

SUPREME COURT OF KENTUCKY

Stilger v. Flint

391 S.W.3d 751 (Ky. 2013) · Decided February 21, 2013

SUMMARY

The Kentucky Supreme Court held that communications to the Kentucky Attorney General concerning alleged wrongdoing were not part of a judicial proceeding and therefore were entitled to only a qualified, rather than absolute, privilege. Because a genuine issue remained regarding the applicable privilege, the court affirmed the Court of Appeals' reversal of summary judgment for the attorney and remanded the case.

CASE DETAILS

COURT	Supreme Court of Kentucky
WRITING FOR THE COURT	Justice Scott; Cunningham; Noble; Venters; Brad Rhoads, Special Justice; John S. Reed, Special Justice
JURISDICTION	Kentucky
DECIDED	February 21, 2013
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appellant appealed the Court of Appeals' reversal of the Jefferson Circuit Court's grant of summary judgment in a defamation action.
STANDARD OF REVIEW	Summary judgment is reviewed de novo to determine whether the record, viewed in its entirety, shows no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The legal construction and effect of a written instrument are also reviewed de novo.
PRECEDENTIAL VALUE	Published Kentucky Supreme Court opinion; precedential.
PARTIES	Dennis J. Stilger v. Edward H. Flint

TOPICS

defamation summary judgment standard of review appellate procedure civil procedure

PRACTICE AREAS

defamation civil procedure appellate procedure

QUESTIONS PRESENTED

1. Whether communications between an attorney, acting for a client, and the Kentucky Attorney General concerning a request for investigation are absolutely privileged as communications preliminary to a judicial proceeding.
2. Whether summary judgment was proper where a genuine issue existed concerning whether Stilger's letter was pertinent, material, or relevant to a judicial proceeding.

HOLDINGS

1. Communications made to the Kentucky Attorney General's office in connection with an investigation are not part of a judicial proceeding and are therefore entitled only to a qualified privilege, not an absolute privilege.
2. Summary judgment was improper because the record presented a genuine issue concerning whether Stilger's communication to the Attorney General was entitled to absolute or qualified privilege.

KEY QUOTATIONS

“For the previously stated reasons, this Court holds that the communications made to the AG’s office were not part of a judicial proceeding and thus are entitled to only a qualified privilege.” (754)

“The proper standard of review on appeal when a trial judge has granted a motion for summary judgment is whether the record, when examined in its entirety, shows there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.” (753)

FACTUAL BACKGROUND

Flint, a condominium owner, requested access to the condominium association's financial records and meeting minutes after suspecting that association funds were being misappropriated. Stilger, the association's attorney, responded to Flint's request and later sent the Kentucky Attorney General a letter containing unflattering statements about Flint after Flint asked the Attorney General to investigate the records dispute. Flint sued Stilger for defamation, and the circuit court granted Stilger summary judgment based on absolute privilege.

PROCEDURAL HISTORY

Flint sued Stilger, alleging that a letter Stilger sent to the Kentucky Attorney General was defamatory. The Jefferson Circuit Court granted Stilger summary judgment on the ground that the letter was absolutely privileged as part of a judicial proceeding. The Court of Appeals reversed and remanded, and the Supreme Court of Kentucky affirmed that reversal and remanded for further proceedings.

DISPOSITION

affirmed

REMAND INSTRUCTIONS

Remanded to the trial court to make the necessary determinations consistent with the holding that the communications were subject to qualified privilege rather than absolute privilege.

CASES CITED

- Hammons v. Hammons, 327 S.W.3d 444, 448 (Ky. 2010)
- Malone v. Kentucky Farm Bureau Mutual Insurance Co., 287 S.W.3d 656, 658 (Ky. 2009)
- Morganfield National Bank v. Damien Elder & Sons, 836 S.W.2d 893, 895 (Ky. 1992)
- Cumberland Valley Contractors, Inc. v. Bell County Coal Corp., 238 S.W.3d 644, 647 (Ky. 2007)
- Schmitt v. Mann, 291 Ky. 80, 163 S.W.2d 281 (1942)
- General Electric Co. v. Lundy, 916 F.2d 1119, 1127 (6th Cir. 1990)

OPINION

SCOTT, J.

Opinion of the Court by Justice SCOTT. Appellant, Dennis J. Stilger, appeals the Court of Appeals' reversal of his award of summary judgment against Appellee, Edward H. Flint. Appellant argues that the Jefferson Circuit Court correctly granted summary judgment due to the fact that communications between an attorney, on behalf of his client, and the attorney general enjoy an absolute privilege.

We disagree with Appellant and affirm the Court of Appeals' decision. I. BACKGROUND Appellee is the owner of a condominium managed by the Coach House, and is accordingly a member of the condominium owners' association. Appellee became suspicious that association funds were being misappropriated, and thus requested that the Board of Directors of the Coach House ("the Board") allow him access to the financial records and minutes of the Board's meetings spanning a period from 2005 to 2007.

Appellant, who was the attorney for the Board, informed Appellee that his request was unreasonable. Thereafter, Appellee wrote to the Office of the Kentucky Attorney General (AG) asking that it prosecute the matter involving his records request. Appellant responded by sending a letter to the AG detailing the reasons that restrictions were placed on access to the records, including some that were unflattering to the Appellee.¹ In response, Appellee filed suit against Appellant, asserting that Appellant's letter to the AG was defamatory.

