

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**MAY 21, 1996**

**NOTICE**

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

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

**No. 95-1864-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

**INTERIOR CUSTOM MILLWORK, INC.  
and CHELSEA FAIRFAX GROUP, INC.,**

**Plaintiffs,**

**v.**

**RONALD FILBRUN,  
IDEAL CUSTOM MILLWORK,  
DISPLAY DYNAMICS,  
VEIT PARKER,  
GERALD A. LASH,  
SCOTT P. NORVELL,  
MICHAEL MEYER,  
JAMES K. ROBBE  
and KEITH G. BOHN,**

**Defendants-Third Party  
Plaintiffs-Appellants,**

**v.**

**WILLIAM STOECKER and  
SALLY YULE MENGO,**

**Third Party Defendants-  
Respondents.**

APPEAL from an order of the circuit court for Milwaukee County:  
MICHAEL J. SKWIERAWSKI, Judge. *Affirmed in part and reversed in part.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Ronald Filbrun, Ideal Custom Millwork, Display Dynamics, Veit Parker, Gerald A. Lash, Scott P. Norvell, Michael Meyer, James K. Robbe (together "Ideal") appeal from a circuit court order that dismissed their third-party complaint against Sally Yule Mengo. Ideal contends that the trial court erred when it held that Mengo, who had written letters to Ideal customers and vendors that Ideal maintained were defamatory, was not a necessary party to the underlying action and dismissed her from the case.<sup>1</sup> In addition, Ideal contends that the trial court erroneously held that Mengo's letters were protected by absolute privilege as a matter of law, and dismissed the third-party complaint against Mengo on that additional basis. Pursuant to this court's order dated August 16, 1995, this case was submitted to the court on the expedited appeals calendar. We agree with Ideal that the trial court should not have granted Mengo judgment on the question of whether the letters were protected by absolute privilege. However, we affirm the trial court's conclusion that Mengo was not a necessary party to the underlying action, and that her dismissal on that basis was appropriate.

The relevant facts are largely undisputed. Interior Custom Millwork, Inc., and Chelsea Fairfax Group, Inc., (together "Interior"), sued Ideal alleging breach of contract and fraud, among other things. Further information regarding the underlying suit is irrelevant. During the pendency of the action, Mengo, Interior's counsel, wrote letters to various Ideal customers, prospective customers, vendors, and prospective vendors. Because of the nature of the contractual arrangement between Ideal and Interior, at least some of the

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<sup>1</sup> Ideal impleaded William Stoecker, the sole shareholder in Interior, along with Mengo. Ideal claimed that Stoecker had also defamed it. The trial court held that Stoecker was not a necessary party. Although Ideal contends that the trial court erred in dismissing the "defendants," -- Mengo and Stoecker -- it appeals only from the portion of the order dismissing Mengo. Consequently, we will not discuss further the trial court's ruling as to Stoecker.

recipients of the letters also had a business relationship with Interior as creditors and customers.

Ideal impleaded Mengo, alleging that some of the statements she made in the letters were false and defamatory. For example, Ideal noted that Mengo stated in her letters that Ideal had attempted "to prevent [Interior]'s customers from placing new work orders with them and to delay the collection of [Interior]'s outstanding accounts receivable." Mengo also stated that Ideal had wrongfully locked Interior out of its plant and corporate offices, wrongfully seized Interior's corporate records, and wrongfully diverted Interior's corporate business and future opportunities. Mengo further stated that Ideal had refused to return many of Interior's records in violation of a court order, and that Interior was therefore unable to confirm the validity of its customers' claims. Ideal contended that as a result of Mengo's letters, the recipients of the letters had withheld credit from Ideal, and had refused to enter into long-term contracts and to do business with Ideal.

Mengo moved the trial court to dismiss Ideal's third-party complaint against her. She contended that Ideal's attempt to join her to the action was improper because Ideal's claim for damages against her was entirely separate from Interior's action against Ideal. She contended that joinder was improper because, under § 803.05(1), STATS., she was not in any way "liable to the defending party for all or part of the plaintiff's claim against the defending party."<sup>2</sup> Ideal responded, arguing that Mengo was a necessary party because, without her presence in the lawsuit, complete relief could not be accorded among those already parties. *See* § 803.03(1)(a), STATS.<sup>3</sup> Ideal contended that

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<sup>2</sup> In pertinent part, § 803.05(1), STATS., provides:

At any time after commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the defending party for all or part of the plaintiff's claim against the defending party, or who is a necessary party under [§] 808.03[, STATS.]

<sup>3</sup> That statute provides that a "person who is subject to service of process shall be joined as a party in the action if ... [i]n the person's absence complete relief cannot be accorded among those already parties."

Mengo's allegedly defamatory statements were inextricably intertwined with the counterclaims it had filed against Interior.

The trial court agreed with Mengo. The trial court noted first that Mengo had written her letters after Interior commenced its lawsuit against Ideal. It reasoned that Mengo could not be liable to Ideal for all or a part of Interior's claims against Ideal for actions she took after the suit was filed. The trial court reasoned that although Ideal's third-party defamation claim was related to the underlying action, it was nonetheless a separate and distinct tort that did not involve the conduct underlying Interior's original suit.

