

2006

Michael Strand, Cari Allen v. Diana Telfer : Brief of Appellee

Utah Court of Appeals

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No. 20060853-CA

IN THE UTAH COURT OF APPEALS

MICHAEL STRAND and CARI ALLEN,

Plaintiffs-Appellants,

vs.

DIANA TELFER, and JANE DOES (1-5),

Defendants-Appellees,

ANSWER BRIEF OF APPELLEE DIANA TELFER

Appeal from a Final Judgment of Dismissal of the
Third Judicial District Court, Salt Lake County, State of Utah,
the Honorable Joseph Fratto presiding

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ORAL ARGUMENT NOT REQUESTED

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List of All Parties

All of the parties are listed on the cover of this Brief.

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IN THE UTAH COURT OF APPEALS

MICHAEL STRAND and CARI ALLEN,

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vs.

DIANA TELFER, and JANE DOES (1-5),

Defendants-Appellees,

ANSWER BRIEF OF APPELLEE DIANA TELFER

Defendant-Appellee Diana Telfer submits this brief in answer to the Brief of Appellants Michael Strand and Cari Allen.

Statement of Jurisdiction

This is an appeal from a final judgment of dismissal of the Third Judicial District Court, Salt Lake County, State of Utah, entered on August 21, 2006. R. 121-24; Add. A. Appellants filed their notice of appeal on September 18, 2006. R. 125-26. This Court has jurisdiction to hear this appeal under Utah Code Ann. § 78-2a-3(j) (West 2004)

providing for jurisdiction in this Court over cases transferred to the Court of Appeals from the Supreme Court.

Issues Presented

1. The trial court correctly granted Telfer's motion to dismiss because Telfer is absolutely immune from claims of libel and slander

Telfer was an attorney guardian ad litem who was appointed to represent the children in a divorce action. Utah law is clear that attorneys are absolutely immune from any and all claims arising out of statements that are relevant to and made in the course of judicial proceedings. Is Telfer immune from the appellants' claims of libel and slander arising out of statements she made in a motion for temporary restraining order and supporting memorandum filed in the divorce action?

A. Standard of review

"When determining whether a trial court properly granted a motion to dismiss, [this Court] accept[s] the factual allegations in the complaint as true and consider[s] them, and all reasonable inferences to be drawn from them, in the light most favorable to the non-moving

party.” *Krouse v. Bower*, 2001 UT 28 ¶ 2, 20 P.3d 895. The trial court’s decision to grant a motion to dismiss raises a question of law, which this Court reviews for correctness, according no deference to the trial court. *Id.*

B. Preservation of issue

This issue was preserved in Telfer’s motion to dismiss. R. 58-67. The trial court granted Telfer’s motion to dismiss on this basis on August 21, 2006. R.121-24.

Determinative Constitutional Provisions, Statutes, and Rules

This appeal turns on the common law judicial proceeding privilege. Therefore, there are no determinative constitutional provisions, statutes, or rules.

Statement of the Case

Nature of the Case

This is an action for damages for libel and slander. R. 1-54. Appellee Telfer was an attorney guardian ad litem appointed to represent the

interests of the children of Rex Strand and Renee Strand, who were involved in a divorce. Rex Strand is appellant Michael Strand's ("Strand") brother. Appellant Cari Allen is Strand's girlfriend. Neither Strand nor Allen was a party to the divorce action.

Telfer submitted a motion for temporary restraining order and supporting memorandum in the divorce action. R. 17-25. The memorandum contained certain statements about Strand and Allen which Strand and Allen allege are false. They seek damages for libel and slander.

Under the judicial proceeding privilege, Telfer is immune from Strand's and Allen's claims because the allegedly false statements were relevant to and made in the course of a judicial proceeding in which Telfer was acting as counsel.

Course of the Proceedings and Disposition Below

In April 2006 Michael Strand and Cari Allen commenced this action by filing a Complaint in Second District Court. R. 1-54. In addition to Telfer, Strand and Allen named five Does as defendants. R. 1. However, the plaintiffs never amended the complaint to name any specific individual other than Telfer.

Pursuant to Telfer's motion, venue was changed to the Third District Court and the case was assigned to the Honorable Joseph Fratto. R. 99-103. Before venue was changed, Telfer filed a motion to dismiss. The motion was fully briefed, R. 58-67, 75-86, 106-13, and the parties presented oral argument to Judge Fratto. R. 144. On August 21, 2006, the court entered its Order Granting Motion to Dismiss and Dismissing the Case with Prejudice. R. 121-24; Add. A. Because the plaintiffs had never amended the complaint to add specific individuals, the trial court's order resolved all claims against all parties. Strand and Allen filed a notice of appeal on September 19, 2006. R. 125-26.

