IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-5291

GENERAL ELECTRIC COMPANY
and GENERAL ELECTRIC
ENVIRONMENTAL SERVICES, INC.,

Plaintiffs-Appellees,

vs.

SARGENT & LUNDY, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Kentucky, No. 84-288.
The Honorable Karl S. Forester, Judge Presiding

BRIEF OF DEFENDANTS-APPELLANTS SARGENT & LUNDY AND ITS INDIVIDUALLY NAMED PARTNERS

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ARGUMENT

GE's injurious falsehood claim rests primarily upon statements that S&L representatives made to KU in October, 1982. In essence, S&L told KU that the damage to the Ghent precipitators and associated ductwork was the fault of the precipitator designer and manufacturer, the Buell division of Envirotech, and not the fault of S&L. These "they did it, we didn't" statements were clearly made in contemplation of litigation. Not only had KU advised S&L to determine the cause of the damage so that it (KU) could fix contractual responsibility, but KU had also extracted a statute of limitations waiver from S&L two months earlier. (See, pp. 13-15 supra.)

Almost two years later, after consulting with its own engineering expert, KU filed suit against S&L, Envirotech, and GE. Obviously, in suing S&L, KU rejected the "we didn't" part of S&L's October, 1982 presentation. Nevertheless, GE contends that, in suing GE, KU blindly relied upon the "they did it" portion of the October, 1982 presentation. Consequently, GE contends that S&L was liable under an injurious falsehood theory for GE's attorneys' fees and other litigation costs incurred in defending the KU action.

The $500,000 judgment entered on that claim must be reversed for five reasons:

1. S&L's statements to KU in October, 1982 were absolutely privileged because they were made in contemplation of litigation.

2. Even if GE's injurious falsehood claim was not barred on privilege grounds, GE totally failed to prove the following key elements of that claim: (a) that S&L made any false statements regarding GE; (b) that KU relied upon S&L's false statements; and (c) that all of the claims in KU's complaint against GE were based upon S&L's false statements.

3. The undisputed facts showed that GE failed to bring its action within the applicable one year statute of limitations.

4. The trial court improperly instructed the jury on the burden of proof, the statute of limitations, reliance, and the identity that GE had to show between the allegations of KU's complaint against GE and S&L's alleged false statements.

5. S&L was denied a fair trial. The trial court not only barred S&L from taking critical discovery, but also allowed GE to introduce evidence at trial on the very issues as to which S&L had been prevented from taking discovery.

As demonstrated below, each of the above grounds, by itself, requires reversal of the instant judgment.

I. THE DISTRICT COURT WRONGFULLY REJECTED S&L'S ABSOLUTE PRIVILEGE DEFENSE AS TO STATEMENTS MADE IN CONTEMPLATION OF LITIGATION.

S&L's October, 1982 statements to KU were clearly made in contemplation of litigation. KU had obtained a statute of limitations waiver from S&L two months earlier. (See pp. 13-14 supra.) KU had also instructed S&L to investigate the causes of the damage to the Ghent precipitators and associated ductwork so that KU could determine contractual responsibility for those damages. (See, pp. 11-15, supra.)

On three separate occasions below, S&L raised an absolute privilege defense to the statements it made in October, 1982 and thereafter, on the ground that such statements were made in contemplation of litigation. On December 2, 1988, S&L filed a motion in limine to exclude all evidence of S&L's alleged statements concerning Envirotech or GE made after August 26, 1982, the date on which S&L provided KU with a statute of limitations waiver. (R. 522.) The district court denied this motion on December 9, 1989. (R. 543: Order.) S&L also

incorporated the absolute privilege defense in its motion for a directed verdict and in its motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.)TR at 6-145-155, 7-219; R. 571: Mot. for Judgment N.O.V.) The lower court also denied both of these motions. (TR at 7-219; R. 580: Order.)

In its opinion rendered on December 9, 1988 denying S&L's motion in limine, the district court ruled that S&L could not avail itself of the absolute privilege defense for two reasons: (1) S&L was an interested party in the contemplated litigation, and (2) S&L was untimely in raising the defense. (R. 543: Order.) The remainder of this section of the brief will demonstrate that the district court was wrong on both counts.

