

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.

APPELLANT'S REPLY BRIEF IN SUPPORT OF APPEAL

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

Attorney for Appellant

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ARGUMENT IN REPLY

This appeal presents 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. Appellant contends they are not and therefore dismissal of Appellant's defamation claims was improper. The issue is not, as Respondent states, "whether the judicial proceedings privilege applies to documents other than pleadings as the South Carolina Rules of Civil Procedure define that term." Initial Brief of Respondents, p. 6. Although the legal question is novel, the South Carolina Supreme Court has a history of supporting the public policy undergirding this appeal stating as early as 1921 that "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. THE STATEMENTS ARE NOT PROTECTED BY THE JUDICIAL PROCEEDINGS PRIVILEGE SINCE THEY DO NOT RELATE TO ANY ISSUE RAISED IN THE PLEADINGS.

Respondents' argument attempts to bifurcate the judicial proceedings privilege to require that the defamatory statements be made in pleadings and then that those statements be relevant. However, this is an oversimplification of the privilege itself and the law based upon it. The appropriate analysis is whether or not the defamatory statements are relevant to issues raised in the pleadings. It is the pleadings in the case that establish the issues and the issues that are determinative of relevance of the statements. The pleadings are the starting point of the analysis then to the extent that

they help determine the issues in the underlying matter. As a result, the analysis is necessarily a joint, not bifurcated, analysis.

In applying the joint analysis, many of Respondents' arguments fracture. For example, in their brief, Respondents cite Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002), for the notion that statements do not necessarily have to be in pleadings to be protected by the privilege. Initial Brief of Respondents, p. 8. However, Respondents failed to acknowledge that in that same paragraph, the Court cited to a New York case standing for the extension of the privilege to statements outside of pleadings "...subject to only one limitation, that what is said or written bears upon the subject of litigation, that is, is pertinent, relevant, germane thereto." Id., at 23, 567 S.E.2d 892-93 (quoting Kraushaar v. LaVin, 39 N.Y.S.2d 880, 883 (N.Y. Sup.Ct. 1943)). This is important because it underscores the fact that the analysis is intended to be a joint analysis. In fact, "[t]he weight of American authority is that the privilege is absolute when, and only when, the matter tendered is pertinent or material or relevant." Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 24, 567 S.E.2d 881, 893 (Ct. App. 2002) (citing Texas Company v. C.W. Brewer & Company, 180 S.C. 325, 327, 185 S.E. 623 (1936)). When the relevant case law is analyzed through this joint analysis of pleadings and relevance, Respondents' argument is disembodied.

Respondents cite to a case nearly a century old to support their contention that when making an inquiry on relevance the Court "should use a 'liberal interpretation' and 'all doubt should be resolved in favor of relevancy.'" Initial Brief of Respondents, p. 10. (citing The Texas Co. v. C.W. Brewer & Co., 180 S.C. 325, 327, 185 S.E. 623, 624

(1936). Yet, Respondents miss the logic and policy reasoning of the very opinion they cite. The full passage provides:

As to whether **allegations in a pleading** are pertinent to the real issues involved, it is held that the question of relevancy in such inquiries is a matter for the determination for the court and not for the jury. Also that a liberal interpretation **of the pleadings** is required in actions of this kind, and that all doubt should be resolved in favor of relevancy.

The Texas Co., 180 S.C. 325, 327, 185 S.E. 623, 624 (1936) (emphasis added)(citing Bussewitz v. Wisconsin Teachers' Association, 188 Wis. 121, 205 N.W. 808). Context is critical here, because the Court was examining a defamation cause of action arising out of allegations made in a Complaint, the "pleading." The Court created this liberal interpretation for purposes of "allowing litigants to freely plead any pertinent or material matter in a judicial proceeding **to which they are parties**, holding them accountable for defamatory matter which is neither pertinent nor material to the subject under inquiry." Id. (citing Carpenter v. Grimes Pass Placer Mining Co., 19 Idaho, 384, 114 P. 42, 45). The liberal standard with respect to the allegations contained in **pleadings** ensures that **parties** to the action are able to establish the issues forming the basis for their grievances or defenses. Once those issues are established there is no indication that the same liberal standard need be applied with respect to subsequent proceedings. Even if it does, there is no public policy or other purpose served by allowing non-parties free reign to slander and defame other non-parties, when their words have no substantial connection with the actual issues to be resolved in a given case.

Respondent argues that this Court should apply the reasoning applied by the federal court in Corbin v. Washington Fire & Marine, because Respondents find the case "closely analogous to the present case." Initial Brief of Respondents, p. 11. 278 F.Supp.

