

IN THE SUPREME COURT OF THE STATE OF NEVADA

BULLIVANT HOUSER BAILEY PC, A
FOREIGN CORPORATION,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
ALLAN R. EARL, DISTRICT JUDGE,
Respondents,
and
L.A. PACIFIC CENTER, INC., A
NEVADA CORPORATION,
Real Party in Interest.

No. 57991

FILED

MAR 30 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Malone
DEPUTY CLERK

ORDER GRANTING PETITION

This is an original petition for a writ of mandamus challenging a district court order granting reconsideration and vacating a previous order to dismiss a complaint in a real estate transaction dispute.

Petitioner Bullivant Houser Bailey PC ("BHB") represented the sellers of two properties in litigation against Real Party in Interest L.A. Pacific Center, Inc. BHB's former clients Hotels Nevada, LLC; Inns Nevada, LLC and Louis Habash (collectively "Hotels") entered into a real estate transaction with LA Pacific for the purchase of two adjacent properties ("the Purchase and Sale Agreement"). One year after the closing of the transaction, BHB was retained to bring suit against LA Pacific for fraud in connection with the Purchase and Sale Agreement. BHB filed complaints and lis pendens both in California and Nevada on Habash's behalf. This litigation forms the factual basis for the claims asserted by LA Pacific against BHB in the instant litigation.

LA Pacific brought suit against BHB in January 2010 on claims of (1) abuse of process, (2) slander of title, (3) intentional interference with contractual relationship, and (4) intentional interference with prospective advantage. BHB then filed a special motion to dismiss pursuant to NRS 41.660 (Nevada's anti-SLAPP¹ statute), arguing that their actions in representing their clients were protected activities and were done in good faith. The district court granted BHB's special motion to dismiss. However, LA Pacific successfully brought a motion for reconsideration. The district court's grant of the motion for reconsideration therefore vacated its previous order granting BHB's special motion to dismiss. BHB now seeks a writ of mandamus instructing the district court to vacate its order granting LA Pacific's motion for reconsideration and directing the district court to reinstate its previous order granting BHB's special motion to dismiss pursuant to NRS 41.660.

In this original proceeding, the following issues are presented: (1) whether a writ of mandamus is procedurally appropriate, (2) whether the district court erred in denying application of NRS 41.660 to this case, and (3) whether the district court erred in determining that LA Pacific's claims are not precluded by the absolute litigation privilege. For the reasons set forth below, we grant BHB's petition for a writ of mandamus. As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

¹"SLAPP" is an acronym for strategic lawsuits against public participation.

Writ relief is appropriate

BHB argues that this court should exercise its discretion to entertain this writ petition because the district court acted improperly in its application of the law. Specifically, BHB contends that there are important issues of law and public policy with respect to Nevada's anti-SLAPP statute involved, as well as the application of the absolute litigation privilege to intentional tort claims made against attorneys, and that both issues require consideration and clarification.

A writ of mandamus is available to compel the performance of an act that the law requires "as a duty resulting from an office, trust or station." NRS 34.160. Review may also be proper to control a manifest abuse of discretion or an arbitrary or capricious exercise of discretion. Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). We may also review a petition if there is "an important issue of law [that] needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." International Game Tech. v. Dist. Ct., 124 Nev. 193, 197-98, 179 P.3d 556, 559 (2008). Mandamus is an extraordinary remedy and we have full discretion to determine whether a petition will be considered. Cote H. v. Dist. Ct., 124 Nev. 36, 39, 175 P.3d 906, 908 (2008). Writ relief will not be available when an adequate and speedy legal remedy exists. NRS 34.170. BHB argues that this court should review its petition in order to clarify important issues of law relating to the application of the anti-SLAPP statute to private parties, as well as the application of the absolute litigation privilege to a wide range of intentional torts. As BHB asserts, these issues have little or no jurisprudential precedent in this state. Additionally, judicial economy favors review of this petition because the

underlying litigation is in its early stages. No answer has been filed, nor has any discovery been conducted. The early stages of litigation also support our determination that there is no speedy legal remedy. Id. Requiring BHB to defend itself during a full trial would be inappropriate when the absolute litigation privilege required the district court to grant BHB's special motion to dismiss.² See Round Hill, 97 Nev. at 603-04, 637 P.2d at 536.

The district court erred in determining that LA Pacific's claims are not precluded by the absolute litigation privilege

BHB contends that the district court erred in vacating its order granting BHB's special motion to dismiss because LA Pacific's claims are precluded by the absolute litigation privilege. LA Pacific counters that the absolute litigation privilege does not apply here because the privilege is limited to communications that give rise to defamation claims, and has never been extended by this court to shield attorneys from liability for intentional torts. It asserts that the basis of its claims is the tortious conduct in which BHB actively participated, not merely the communications made by BHB while acting as legal counsel.

Whether the absolute litigation privilege is applicable is a question of law reviewed de novo. Clark County Sch. Dist. v. Virtual Educ., 125 Nev. 374, 382, 213 P.3d 496, 502 (2009).

Nevada follows the "long-standing common law rule that communications [made] in the course of judicial proceedings [even if known to be false] are absolutely privileged." Id. (alterations in original) (quoting Circus Circus Hotels v. Witherspoon, 99 Nev. 56, 60, 657 P.2d

²Because this case is disposed of by the absolute litigation privilege, we do not reach the issue of the applicability of NRS 41.660 to this case.

