CARLA MCKINNEY, APPELLANT, V. MATTHIAS I. OKOYE AND NEBRASKA FORENSIC MEDICAL SERVICES, P.C., APPELLEES.

806 N.W.2d 571

Filed December 16, 2011. No. S-10-722.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's grant of a motion to dismiss de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Libel and Slander.** Whether a communication is privileged is a question of law.
3. **Appeal and Error.** An appellate court reviews questions of law independently of the trial court's decision.
4. **Actions: Proof.** A plaintiff in a malicious prosecution case must prove that proceedings were commenced or instituted against him or her, that the defendant caused the proceedings to be commenced or instituted, that the proceedings terminated in the plaintiff's favor, that the defendant lacked probable cause to institute or procure the proceedings, that the defendant acted with malice, and that the plaintiff suffered damages.
5. **Libel and Slander.** An absolute privilege bars an action for libel or slander.
6. **Libel and Slander: Liability: Immunity.** Judges, attorneys, parties to proceedings, witnesses, and jurors may assert an absolute privilege as an immunity from liability for defamation for publications made during judicial proceedings if the defamatory matter has some relation to the proceedings.
7. **Libel and Slander.** Absolute privilege applies to statements within a judicial proceeding and statements preliminary or ancillary to judicial proceedings.
8. **Criminal Law: Torts.** At common law, a private citizen who initiated or procured a criminal prosecution can be sued for the tort of malicious prosecution.
9. **Libel and Slander: Case Overruled.** Absolute privilege does not bar an action for malicious prosecution. To the extent that *Central Ice Machine Co. v. Cole*, 2 Neb. App. 282, 509 N.W.2d 229 (1993), holds otherwise, it is overruled.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and remanded for further proceedings.

George H. Moyer, of Moyer & Moyer, for appellant.

James A. Snowden and Krista M. Carlson, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

This appeal requires us to decide whether a person who gives information to a prosecutor that results in a criminal prosecution against another has an absolute privilege from liability for malicious prosecution.

Carla McKinney sued Matthias I. Okoye, a pathologist, and Nebraska Forensic Medical Services, P.C. (collectively the appellees), for malicious prosecution. She alleged that Okoye had reported in an autopsy report that an infant under McKinney's care died of injuries from child abuse and that the State charged McKinney with child abuse but later dropped the charges. The district court granted the appellees' motion to dismiss McKinney's complaint. It concluded that an absolute privilege barred McKinney's claim. We reach the opposite conclusion; absolute privilege does not bar a claim for malicious prosecution. We reverse, and remand for further proceedings.

BACKGROUND

McKinney alleges the following facts, which, given the procedural posture of the case, we accept as true.[1]

McKinney operated a daycare center in Lincoln, Nebraska. On October 17, 2007, McKinney attempted to wake an infant under her care. The infant was unresponsive, so McKinney called the 911 emergency dispatch service. Paramedics were unable to revive the infant, who was later pronounced dead.

Okoye, who was working for Nebraska Forensic Medical Services, conducted an autopsy on the infant. He reported to prosecutors that the child had died from blunt force trauma to the head, asphyxia, and hemorrhaging into the brain from child abuse. McKinney alleges Okoye acted maliciously and without probable cause in reporting his findings. McKinney was arrested and charged with felony child abuse.

Using the opinions of two other forensic pathologists, McKinney eventually persuaded authorities to drop the charges against her. Nevertheless, she claims that her name remains on a child abuse registry, which prevents her from operating

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[1] See *Dobrovolny v. Ford Motor Co.*, 281 Neb. 86, 793 N.W.2d 445 (2011).

a daycare. And she claims that the incident has greatly diminished her earning capacity.

Under Neb. Ct. R. Pldg. § 6-1112(b)(6), the appellees moved to dismiss McKinney's complaint. The district court granted the appellees' motion. The court concluded that McKinney could not base an action for malicious prosecution on Okoye's statements, because an absolute testimonial privilege shielded them. The court went further, concluding that the privilege shielded Okoye's statements from liability for any tort, and so the court concluded that no amendment could cure McKinney's complaint.

