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Fitzgerald v. Mobile Billboards, L.L.C., 134 Nev. Adv. Op. 30 (May 3, 2018)¹

CIVIL PROCEDURE: MOTION TO DISMISS; CIVIL LAW: DEFAMATION,
CONDITIONAL PRIVILEGE

Summary

The Court found that the absolute privilege provided in common law that protects defamatory statements made during the course of quasi-judicial proceeding does not apply to workers' compensation proceedings governed by the Nevada Industrial Insurance Act (NIIA). There, a conditional privilege applies, and allegedly defamatory statements are protected so long as the speaker made the statements without malicious intent.

Background

Appellant Sean Fitzgerald worked at Mobile Billboards, owned by Vincent Bartello (collectively, Respondents) for a brief amount of time before sustaining a work-related injury. Following the injury, Appellant applied for workers' compensation with the company's insurance company. The Respondents, in reference to the claim, told the insurance company that they were concerned with Appellant's use of prescription pain medication. More specifically, that the Appellant "was attempting to obtain more and different prescription painkillers after his industrial injury, that multiple prescription painkillers, and prescriptions for additional painkillers were found" in Appellant's belongings. The insurance company provided those statements to Appellant and also to his workers' compensation doctor. Subsequently, Appellant filed a claim for defamation against Respondents alleging that their statements were false and caused harm to his reputation. The district court dismissed Appellant's case after granting Respondents' NRCP 12(b)(5)² motion to dismiss. That court found the statements were immune under absolute privilege. Thereafter, Appellant appealed.

Discussion

Absolute privilege

Appellant challenged the district court's findings that the Respondents' statements to the insurance company were protected by an absolute common law privilege. Appellant also challenged the district court's failure to consider the conditional privilege provided under NRS 616D.020.³ The Court agreed.

In Nevada, there is a common law absolute privilege that protects defamatory statements made during the course of judicial proceedings.⁴ This privilege extends to "quasi-judicial proceeding before executive officers, boards, and commissions."⁵ Additionally, this privilege completely bars defamation claims where: (1) the proceeding was contemplated in good faith and

¹ By Shaneka J. Malloyd.

² N.R.C.P. 12(b)(5) (2016).

³ NEV. REV. STAT. § 616D.020 (2017); *see* NEV. REV. STAT § 616D.300 (2017).

⁴ *Jacobs v. Adelson*, 130 Nev. 408, 412, 325 P.3d 1282, 1285 (Nev. 2014).

⁵ *Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 61, 657 P.2d 101, 104 (Nev. 1983).

under serious consideration and (2) the statements were related to the investigation.⁶ The absolute privilege further applies to those claims where the defamatory statements were made with malicious intent.

However, this common law rule does not apply where it conflicts with a statute. Workers' compensation claims are governed by the Nevada Industrial Insurance Act (NIIA).⁷ The NIIA conditionally precludes liability in a defamation suit.⁸ The alleged defamer must not have made the statement with malicious intent to be protected from civil liability. Here, there is a conflict between the common law privilege and statutory privilege because the common law privilege is absolute, and the statutory privilege is conditional. Consequently, the district court erred by concluding the respondents' statements were absolutely privileged in granting the motion to dismiss as a matter of law.

Application of NRS 616D.020

It is a question of law whether a conditional privilege exists. If a conditional privilege exists, a defamation claim will be "presented to a jury only if there is sufficient evidence for a jury to reasonably infer" that a statement was made with malicious intent.⁹ While the limited record suggested that the Respondents' statements would be immune from civil liability because they were made in connection with Appellant's workers' compensation claim, the Respondents must have also made their statements without malicious intent to be immune. Because it not known if the Respondents presented a defense under NRS 616D.020 and the case is at the NRCP 12(b)(5) stage, the Court declined to address whether a conditional privilege applied in this case given that it was its first time on appeal.¹⁰

Conclusion

The Court reversed the district court's order to dismiss and remanded the matter back to the district court. The Court found that the district court erred in granting the Respondents' NRCP 12(b)(5) motion to dismiss solely based on findings that the statements were immune under absolute privilege.

⁶ *Id.*

⁷ NEV. REV. STAT. § 616A (2017).

⁸ NEV. REV. STAT. § 616D.020 (2017).

⁹ *Lubin v. Kunin*, 117 Nev. 107, 115, 17 P.3d 422, 428 (Nev. 2001).

¹⁰ *See Jacobs*, 130 Nev. at 418, 325 P.3d at 1288 (the Court declined to address applicability at 12(b)(5) stage because record was not fully developed); *see also Lubin*, 117 Nev. at 116, 17 P.3d at 418 (The Court cautioned against granting an NRCP 12(b)(5) motion to dismiss where conditional privilege applies).