STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2120

Daniel Ehrman,
Appellant,

vs.

Lesley J. Adam, et al.,
Respondents.

Filed September 1, 2009
Affirmed
Lansing, Judge

Ramsey County District Court
File No. 62-CV-08-5092

Daniel J. Ehrman, 5434 Osgood Avenue South, Afton, MN 55001 (pro se appellant)

Donald Chance Mark, Jr., Patrick J. Rooney, Jennifer S. Pirozzi, Fafinski Mark & Johnson, P.A., Flagship Corporate Center, Suite 400, 775 Prairie Center Drive, Eden Prairie, MN 55344 (for respondents)

Considered and decided by Lansing, Presiding Judge; Shumaker, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

LANSING, Judge

The district court dismissed with prejudice Daniel Ehrman's defamation lawsuit against Lesley Adam for failing to state a claim upon which relief can be granted under Minn. R. Civ. P. 12.02(e). On appeal, Ehrman argues that the district court erred when it

determined that Adam's allegedly defamatory statement was absolutely privileged as a statement made by an attorney in communications preliminary to a proposed judicial proceeding. Because Ehrman's complaint establishes that absolute privilege applies to Adam's statement and shields her from liability, we affirm.

F A C T S

Daniel Ehrman stated the following facts in his complaint, which we accept as true for purposes of reviewing a judgment of dismissal under Minn. R. Civ. P. 12.02(e). Ehrman is a licensed claims adjuster who earns a substantial part of his income adjusting claims and advising taxicab owners in the Twin Cities. Acting under a power of attorney signed by Madiha Zidan, Ehrman entered into negotiations to adjust and settle a claim that arose out of a February 2004 collision between a taxicab, owned by Zidan and driven by Bashi Nor Ibrahim, and a vehicle owned by Valerie Nelson. Zidan sued Nelson, and Ibrahim was named as a third-party defendant.

The district court scheduled arbitration for November 7, 2007. Ehrman was present on November 7 when counsel for the three parties—Zidan, Nelson, and Ibrahim—met in advance of the scheduled time to discuss a possible settlement. Attorney Lesley Adam attended the meeting representing Ibrahim.

"[I]n the hallway outside the arbitration courtroom in the settlement discussions preceding the [] scheduled arbitration," Ehrman represented to Adam that "he had a lawful power of attorney that enabled him to negotiate a settlement on behalf of [Zidan]." Adam looked over the power-of-attorney document that Zidan had executed, made a phone call to the assigned claims adjuster for Ibrahim's insurer, and told Ehrman that the

power of attorney "doesn't pass the 'smell test.'" At least one other person was within hearing range when Adam made the comment to Ehrman. Ehrman alleged that he was embarrassed, humiliated, and insulted by Adam's comment. Notwithstanding this exchange, the case was settled before the arbitration hearing began.

Ehrman filed a pro se complaint against Adam that alleged that Adam defamed him by publicly impugning his honesty in the conduct of his business and caused him damages in excess of $75,000. Adam moved to dismiss. She asserted that her communication to Ehrman was absolutely privileged as a communication related to a judicial proceeding in which she participated and that she was therefore immune from liability arising out of the communication. The district court granted Adam's motion to dismiss, and Ehrman appeals.

D E C I S I O N

Our review of a dismissal for failure to state a claim upon which relief can be granted under Minn. R. Civ. P. 12.02(e) centers on whether the complaint sets forth a legally sufficient claim for relief. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). A claim is legally sufficient if it is possible to grant the relief demanded on any evidence that might be produced consistent with the pleader's theory. *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490 (Minn. 2004). We accept the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). Whether a claim is legally sufficient is a question of law, which receives de novo review. *Id.*

The district court granted Adam's rule 12.02(e) motion to dismiss on the basis that Adam was entitled to immunity because her comment to Ehrman was absolutely privileged as a communication related to a judicial proceeding. Absolute privilege for judicial-proceeding communications is a defense on which the defendant has the burden of proof. *Mahoney & Hagberg v. Newgard*, 729 N.W.2d 302, 306 (Minn. 2007); *Bol v. Cole*, 561 N.W.2d 143, 147-48 (Minn. 1997) (referring to "defense of absolute privilege"). Thus a person alleging defamation would not ordinarily have the burden of anticipating and pleading facts sufficient to overcome the privilege. *See* Minn. R. Civ. P. 8.03 (stating that party has burden of "pleading to a preceding pleading" any "matter constituting an avoidance or affirmative defense"). Minnesota courts have not expressly considered whether the defense of absolute privilege is a proper basis for granting a rule 12.02(e) motion to dismiss. Nevertheless, the supreme court, without expressly addressing the issue of the defendant's burden, has applied absolute privilege for judicial-proceeding communications to reverse a district court's denial of a motion to dismiss. *Mahoney*, 729 N.W.2d at 310.