ASSIGNMENTS OF ERROR

McKinney assigns that the district court erred in (1) applying the testimonial privilege to Okoye's report and (2) refusing to allow McKinney to amend her complaint.

STANDARD OF REVIEW

[1] An appellate court reviews a district court's grant of a motion to dismiss de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[2]

[2,3] Whether a communication is privileged is a question of law.[3] An appellate court reviews questions of law independently of the trial court's decision.[4]

ANALYSIS

Absolute Privilege Does Not Bar McKinney's Malicious Prosecution Claim

McKinney's complaint is somewhat unclear as to whether she is alleging a claim for defamation or malicious prosecution. The district court considered both. But before this court, McKinney claims that she is asserting a claim only for malicious prosecution. So we will address only that claim.

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[2] *Id.*

[3] See *Kocontes v. McQuaid*, 279 Neb. 335, 778 N.W.2d 410 (2010).

[4] See *id.*

[4] The rules governing malicious prosecution are grounded on competing public policies: A person who knows that a crime has been committed should not be deterred from reporting it to public officials out of fear of civil liability.[5] Conversely, a person wrongly charged with criminal conduct has an important interest in his freedom and his reputation.[6] A plaintiff in a malicious prosecution case must prove that

- proceedings were commenced or instituted against him or her;
- the defendant caused the proceedings to be commenced or instituted;
- the proceedings terminated in the plaintiff's favor;
- the defendant lacked probable cause to institute or procure the proceedings;
- the defendant acted with malice; and
- the plaintiff suffered damages.[7]

Here, the appellees do not argue that McKinney has failed to allege any of these elements. Instead, the appellees argue that an absolute privilege bars McKinney's claim.

[5-7] An absolute privilege bars an action for libel or slander.[8] Although referred to as a "privilege" because of historical reasons, in reality, it is an immunity because it is based on the speaker's position or status.[9] Absolute privilege recognizes the necessity that certain persons, because of their special position or status, should be as free as possible from fear that their actions might have an adverse effect upon their own personal

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[5] See *Kersenbrock v. Security State Bank*, 120 Neb. 561, 234 N.W. 419 (1931). See, also, *Bhatia v. Debek*, 287 Conn. 397, 948 A.2d 1009 (2008).

[6] See *Bhatia, supra* note 5.

[7] See, *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001); *Prokop v. Hoch*, 258 Neb. 1009, 607 N.W.2d 535 (2000); *Johnson v. First Nat. Bank & Trust Co.*, 207 Neb. 521, 300 N.W.2d 10 (1980); *Cimino v. Rosen*, 193 Neb. 162, 225 N.W.2d 567 (1975); *Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 215 N.W.2d 105 (1974); *Kersenbrock, supra* note 5.

[8] See *Kocontes, supra* note 3.

[9] Restatement (Second) of Torts ch. 25, Title B, Introductory Note (1977).

interests.[10] In defamation actions, we have, at least in part, adopted the rule of absolute privilege from the Restatement (Second) of Torts.[11] Under the Restatement, judges,[12] attorneys,[13] parties to proceedings,[14] witnesses,[15] and jurors[16] may assert an absolute privilege as an immunity from liability for defamation for publications made during judicial proceedings if the defamatory matter has some relation to the proceedings.[17] We have stated that this privilege applies to statements within a judicial proceeding and statements preliminary or ancillary to judicial proceedings.[18]

The absolute privilege rule appears in the Restatement as a defense to defamation, injurious falsehood, and invasion of privacy.[19] At common law, absolute privilege was "an immunity only against slander and libel actions."[20] Before our decision in *Kocontes v. McQuaid*,[21] this court had seldom, if ever, extended absolute privilege beyond actions for defamation. But in *Kocontes*, we stated that the privilege would bar a claim for interference with a business expectancy.