393 (D.S.C. 1968). But Respondents miss the crux of the case when they assert that the statements in Corbin “directly challenged the veracity of the plaintiff’s counsel.” Initial Brief of Respondents, p. 11. This is not on point. Instead, the statements in Corbin that were alleged to be defamatory related directly to the way the insurer handled the claim. The pertinent statements were from a letter laying out the facts to the arbitrator:

We particularly call your attention to paragraph four that it was stated that negotiations were made in good faith by the attorney for Sandra Simmons and settlement was made July 2, 1964, and a release and draft was furnished that date which is a falsehood. As you know, it is a legal maxim, that false in one thing is false in all things.

Id., at 399.

Here, the federal court found that the allegation of falsity was directly related to the proceeding and claims therein since it was a denial of an allegation of good faith in an insurance bad faith suit. The Court found that, “[o]f course the statements must be relevant to the arbitration issues” to be protected. Id. Furthermore, the Court held that because the “proceeding herein presented largely a question of credibility, the argument submitted, which forms the basis for plaintiff’s action, was addressed to such question” of credibility thereby making it relevant and privileged. Id., at 399. Importantly, the Court in that case also held that the “unqualified privilege does not depend on the rigid requirement of a strictly legislative or judicial proceeding; [but that] **its limits are fixed rather by considerations of public policy.**” Id., at 396. The liberal relevance interpretation standard was applied in Corbin since the statements were directly related to issues in the case, and the timing of the purported settlement was directly relevant and material to establishing the claim itself.

The present case is very different in that regard. By way of one example, whether or not Appellant is a “thief” and whether or not he is a part of a “villainous band of thieves” as Respondent Cole stated is not at issue in the underlying suit. In fact, Respondents do not allege that it is at issue, and it is not addressed in any of the pleadings. Therefore, the statement is clearly beyond the scope of the issues in the underlying case, and not protected by privilege. Moreover, there is no fathomable public policy consideration for those statements to be made within the course of a dispute over insurance coverage involving a determination of whether a common law marriage exists. As a result, the statement falls outside of any limits fixed by considerations of public policy.

Respondents’ hypothetical is further illustrative. In Respondents’ hypothetical they admit that one attorney accusing the other of being “a well-known adulterer who also cheats on his taxes” would “not have any conceivable relation to any issues in” a foreign substance premises liability case. Initial Brief of Respondents, pg. 15. Likewise, it is inconceivable in a case involving determination of a common law marriage, how accusing opposing counsel of extortion, and theft, would have any relation to the underlying issue. The statements do not simply “criticize the Appellant’s tactics and challenge their validity,” they go beyond and rise to the level of defaming Appellant. Initial Brief of Respondents, pg. 12. Creating a shield for such statements and their purveyors by bifurcating and then extending the relevance interpretation in all analysis to illogical ends is not the purpose of the judicial proceedings privilege. It goes beyond the limits fixed by considerations of public policy, and is not the law of South Carolina.

With respect to Respondents' attempt to distinguish the persuasive authority cited in Appellant's Initial Brief, it is important to note that Respondents' arguments once more undercut their own attempt to bifurcate the analysis. Respondents state that in Sussman v. Damian, 355 So.2d 809 (Fla. Ct. App. 1977), the court refused to draw a distinction on the content of the statement (i.e. one attorney personally attacking another) in finding that absolute privilege did not exist to a statement made on an elevator, but did to a statement made in deposition, instead holding "[t]he difference was the setting." Initial Brief of Respondent's, p. 15. In fact, to the contrary, the court expressly addressed the issue and refuted Respondents' contention here in the opinion:

[a]s to Damian's statement made during his conversation with Sussan, it is clear that such statement is not absolutely privileged...[a]lthough is was uttered during an otherwise privileged conversation with opposing counsel in a pending lawsuit, the defamatory statement was in no sense relevant or material to the cause at hand. As such, it cannot come within the umbrella of an absolute privilege.

Sussman v. Damian, 355 So.2d at 812. Therefore, while the court found that the conversation was "in the course of the litigation," it found the statement not protected because it was not relevant or material to the cause at hand, because veracity of a counselor was not at issue in the underlying matter.

