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DISTRICT III

June 25, 2024

To:

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Robin Zahran
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You are hereby notified that the Court has entered the following opinion and order:

2023AP733 Robin Zahran v. Jon R. Pinkert (L. C. No. 2022CV144)

Before Stark, P.J., Hruz and Gill, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Robin Zahran, pro se, appeals an order dismissing his amended complaint against Jon R. Pinkert, Pinkert Law Firm, LLP, Ruth Rademacher, Christine Rademacher, and Greg Seitz (collectively, "the Pinkert defendants"). The Pinkert defendants have filed a motion for sanctions under WIS. STAT. RULE 809.25(3) (2021-22),[1] asserting that this appeal is frivolous.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Zahran has filed a response opposing the Pinkert defendants' motion and seeking sanctions on the grounds that the motion itself is frivolous.

Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition, and we summarily affirm the order dismissing Zahran's amended complaint. *See* WIS. STAT. RULE 809.21. In addition, we agree with the Pinkert defendants that this appeal is frivolous. Accordingly, we grant the Pinkert defendants' motion for sanctions and remand this matter to the circuit court to determine the amount of costs, fees, and reasonable attorney fees that the Pinkert defendants are entitled to recover. We deny Zahran's motion for sanctions.

The issues in this appeal arise from a separate case—Door County case No. 2020CV46—which involves a real estate dispute between Robin and Karen Zahran,[2] on one hand, and Christine Rademacher, Ruth Rademacher, and Greg Seitz, on the other. Attorney Jon R. Pinkert, an attorney at Pinkert Law Firm, LLP, represented Christine, Ruth, and Greg in case No. 2020CV46.

On October 17, 2022, Attorney Pinkert, on behalf of his clients, filed a motion for sanctions against Zahran in case No. 2020CV46. The motion alleged that Zahran had "engaged in numerous threatening and abusive emails" to Attorney Pinkert, which included "references to race and religion, and various forms of name calling." The motion also alleged that Zahran had filed a complaint against Attorney Pinkert with the Office of Lawyer Regulation. The motion

[2] Karen Zahran is not a party to this appeal. In this summary disposition order, we refer to Robin Zahran as "Zahran."

asserted that the purpose of these actions was "to threaten and intimidate Attorney Pinkert and the defendants to withdraw their defenses or settle the case" and that Zahran's actions had caused Attorney Pinkert's clients to incur "significant attorney's fees."

Three days later, on October 20, 2022, Zahran filed the instant lawsuit against the Pinkert defendants—Door County case No. 2022CV144. Zahran subsequently filed an amended complaint. In the amended complaint, Zahran asserted that by virtue of their motion for sanctions in case No. 2020CV46, the Pinkert defendants "inserted in [the] public record libel and slanderous statements against [Zahran] without any legitimate, proper or legal reason whatsoever for such act[s] and for [an] improper purpose." The amended complaint further alleged that the Pinkert defendants "injected these statements in the public record motivated by malice and retaliation for Zahran['s] pursuit of the truth and relief in" case No. 2020CV46. Based on these allegations, the amended complaint asserted a claim against the Pinkert defendants for "Defamation, Slander and Leibel [sic]."

The Pinkert defendants moved to dismiss Zahran's amended complaint for failure to state a claim on which relief could be granted. The Pinkert defendants argued that Zahran could not prevail on his defamation claim because Attorney Pinkert, on behalf of his clients, had an absolute privilege to make the allegedly defamatory statements in the context of a judicial proceeding. The circuit court agreed with the Pinkert defendants and granted their motion to dismiss. In its decision, the court "assume[d]" that the statements in the Pinkert defendants' motion for sanctions were defamatory. Nevertheless, the court agreed that the statements were protected by an absolute privilege and that, as a result, Zahran's defamation claim failed as a matter of law.

"A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693 (citation omitted). When reviewing a motion to dismiss, a court must "accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." ***Id.*** In order to state a claim, "a complaint must plead facts, which if true, would entitle the plaintiff to relief." ***Id.***, ¶21. Whether a complaint states a claim on which relief can be granted is a question of law that we review independently. ***Id.***, ¶17.