Second, the trial court rejected Ideal's contention that complete relief could not be accorded among the parties if Mengo was not included in the suit. The trial court again noted that Interior's claims against Ideal were separate and distinct from Ideal's claims against Mengo, and that the basis for Ideal's action against Mengo arose after commencement of the original lawsuit. The trial court reasoned that if Ideal's claim against Mengo was to proceed to litigation, the litigation could and should occur separately from Interior's action.

On the basis of the record before us, we can only conclude that the trial court properly exercised its discretion when it disallowed Ideal's attempt to implead Mengo.<sup>4</sup> In the absence of Wisconsin case law on the precise question presented to it, the trial court turned to federal case law interpreting Fed. R. Civ. P. 14, on which Wisconsin's third-party practice statute, § 803.05, STATS., is based. The trial court noted that in *Majors v. American Nat'l Bank*, 426 F.2d 566, 568 (5th Cir. 1970), the Fifth Circuit Court of Appeals held that, even if a third-party claim arises out of the same general set of facts as the main claim, impleader is improper if the third-party claim is entirely separate and independent.

A trial court's discretionary determination will be upheld by this court if the record shows that the trial court examined the relevant facts, applied

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<sup>4</sup> Trial courts have discretion to grant or deny an attempt to implead a third-party defendant. JAY E. GRENIG & WALTER L. HARVEY, CIVIL PROCEDURE § 305.2 at 397 (West's Wis. Prac. Series, 2nd ed. 1994).

a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *State v. Gudenschwager*, 191 Wis.2d 431, 440, 529 N.W.2d 225, 229 (1995). Ideal's claim against Mengo arose after the original complaint was filed. Thus, Ideal's claim against Mengo depended upon proof of a separate, but related set of facts. Those facts, although related to Interior's lawsuit, are not so inextricably intertwined that complete relief cannot be afforded to Ideal without Mengo's joinder to Interior's action. In addition, neither relief for Ideal in its action against Mengo nor for Interior in its original suit depends upon the outcome of the other. Because complete relief for Interior against Ideal and for Ideal against Mengo can be obtained in separate actions, Mengo is not a necessary party to the litigation between Interior and Ideal. We therefore affirm the trial court's order in this regard.

After rendering its ruling on joinder, however, the trial court went on to hold that Mengo's letters were protected by absolute privilege as a matter of law. The trial court held that, even assuming Mengo's letters contained false and defamatory information about Ideal, she was protected by absolute privilege because the letters had been written when she was Interior's counsel and in the context of Interior's action against Ideal. We reverse on this point because, given the information before the trial court at the time of the hearing, unresolved issues of material fact regarding the purpose of those letters remained. Consequently, it was not clear whether Mengo's letters had been made in a procedural context that afforded absolute privilege.

Judicial proceedings are protected by an absolute privilege, and "[a]n absolutely privileged statement is subject to only two restrictions: It must be made in a procedural context that is recognized as affording absolute privilege, and it must be relevant to the matter under consideration." *Rady v. Lutz*, 150 Wis.2d 643, 647-48, 444 N.W.2d 58, 59 (Ct. App. 1989). The determination of whether an attorney's statements are absolutely privileged is one of law and this court therefore owes no deference to the trial court's decision. *Id.* at 647, 444 N.W.2d at 59. However, that determination cannot be made until all factual disputes have been resolved. *Id.* (Summary judgment not appropriate if material factual dispute exists or conflicting inferences might be drawn from undisputed facts). In cases involving the absolute privilege, the allegedly defamatory statement must generally have been made as part of the judicial proceeding. *Converters Equip. Corp. v. Condes Corp.*, 80 Wis.2d 257, 266-67, 258 N.W.2d 712, 716-17 (1977). Thus, "a nexus between the publication

and the proceeding must exist" to meet the "procedural context" requirement of the absolute-privilege rule. *Id.* at 267, 258 N.W.2d at 717.

Here, there is no dispute but that Mengo's statements regarding the actions Ideal had taken were relevant to the underlying suit. Mengo's communications, made to Ideal customers and creditors, discussed the very claims that Interior was making against Ideal.

We conclude, however, that conflicting inferences regarding the purpose of Mengo's letters could be drawn such that the absolute privilege rule might not protect her statements. "[L]etters sent to persons having collateral interests in the litigation are privileged to the extent that the alleged defamatory statements have some relation to the subject matter of the proposed litigation and are made in furtherance of the litigation." *Rady*, 150 Wis.2d at 649, 444 N.W.2d at 60. On the basis of the record before the trial court, it was unclear whether the statements Mengo made to entities not directly involved in the litigation were made in furtherance of the litigation and to apprise Interior's and Ideal's customers and creditors of the status of the litigation, or whether they were made to disrupt Ideal's business. If Mengo's statements were made for the latter reason, there was no "nexus between the publication and the proceeding" that would permit application of the privilege. Because the purpose of Mengo's letters was not clear, it follows that their connection to the judicial proceedings was unclear. The trial court's holding that Mengo's allegedly defamatory statements were absolutely privileged as a matter of law was therefore unwarranted. However, since we affirm the dismissal of Mengo from the underlying lawsuit, the question of Mengo's liability to Ideal, if any, must be litigated in another context. The trial court's dismissal of Mengo is therefore affirmed in part, but reversed as to the portion of the order that dismisses Ideal's claim against Mengo on the basis of absolute privilege.

*By the Court.* – Order affirmed in part and reversed in part.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.