While we have historically been reluctant to apply absolute privilege to bar torts other than defamation, the Nebraska Court

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[10] *Id.*

[11] See, e.g., *Kocontes, supra* note 3; *Cummings v. Kirby*, 216 Neb. 314, 343 N.W.2d 747 (1984).

[12] Restatement, *supra* note 9, § 585.

[13] *Id.*, § 586.

[14] *Id.*, § 587.

[15] *Id.*, § 588.

[16] *Id.*, § 589.

[17] See, e.g., *Kocontes, supra* note 3; *Cummings, supra* note 11; *Beckenhauer v. Predoehl*, 215 Neb. 347, 338 N.W.2d 618 (1983).

[18] See *Kocontes, supra* note 3. See, also, Restatement, *supra* note 9, § 586, comment *e.*; § 587, comment *e.*; and § 588, comments *b.* and *e.*

[19] See Restatement, *supra* note 9, §§ 588, 635, and 652F.

[20] *Kalina v. Fletcher*, 522 U.S. 118, 133, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997) (Scalia, J., concurring).

[21] *Kocontes, supra* note 3.

of Appeals has applied it to bar other tort actions—including malicious prosecution.[22]

In *Central Ice Machine Co. v. Cole*,[23] the Court of Appeals held that the absolute privilege barred claims for malicious prosecution. In *Cole*, Central Ice Machine Company (Central Ice) sued Ronald A. Cole for malicious prosecution for statements he had made while consulting one of Central Ice's customers. Cole had told the customer that products the customer had purchased from Central Ice were defective. Later, Cole testified as an expert witness in a lawsuit between Central Ice and the customer.

Central Ice later sued Cole for malicious prosecution, claiming that Cole's statements were the reason that its customer had sued the company. The district court granted summary judgment to Cole, finding that because he was an expert witness in the later legal proceedings, he was immune from liability. The Court of Appeals affirmed. The court noted that a witness generally enjoyed an absolute immunity from civil liability for his or her testimony. But the Court of Appeals refused to find any distinction between statements Cole made as a consultant and those he made as a witness. And the court refused to recognize an exception to witness immunity for malicious prosecution claims.

In *Cole*, the underlying action that the defendant was alleged to have instigated was civil, while here, the underlying action is criminal. But this presents merely a difference in nomenclature, not substantive elements. The elements for malicious prosecution—which deals with the wrongful institution of criminal proceedings—and wrongful use of civil proceedings are essentially identical.[24] Further, while the Restatement assigns different names to the tort depending on whether the action that

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[22] See *Central Ice Machine Co. v. Cole*, 2 Neb. App. 282, 509 N.W.2d 229 (1993). See, also, *Drew v. Davidson*, 12 Neb. App. 69, 667 N.W.2d 560 (2003).

[23] *Cole, supra* note 22.

[24] Compare *Prokop, supra* note 7, and *Schmidt, supra* note 7. Compare Restatement, *supra* note 9, § 653 with § 674.

the defendant instigated was civil or criminal, Nebraska courts have not. We have referred to both causes of action as "malicious prosecution."[25]

[8] Upon further analysis, we conclude that *Cole* was incorrectly decided. This is because at common law, "[a] private citizen who initiated or procured a criminal prosecution could (and can still) be sued for the tort of malicious prosecution . . . ."[26]

Moreover, *Cole* is also inconsistent with both the Restatement and this court's case law. The Restatement makes clear that a citizen can be liable for providing information to a public prosecutor if the citizen knows the information is false or if the citizen directed, requested, or pressured the prosecutor to institute proceedings.[27] We applied this rule in a case predating *Cole*. There, we considered a malicious prosecution action stemming from a report that a store security officer had given prosecutors.[28] But under *Cole*, no such case could proceed. Absolute privilege would shield any statements an informant made to a prosecutor, even if those statements were knowingly false. Extending the rule in *Cole* would cripple, if not kill, the tort of malicious prosecution.[29]

Furthermore, because the elements of the tort are difficult to prove, it is unnecessary to grant informants absolute privilege. "[T]here [is] a kind of qualified immunity built into the elements of the tort."[30] Indeed, "all those who instigate litigation are given partial protection by the rules that require a plaintiff claiming malicious prosecution to show improper purpose, a lack of probable cause for the suit or prosecution, and other elements."[31] These elements effectively act as and could be analogized to the defamation defense of qualified or

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[25] See, e.g., *Prokop, supra* note 7; *Schmidt, supra* note 7.