Several federal courts have expressly addressed the issue of the defendant's burden on immunity issues in the context of the federal equivalent of Minnesota's rule 12.02(e). *See* Fed. R. Civ. P. 12(b)(6) (stating that party may assert defense of "failure to state a claim upon which relief can be granted"). The federal decisions generally take the approach that dismissal under Fed. R. Civ. P. 12(b)(6) is proper when an immunity defense is established on the face of the complaint. *See, e.g.*, *Burlison v. United States*, 627 F.2d 119, 122 (8th Cir. 1980) (applying rule to case involving federal statutory

immunity); 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1357, at 713-22 (3d ed. 2004) (stating that early cases held that affirmative defense could not be basis for motion to dismiss but that several federal jurisdictions now allow consideration of affirmative defenses including "a wide range of forms of legal immunity from suit").

Because the Minnesota Supreme Court has applied an absolute-privilege defense to reverse a district court's denial of a motion to dismiss and because Minnesota courts may not look beyond the complaint to decide a rule 12.02(e) motion, we conclude that Minnesota has implicitly adopted the current federal approach. *See Mahoney*, 729 N.W.2d at 310 (applying absolute privilege); *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 740 n.7 (Minn. 2000) (stating that review is limited to complaint, but encompasses "particular documents and oral statements referenced in the complaint"). Thus the essential question presented in this case is whether Ehrman's complaint establishes Adam's defense of absolute privilege for judicial-proceeding communications.

The Minnesota Supreme Court defined the defense of absolute privilege for judicial-proceeding communications in *Matthis v. Kennedy*, 243 Minn. 219, 227-28, 67 N.W.2d 413, 419 (1954). Citing the Restatement of Torts § 586 (1938), the supreme court adopted the rule that "[a]n attorney at law is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of a judicial proceeding in which he participates as counsel, if it has some relation thereto." *Matthis*,

243 Minn. at 228, 67 N.W.2d at 419; *see also Kittler v. Eckberg, Lammers, Briggs, Wolff & Vierling*, 535 N.W.2d 653, 655 & n.2 (Minn. App. 1995) (noting adoption of Restatement rule in *Matthis* and acknowledging 1977 Restatement update that uses nearly identical language), *review denied* (Minn. Oct. 10, 1995). The *Matthis* court, however, noted that the privilege is narrow and may only be applied when "the administration of justice requires complete immunity from being called to account for language used." 243 Minn. at 223, 67 N.W.2d at 417.

Aggregating these factors, we conclude that an absolute privilege for judicial-proceeding communications will apply if the statements are (1) made by a participating attorney, judge, judicial officer, or witness, (2) made in communications preliminary to, or in the course of, a judicial proceeding, (3) relevant to the subject matter of the litigation, and (4) protected in the interest of the administration of justice. *See Mahoney*, 729 N.W.2d at 306 (recognizing three requirements explicitly stated in Restatement and separately noting fourth requirement). When absolute privilege applies to statements that are the subject of a defamation lawsuit, "the speaker is completely shielded from liability for her statements, even statements that are intentionally false or made with malice." *Id.*

The first of the four prongs is readily established by Ehrman's complaint. He states that Adam is "licensed to practice law" and represented Ibrahim, who was brought in as a third-party defendant in Zidan's lawsuit against Nelson. Thus, the person who made the allegedly defamatory statement is an attorney.

The application of the second prong to the facts in this case turns on the meaning of "communications preliminary to a proposed judicial proceeding." Comment a to the

Restatement (Second) of Torts § 586 (1977) describes the absolute privilege for judicial-proceeding communications as encompassing communications "in conferences and other communications preliminary to the proceeding," not just communications "in the institution of the proceedings or in the conduct of litigation before a judicial tribunal." *See Mahoney*, 729 N.W.2d at 306 (citing and quoting comment a). Comment d to section 586 also states that "judicial proceedings" may include an "arbitration proceeding."

Although no published appellate opinion has applied absolute privilege to statements made during settlement negotiations, at least one unpublished opinion has provided guidance in its application of the privilege. *Milavetz, Gallop & Milavetz, P.A. v. Hill*, No. CX-98-140, 1998 WL 422229, at *3-*4 (Minn. App. July 28, 1998) (applying privilege to settlement negotiations that occurred before filing of lawsuit), *review denied* (Minn. Sept. 30, 1998); *see also Plack v. Stempel*, No. CX-99-1797, 2000 WL 890456, at *3-*4 (Minn. App. July 3, 2000) (holding that privilege applies to "post-settlement communication"), *review denied* (Minn. Sept. 13, 2000). Other state courts have also determined that settlement negotiations qualify as communications preliminary to a proposed judicial proceeding. *See Oesterle v. Wallace*, 725 N.W.2d 470, 475-76 (Mich. Ct. App. 2006) (noting, with one possible exception, uniform application of privilege to "statements made by attorneys during settlement negotiations" and citing cases from nine states).

The policy considerations that underlie the absolute privilege for judicial-proceeding communications weigh in favor of applying the privilege to statements made during settlement negotiations. The privilege is intended to serve "the purpose of justice

in allowing counsel full freedom of speech in conducting causes and advocating the rights of the parties they represent." *Matthis*, 243 Minn. at 225, 67 N.W.2d at 418. The privilege is important because an attorney's words preliminary to, and during, judicial proceedings "might be such as to impute crime to another and therefore if spoken elsewhere would import malice and be actionable in themselves." *Id.* at 225, 67 N.W.2d at 417. This protection for discussions during settlement negotiations is necessary because settlements are forged by full and frank exchanges that may involve allegations of wrongdoing. Relying on this principle, the reasoning in *Milavetz*, and the cases from other states, we conclude that statements made during settlement negotiations qualify as "communications preliminary to a proposed judicial proceeding." *Id.* at 228, 67 N.W.2d at 419.

Ehrman's complaint states that Adam's comment was made "in the settlement discussions preceding the [] scheduled arbitration." The complaint thus establishes that Adam's statement would satisfy the second prong of the absolute-privilege test as "communications preliminary to a proposed judicial proceeding." Ehrman now contends that the complaint misstated the facts and that Adam did not make her comment until "*after* the case had settled." Because our review of a dismissal under Minn. R. Civ. P. 12.02(e) accepts the allegations in the complaint as true, we do not address Ehrman's current assertion of a factual variance. *Hebert*, 744 N.W.2d at 229. We note, however, that in response to the district court's inquiry on this assertion, Ehrman acknowledges that he still "had to sign off" on the settlement after Zidan orally agreed to the terms.

Turning to the third-prong of the absolute-privilege test, we consider whether Adam's statement is relevant to the subject of the litigation. Statements are relevant to the subject matter of the litigation if the statements "have reference and relation to the subject matter of the action and [they are] connected therewith." *Mahoney*, 729 N.W.2d at 306. "[R]elevance is defined broadly" and encompasses "all statements that have reference, relation, or connection to the case," not just those "that are 'legally relevant.'" *Id.* at 308. Accordingly, Adam's statement that the power of attorney "doesn't pass the 'smell test'" relates to the subject matter of the litigation because the issue of whether the power of attorney authorized Ehrman to settle Zidan's claim was directly relevant to the settlement of the case.

The fourth and final prong of the absolute-privilege test limits application of the privilege to circumstances in which the "administration of justice requires complete immunity from being called to account for language used." *Mahoney*, 729 N.W.2d at 306. In applying this prong, courts examine whether any policy interests exist that outweigh the policy interests favoring the privilege. *Id.* at 309; *Bol*, 561 N.W.2d at 149. As we have concluded, absolute privilege is intended to promote justice by allowing counsel fully and frankly to discuss the facts underlying the litigation and reach a fair and effective resolution. *Matthis*, 243 Minn. at 225, 67 N.W.2d at 418. The privilege allows full and frank discussion that may include assertions of wrongdoing that "if spoken elsewhere would import malice and be actionable in themselves." *Id.* at 225, 67 N.W.2d at 417.

Ehrman argues that the policy interests favoring the privilege are outweighed by a public-policy interest in preventing "full, frontal assault[s]" on a person's "honesty in business transactions." We agree that avoiding assaults on a person's honesty in business transactions is an important public-policy interest. We also agree that the question of the validity of the power-of-attorney document could have been framed more professionally. Nevertheless, an attorney has an obligation to take actions to protect a client's interests when the attorney suspects malfeasance. And absolute privilege is intended to protect the statements of an attorney in exactly Adam's situation, when proper representation of a client may necessitate broaching a topic that causes offense.

Although declining to apply the privilege to the "smell test" remark may advance professionalism in the practice of law, there is a significant danger that this type of limitation would have a chilling effect on client representation by making attorneys hold back because of fear that their comments will cause insult. We conclude that Adam's statement also satisfies the fourth prong of the absolute-privilege test and that the district court did not err when it granted Adam's rule 12.02(e) motion on the basis that she is entitled to immunity.

Affirmed.