

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 11-30-2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ALLAN SOBOL, a single man,) 1 CA-CV 09-0773
)
Plaintiff/Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
)
ROY E. MCALISTER, and KATHLEEN)
MCALISTER, husband and wife; and) Not for Publication -
AMERICAN HYDROGEN ASSOCIATION,) (Rule 28, Arizona Rules
an Arizona Corporation,) of Civil Appellate Procedure)
)
Defendants/Appellees.)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-052199

The Honorable Brian R. Hauser, Judge

AFFIRMED

Allan Sobol
Appellant, *In Propria Persona*

Scottsdale

B A R K E R, Judge

¶1 Allan Sobol ("Sobol") appeals from the superior court order granting a motion to dismiss his complaint.¹ He argues that the absolute immunity from civil liability for police reports by putative crime victims set out in *Ledvina v. Cerasani*, 213 Ariz. 569, 146 P.3d 70 (App. 2006), was improperly applied to dismiss his defamation claim. We disagree, and for the reasons set forth below, affirm.

Facts and Procedural History

¶2 "In reviewing motions to dismiss for failure to state a claim, we assume that the allegations in the complaint are true and determine if the plaintiff is entitled to relief under any theory of law." *Sensing v. Harris*, 217 Ariz. 261, 262, ¶ 2, 172 P.3d 856, 857 (App. 2007). The facts set out by Sobol's complaint are as follows.

¶3 Sobol operates Consiglieri Legal Support Services, a referral service that provides access to private investigators, legal research, legal secretaries, and other support services. On March 24, 2008, Roy McAlister ("McAlister"), responding to an offer for a free consultation, met with Sobol at his office. McAlister was interested in retaining Sobol to review and

¹ No answering brief was filed. "Although we may regard [the] failure to respond as a confession of reversible error, we are not required to do so;" and we do not do so here. *Gonzales v. Gonzales*, 134 Ariz. 437, 437, 657 P.2d 425, 425 (App. 1982).

organize files from a civil action and to assist typing documents for a civil appeal.

¶4 On March 25, 2008, McAlister returned to Sobol's office and signed a retainer agreement securing Sobol's services. As payment, McAlister presented Sobol with a check that listed Sobol as the payee but was signed by a third party. Sobol accepted the check and cashed it that day. McAlister then delivered case files to Sobol. The next day, McAlister called Sobol and requested he stop working on the case. McAlister sought a refund of the retainer amount, but Sobol told him the check was a retainer of his services, which he had already exhausted by working several hours on McAlister's case, and could not be refunded.

¶5 McAlister filed a report with the Phoenix Police Department alleging that Sobol had cashed the third-party check after altering it to state his name as the payee. On May 29, 2008, police officers arrived at Sobol's office with a criminal arrest warrant in connection with charges of theft and forgery; they arrested Sobol, placed him in handcuffs, and transported him to jail. Later that evening, after an initial appearance, Sobol was released on his own recognizance and ordered to appear on June 12, 2008, for a status conference. When Sobol arrived for the status conference he was informed that the charges underlying his arrest had been scratched.

¶6 Sobol filed a civil action against McAlister, among others,² alleging intentional infliction of emotional distress, libel, and misrepresentation. In response, McAlister filed a motion to dismiss arguing that the "entire action is premised on a police report" and that "[u]nder Arizona law, Defendants are absolutely immune from suit for filing a police report." The court granted McAlister's motion to dismiss "as all of the defendants' conduct complained of in the complaint is protected by absolute immunity," and ultimately disposed of all counterclaims filed in the action. Sobol timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

Discussion

¶7 On appeal, Sobol contends that the trial court improperly relied on *Ledvina* because only "putative crime victims in Arizona are entitled to absolute immunity when they complain to police." *Ledvina*, 213 Ariz. at 574, ¶ 14, 146 P.3d at 75. Attempting to read *Ledvina* narrowly, Sobol argues

² The parties listed in the original complaint were Sobol as Plaintiff, Roy McAlister, Kathleen McAlister (McAlister's wife), and American Hydrogen Association (asserted to be a corporation controlled by McAlister that caused the alleged events to occur) as Defendants. The motion to dismiss was filed and granted as to all Defendants. Our analysis is identical as to each. Accordingly, we simply refer to McAlister throughout.