[26] *Kalina, supra* note 20, 522 U.S. at 132 (Scalia, J., concurring).

[27] See Restatement, *supra* note 9, § 653, comment *g*.

[28] See *Schmidt, supra* note 7.

[29] See *Rioux v. Barry*, 283 Conn. 338, 927 A.2d 304 (2007).

[30] *Kalina, supra* note 20, 522 U.S. at 133 (Scalia, J., concurring).

[31] Dan B. Dobbs, The Law of Torts § 429 at 1215 (2000).

conditional privilege, which protects speakers in certain situations, but is lost if the speaker abuses it.[32]

For example, merely reporting the details of the crime is insufficient to establish liability if the reporting is made in good faith. In *Schmidt v. Richman Gordman, Inc.*,[33] we approvingly cited an Eighth Circuit decision that said that "'a person who supplies information to prosecuting authorities is not liable for his action as long as any ensuing prosecution is left entirely to the official's discretion.'" To be liable for malicious prosecution, a defendant must either knowingly give false or misleading information or otherwise direct or counsel officials in such a way as to actively persuade and induce the officer's decision.[34]

In addition, a plaintiff must prove the absence of probable cause.[35] We have previously said that lack of probable cause is the gist of malicious prosecution.[36] Finally, the plaintiff must prove that the defendant acted with malice, which means that the defendant initiated the proceedings *primarily* for a purpose other than that of bringing an offender to justice.[37] Summed up, a plaintiff has a steep climb in prosecuting a malicious prosecution action.

The dissenting opinion seemingly agrees that an absolute privilege for a witness statement does not apply in this case. Instead, it argues that Okoye is shielded by the same privilege that protects a prosecutor's decision to prosecute. But this misses the mark in several respects. Okoye never raised an agency theory of prosecutorial privilege. But even if he had not waived that claim, it is without merit. It is true that in *Koch v.*

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[32] See Restatement, *supra* note 9, §§ 593, 599, and 600.

[33] *Schmidt, supra* note 7, 191 Neb. at 351, 215 N.W.2d at 109, quoting *White v. Chicago, Burlington and Quincy Railroad*, 417 F.2d 941 (8th Cir. 1969). See, also, *Jensen v. Barnett*, 178 Neb. 429, 134 N.W.2d 53 (1965); *Gering v. Leyda*, 91 Neb. 430, 136 N.W. 53 (1912).

[34] See, *Holmes, supra* note 7; *Johnson, supra* note 7; *Schmidt, supra* note 7. See, also, Restatement, *supra* note 9, § 653, comment *g*.

[35] See, e.g., *Rose v. Reinhart*, 194 Neb. 478, 233 N.W.2d 302 (1975).

[36] *Id.*; *Jones v. Brockman*, 190 Neb. 15, 205 N.W.2d 657 (1973).

[37] Restatement, *supra* note 9, § 668.

Grimminger,[38] we held that public prosecutors are entitled to a qualified privilege in deciding whether to prosecute:

> [A] public prosecutor, acting within the general scope of his official authority in making a determination whether to file a criminal prosecution, is exercising a quasi-judicial and discretionary function and that *where he acts in good faith* he is immune from suit for an erroneous or negligent determination.

But the qualified privilege in *Koch* does not apply to communications made to a prosecutor that inform his or her decision to prosecute. It is correct that county attorneys are charged with coroner duties and with appointing a coroner's physician. But the powers and duties of coroners are not judicial,[39] and the dissent cites no authority conferring a privilege on a coroner's communications to a prosecutor. Because a county attorney's prosecutorial and coroner duties represent separate functions, a prosecutorial privilege cannot extend to a coroner through an agency theory. Moreover, the dissent's reasoning that a coroner physician conducting an autopsy acts in tandem with a prosecutor has disturbing implications. We reject any suggestion that a pathologist's findings during a criminal investigation should not be completely independent from a prosecutor's decision to prosecute.

