

NO. A08-1764

STATE OF MINNESOTA
IN SUPREME COURT

Loren J. Zutz and Elden J. Elseth,

Appellants,

vs.

John Nelson and Arlyn Stroble,

Respondents,

Reply Brief of Appellants

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STATEMENT OF ISSUES

1. Whether members of a subordinate public body, such as municipal councils or Watershed Districts, have an absolute privilege to make defamatory statements about fellow board members.

The Court of Appeals held that public policy supports the extension of absolute privilege to appointed board members of a Watershed District, on the grounds that it ensures the freedom of such board members to speak out on their performance of their required duties without fear of liability. (Court of Appeals Decision, p. 5).

ARGUMENT

I. MEMBERS OF A SUBORDINATE PUBLIC BODY DO NOT HAVE AN ABSOLUTE PRIVILEGE TO MAKE DEFAMATORY STATEMENTS.

In their brief, the Respondents, Nelson and Stroble, assert that they are entitled to absolute immunity and are therefore immune from suit for making defamatory statements in the context of a board meeting of the Watershed District. In alleging that this doctrine of absolute immunity applies to members of subordinate bodies, such as Watershed Districts, the Respondents simply ignore long-standing Minnesota case law on point, which clearly holds to the contrary.

The Minnesota rule is stated in the case of Jones v. Monico, 276 Minn. 371, 375, 150 N.W.2d 213, 216 (1967), where this Court held that “proceedings of subordinate

bodies, including municipal councils or town meetings are not protected by absolute privilege because they are “sufficiently protected from exemption from liability in the exercise of good faith.” This holding was followed and restated 24 years later, more recently, in the case of Johnson v. Northside Residents Redevelop. Council, 467 N.W.2d 826 (Minn. App. 1991).

Minnesota has long held that members of subordinate legislative bodies, such as city councils do not have absolute immunity against defamation claims. See, Wilcox v. Moore, 69 Minn. 49, 71 N.W. 917 (1897), and Treby v. Transcript Publish. Co., 74 Minn. 84, 76 N.W.2d 961 (1989) (holding that a defamation claim could proceed against a city council for allegedly publishing a false report, because it was not official and the resolution itself was not within the scope of the official authority of the city council). In Burch v. Bernard, 107 Minn. 210, 120 N.W. 33 (1909), a lawsuit was allowed to proceed against a member of the Pipestone City Council for defaming the plaintiff by alleging that she had participated in running a house of ill fame, when she presented a bill to the council for nursing services.

The Defendants have given no reason why this well-established Minnesota case law should be overturned, or why the doctrine of absolute immunity should be applied to members of subordinate public bodies, such as Managing Board of the Watershed District, such as we have here.

The sub-issues raised by the Respondents are dealt with as follows:

A. Public Policy Does Not Allow Respondents to Defame with Absolute Immunity.

Traditionally, in Minnesota, the concept of absolute immunity, as opposed to qualified immunity, applied only to members of the Legislature to protect them from litigation for defamatory statements. This privilege was extended to members of the Executive Branch in Johnson v. Dirkswager, 315 N.W.2d 215 (Minn. 1982) where this Court held that the Commissioner of the Minnesota Department of Public Welfare - which the Court considered a high level executive officer - enjoys such absolute immunity, similar to the Legislature.

In a separate line of cases, this Court has also held that law enforcement officers are entitled to absolute immunity from a civil suit for allegedly defamatory statements that were made in a compulsory arrest report. Carradine v. State, 511 N.W.2d 733, 736-37 (Minn. 1994). In the same decision, moreover, the Court held that the officer had only qualified immunity for any statements made in response to press inquiries. The Court determined that these were not at all essential in the officer's performance of his duties. The Court further held that because of the greater risk of publication to a larger number of people, and the circumstances, the statements would not be absolutely privileged, unless they amounted to a "exact repetition or substantial repetition, without application or comment, of the statements made in the arrest report, which is a matter of public record . . ." 511 N.W.2d at 737.

