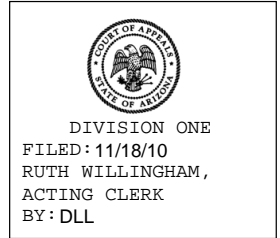


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



ALEJANDRO REYNOSO, a single man, ) 1 CA-CV 09-0712  
)  
Plaintiff/Appellant, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
)  
STEPHEN M. GATYAS and PATRICIA )  
GATYAS, husband and wife, ) Not for Publication -  
) (Rule 28, Arizona Rules  
Defendants/Appellees. ) of Civil Appellate Procedure)  
)  
)  
)  
)  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CV2008-014817

The Honorable John A. Buttrick, Judge

**AFFIRMED**

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Richardson & Richardson, P.C.  
By William R. Richardson  
Attorneys for Plaintiff/Appellant

Mesa

Peter Strojnik, P.C.  
By Peter Strojnik  
Attorney for Defendants/Appellees

Phoenix

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**B R O W N**, Judge

¶1 Alejandro Reynoso appeals the trial court's summary judgment in favor of Stephen M. Gatyas and Patricia Gatyas.<sup>1</sup> For the following reasons, we affirm.

#### BACKGROUND

¶2 This defamation action arises out of statements published initially in a bankruptcy proceeding.

¶3 Reynoso was the president of AR Utility Specialists, Inc. ("ARUSI"), a debtor in a proceeding under Chapter 11 of the United States Bankruptcy Code. In June 2007, in connection with the bankruptcy case, ARUSI filed an adversary action against Edmundo S. Uribe, Denise Uribe, and MCC Technologies, Inc., seeking to recover monies that it alleged were fraudulently or otherwise impermissibly transferred from ARUSI to the Urbes and MCC.<sup>2</sup>

¶4 The Urbes and MCC filed a motion to dismiss the adversary complaint for failure to state a claim. They alleged the adversary action had not been authorized by ARUSI's Chapter 11 Trustee, that the entire claim was without a basis in fact and had been filed without the necessary due diligence, and that it was "filed with the intent to cower Mr. Uribe from coming

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<sup>1</sup> We refer to Stephen and Patricia Gatyas collectively and in the singular as "Gatyas."

<sup>2</sup> It appears from the record that Reynoso and Mr. Uribe had a business relationship and personal friendship, and that Mr. Uribe and MCC provided services to ARUSI.

forward with his knowledge of the frauds committed by Mr. Alejandro Reynoso." In support of their motion, the Uribes and MCC offered an affidavit from ARUSI's former Chief Financial Officer, Stephen Gatyas. As relevant, Mr. Gatyas avowed:

7. [Reynoso] personally told me on numerous occasions that the relationship with Uribe and MCC were joint venture relationships that he had developed with Uribe and MCC in case ARUSI ever got into financial problems so that he (Mr. Reynoso) "[ ] would have a place to go." Secondly, since his separation from his spouse, "he now had a vehicle to hide money from his wife," for he had no intentions of sharing anything with her.

8. Mr. Reynoso's plan of hiding assets through transactions with Uribe and MCC was not a passing fancy, but a real plan that I was reminded of on numerous occasion[s] throughout my employ at ARUSI.

9. In 2006, the ARUSI offices suffered a flood. The flood damage was covered by ARUSI's policy of insurance. Alex Reynoso hired one Mike Apodaca, an unlicensed contractor, to [e]ffect the repairs.

10. In this same tenor of Alex Reynoso directing his operations, he made it abundantly plain to me to "relax my financial scrutiny of Mike Apodaca's invoices" for he (Apodaca) "was rebating \$30,000.00 to me (Alex Reynoso personally)" from the renovation and [remodeling] disbursements for the office reconstruction.

The adversary action was subsequently dismissed on agreement of the parties when the court granted the trustee's motion to approve compromise.