Appellant then filed a motion for summary judgment. The trial court determined that Appellant's letter to the AG, although unflattering, was a direct response to an appeal for prosecution and was thus part of a judicial proceeding. It was for this reason that the trial court granted Appellant's motion for summary judgment. Appellee appealed this decision to the Court of Appeals which reversed and remanded the trial court's grant of summary judgment.

Appellant now appeals the Court of Appeals' reversal to this Court. II. ANALYSIS "The proper standard of review on appeal when a trial judge has granted a motion for summary judgment is whether the record, when examined in its entirety, shows there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Hammons v. Hammons*, 327 S.W.3d 444, 448 (Ky.2010). "Because summary judgment does not require findings of fact but only an examination of the record to determine whether material issues of fact exist, we generally review the grant of summary judgment without deference to either the trial counsel's assessment of the record or its legal conclusions." *Id.* (citing *Malone v. Kentucky Farm Bureau Mut.*

Ins. Co., 287 S.W.3d 656, 658 (Ky.2009)). "Furthermore, it is well established that '[t]he construction as well as the meaning and legal effect of a written instrument... is a matter of law for the court.' " *Id.* (quoting *Morganfield Nat. Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky.1992)); see also *Cumberland Valley Contractors, Inc. v. Bell County Coal Carp.*, 238 S.W.3d 644, 647 (Ky.2007).

In such cases, this Court reviews the issue *de novo*. *Id.* (citing *Cumberland Valley Contractors, Inc.*, 238 S.W.3d at 647). A. Summary Judgment The trial court granted Appellant's motion for summary judgment after it determined that Appellant's libelous statements were protected speech, given that they were statements made during the course of a judicial proceeding.

See *Schmitt v. Mann*, 291 Ky. 80, 163 S.W.2d 281 (1942) (holding statements in pleadings in judicial proceedings are absolutely privileged when they are material, pertinent, and relevant). The trial court made determinations that (1) Appellee's letter to the AG was a communication that was a preliminary part of a judicial proceeding, (2) Appellant's response would enjoy an absolute privilege, and (3) therefore summary judgment was appropriate.

However, Appellee argues that summary judgment was improper due to the fact that Appellant's letter to the AG was not pertinent, material, or relevant to a judicial proceeding. We agree that upon an examination of the record in its entirety there was an issue that needed to be resolved, i.e., whether the communication between Appellant and the AG is entitled to an absolute or qualified privilege.

Therefore Appellant was not entitled to summary judgment. B. Absolute or Qualified Privilege Whether the communication in question is protected by an absolute or qualified privilege is an issue of first impression for this Court. Kentucky has a longstanding acceptance of the rule that statements made during the course of a judicial proceeding shall enjoy an absolute privilege.

Schmitt, 291 Ky. 80, 163 S.W.2d 281 at 283. "[W]e must conclude that Kentucky would in the proper case apply the absolute privilege to communications by a party made preliminary to a seriously considered judicial proceeding." *General Electric Company v. Lundy*, 916 F.2d 1119, 1127 (6th Cir.1990).

However, “[a] qualified privilege attaches to reports made to law enforcement authorities for investigation, and like any other qualified privilege, the speaker is afforded immunity unless it is shown that the defamatory statement was malicious.” Am.Jur.2d Libel § 275. “Thus, a qualified privilege exists when a statement about suspected wrongdoing is made in good faith to law enforcement authorities.” Id. Furthermore, “Communications made to a state attorney general’s office enjoy a qualified rather than an absolute privilege, since the attorney general does not act in a judicial or quasi-judicial capacity because, although he or she investigates allegedly fraudulent or illegal acts, he or she must seek enforcement in court.” Id. When statements are made as a pertinent part of a judicial proceeding there is no question that they enjoy absolute privilege.

However, in the case at hand there is a genuine dispute as to whether the letter written by Appellant to the AG was in fact correspondence relevant to a judicial proceeding. The trial court determined that Appellee’s letter to the AG was clearly a communication in preparation for a judicial proceeding and thus so was Appellant’s response.

However, Appellee argues that there is a significant difference between a proposed judicial action and a judicial proceeding. We agree. In the case at hand,. Appellee wrote the letter to the AG in hopes that he would investigate the situation, as the AG’s office is an investigatory body.

In order for any judicial proceedings to ensue, the AG would have to seek enforcement in a court of law. For the previously stated reasons, this Court holds that the communications made to the AG’s office were not part of a judicial proceeding and thus are entitled to only a qualified privilege. III. CONCLUSION For the aforementioned reasons, we affirm the Court of Appeals’ reversal of the trial court’s grant of summary judgment and remand to the trial court to make the necessary determinations in accordance with this opinion.

CUNNINGHAM, NOBLE, and VENTERS, JJ., BRAD RHOADS and JOHN S. REED, Special Justices, sitting. All concur. MINTON, C.J., and ABRAMSON, J., not sitting.. Appellant’s letter to the AG contained the following language which could be viewed as unflattering to the Appellee: "Mr. Flint’s letter of October 17th contains false allegations. Mr. Flint has previously sued and lost litigation with Coach House and is extremely erratic and unstable.

He made an unreasonable demand for review of records. Because of his past conduct, Mr. Flint would only be allowed to review the records under supervision. No one at the condo feels physically safe with him....”