Finally, under the difficult-to-prove elements of a malicious prosecution claim, good faith mistakes are already immunized and will not render a defendant liable for malicious prosecution. As the Connecticut Supreme Court said:

> These stringent requirements [of the tort] provide adequate room for both appropriate incentives to report wrongdoing and protection of the injured party's interest in being free from unwarranted litigation. Thus, because the tort of [malicious prosecution] strikes the proper balance, it is unnecessary to apply an additional layer of protection to would-be litigants in the form of absolute immunity.[40]

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[38] *Koch v. Grimminger*, 192 Neb. 706, 714, 223 N.W.2d 833, 837 (1974) (emphasis supplied).

[39] *State, ex rel. Crosby, v. Moorhead*, 100 Neb. 298, 159 N.W. 412 (1916).

[40] *Rioux, supra* note 29, 283 Conn. at 347, 927 A.2d at 310.

[9] We conclude that absolute privilege does not bar an action for malicious prosecution. To the extent that *Cole* is inconsistent with this opinion, we disapprove.

CONCLUSION

We conclude that the district court erred in holding that an absolute privilege barred McKinney's malicious prosecution action. We reverse, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

HEAVICAN, C.J., dissenting.

It is well established that

> a public prosecutor, acting within the general scope of his official authority in making a determination whether to file a criminal prosecution, is exercising a quasi-judicial and discretionary function and that where he acts in good faith he is immune from suit for an erroneous or negligent determination.[1]

This case presents the question of whether a pathologist, appointed by the prosecutor in accordance with state law, is entitled to that same immunity in connection with his official duties. Because I believe that such a physician should be granted that immunity, I respectfully dissent from the decision of the majority.

Under Nebraska law, one of the primary duties of the county attorney in each Nebraska county is, of course, to act as a prosecuting attorney against those accused of violating the law.[2] But the county attorney is also vested with all the duties enjoined by law on the county coroner.[3] And one of those duties is the statutory requirement that the county attorney appoint a coroner's physician, a physician whose duties include certifying the cause of death for each death in the county not

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[1] *Koch v. Grimminger*, 192 Neb. 706, 714, 223 N.W.2d 833, 837 (1974). See, also, Restatement (Second) of Torts § 656 (1977).

[2] Neb. Rev. Stat. § 23-1201 (Reissue 2007).

[3] Neb. Rev. Stat. § 23-1210 (Reissue 2007).

otherwise attended by another physician and conducting an autopsy when requested by the county coroner or when otherwise required by law.[4] In this case, where the death was that of a minor and under suspicious circumstances, state law required that an autopsy be performed.[5]

Here, Okoye was appointed as required by and in accordance with state law. He was vested with the duty to conduct an autopsy in connection with the minor in the underlying case. During the course of that autopsy, Okoye was tasked with attempting to establish, "by a reasonable degree of medical certainty, the cause or causes of the death" and was further required to "certify the cause or causes of death to the county attorney."[6]

Under the circumstances presented by this case, I would find that in his role, Okoye was acting in tandem with the county attorney, who was ultimately responsible for bringing any necessary criminal charges. I would find that the coroner's physician's duties, like the duties of a prosecutor in the same situation, are quasi-judicial in nature. As such, I would find that Okoye is entitled to the same immunity as enjoyed by the county attorney.

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[4] Neb. Rev. Stat § 23-1820 (Reissue 2007).

[5] Neb. Rev. Stat. § 23-1824(1) (Reissue 2007).

[6] § 23-1824(2).

Melissa Alsidez, Special Administrator of the Estate of Anthony Alsidez, deceased, and Melissa Alsidez, individually, appellants, v. American Family Mutual Insurance Company, appellee.

807 N.W.2d 184

Filed December 16, 2011. No. S-10-1220.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.