationwide Mutual Insurance Company.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



Eric M. Poulin
S.C. Bar No.: 100209
2557 Ashley Phosphate Road
North Charleston, SC 29418
843-614-8888

Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Thomas J. Russo, Sr., Circuit Court Judge

Case No. 2012-CP-21-0301

Akim A. Anastopoulo.....Appellant,

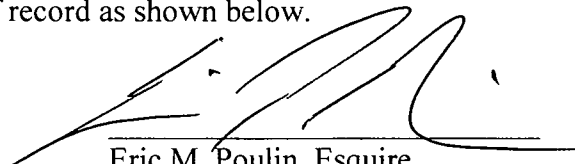
v.

Edward R. Cole, Turner Padget Graham and Laney P.A.,
and Nationwide Mutual Insurance Company.....Respondents.

PROOF OF SERVICE

I certify that I have served a copy of Appellant's Final Brief and Final Reply Brief on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on May 8, 2013, addressed to their attorneys of record as shown below.

May 8, 2013



Eric M. Poulin, Esquire
Anastopoulo Law Firm, LLC
2557 Ashley Phosphate Rd.
North Charleston, SC 29418
(843) 614-8888
Attorney for Appellant

Other Counsel of Record:

Kevin M. Barth
~~P.O. Box 107~~ 205 N. 1st Street
Florence, SC 29501

Regina H. Lewis
3710 Landmark Drive, Suite 109
Columbia, SC 29204

Attorney for Respondents
Cole and Turner Padget

Attorney for Respondent
Nationwide

RECEIVED

MAY 09 2013

SC Court of Appeals