On appeal, Zahran first argues that the circuit court erred by assuming that the statements in the Pinkert defendants' motion for sanctions were defamatory. To qualify as defamatory, a statement must, among other things, be false. *See* ***Torgerson v. Journal/Sentinel, Inc.***, 210 Wis. 2d 524, 534, 563 N.W.2d 472 (1997). Zahran contends that "[u]nder Wisconsin law[,] whether a statement is false or substantially true is a factual determination to be found by the jury and is unsuitable for motions to dismiss."

Zahran misapprehends the standard that a court must apply when ruling on a motion to dismiss for failure to state a claim. As noted above, in this context, a court must "accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." ***Data Key Partners***, 356 Wis. 2d 665, ¶19. Thus, in this case, the circuit court was required to accept as true the factual allegations in Zahran's complaint, which arguably gave rise to a reasonable inference that the Pinkert defendants' motion for sanctions contained false statements. The court then determined that, even if the statements in question were defamatory, Zahran could not prevail on his defamation claim because the statements were protected by an absolute privilege. Under these circumstances, Zahran was not entitled to have a jury determine whether the statements were false.

Zahran also argues that the circuit court erred by concluding that the statements in the sanctions motion were protected by an absolute privilege. One of the elements of a defamation claim is that the communication is not privileged. *See* ***Torgerson***, 210 Wis. 2d at 534. Statements made in judicial or quasi-judicial proceedings are protected by an absolute privilege. ***Rady v. Lutz***, 150 Wis. 2d 643, 647, 444 N.W.2d 58 (Ct. App. 1989). "An absolute 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." ***Id.*** at 647-48. "The absolute privilege to defame in the course of judicial or quasi-judicial proceedings is not limited to statements during trial, but may extend to steps taken prior to trial such as conferences and other communications relevant to the proceeding." ***Id.*** at 649. Whether the absolute privilege applies to a particular communication is a question of law that we review independently. *See* ***id.*** at 647.

In ***Rady***, Attorney Holly Lutz defended the City of Tomahawk against several lawsuits filed by Carl Rady. ***Id.*** at 646. In a letter to the Ninth District Court Administrator, "Lutz accused Rady 'of filing frivolous lawsuits and harassing public officials,' detailed alleged examples of the problem in highly editorialized fashion, and sought various remedies." ***Id.*** Rady then sued Lutz, alleging that her letter defamed him. ***Id.*** at 646-47. The circuit court dismissed Rady's lawsuit, "holding Lutz's comments to be absolutely privileged because they were relevant to proposed and pending judicial proceedings." ***Id.*** at 647. On appeal, this court affirmed. We concluded that Lutz's statements were "relevant to either past or present litigation" because they pertained "to several pending and past suits involving Rady" and because they "explained [Lutz's] complaints concerning each of these suits." ***Id.*** at 649-50. We further concluded that the statements were "made in a setting affording absolute privilege"

because the district court administrator was "a proper person to direct concerns regarding the administration of justice." ***Id.*** at 650-51.

Here, Attorney Pinkert's allegedly defamatory statements were made in a motion for sanctions filed on behalf of his clients in case No. 2020CV46. The statements were therefore "relevant to … present litigation" because they pertained to a pending lawsuit involving Zahran and because they "explained [Attorney Pinkert's] complaints concerning" Zahran's conduct in that lawsuit. *See* ***id.*** at 649-50. Furthermore, the statements were "made in a setting affording absolute privilege" because the motion for sanctions "pertain[ed] to the efficiency of the judicial process and [was] properly presented to an officer of the court"—namely, the circuit court judge presiding over case No. 2020CV46. *See* ***id.*** at 650-51. Accordingly, Attorney Pinkert's statements were absolutely privileged under the test set forth in ***Rady***. Consequently, Zahran could not prevail on his defamation claim as a matter of law, and the circuit court properly granted the Pinkert defendants' motion to dismiss.[3]

We now turn to the Pinkert defendants' motion for sanctions under WIS. STAT. RULE 809.25(3). "If an appeal … is found to be frivolous by the court, the court shall award to the successful party costs, fees, and reasonable attorney fees under [RULE 809.25(3)]."