McAlister should not receive the protection of absolute immunity because, with the charges against Sobol scratched, McAlister is not a "victim." We do not agree with Sobol's interpretation.

¶8 In *Ledvina*, a neighbor filed a police report against Ledvina alleging that Ledvina had slashed the tires of the neighbor's recreational vehicle. *Id.* at 570, ¶ 2, 146 P.3d at 71. The prosecutor subsequently filed charges for criminal damages against Ledvina. *Id.* Ledvina then sued the reporting neighbor for defamation. *Id.* Prior to the criminal trial, the prosecutor dismissed the criminal charges against Ledvina due to insufficient evidence. *Id.* In the underlying defamation action, the reporting neighbor moved for summary judgment "on the sole ground that [his] complaint to the police was absolutely privileged." *Id.* The trial court agreed.

¶9 On appeal, we determined that the policy of encouraging free and unhindered communications applied to communications to law enforcement authorities in the same way it applied to complainants alleging unethical conduct to the Arizona Board of Legal Document Preparers. *Id.* at 572, ¶ 9, 146 P.3d at 73 (referencing *Sobol v. Alarcon*, 212 Ariz. 315, 318, ¶ 15, 131 P.3d 487, 490 (App. 2006)). We found "no reason why a person who reports a crime to police should be afforded any less protection than a person reporting ethical misconduct by an attorney or a licensed document preparer." *Id.* Based on this

rationale, "we conclude[d] putative crime victims in Arizona are entitled to absolute immunity when they complain to police." *Id.* at 574, ¶ 14, 146 P.3d at 75. McAlister, as a person reporting a crime, "complain[ed] to police." Additionally, A.R.S. § 13-4402 provides that victims' rights "arise on the arrest . . . of the person or persons who are alleged to be responsible for a criminal offense against a victim." As such, McAlister was a putative victim entitled to absolute immunity from civil liability.

¶10 Sobol also argues that granting absolute immunity to McAlister's report would contradict the policy furthered by A.R.S. § 13-2907.01 (2010). That section provides that a person who knowingly makes a false, fraudulent, or unfounded report to a law enforcement agency is guilty of a class one misdemeanor. There is no conflict between § 13-2907.01 and our holding in *Ledvina*. As we discussed in *Ledvina*, § 13-2907.01 acts as a "safeguard[] for the subjects of malicious accusations, and [a] disincentive[] for making scurrilous allegations to police." 213 Ariz. at 575, ¶ 15, 146 P.3d at 76. Although putative crime victims are immune from civil liability, they are still subject to criminal prosecution if they "knowingly make . . . a false, fraudulent or unfounded report" to a law enforcement agency. A.R.S. § 13-2907.01(a). Additionally, as we noted in *Ledvina*, if a crime victim takes affirmative steps to file a civil

action, he "could also face civil liability for abuse of process and malicious prosecution." *Id.*; see also *Sierra Madre Dev. Inc. v. Via Entrada Townhouses Ass'n*, 20 Ariz. App. 550, 554, 514 P.2d 503, 507 (1973) (stating that absolute privilege for defamatory statements in judicial pleadings is not "intended to affect the validity of any claim for relief based upon malicious prosecution or abuse of process"). Thus, the court did not err in granting summary judgment.

Conclusion

¶11 Because the court correctly relied on *Ledvina* to determine that McAlister's police report was entitled to absolute immunity, we affirm the court's order granting McAlister's motion to dismiss.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

DONN KESSLER, Presiding Judge

/s/

JON W. THOMPSON, Judge