

SUPREME COURT OF SOUTH DAKOTA

Harris v. Riegenbach

2001 SD 110 (S.D. 2001) · No. No. 21709 · Decided August 22, 2001

SUMMARY

The Supreme Court of South Dakota affirmed summary judgment in favor of an attorney in a defamation action arising from an affidavit concerning alleged child abuse in custody and visitation proceedings. The court held that the affidavit was absolutely privileged under SDCL 20-11-5(2) because it was made in connection with a judicial proceeding. The privilege also barred related negligence and emotional-distress claims based on the same conduct.

CASE DETAILS

COURT	Supreme Court of South Dakota
WRITING FOR THE COURT	Tucker, Circuit Judge; Miller, Chief Justice; Sabers, Justice; Amundson, Justice; Gilbertson, Justice
JURISDICTION	South Dakota
DECIDED	August 22, 2001
DOCKET	No. 21709
DISPOSITION	affirmed
PROCEDURAL POSTURE	Randy Harris appealed an order granting summary judgment to third-party defendant Jean M. Cline in claims for defamation, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress.
STANDARD OF REVIEW	Summary judgment is reviewed de novo to determine whether the moving party demonstrated the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. The evidence is viewed most favorably to the nonmoving party, but that party must present specific facts showing a genuine, material issue for trial.
PRECEDENTIAL VALUE	Published South Dakota Supreme Court opinion; precedential.
PARTIES	Randy Harris v. Jean M. Cline

TOPICS

defamation

summary judgment

civil procedure

negligence

intentional infliction of emotional distress

PRACTICE AREAS

defamation

civil procedure

torts

QUESTIONS PRESENTED

1. Whether SDCL 20-11-5(2) barred Harris's defamation claim against Cline by providing an absolute privilege for communications made in a judicial proceeding.
2. Whether summary judgment was proper on Harris's negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, and contribution-related claims when those claims were based on the same facts as the privileged defamation claim.

HOLDINGS

1. An affidavit prepared for and used in a judicial proceeding is absolutely privileged when it was made in the proceeding, had a logical connection to the action, was intended to advance the litigation, and involved litigants or other legally authorized participants. The privilege applied to Riggenbach's affidavit and excluded Cline from liability.
2. Absolute privilege or immunity under defamation law barred Harris's negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, and related claims because they were based on the same facts as the privileged defamation claim.

KEY QUOTATIONS

"A privileged communication under SDCL 20-11-5(2) is 'absolute and remain[s] privileged whether made with or without malice.'" (633 N.W.2d at 194)

"An allegation that discovery is not complete and that unknown third parties may know of the affidavit is action-less when there are no supporting facts.'" (633 N.W.2d at 195)

"The salutary purpose of the privilege should not be frustrated by putting a new label on the complaint.'" (633 N.W.2d at 196)

FACTUAL BACKGROUND

Harris's former wife retained attorney Jean Cline in visitation and custody proceedings involving Harris's son. Cline consulted Bonnie Riggenbach, who had counseled the child, and prepared an affidavit containing Riggenbach's sworn opinion that the child had been physically and sexually abused by Harris. It was later determined that no abuse had occurred. Harris claimed that the affidavit and related conduct supported defamation and several associated tort claims.

PROCEDURAL HISTORY

Harris sued Bonnie Riggenbach for defamation, negligence, and negligent and/or intentional infliction of emotional distress. After Cline was brought into the action as a third-party defendant, Harris amended his

complaint to assert the claims directly against Cline. The trial court granted Cline summary judgment, and Harris appealed.

DISPOSITION

affirmed

CASES CITED

- Peterson v. Hohm, 2000 SD 27, 607 N.W.2d 8, 10
- Wolff v. South Dakota Game, Fish and Parks Department, 1996 SD 23, 544 N.W.2d 531, 537
- St. Paul Fire & Marine Insurance Co. v. Schilling, 520 N.W.2d 884, 886 (S.D. 1994)
- Petersen v. Dacy, 1996 SD 72, 550 N.W.2d 91, 92
- Flugge v. Wagner, 532 N.W.2d 419, 421 (S.D. 1995)
- Larson v. Baer, 418 N.W.2d 282, 288-89 (N.D. 1988)
- Home Federal Savings & Loan v. First National Bank, 405 N.W.2d 655 (S.D. 1987)
- Aronson v. Kinsella, 58 Cal. App. 4th 254, 68 Cal. Rptr. 2d 305, 313 (1997)
- Hackworth v. Larson, 83 S.D. 674, 165 N.W.2d 705, 709 (1969)
- Janklow v. Keller, 90 S.D. 322, 241 N.W.2d 364, 367, 370 (1976)
- Bradley v. Hartford Accident & Indemnity Co., 30 Cal. App. 3d 818, 106 Cal. Rptr. 718, 722 (1973)
- Hughes v. O'Connor, 313 N.W.2d 463 (S.D. 1981)
- Thornton v. Rhoden, 245 Cal. App. 2d 80, 53 Cal. Rptr. 706, 719 (1966)