¶15 On June 26, 2008, Reynoso filed this action alleging claims against Gatyas for defamation, false light invasion of privacy, and intentional infliction of emotional distress arising out of the statements contained in paragraphs seven through ten of Mr. Gatyas' affidavit. Gatyas moved for summary judgment on the basis that the statements in the affidavit were protected by an absolute privilege because they were published in connection with a judicial proceeding.<sup>3</sup> Reynoso argued the privilege did not apply because the statements were not connected to the adversary action and because the affidavit was published outside the adversary action. The trial court granted Gatyas' motion for summary judgment, ruling that the statements had some reference to the subject matter of the adversary action and therefore were absolutely privileged.

¶16 Reynoso moved for a new trial, which the court denied. Reynoso timely appealed.<sup>4</sup>

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<sup>3</sup> Gatyas also asserted the statements were true and therefore not actionable.

<sup>4</sup> The superior court's original minute entry denying Reynoso's motion for new trial was not signed, and therefore his appeal was premature. *Tripati v. Forwith*, 223 Ariz. 81, 84, ¶ 10, 219 P.3d 291, 294 (App. 2009). On December 28, 2009, we suspended the appeal to allow Reynoso to apply to the superior court for a signed order corresponding to the minute entry ruling. He obtained a signed order on January 28, 2010 and his notice of appeal was deemed effective.

## DISCUSSION

¶17 A court may grant summary judgment when "there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c). In a defamation case, the existence and scope of any privilege are questions of law that we review de novo. *Sobol v. Alarcon*, 212 Ariz. 315, 317 n.2, ¶ 10, 131 P.3d 487, 489 (App. 2006).

¶18 Arizona affords an absolute privilege to statements made by a witness testifying in a judicial proceeding, whether the testimony occurs in open court or in an affidavit. *Todd v. Cox*, 20 Ariz. App. 347, 348-49, 512 P.2d 1234, 1235-36 (1973). This privilege promotes the socially important interest in "the fearless prosecution and defense of claims which leads to complete exposure of pertinent information for a tribunal's disposition." *Green Acres Trust v. London*, 141 Ariz. 609, 613, 688 P.2d 617, 621 (1984). Thus, "A witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as part of a judicial proceeding in which he is testifying, if it has some relation to the proceeding." Restatement (Second) of Torts § 588 (1977).

¶19 Reynoso contends the summary judgment ruling was incorrect as a matter of law because the Gatyas statements bore

no relation to the adversary action. However, "[t]he defamatory content of the communication need not be 'strictly relevant,' but need only have 'some reference to the subject matter of the proposed or pending litigation . . . .'" *Green Acres Trust*, 141 Ariz. at 613, 688 P.2d at 621 (quoting Restatement § 586 cmt. c). All doubts as to relevancy should be resolved in the speaker's favor. *Bailey v. Superior Court*, 130 Ariz. 366, 368, 636 P.2d 144, 146 (App. 1981); *Sierra Madre Dev. v. Via Entrada Townhouses Ass'n*, 20 Ariz. App. 550, 554, 514 P.2d 503, 507 (1973).

¶10 The Uribes and MCC moved to dismiss ARUSI's complaint in the adversary action based in part on their contention that it was brought solely to intimidate Mr. Uribe from revealing his knowledge of Reynoso's fraudulent activities. In support of their allegations, the Uribes and MCC offered the Gatyas statements as evidence that Reynoso had committed financial improprieties in connection with ARUSI. Although Gatyas' assertions concerning Reynoso's alleged plans to hide money from his wife and alleged financial improprieties in connection with ARUSI's repair of flood damage may not have been strictly relevant to ARUSI's claims in the adversary action, they bore some reference to the subject of inquiry. More specifically, the Gatyas statements described financial improprieties allegedly committed by Reynoso and therefore were relevant as to

whether ARUSI's initiation of the adversary action was baseless and intended only to intimidate Mr. Uribe from disclosing his knowledge of Reynoso's fraudulent activities. See *Green Acres Trust*, 141 Ariz. at 613, 688 P.2d at 621; *Bailey*, 130 Ariz. at 368, 636 P.2d at 146. Accordingly, the evidence established the existence of an absolute privilege that protects Gatyas from liability for defamation and the trial court properly granted summary judgment.<sup>5</sup>

¶11 Nevertheless, Reynoso argues that summary judgment for Gatyas was erroneous because the Gatyas statements were published to persons who were not involved in the adversary action, specifically: CNA Insurance, ARUSI's insurer; ARUSI's bankruptcy attorney; the attorney for ARUSI's Chapter 11 trustee; and others involved in ARUSI's bankruptcy proceeding. Extra-judicial statements may fall within the absolute privilege applicable to statements made in judicial proceedings if both the content and manner of the statements bear some relation to the litigation and the recipient of the communication has some relationship to the judicial proceeding. *Green Acres Trust*, 141 Ariz. at 614, 688 P.2d at 622. We need not undertake this

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<sup>5</sup> Reynoso also alleges defamation occurred before the affidavit was filed in the adversary action, when Gatyas communicated the statements to the Uribes' and MCC's attorney. We reject this argument, as the absolute privilege applicable to witnesses is not limited strictly to statements made as part of judicial proceedings, but encompasses statements made preliminary to such proceedings. Restatement § 588.

analysis, however, as the record contains no evidence that Gatyas published the statements to third parties not involved in the adversary action. Reynoso cites evidence that Mr. Strojnik, legal counsel for Gatyas in this litigation, published the Gatyas statements to CNA Insurance and to others involved in ARUSI's bankruptcy proceeding on June 27, 2007 and July 11, 2007, respectively. But on those occasions Mr. Strojnik was counsel for the Uribes and MCC in the adversary action; he did not serve as Gatyas' counsel until after the present defamation action was filed in June 2008.

¶12 Regardless, the extra-judicial dissemination of the Gatyas statements is privileged as a report of a public proceeding ("fair reporting privilege"). The fair reporting privilege provides immunity for defamatory publication of "a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern." Restatement § 611 cmt. b (1977). The privilege has been extended to reports that describe the contents of pleadings filed with the court. *Green Acres Trust*, 141 Ariz. at 619, 688 P.2d at 627. The scope of the privilege is not limited to the media, but rather allows "anyone [to] describe what transpired at a public proceeding so long as the publisher provides a fair and accurate rendition." *Id.* at 618, 688 P.2d at 626. Here, the republished statements fall within the fair reporting



privilege because: (1) they were originally filed with the bankruptcy court in conjunction with the Uribe's motion to dismiss; and (2) they constituted a "fair and accurate rendition" of the Gatyas statements, as the same language was used in both instances.<sup>6</sup> Accordingly, we find no error in the trial court's summary judgment.<sup>7</sup>

¶13 Gatyas requests an award of attorneys' fees he incurred in the trial court and on appeal pursuant to A.R.S. §§ 12-341.01(C) and -349 (2003). As Gatyas did not request an award of attorneys' fees in the trial court, we will not consider his request for those fees. *Lacer v. Navajo Cnty*, 141 Ariz. 392, 395, 687 P.2d 400, 403 (App. 1984) (a party who fails to request an award of attorneys' fees in the trial court is precluded from recovering such fees from the appellate court). In the exercise of our discretion, we decline Gatyas' request for fees incurred in this appeal. We award Gatyas appellate costs conditioned on compliance with Arizona Rule of Civil Appellate Procedure 21.

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<sup>6</sup> A pleading must be filed with the court before the fair reporting privilege is applicable to a report of a judicial proceeding. *Id.* at 619, 688 P.2d at 627. Reynoso does not argue that republication of the Gatyas statements predated the filing of the statements in the bankruptcy court.

<sup>7</sup> Reynoso contends the trial court erred in denying his motion for new trial, which was based on the issues he raises in this appeal. Because we find no error in the court's ruling on summary judgment, we affirm its denial of Reynoso's motion for new trial.

**CONCLUSION**

¶14 For the foregoing reasons, we affirm the summary judgment.

/s/

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MICHAEL J. BROWN, Judge

CONCURRING:

/s/

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DIANE M. JOHNSEN, Presiding Judge

/s/

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JOHN C. GEMMILL, Judge