Absolute immunity for law enforcement officers was also applied in Redwood County Telephone Co. v. Luttman, 567 N.W.2d 717, 720 (Minn. App. 1997), review denied (Minn. October 21, 1997). In Redwood County, it was held that absolute privilege applied to statements made by a sheriff and that these were similar to the absolute privilege provided to the state patrol officer in Carradine.

The limitations of Carradine were noted in Bauer v. State, 511 N.W.2d 447, 450 (Minn. 1994), decided the same day, where this Court noted that while a police officer would have absolute immunity from a civil suit and defamation for statements made in a written arrest report, because the police report can be a critical part of the law enforcement process, governmental interests involved in a personnel matter would not rise to the same urgency as Carradine. Instead, where there were allegedly defamatory statements made within the context of an administrative personnel matter, the Court concluded that the defendants were not entitled to either official immunity or absolute privilege but, instead, were governed by the common law doctrine of qualified privilege. Id.

Consequently, from the string of cases that have examined this point, there is nothing in the reported decisions of this Court which would extend absolute privilege to all government officials, as propounded by the Respondents. There is no rationale for reversing prior law, nor is there any good public policy consideration.

In Jones v. Monico this Court concluded that “proceedings of subordinate bodies

were not protected by absolute privilege because they are “sufficiently protected by exemption from liability in the exercise of good faith.” Jones v. Monico, 276 Minn. 371, 375, 150 N.W.2d 213, 216 (1967). In addition, this rule was affirmed and restated 24 years later in Johnson v. Northside Residents Redevelop. Council, 467 N.W.2d 826 (Minn. App. 1991). In Johnson v. Northside, the Court of Appeals held that a publication is “conditionally privileged if an inferior administrative officer of a state or any of its subdivisions who is not entitled to absolute privilege makes a defamatory communication required or permitted in the performance of his official duties.”

Johnson notes that Minnesota is among the jurisdictions applying this conditional privilege to city council members. By way of analogy, that would include members of the Watershed District governing body. The Court went on to confirm the holding in Jones v. Monico that absolute immunity was not necessary with respect to municipal councils or town meetings, because they have the conditional privilege, subject to the exercise of good faith. 467 N.W.2d at 828.

The Respondents attempt to glean some sort of extension of absolute immunity and reversal of Monico, and Northside Residents Redevelop. Council, through the ruling of this Court in Carradine. Both the Respondents, as well as the Court of Appeals improperly attempt to extend Carradine by the blanket statement, “Government officials are protected from defamation suits when granting absolute immunity serves the public interest by allowing the official to freely address matters that are pertinent to job

performance.” (Court of Appeals Decision, p. 3, App. 185), citing Carradine v. State, 511 N.W.2d at 735-36 (Minn. 1994). The Court of Appeals’ decision in this case does not accurately convey the decision of this Court in Carradine, nor do the cases support what the Respondents are attempting to argue.

The construction which the Respondents place on Carradine, as somehow reversing 100 years of Minnesota case law, is misplaced. In that decision, this Court only held that an arresting officer had absolute immunity from a civil suit for allegedly defamatory statements that were made about an arrestee in an arrest report. However, if statements were made to a reporter, the officer had only qualified immunity for such statements that differed significantly from statements made in the written report.

The discussion by this Court in Carradine focuses upon the fact that the person involved was a state trooper, who had stopped and arrested an actor, Robert Carradine. This Court specifically limited its ruling, holding that the trooper had absolute immunity from a civil suit for allegedly defamatory statements made in the arrest report, but denied that he had absolute immunity from a civil suit for alleged defamatory statements made in response to press inquiries.

Noting that the defendant was a law enforcement officer, and required to make such a report, absolute immunity would apply. See, generally, discussion at 511 N.W.2d, 736-37.

In regards to defamatory statements made in response to press inquiries, the Court

noted that such statements were not at all essential in the officer's performance of his duties, and because of the greater risk of publication to a large number of people, the statements were not absolutely privileged, unless they amounted to an "exact repetition or substantial repetition, without application or comment, of the statements made in the arrest report, which is a matter of public record . . ." 511 N.W.2d at 737.