OPINION

TUCKER, J.

633 N.W.2d 193 (2001) 2001 SD 110 Randy HARRIS, Plaintiff and Appellant, v. Bonnie RIGGENBACH, Defendant and Third Party Plaintiff, and Jean Cline, Third Party Defendant and Appellee. No. 21709. Supreme Court of South Dakota. Argued March 19, 2001. Decided August 22, 2001. Steven C. Beardsley of Truhe, Beardsley, Jensen, Helmers & VonWald, Rapid City, SD, Attorneys for plaintiff and appellant.

Charles M. Thompson of May, Adam, Gerdes, Thompson, Pierre, SD, Attorneys for third party defendant and appellee. TUCKER, Circuit Judge [¶ 1.] Randy Harris (Harris) appeals from an order granting summary judgment in a defamation action against Jean M. Cline (Cline).

We affirm. FACTS [¶ 2.] Harris' former wife hired Attorney Cline to represent her in visitation and custody proceedings concerning Harris' son. During the same time, defendant and third-party plaintiff Bonnie Riggenbach was counseling the Harris' son.

In preparation for the visitation and custody hearing, Cline spoke with Riggenbach, whom *194 she had known professionally for fifteen years. Riggenbach expressed her concerns that Harris had

sexually and physically abused his son. Cline then prepared an affidavit that included a signed statement by Riggenbach that, "based on my training, background, and working with the child, I believe that he has been abused both physically and sexually.

That the evidence presented indicates that this abuse comes from Joshua's father, Randy Harris." [¶ 3.] Riggenbach admitted that she does not perform evaluations or make determinations regarding physical and sexual abuse.

However, Riggenbach testified that she had legitimate concerns about Harris having custody of his son, and that the affidavit was true, even though the language was strong. She reviewed the affidavit, signed it under oath, and at no time challenged or sought to modify the language in the affidavit. Riggenbach knew that she was signing the affidavit as her sworn testimony of her opinions, and that it would be used in court. [¶ 4.]

It was later determined that no sexual abuse ever occurred, and that Harris never abused his child. Harris originally brought suit against Riggenbach for defamation, negligence, and negligent and/or intentional infliction of emotional distress. When Cline was brought in as a third party defendant to these claims, Harris amended his complaint to assert these claims directly against Cline.

The trial court granted Cline's motion for summary judgment against both Harris and Riggenbach. It is from this order that Harris appeals. STANDARD OF REVIEW [¶ 5.] This Court's standard of review of a trial court's granting of summary judgment is well established: In reviewing a grant or a denial of summary judgment under SDCL 15-6-56(c), we must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law.

The evidence must be viewed most favorable to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied.

Peterson v. Hohm, 2000 SD 27, ¶ 7, 607 N.W.2d 8, 10. "Summary judgment will be affirmed if there exists any basis which would support the trial court's ruling." Wolff v. SD Game, Fish and Parks Dept., 1996 SD 23, ¶ 32, 544 N.W.2d 531, 537 (citing St. Paul Fire & Marine Ins. v. Schilling, 520 N.W.2d 884, 886 (S.D.1994)). DECISION ISSUE ONE [¶ 6.] Does SDCL 20-11-5(2) preclude assertion of a defamation claim against Attorney Cline? [¶ 7.]

Defamation, including libel or slander, is statutorily defined as an unprivileged publication. SDCL 20-11-3 and 20-11-4. If, however, a publication or communication is privileged, it is not actionable as defamation. Petersen v. Dacy, 1996 SD 72, 550 N.W.2d 91, 92. A communication made in any legislative or judicial proceeding is a privileged communication SDCL 20-11-5(2).