101, 104 (1983)). In order to facilitate the policy of zealous advocacy by attorneys underlying this privilege, its scope is “quite broad,” and that it should be applied “liberally.” Fink v. Oshins, 118 Nev. 428, 433-34, 49 P.3d 640, 643-44 (2002). As such, when “determining whether the privilege applies [we] resolve any doubt in favor of a broad application.” Virtual Educ., 125 Nev. at 382, 213 P.3d at 502.

Consistent with its broad applicability, this court has concluded that “the privilege applies not only to communications made during actual judicial proceedings, but also to ‘communications preliminary to a proposed judicial proceeding.’” Fink, 118 Nev. at 433, 49 P.3d at 644 (2002) (quoting Bull v. McCuskey, 96 Nev. 706, 712, 615 P.2d 957, 961 (1980), abrogated on other grounds by Ace Truck v. Kahn, 103 Nev. 503, 507, 746 P.2d 132, 135 (1987), abrogated by Bongiovi v. Sullivan, 122 Nev. 556, 138 P.3d 433 (2006)). Additionally, there is “no reason to distinguish between communications made during the litigation process and conduct occurring during the litigation process.” Clark v. Druckman, 624 S.E.2d 864, 870 (W. Va. 2005); see also Maness v. Star-Kist Foods, Inc., 7 F.3d 704, 709 (8th Cir. 1993) (applying Minnesota law and explaining that the privilege can extend to an attorney’s “actions arising out of his professional relationship”); Levin, Middlebrooks v. U.S. Fire Ins. Co., 639 So. 2d 606, 608 (Fla. 1994) (explaining that the privilege may be extended to “any act . . . regardless of whether the act involves a defamatory statement or other tortious behavior”). When applicable, “[a]n absolute privilege bars any civil litigation based on the underlying communication.” Hampe v. Foote, 118 Nev. 405, 409, 47 P.3d 438, 440 (2002) (emphasis added), overruled in part on other grounds by Buzz Stew.

LLC v. City of N. Las Vegas, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008).

In this case, the majority of BHB's alleged wrongdoing consists of communications made by BHB in its capacity as legal counsel for Habash during the course of litigation. In LA Pacific's complaint, it alleges that BHB filed the Nevada lawsuit and recorded numerous *lis pendens* for the improper purpose of clouding its title and disrupting the sale of the property. These acts are communications made in the course of litigation that are absolutely privileged, and thus, as a matter of law, cannot constitute the basis of LA Pacific's claims against BHB. See Ringier America v. Enviro-Technics, Ltd., 673 N.E.2d 444, 447 (Ill. App. Ct. 1996) (“[N]early every jurisdiction to consider the question has extended the absolute privilege accorded statements made in the course of litigation to include the filing and/or recording of a *lis pendens* notice.”); Restatement (Second) of Torts § 586 cmt. a (1977) (explaining that an attorney's filing of “all pleadings and affidavits necessary to set the judicial machinery in motion” are absolutely privileged).

BHB also allegedly plotted with Habash to retake the property and, to that end, generated a research memorandum identifying potential theories upon which Habash could seek rescission of the purchase agreement. BHB also wrote a demand letter on behalf of Habash to LA Pacific feigning ignorance of the 60-month closing date. These actions are plainly communications made in contemplation of litigation and relate to the subject of the litigation. Thus, the communications are covered by the absolute litigation privilege. See Fink, 118 Nev. at 434, 49 P.3d at 644 (privilege protects attorney's pre-litigation discussions with client); Richards v. Conklin, 94 Nev. 84, 85, 575 P.2d 588, 589 (1978) (privilege

protects letters written by attorneys to their clients' adversary before the initiation of a malpractice suit). All of these communications are protected by the absolute litigation privilege even if they were known to be false or made with malicious intent. Virtual Educ., 125 Nev. at 382, 213 P.3d at 502. Because the absolute litigation privilege applies to these communications, all claims based on them are barred. Hampe, 118 Nev. at 409, 47 P.3d at 440.

In addition to BHB's privileged communications discussed above, LA Pacific argues that BHB acted affirmatively and with the intent to disrupt the sale of the property to a third party. Such conduct does not form a basis for LA Pacific's claims because all causes of action are based on BHB's filing of complaints and lis pendens, which we have already determined are privileged communications. Furthermore, even if it were established that BHB had scrubbed its files clean of evidence that showed Habash had agreed to a 60 month hold-back period, any filings that contained such misleading information would still be privileged. See Virtual Educ., 125 Nev. at 382, 213 P.3d at 502. Any alleged misconduct by BHB would have ultimately manifested itself in a privileged communication.³ For the foregoing reasons, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate its order granting LA Pacific's motion for

³After this case was submitted for decision, LA Pacific filed a motion to supplement the record with a recent California decision related to the parties. We deny LA Pacific's motion because the California decision is inapplicable and does not affect our disposition.

reconsideration and to enter an order dismissing LA Pacific's case on the basis that it is barred by the absolute litigation privilege.

Douglas, J.
Douglas

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

cc: Hon. Allan R. Earl, District Judge
Prince & Keating, LLP
Marquis Aurbach Coffing
Eighth District Court Clerk