Carradine also discusses the history of absolute privilege for statements made during a judicial or quasi-judicial proceeding. This same issue, with respect to subordinate government bodies was addressed in the case of Honan v. City of Cottonwood, unpublished, 2005 WL 2077277 (Minn. App., August 30, 2005). In this case, the Court of Appeals correctly noted that it could not determine from the proceedings alone whether the council meeting was judicial or a quasi-judicial proceeding. If the council meeting in question was considered a judicial proceeding, then absolute immunity may apply for statements made. There is nothing in this present case that indicates that the Watershed District was meeting in any sort of judicial or quasi-judicial proceeding, and there would be no basis for absolute immunity.

In Bauer v. State, which involved allegedly defamatory statements made within the context of an administrative personnel matter, the Court held that these governmental interests did not raise public policy considerations of the same urgency as Carradine which was the justification for giving the arresting officer absolute immunity for statements made in the arrest report. Bauer, 511 N.W.2d at 450.

Consequently, any argument that Carradine somehow extends absolute privilege to false statements made during the course of council meetings, which are certainly not required under any sort of statute or procedure, the argument for such extension must fail.

The rationale of these cases should be easy to determine. This Court has held, that while absolute immunity should apply to the Minnesota Legislature, and also to high level officers of the Executive Branch, or to the University, it has never extended the doctrine to lower-level governmental bodies, such as municipal council meetings or Watershed Districts. Indeed, there are a number of problems that would arise if the doctrine were extended to lower level bodies, such as Watershed Districts. If absolutely immunity were extended, there would be situations where there was less oversight, less news coverage, and less ability of the offended party to fight back against the defamatory comments. Consequently, this Court has decided, in sound public policy determination, that there should be no absolute immunity. At best, a conditional privilege may be allowed, which provides adequate protection for the public officer, as well as persons whose reputation has been damaged by defamatory statements, as here.

B. Respondents Were Not Fulfilling Any Prescribed Official Function When Making the Defamatory Statements.

The Respondents' statements in this case were not made in the course of fulfilling their official function, any more than the administrative personnel agency was involved in Bauer v. State, supra. Simply because somebody makes a statement in their capacity as a

governing board member of a Watershed District, that gives such a person no absolute immunity privilege to make false and defamatory statements, as those alleged here.

The Respondents, as well as the Court of Appeals were incorrect in asserting that, “As District Board Members, one of the Respondents’ functions is to ensure that other Board Members are not participating in illegal activities.” (See, Opinion, p. 4, App. 186). Not only does this turn the factual situation upside down, as it was the Plaintiffs who were investigating the financial improprieties of the Watershed District, but it is quite clear the Watershed District is not a prosecuting or arresting authority. It has no law enforcement function, such as in Carradine, which would justify the defamatory statements.

The Respondents’ brief fails to examine any of the cases on point, where this Court has clearly held that absolute immunity does not apply to members of subordinate government bodies.

Jones v. Monico, *supra*, disposes of the case of Peterson v. Steenerson, 113 Minn. 87, 89, 129 N.W.2d 147 (1910), cited by the Defendants in support of their proposition for absolute immunity. After analyzing this and other cases, the Court construed the case of Peterson v. Steenerson to be really talking about qualified privilege, as it noted that the privilege may be lost by proof of malice in the publication. It goes on to state that it is *well recognized*, that the proceedings of subordinate public bodies, including municipal councils or town meetings, are not within the policy underlying absolute immunity since

the members of such bodies are sufficiently protected by exemption from liability in the exercise of good faith. 150 N.W.2d at 216.

The Court in Jones v. Monico specifically held:

No privilege attaches to the publication of a public officer's unfounded and baseless suspicions which have arisen without proper investigation.

That, of course, is exactly the situation which we are facing here.

The Respondents, in this section do not attempt to analyze why the doctrine of absolute immunity was rejected by this Court in a number of cases, including Johnson v. Northside Residents Redevelop. Council, supra.

Instead, the Respondents attempt to insist that the doctrine of absolute immunity has been extended to all subordinate legislative bodies, somehow, through the operation of Carradine which, of course, does not apply to a subordinate legislative body whatsoever.

The attempt by the Respondents, beginning on Page 10, to place a "white hat" on their heads, in asserting that they were fulfilling their obligation to the public as Board Members, by casting aspersions against Appellants, turns this matter on its head.