"A privileged communication under SDCL 20-11-5(2) is `absolute and remain[s] privileged whether made with or without malice.'" *Flugge v. Wagner*, 532 N.W.2d 419, 421 (S.D.1995). [¶ 8.] Harris contends that Cline defamed him when she prepared a defamatory affidavit which was used in open court. *195 Harris claims that absolute immunity does not attach to extra judicial statements.

He argues that even if the affidavit is a privileged communication made in a judicial proceeding, discovery is not complete and therefore it is uncertain to whom the allegations were made known and in what venue. Harris alleges that he is "aware the subject matter of the affidavit was made known to employees at the school where his son attends." Despite Harris' allegation that the subject matter of the affidavit has fallen on ears outside this judicial proceeding, no individuals outside the proceeding have been identified that are directly aware of any specific statements in the affidavit.

Nor are there facts demonstrating that Cline is the source of any general information individuals outside the proceeding might have. [¶ 9.] An allegation that discovery is not complete and that unknown third parties may know of the affidavit is action-less when there are no supporting facts.

The possibility that discovery will yield evidence favorable to a party opposing summary judgment is not a ground to deny summary judgment where the party opposing summary judgment has failed to invoke the procedures under [Rule 56(f)] to submit affidavits stating a need for discovery or to request a continuance in order to present further affidavits or depositions in opposition to summary judgment.

Larson v. Baer, 418 N.W.2d 282, 288-289 (N.D.1988). "General allegations which do not set forth specific facts will not prevent issuance of a summary judgment." *Home Fed. Sav. & Loan v. First Nat. Bank*, 405 N.W.2d 655 (S.D.1987). Harris' allegations here are insufficient to prevent the summary judgment. [¶ 10.] Harris further requests that this Court adopt a good faith test to determine whether the absolute privilege found in SDCL 20-11-5(2) applies.

He cites *Aronson v. Kinsella*, 58 Cal.App.4th 254, 68 Cal.Rptr.2d 305, 313 (1997), where the court held a statement must be "made with a good faith belief in a legally viable claim" to be privileged. *Id.* at 313. Thus, he argues, it must be a question of fact for the jury to decide whether Cline had a good faith belief in the affiant's claim. [¶ 11.] SDCL 20-11-5(2) does not provide any legislative authority for a good faith exception to the privilege at issue.

Because of this absolute privilege, the purpose behind the communication, or the state of mind of the one making the communication is neither material nor relevant. See *Hackworth v. Larson*, 83 S.D. 674, 165 N.W.2d 705, 709 (S.D.1969); *Janklow v. Keller*, 90 S.D. 322, 241 N.W.2d 364, 367 (1976). [¶ 12.]

The trial court used the four part test in Janklow to determine whether the absolute privilege applied in this case. The conditions set forth in Janklow were: the publication (1) was made in a judicial proceeding; (2) had some connection or logical relation to the action; (3) was made to achieve the objects of the litigation; and (4) involved litigants or other participants authorized by law.

Janklow, *supra*, (citing *Bradley v. Hartford Accident & Indemnity Co.*, 30 Cal.App.3d 818, 106 Cal.Rptr. 718, 722 (1973)). Applying the Janklow factors to the present case, and viewing the evidence most favorable to the nonmoving party, the trial court found that all conditions were met.

We agree. An absolute privilege attached to Riggerbach's affidavit and excluded Cline from liability. ISSUE TWO [¶ 13.] Did the trial court properly grant summary judgment on the negligence, intentional and negligent infliction of emotional distress, and contribution claims? [¶ 14.] Harris also asserted claims based on negligence, intentional infliction *196 of emotional distress and negligent infliction of emotion distress.

These claims are all based on the same facts as the defamation claim. This Court has previously ruled, "The defense of absolute privilege or immunity under the law of defamation avoids all liability." *Hughes v. O'Connor*, 313 N.W.2d 463 (S.D.1981). "The salutary purpose of the privilege should not be frustrated by putting a new label on the complaint." Janklow, *supra* at 370 (quoting *Thornton v. Rhoden*, 245 Cal.App.2d 80, 53 Cal.Rptr.

706, 719 (1966)). The trial court properly granted summary judgment on each of these claims. [¶ 15.] We affirm. [¶ 16.] MILLER, Chief Justice, and SABERS, AMUNDSON and GILBERTSON, Justices, concur. [¶ 17.] TUCKER, Circuit Judge, for KONENKAMP, Justice, disqualified.