A. The Statements Made By S&L Were Absolutely Privileged.

A participant in a lawsuit is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a contemplated judicial proceeding if the matter has some relation to the proceeding. Restatement (Second) of Torts § 587 (1977). This privilege, which is recognized by virtually all courts,[1] is also recognized under Kentucky law. Schmitt v. Mann, 163 S.W.2d 281 (Ky. Ct. App. 1942); Stewart v. Hall 83 Ky. 375 (Ky. Ct. App. 1885). It is equally clear that the absolute privilege applies to the tort of injurious falsehood. Restatement (Second) of Torts § 635. See also Block v. Sacramento Clinical Labs, Inc., 182 Cal. Rptr. 438 (3d Dist. 1982); Wendy's of South Jersey, Inc. v. Blanchard Mgmt. Corp., 406 A.2d

[1]/ See, e.g., Walker v. Majors, 496 So. 2d 726 (Ala. 1986); Western Technologies, Inc. v. Sverdrup & Parcel, Inc.,739 P.2d 1318 (Ariz. Ct. App. 1986); Pinto v. Internationale Set, Inc., 650 F. Supp. 306 (D. Minn, 1986); Lerette v. Dean Witter Org., Inc.,131 Cal, Rptr. 592 (Cal. Ct. App.1976); Sriberg v. Raymond, 544 F.2d 15 (1st Cir. l976)(applying Massachusetts law); Theiss v. Scherer, 396 F.2d 646 (6th Cir. l968)(applying Ohio law); Johnston v. Cartwright, 355 F.2d 32 (8th Cir. 1966)(applying Iowa law); Middlesex Concrete Products & Excavating Corp. v. Cartaret Indus. Ass'n.,172 A.2d 22 (N.J. Sup. Ct. 1961).

1337 (N.J. Sup. Ct. 1979),: B.C. Morton Int'l Corp. v. FDIC, 199 F. Supp. 702 (D. Mass. 1961).

The elements of the absolute privilege defense as applied to pre-litigation investigations are well established. To be privileged, the communication should be relevant to an actual judicial proceeding or one which is "actually contemplated in good faith and under serious consideration by the witness or a possible party to the proceeding." Western Technologies, Inc. v. Sverdrup & Parcel, Inc., 739 P.2d 1318, 1322 (Ariz. Ct. App. l986) (quoting Restatement (Second) of Torts § 588, comment e). Moreover, the concept of relevance for purposes of determining the privilege has been given a broad interpretation:

> [T]he matter to which the privilege does not extend must be so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety. If it is so related to the subject matter of the controversy that it may become the subject of inquiry in the course of the trial, the rule of absolute privilege is controlling.

Scott v. Statesville Plywood & Veneer Co., 81. S.E.2d 146, 149 (N.C. 1954). See also Libco Corp. v. Adams, 426 N.E.2d 1130 (Ill. App. Ct. 1981); Wendy's of South Jersey, 406 A.2d at 1339.

In Western Technologies, Inc., 739 P.2d 1318 (Ariz. Ct. App. 1986), the Arizona Appellate Court held that statements made by an engineering firm in a pre-litigation investigation ware absolutely privileged. The defendant, Sverdrup, was hired by the Arizona Board of Regents (the "Board") to investigate cracks in the Sun Devil Stadium. Western had performed geotechnical engineering testing for expansion of the stadium. Sverdrup's report criticized Western and partly blamed it for the stadium cracks. The Board then sued Western. Western settled with the Board and then sued Sverdrup alleging, among other things, injurious falsehood. 739 P.2d at 1319-20. Western charged that:

> Sverdrup, knowing its statement to be false, reported to the Board

> that Western was at fault for the damage to Sun Devil Stadium. As a result, the Board sued Western, and Western suffered pecuniary loss in the defense of the suit.