What precipitated this matter, as noted in the Complaint, was that Zutz and Elseth had concerns and had discovered financial improprieties of the Watershed District. Their review of the payroll records indicated that overtime had been paid to employees improperly, and that overtime had also been paid to salaried executive officers of the Watershed District, without authority.

The Complaint shows that Zutz and Elseth had concerns about compensation being paid to some of the employees, and that the Watershed District employees were not answering their concerns about compensation. In order to look at this, the Plaintiffs had to obtain the bank records to prove their point. (See, Complaint, ¶¶ 6-15). Because of this, the Defendants cast false aspersions, alleging that the Plaintiffs had acted improperly. (See, Complaint, ¶¶ 9-13).

As noted in the Affidavit of Loren Zutz, April 28, 2008, submitted to the district court (App. 88), the Plaintiffs' suspicions of financial wrongdoing by the Watershed District were upheld by the Minnesota State Auditor's Office. In a letter from the Minnesota State Auditor, the Auditor criticized the fact that gross salaries of the district employees were not publicly communicated, and that references to whether district employees were salaried or hourly employees were also inconsistent. The Auditor also criticized the fact that the Administrator sometimes approved his own overtime forms, and sometimes these forms were approved by a subordinate. (See, Affidavit, ¶¶ 12-15, App. 90-91).

The defamatory statements made by the Respondents were not, in any sense, in support of any function on their part, other than an attempt to stifle the investigation into these financial improprieties. If anybody was acting in the public interest, and pursuant to their duties, it was the Appellants, not the Respondents.

There is no justification, legally or factually, for the false assertions made by the

Respondents against Loren Zutz and Elden Elseth. Their false statements impugning the integrity of the Appellants was certainly not “integral to insuring that the Board and its members complied with Minnesota statutes . . .” but, directly to the contrary. There is no reason or justification to invoke Respondents with some sort of protection of absolute privilege.

II. RESPONDENTS ARE NOT ENTITLED TO AFFIRMATION ON OTHER GROUNDS NOT CONSIDERED BY THE COURTS BELOW.

As sort of a “back-up” defense, the Respondents assert that they are entitled to dismissal on other grounds which were argued below. The Respondents failed to note, however, that the district court ruled against them on these other issues, and the matter was not considered by the Court of Appeals.

The district court ruled against the Respondents on all of these issues. They did not appeal this to the Minnesota Court of Appeals, and the Court of Appeals did not address these issues, either.

When faced with these exact same issues, the district court ruled, in its Order and Memorandum of July 31, 2008, that of all of the affirmative defenses raised by the Defendants, only one, absolute immunity, was applicable. (See, Decision of Judge Kraker, July 31, 2008, p. 6, App. 175). Likewise, the Court of Appeals refused to address the other affirmative defenses raised by the Respondents. (See, Decision, p. 5, App. 187).

This Court should not address issues that were not decided by the lower courts, and for which there was no appeal by the Respondents.

These other issues, essentially a “grab-bag” approach, attempting to defeat the claims of defamation were dealt with in the Appellants’ brief to the district court below. (See, Memorandum of Plaintiffs in Opposition to Defendants’ Motion to Dismiss, App. 60, See, Particularly, App. 13-86). Simply put, the Defendants’ statements are not protected by any qualified privilege of fair comment. Minnesota’s Anti-SLAPP statutes do not apply to Defendants’ defamatory activity, and are not applicable to the facts of this case. Contrary to the assertions of the Respondents, Minnesota law does recognize defamation by innuendo or implication, and there is no “official immunity” that would apply to this case. The claimed Noerr-Pennington doctrine, similarly, does not immunize Defendants’ defamatory activity. (See, App., Id.)

CONCLUSION

The decision of the Court of Appeals, upholding the dismissal of Appellants’ claims on the grounds of absolute immunity, based on Legislative privilege and public policy, is contrary to existing case law. Minnesota does not afford absolute immunity to members of subordinate governing bodies to make defamatory statements.

The decision of the Court of Appeals must be reversed, and this matter should be remanded to the district court to allow the Plaintiffs to proceed with their case.

Dated this 23rd day of November, 2009

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