Next, Respondents address a Pennsylvania case whereby an action for defamation was commenced after one attorney referred to another as "unprofessional" and "a nefarious piranha and liar" in a letter related to a case in which both attorneys were involved. Post v. Mendell, 510 Pa. 213, 223, 507 A.2d 351. (Pa. 1986). With respect to that case, Respondents assert that the "court's decision had nothing to do with what the defendant said. . . . The court based its decision on when he said it – i.e. in a letter drafted and sent after the case was

over.” Initial Brief of Respondents, pg. 16. Again, Respondents oversimplify and misstate the court’s holding. The court actually held that:

Although the letter made reference to matters which occurred in an ongoing trial, the letter was not directly relevant to the court proceedings. Accordingly, we do not believe issuance of the letter was within the sphere of activities which judicial immunity was designed to protect. The privilege is not a license for extrajudicial defamation, and there is unnecessary potential for abuse if letters of the sort written in this case are published with impunity.

Id., at 222-23. Thus, the underlying case was ongoing, it was not “recently completed” as Respondents state in their brief. Moreover, due to the lack of pertinence the statements had to the underlying issues in that case, the court held that “the policy of promoting an unfettered airing of issues at trial is not infringed by [the] holding that the letter published in [that] case was outside the ambit of judicial immunity.” Id., at 222. The court’s analysis was based on the joint nature of relevance with the underlying judicial proceedings—not merely the geography within which such statements were made.

In Sussman, Pennsylvania joined the list of states elevating professionalism and pertinence above a shielded reign of slander. Interestingly, the statements in Post, nearly mirror those made in the present case except the perpetrator in Post chose the term piranha rather than “villainous thief” as did Respondent Cole. This court should join those courts, like the Pennsylvania court in Sussman, that when presented with a similar issue as the one presented in choosing a joint approach analysis, and elevating public policy considerations of professionalism and civility above an ill-extended shield of privilege.

Similarly, in Respondent's discussion of Demopolis v. Peoples Nat'l Bank, 59 Wn. App. 105, 796 P.2d 426 (Wash. App. 1990) and Bradley v. Hartford Acc. & Indem. Co., 106 Cal. Rptr. 718 (Cal. App. 1973), they misconstrue the holding. In Demopolis, the court relied on the joint analysis of whether the "defamatory statement was pertinent to the estate proceedings and therefore privileged." Id., at 110. There, the court found that whether the statement was "sufficiently pertinent to warrant an extension of the judicial proceedings privilege is a close question" and ultimately resolved it on the basis of "whether the policies of absolute privileges would be served by finding the requisite pertinency." Id., at 111-12. The court found that the public policy would not be served since "a lawyer's duty to represent a client with zeal does not militate against the concurrent obligation to treat all persons involved in the legal process with consideration and to avoid inflicting needless harm." Id., at 112 (citing Green Acres Trust v. London, 141 Ariz. 609, 688 P.2d 617 (1984)).

Of course, to acknowledge the same would greatly undermine Respondent's argument, and it better serves their argument to deflect the analysis to venue where the statements were made, and to pigeon hole it there, rather than to undertake the more appropriate analysis of venue coupled with relevance. The same is attempted with Respondents' handling of the Bradley case, whereby Respondents note that "the California Supreme Court expressly rejected [an "interest of justice]" requirement for being inconsistent with the absolute nature of the litigation privilege and its underlying purposes in Silberg v. Anderson, 786 P.2d 365 (Cal. 1990), a later case.

However, the California court only disapproved of the “interest of justice” test and disapproved of Bradley to the extent it conflicted with the purpose of the California statute establishing the privilege and the Silberg decision. Id. In fact, the court goes on to note in Silberg that “the Bradley court’s announcement of the ‘interest of justice’ test was wholly unnecessary to its decision” because “the communication was not reasonably related to the action” and that alone “was ample basis for holding that the communication was not privileged.” Id., at 217. This is exactly the point for which Appellant relied upon Bradley. Therefore, this Court should dismiss Respondent’s contention that Bradley is no longer good law in its state of origin, since that is inaccurate, and should use Bradley for the larger point of the holding – that a communication not reasonably related to the underlying action is not to be afforded judicial immunity.

Respondents’ reply to the Edelman v. Hinshaw & Culbertson case mirrors the fallacy incorporated in their replies to the above. Here, again, Respondents disregard the court’s finding that privilege did not apply because “[m]ost importantly, defendants have not demonstrated how publishing the . . . memorandum . . . served the interest of any client” or how “the communication furthered some interest of social importance.” Edelman, Combs and Lattuner v. Hinshaw and Culbertson, 338 Ill. App.3d 156, 273 Ill. Dec. 149, 788 N.E.2d 740 (2003). In finding the communication to the bankruptcy trustee absolutely privileged the court went into depth regarding the “connection or logical relation to the action” and specifically how the communication “further the interests of the client” thereby supporting the public policy considerations of the privilege. Id.

Here, Respondents have shown no relation between the statements made by Respondent and the underlying action seeking a determination of whether or not a common law marriage existed. Therefore, this Court should reverse the circuit court's dismissal.

II. THE STATEMENTS SHOULD NOT BE PROTECTED BY THE JUDICIAL PROCEEDINGS PRIVILEGE BECAUSE EXTENDING THE PRIVILEGE TO INCLUDE THEM WOULD OFFEND PUBLIC POLICY.

“[A] citizen is as much entitled to the protection of the court for his good name as for his property. If any difference should be made, it ought to be made in favor of the former. . .” Oliveros v. Henderson, 116 S.C. 77, 106 S.E. 855, 858 (S.C. 1921). The judicial proceedings privilege has “limits [that] are fixed by considerations of public policy” as Respondents aptly acknowledge. Corbin v. Washington Fire and Marine Ins. Co., 278 F. Supp. 393, 396 (D.S.C. 1968). Initial Brief of Respondents, pg. 21. As described more fully above, however, the privilege's test cannot be disjointed because the public policy considerations are driven by the issues laid out in the pleadings, and the relevance of later statements derived therefrom. The pleadings are the starting point of the analysis to the extent they help determine the issues in the underlying matter. The public policy is simply to ensure that men are free to set forth their complaints and defenses in the pleadings—not to encourage unbridled libel. Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 861, 892 (Ct. App. 2002).

In fact, in this Court's decision citing the New York case provided by Respondents to support their narrow reading of the policy consideration, this Court need only read the rest of the paragraphs from which Respondents cite to overcome the notion that only “freedom of expression” was and is to be considered in applying the privilege,

as Respondents argue. Respondents end the citation in their brief at the following sentence from the case:

So the law offers 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.

Initial Brief of Respondents, pg. 22. (citing Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 861, 892 (Ct. App. 2002)).

But the very next sentence reads:

The law gives to all who take part in judicial proceedings, judge, attorney, counsel, printer, witness, litigant, a right to speak and to write, **subject only to one limitation, that what is said or written bears upon the subject of litigation, that is, is pertinent, relevant, germane thereto.**

Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 861, 892 (Ct. App. 2002)

(quoting Kraushaar v. Lavin, 39 N.Y.S.2d 880, 893 (N.Y. Sup. Ct. 1943))(emphasis added). The public policy, then, is not to provide “full freedom of expression for everyone participating in a legal action” as Respondents argue. Initial Brief of Respondents, pg. 22. Instead, the “weight of American authority is that the privilege is absolute [and should be extended] when, and **only when**, the matter tendered is pertinent or material or relevant.” Id., at 894. (quoting Texas Company v. C.W. Brewer & Company, 180 S.C. 325, 327, 185 S.E. 623, 623 (1936)(emphasis added)). When the statement is made by a lawyer, it should be protected only when it relates to the underlying issues and advances the client’s interest.

Here, there is no pertinence, materiality or relevance to Respondent Cole’s assertions beginning with referring to Appellant’s pursuit as a “nefarious scheme,” a “sham proceeding” and further referring to Appellant, his law firm, and clients as a “villainous band of thieves.” Complaint ¶¶ 30-31. Nor is there any materiality to

Respondent Cole's personal attacks against Appellant asserting that he is "absurd," "dishonest" and "nothing short of shameful." Complaint ¶¶ 32, 39. In other statements, Respondent Cole refers to Appellant 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.' Complaint ¶¶ 45, 47, 49. Respondent Cole also asserted that Appellant was an extortionist and used 'scurrilous conduct' to 'extort' monies from a Defendant." Complaint ¶ 61. None of these statements were material, pertinent or relevant to a judicial proceeding concerned with establishing a determination of a common law marriage of two individuals, of which neither Appellant nor Respondent were parties. In fact, Respondent admits in their brief that these statements were Respondent Cole's and his alone, thereby removing any contention that they advanced his client's (Nationwide's) interest, or that they were relevant and pertinent to the issues in the underlying case. As a result, these types of statements fall outside of the reasonable scope of the judicial proceedings privilege, and this Court should not afford Respondent protection for them.

Moreover, 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. While Respondents contend that they "most certainly do not believe or concede any violation of that oath occurred in this case," it is difficult to fathom how accusing a fellow practitioner of practicing witchcraft or extortion, among other things, would be

broadly permissible under the oath of “fairness, integrity, and civility.” Initial Brief of Respondents, pg. 22. S.C. App. Ct. R. 402(k) South Carolina’s Lawyer’s Oath.

For these reasons, Respondent’s statements are exactly the type that fall outside of the protection of the judicial proceedings privilege. Respondents misstate the applicable law when they argue that “[r]egardless of how they were worded” the statements should be protected. How they are worded and the words used are exactly the inquiry that is required to determine if judicial proceedings privilege should be extended. Otherwise, and by logical extension of Respondents’ argument, free reign to defame in a brief or memorandum would be the law of South Carolina. It is difficult to imagine that our system of justice would support that proposition.

III. THE STATEMENTS ARE NOT CONSTITUTIONALLY PROTECTED OPINIONS.

Respondents now contend that even if the judicial proceedings privilege does not apply, that the statements should be found to be constitutionally protected opinions. However, Respondents did not raise this issue in their original motion to dismiss, and therefore the circuit court did not rule on it, and did not use it as a basis for the order at issue in this appeal. Therefore this Court should not rule on it. Nevertheless, if this Court considers Respondents’ opinion argument, Appellant would urge this court to start and end where Respondent did, with Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

In Milkovich, the Supreme Court rejected the idea that the dictum relied on by the lower court from Gertz v. Robert Welch, Inc., 418 U.S. 323 (1973), and cited by Respondents created a defamation exemption for “opinions.” Milkovich, at 18. In fact, the Court in Milkovich, held that the passage from Gertz was not “intended to create a wholesale defamation exemption from anything that might be labeled ‘opinion.’” Id., at

18. Instead, the Court held that the defamer in that case, a newspaper columnist, should be held liable because a “reasonable factfinder could conclude that the statements in the...column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding.” Id., at 21. The Court found that accusing Milkovich of intentionally lying while under oath was “not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury.” Id.

Interestingly, in the present case, Respondent Cole made the exact type of statements, as those made against Milkovich. If anything, Respondent Cole’s statements were even more pronounced than the statements made about Milkovich. Milkovich was simply pictured above an article that went on state “A lesson which, sadly, in view of the events of the past year, is well they learned early. It is simply this: If you get in a jam lie your way out.” Id., at 5 (quoting Milkovich v. News-Herald, 46 Ohio App. 3d 20, 21, 545 N.E.2d 1320, 1321-22 (1989)). Here, Respondent Cole actually wrote that Appellant “intentionally misled the Family Court” and described Appellant’s work as a “blatant, shameful exercise in deceit.” Complaint ¶¶ 30-31, 57. As the Court analyzed in Milkovich, if a speaker, Cole in this case, says “In my opinion Jones is liar” or even more pronounced “Anastopoulo intentionally misled the Family Court” therein is an implication of a “knowledge of facts which lead to the conclusion that Jones told an untruth” or in this case that Appellant misled the court. Milkovich, at 18-19. Therefore, because “the statement, ‘in my opinion Jones is a liar,’ can cause as much damage to reputation as the statement, ‘Jones is a liar’” neither are afforded protection. Id.

The Court then engages in the analysis regarding statements on matters of public concern and require that such statements “must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved.” Milkovich, at 20. Here, there is no allegation that the statements were a matter of public concern, nor any logical means by which to establish the same. Therefore, the provability of the statements as either true or false is immaterial except to the extent that it is necessary for purposes of the underlying defamation analysis, which requires falsity. After all, it is well settled that the key distinction between a “fact” and “opinion” is its provability as either true or false. Milkovich, at 19-21.

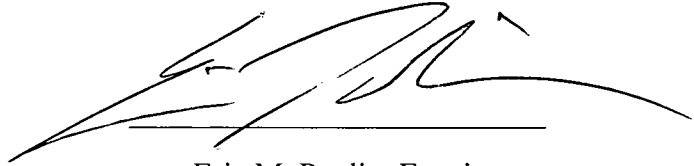
In this case, a factfinder could determine the truth or lack thereof of Respondent’s statements. In fact, and by way of example, courts in this state and others rely on juries every day to determine whether someone is guilty of extortion, perjury, harassment, and theft, all of which Respondent stated Appellant committed. Likewise, a jury could readily find that Appellant is not a witch, does not practice witchcraft, and therefore is incapable of concocting any type of witches’ potion as Respondent stated he had. Whether an individual “committed perjury is sufficiently factual to be susceptible of being proved true or false” as are the other statements made by Respondent. Milkovich, at 21. These statements are simply not capable of an opinion based reading, and even if they were, this Court should not engage in it.

As the United States Supreme Court did in Milkovich, this Court should find that the statements accusing Appellant of perjury, amongst other things, are not constitutionally protected opinions, and should overturn the lower court’s ruling.

CONCLUSION

For the reasons stated above, and in Appellant's Initial Brief, this Court should reverse the dismissal of the circuit court.

March 26, 2013

A handwritten signature in black ink, appearing to read 'Eric M. Poulin', written over a horizontal line.

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