Statement of the Facts

The facts are taken from Strand and Allen's complaint.

In 2005 Rex Strand was involved in a divorce from his wife, Renee. R. 2. Telfer was appointed as guardian ad litem for Rex and Renee's children. R. 3. Rex is appellant Strand's brother. R. 2 Allen is appellant Strand's girlfriend. Neither of the appellants was a party to the divorce action.

When Rex and Renee separated, Rex moved in with Strand and Allen. R.2. Some time later, Telfer filed a motion for temporary

restraining order and supporting memorandum in the divorce action. R. 17-25. The motion requested a change of custody to Renee during the divorce and argued that it was not in the Strand children's best interest to have frequent contact with Strand and Allen, or to stay in their home while they visited their father. R. 24-25.

Strand and Allen allege that the motion and supporting memorandum "contained numerous misstatements and [were] glutted with salacious innuendo's [sic] involving plaintiffs Michael Strand and Cari Allen's, lifestyles, living conditions, personal character, past experience and dress attire." R. 3. Appellants allege that Telfer "knew or should have known this information to be false, malicious and wrong." R. 4.

Strand and Allen filed a complaint against Telfer raising claims for slander and libel and seeking punitive damages. Strand and Allen seek \$400,000 in damages from Telfer. R. 15.

Summary of the Argument

The trial court properly dismissed Strand's and Allen's complaint because Telfer is entitled to immunity under the judicial proceeding privilege. Strand and Allen sued Telfer for libel and slander for statements Telfer made in court papers she filed in her capacity as guardian ad litem for the Strand children in their parents' divorce action. Thus, the allegedly inaccurate statements were made by an attorney and were relevant to and made in the course of a judicial proceeding. Under Utah law, Telfer is immune from Strand's and Allen's claims.

Argument

1. The trial court correctly granted Telfer's motion to dismiss because Telfer is absolutely immune from claims of libel and slander

This Court should affirm the trial court's grant of Telfer's motion to dismiss because the court correctly ruled that Telfer is protected by the judicial proceeding privilege.

"The general rule is that judges, jurors, witnesses, litigants, and counsel involved in a judicial proceeding have an absolute privilege against suits alleging defamation." *Krouse*, 2001 UT, ¶ 8, 20 P.3d 895.

The common law judicial proceeding privilege is intended to promote the integrity of the adjudicatory proceeding and its truth finding processes." *DeBry v. Godbe*, 1999 UT 111, ¶ 10, 992 P.2d 979.

Accordingly, "[a]n attorney at law is absolutely privileged to publish false and defamatory matter of another in communications . . . during the course and as part of a judicial proceeding in which [she] participates as counsel, if it has some relation thereto." *Price v. Armour*, 949 P.2d 1251, 1256 (Utah 1997) (quoting *Beezley v. Hansen*, 4 Utah 2d 64, 286 P.2d 1057, 1058 (1955)). Attorneys are entitled to immunity because they act "in furtherance of [an] interest of social importance, which is entitled to protection even at the expense of uncompensated

harm to the plaintiff's reputation.” *Allen v. Ortez*, 802 P.2d 1307, 1311 (Utah 1990) (quoting W. Prosser & P. Keeton, *The Law of Torts* § 114 (5th ed. 1984)).

A three part test has been established to determine whether a statement is protected by the judicial proceeding privilege. *Krouse*, 2001 UT, ¶ 8, 20 P.3d 895. “To establish the judicial proceeding privilege, the statements must be (1) “made during or in the course of a judicial proceeding”; (2) “have some reference to the subject matter of the proceeding”; and (3) be “made by someone acting in the capacity of judge, juror, witness, litigant, or counsel.”” *Id.* (quoting *DeBry*, 1999 UT, ¶ 11, 922 P.2d 979).

The trial court’s application of the judicial proceeding privilege was unquestionably correct in this case. First, Telfer made the allegedly inaccurate statements in the course of a judicial proceeding—she included them in support of a motion for temporary restraining order she filed on behalf of the children in Rex and Renee’s divorce case. Second, the statements were relevant to the divorce proceeding because they related to child custody and visitation. In fact, the purpose of the motion was to seek a change of custody to Renee during the pendency of the divorce proceedings. Third, the statements were made by Telfer in

her capacity as guardian ad litem for the children. While Strand and Allen argue that Telfer was acting outside the scope of her duties as guardian ad litem when she filed the motion, Op. Br. at 27-28, this is plainly not the case.

Moreover, this case illustrates well the importance of the privilege. Telfer's position requires her, at times, to make statements bearing on the best interests of children that are not flattering to parents or other family members. Telfer, along with all other guardians ad litem, would be unduly limited in their roles as advocates if they were subjected to liability for making such statements. Attorneys such as Telfer must be free of the chilling effects of potential liability if they are to zealously protect the interests of their clients. *See Price*, 949 P.2d at 1258.