[3] On appeal, Zahran also argues that the Pinkert defendants lost their right to assert that Attorney Pinkert's statements were absolutely privileged because Attorney Pinkert "abuse[d]" the privilege. In support of this proposition, Zahran cites two cases that pertain to the abuse of a *conditional* privilege. *See* ***Zinda v. Louisiana Pac. Corp.***, 149 Wis. 2d 913, 924-25, 440 N.W.2d 548 (1989); ***Denny v. Mertz***, 106 Wis. 2d 636, 663-64, 318 N.W.2d 141 (1982). Zahran also cites ***State v. Cardenas-Hernandez***, 219 Wis. 2d 516, 537, 579 N.W.2d 678 (1998), where our supreme court addressed "whether the absolute civil privilege for defamatory statements made in judicial proceedings applies *in a criminal prosecution for defamation* under WIS. STAT. § 942.01 when the statements are perjurious as well as defamatory." (Emphasis added.) None of these cases stands for the proposition that a defendant can lose the right to assert the absolute privilege in a civil case based on the defendant's alleged abuse of that privilege.

RULE 809.25(3)(a). "[A]n appellate court decides whether an appeal is frivolous solely as a question of law." ***Howell v. Denomie***, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621. To find an appeal frivolous, we must find either: (1) that the appeal was filed, used, or continued in bad faith, solely for purposes of harassing or maliciously injuring another; or (2) that the party or the party's attorney knew, or should have known, that the appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law. RULE 809.25(3)(c). To award costs and attorney fees under RULE 809.25, we must find that the entire appeal is frivolous. *See* ***Howell***, 282 Wis. 2d 130, ¶9.

Here, we conclude that Zahran's entire appeal from the order dismissing his amended complaint is frivolous because Zahran knew, or should have known, that the appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law. *See* WIS. STAT. RULE 809.25(3)(c)2. As explained above, each of Zahran's appellate arguments is clearly contrary to Wisconsin law. There is simply no legal authority supporting Zahran's claims that: (1) the circuit court erred by assuming that the relevant statements were false; (2) the court erred by concluding that the statements were absolutely privileged; and (3) the absolute privilege does not apply because Attorney Pinkert abused the privilege. Furthermore, Zahran has not developed any argument that he should prevail on appeal based on an extension, modification, or reversal of existing law. Under these circumstances, we agree with the Pinkert defendants that Zahran's entire appeal is frivolous.

In his response to the Pinkert defendants' motion for sanctions, Zahran suggests that the Pinkert defendants are not entitled to attorney fees because "Attorney Pinkert and his law firm

are appearing [p]ro se on their own behalf." The Pinkert defendants, however, are not seeking to recover attorney fees for work performed by Attorney Pinkert. Instead, they are seeking fees for work that Attorney Zachary Buchta has performed while representing them in this appeal. It is undisputed that an attorney-client relationship exists between Attorney Buchta and Ruth Rademacher, Christine Rademacher, and Greg Seitz. *See* ***Dickie v. City of Tomah***, 190 Wis. 2d 455, 462, 527 N.W.2d 697 (Ct. App. 1994) ("[A]ttorney fees cannot be awarded to a litigant unless an attorney[-]client relationship exists."). In addition, we agree with the Pinkert defendants that an attorney-client relationship exists between Attorney Buchta and Attorney Pinkert and the Pinkert Law Firm, pursuant to this court's reasoning in ***Dickie***. Specifically, the facts here do not give rise to a reasonable inference that Attorney Buchta's work on this appeal was performed under Attorney Pinkert's supervision, so as to negate the existence of an attorney-client relationship. *See* ***id.*** at 464-65.

We therefore grant the Pinkert defendants' motion for sanctions under WIS. STAT. RULE 809.25(3), having concluded that Zahran's entire appeal is frivolous. Accordingly, we remand this matter to the circuit court for a determination of the amount of costs, fees, and reasonable attorney fees that the Pinkert defendants are entitled to recover under RULE 809.25(3)(a).[4] Additionally, we reject Zahran's argument that the Pinkert defendants' motion for sanctions itself is frivolous, and we deny Zahran's request for sanctions on that basis.

[4] The Pinkert defendants have conceded that they are not entitled to recover 1.9 hours of attorney fees billed by Attorney Pinkert in this matter. We agree that the Pinkert defendants are not entitled to recover those attorney fees, and we direct the circuit court not to award those fees on remand.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed.

IT IS FURTHER ORDERED that the Pinkert defendants' motion for sanctions is granted and the cause is remanded for the circuit court to determine the amount of costs, fees, and reasonable attorney fees that the Pinkert defendants are entitled to recover under WIS. STAT. RULE 809.25(3)(a).

IT IS FURTHER ORDERED that Zahran's motion for sanctions is denied.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals