

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 18, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP3060

Cir. Ct. No. 2004CV2611

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

ROBERT KUHNMUENCH,

PLAINTIFF-APPELLANT,

V.

EDWARD ENNIS, MARTY RICE AND FRONTIER MOTOR CARS, INC.,

DEFENDANTS-RESPONDENTS,

ECONOMY PREMIER ASSURANCE COMPANY,

INTERVENOR.

APPEAL from a judgment of the circuit court for Milwaukee County: CLAIRE L. FIORENZA, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Robert Kuhnmuench appeals a summary judgment dismissing his action against his former employer and Marty Rice, his former roommate and co-worker. Kuhnmuench alleged defamation, invasion of privacy and abuse of process for statements Rice made in an affidavit submitted to the Department of Workforce Development (DWD). He also alleged defamation and abuse of process against Rice based on Rice's petition for a restraining order filed during pendency of this action. Because the trial court correctly concluded that Rice's accusations were privileged and that Kuhnmuench's allegations of invasion of privacy and abuse of process lacked evidence of essential elements, we affirm the judgment.

¶2 After Kuhnmuench was fired from his job as a used car salesman, he filed a wage claim with the DWD, alleging that he was not paid minimum wage for twelve-hour days and seventy-hour weeks he worked. His employer filed Rice's affidavit contradicting Kuhnmuench's claims and stating that Kuhnmuench failed to show up for work because he was suffering from depression and alcoholism resulting in frequent police calls to their apartment. Rice stated that he endured anti-Semitic and racist remarks and a threat involving Kuhnmuench's use of a gun during a drunken rage. He also stated that Kuhnmuench "reacquainted with a woman over the internet and began seeing her," and Rice would not see Kuhnmuench for days or weeks at a time.

¶3 The trial court ruled that Rice's affidavit was privileged, and Rice was immune from liability for making these statements to the DWD. Whether statements are privileged is a question of law that this court decides without deference to the trial court. *Rady v. Lutz*, 150 Wis. 2d 643, 647, 444 N.W.2d 58 (Ct. App. 1989). Statements made in judicial or quasi-judicial proceedings are absolutely privileged and persons who make or file them are immune from

liability if the statements are pertinent and relevant to the issues presented. *Bussewitz v. Wisconsin Teachers' Ass'n*, 188 Wis. 121, 127, 205 N.W. 808 (1925). When deciding whether to grant absolute immunity to statements made before an administrative agency, courts accord the statements broad latitude in determining what is relevant, and resolve any doubt in favor of finding the statements privileged. See *Churchill v. WFA Econometrics Corp.*, 2002 WI App 305, ¶14, 258 Wis. 2d 926, 655 N.W.2d 505. A litigant or witness should not have to fear a lawsuit for mistakes as to facts or some excess of zeal in the litigation. *Id.*

¶4 Kuhnmuensch argues that Rice's affidavit is not privileged because it presents facts that are inadmissible under WIS. STAT. § 906.08 (which prohibits impeachment on collateral matters by extrinsic evidence), and WIS. STAT. § 904.03 (which allows exclusion of evidence that is substantially more prejudicial than probative).¹ The pertinency of the statement is not judged by technical legal relevancy, but rather by its general frame of reference to the subject matter.² Rice's affidavit stated that Kuhnmuensch did not work the hours he claimed to work, suggested reasons Kuhnmuensch was not at work and established Rice's relationship with Kuhnmuensch and his first-hand knowledge of Kuhnmuensch's activities. While some of the statements did not relate directly to the issues before

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² We also note that the rules of evidence do not apply in cases before administrative agencies. See *Gehin v. Wisconsin Group Ins. Bd.*, 2005 WI 16, ¶49, 278 Wis. 2d 111, 692 N.W.2d 572.

the administrative law judge, they bear sufficient relationship to the issues³ to meet the low threshold for privilege and immunity.

¶5 Rice's statements in his petition for a restraining order are also privileged. The statements relate to threatening and harassing behavior by Kuhnmuench and therefore are relevant to the proceedings.

¶6 The trial court also properly dismissed Kuhnmuench's invasion of privacy claim relating to Rice's statement that Kuhnmuench began seeing a woman he met over the internet. A privacy action must be based on public disclosure of a private matter that would be highly offensive to a reasonable person of ordinary sensibilities. *See* WIS. STAT. § 895.50. The affidavit was not publicly disclosed. An affidavit submitted to the DWD is not likely to become public knowledge, particularly considering the safeguards set out in WIS. STAT. §§ 19.365 and 19.36(10)(d). Nor was Rice's statement a disclosure of private or highly offensive facts.

¶7 Finally, the trial court properly concluded that Kuhnmuench failed to establish all of the elements of abuse of process. To state a claim for abuse of process, Kuhnmuench must allege something was done under the process that was not warranted by its terms. *See Thompson v. Beecham*, 72 Wis. 2d 356, 363, 241 N.W.2d 163 (1976). Kuhnmuench did not allege any improper use of process. Rice never succeeded in serving the petition and no restraining order was issued. Rice therefore made no use, much less any improper use, of any legal process.

³ Some statements arguably support ultimate conclusions Rice drew concerning Kuhnmuench's impairments.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5.