(holding that purpose of judicial privilege is to “ensure free and open expression by all participants in judicial proceedings by alleviating any and all fear that participation will subject them to the risk of subsequent legal actions”).

Strand and Allen do not allege that Telfer disclosed the motion and supporting memorandum to anyone outside the divorce proceedings. Nevertheless, they argue on appeal that Telfer's statements were not privileged because she published them more broadly than necessary.

Op. Br. at 30. Relying on Utah's child abuse reporting statutes, Strand and Allen suggest that Telfer's submission of information to the court constituted unnecessarily broad publication because the Division of Child and Family Support was the only proper recipient of the information. *Id.*

However, Strand and Allen did not argue before the trial court that the elements of the judicial proceeding privilege are not met in this case. Instead, they argued, first, that the allegations of their complaint were sufficiently specific to pass muster under Rule 12(b)(6). R. 76-78. Second, misapprehending the judicial proceeding privilege as a qualified rather than an absolute privilege, they argued that Telfer must first raise the privilege as an affirmative defense before the burden shifted to Strand and Allen to show why the privilege should not apply. R. 78-81.

Strand and Allen have, accordingly, waived the right to argue on appeal that Telfer published the allegedly false statements more broadly than necessary. "[I]n order to preserve an issue for appeal[,] the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." *438 Main Street v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801 (quoting *Brookside*

Mobile Home Park, Ltd. v. Peebles, 2002 UT 48, ¶ 14, 48 P.3d 968)

(alterations in original). Issues not raised before the trial court are usually deemed waived. *Id.*

Strand and Allen also note on appeal that prosecutors do not enjoy absolute immunity when they perform investigatory functions. Op. Br. at 27-28. But Telfer is not a prosecutor, the plaintiffs were not prosecuted, and their claims against Telfer do not relate to any investigation she performed. Strand's and Allen's claims for libel and slander relate solely to the motion Telfer filed with the court and the discussions she had with affiants in the course of preparing it.¹ R. 9-14. Therefore, Telfer's investigation is not at issue.

Finally, Strand and Allen seem to suggest in their brief that Telfer failed to follow Utah's statutory procedure for reporting child abuse and characterize the motion filed in the divorce case as Telfer's effort to

¹ Strand and Allen argue that Telfer sent an investigator to their home to do an evaluation. Op. Br. at 27. They fault Telfer for relying upon statements made by Renee and the children's paternal aunt and cousin instead of statements of the investigator. Op. Br. at 19. Strand and Allen argue that this constitutes unconstitutional suppression of exculpatory evidence for which Telfer does not enjoy immunity. Op. Br. at 27. However, the plaintiffs were not entitled to these protections because they were not criminal defendants. Moreover, the investigator's report is not in the record. Accordingly, the plaintiffs cannot show that it was favorable to them.

induce the trial court to rule that Strand and Allen were guilty of child abuse. Op. Br. at 26, 29-32. Strand and Allen correctly observe that Utah law gives statutory immunity to those who report suspicions of child abuse in good faith. Utah Code Ann. Section 62A-4a-410 provides:

Any person, official, or institution participating in good faith in making a report, taking photographs or X-rays, assisting an investigator from the division, serving as a member of a child protection team, or taking a child into protective custody pursuant to this part, is immune from any liability, civil or criminal, that otherwise might result by reason of those actions.

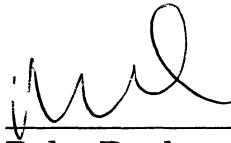
Strand and Allen correctly argue that the statutory immunity did not attach in this case because Telfer did not make a report of child abuse. *Id.* Nevertheless, the statutory immunity does not replace or diminish the separate common law judicial proceeding privilege. The elements of that privilege unquestionably are met in this case and Strand's and Allen's complaint was properly dismissed.

Conclusion

The statements that give rise to Strand's and Allen's libel and slander claims were made in court papers Telfer filed in her capacity as guardian ad litem for the children in Rex and Renee's divorce action. Telfer is an attorney and the statements were relevant to and made in

the course of a judicial proceeding. Under Utah law, there is no question that Telfer is immune from Strand's and Allen's claims. Accordingly, the trial court correctly granted Telfer's motion to dismiss and Telfer urges this Court to affirm the judgment entered by the trial court.

RESPECTFULLY submitted this 20th day of February, 2007.

A handwritten signature in black ink, appearing to read 'Reha Deal', is positioned above a horizontal line.

Reha Deal
Assistant Attorney General
Attorneys for Diana Telfer

Certificate of Service

I certify that two true and correct copies of the foregoing Answer Brief of Appellee was served by U.S. mail, first-class postage prepaid, this 20th day of February, 2007, to the following:

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