739 P.2d at 1321.

In affirming the trial court's entry of judgment on the pleadings in favor of Sverdrup, the appellate court focused on three factors: (1) the Board was considering litigation when Sverdrup made the allegedly false statements as part of its investigation; (2) the Board needed Sverdrup's report to assess where responsibility lay before it sued; and (3) the Board relied upon Sverdrup's report in filing suit. As the court stated:

> Sverdrup made its statements while the Board was seriously contemplating litigation. Furthermore, because the Board could not assert Western's liability until it obtained an expert assessment of Western's fault, Sverdrup's reports constituted 'a necessary step in taking legal action.' Finally, the Board actually relied upon the reports in bringing suit. Consequently, Sverdrup'a reports and recommendations are absolutely privileged and Sverdrup's motives arc irrelevant.

739 P.2d at 1322.

The Western Technologies case provides overwhelmingly persuasive authority for reversal of the instant judgment. As with Sverdrup in the Western Technologies case, S&L was hired to investigate the causes and responsibility for the problems in contemplation of a potential lawsuit. (See, pp. 11-15, supra.) Moreover, as in Western Technologies, the statements allegedly made by S&L were also pertinent and relevant to the litigation which was subsequently brought by KU. Those statements related to the cause of the damage to the precipitators and ductwork, which was the subject of the KU lawsuit. Indeed, GE alleged that KU based its suit against GE on S&L's statements, just as the Board was found to have relied upon the statements of Sverdrup. (R. 2l7: Supp. Cross-Claim at ¶ 17.)

The district court in the present case attempted to distinguish Western Technologies on the ground that:

> Sverdrup was a totally objective consultant, hired after the completion of the project. . . . Sverdrup was an independent actor, unlike Sargent & Lundy, and had no interest in any eventual litigation, other than producing an unbiased analysis and opinion of the underlying problem. On the other hand, Sargent & Lundy was not an independent actor, was involved with the Ghent 3 and 4 project from the beginning, and had every reason to know that it could be a potential defendant herein. (R. 543: Order at p. 2.)

However, that legal ruling flies in the face of both Western Technologies and the numerous other court decisions recognizing the existence of the absolute privilege.

It has been specifically held that:

> The defense is absolute in that the speaker's motive, purpose or reasonableness in uttering a false statement do not affect the defense.

Green Acres Trust v. London, 688 P.2d 617, 621 (Ariz. 1984). See also Defend v. Lascelles, 500 N.E.2d 712, 719 (Ill. App. Ct. 1986), appeal denied, 508 N.E.2d 726 (1987); Triester v. 191 Tenants Ass'n, 415 A.2d 698, 702 (Pa. Super. Ct. 1979); Prosser & Keeton, The Law of Torts §114 at 816 (5th ed. 1984). Indeed, in Western Technologies, the Arizona Appellate Court certainly did not rely upon the engineer's lack of motive to lie. 739 P.2d 1318. Plaintiff had alleged that Sverdrup, the engineer, knew that its statements were false. Nevertheless, the court held that the statements were absolutely privileged, ruling that, "Sverdrup's motives are irrelevant." 739 P.2d at 1322.

The reason that motive is irrelevant goes to the very nature of the privilege itself. The privilege facilitates the free flow of communication between persons involved in judicial proceedings and, thus, aids in the complete and full disclosure of facts necessary to a fair adjudication. Sriberg v. Raymond, 544 F.2d 15 (1st Cir. 1976). To accomplish this goal, the

privilege protects parties and other persons connected with the litigation from the apprehension of defamation suits, thus permitting them to speak and write freely and without undue restraint. Hoover v. Van Stone, 540 F. Supp. 1118 (D. Del. 1982): Fenning v. S.G. Holding Corp.,135 A.2d 346 (N.J. Sup. Ct. 1957). Moreover, the protection afforded by the privilege is absolute. A person will be shielded from liability irrespective of his purpose in publishing the defamatory matter, of his belief in its truth, or even his knowledge of its falsity. Middlesex Concrete Prod. & Excavating Corp. v. Cartaret Indus. Ass'n, 172 A.2d 22, 25 (N.J. Sup. Ct. 1961); Hoover, 540 F. Supp. at 1122; Restatement (Second) of Torts § 587, comment a. For these reasons, no court of Kentucky, whose law applies to this case, nor any other court in the land, has ever allowed a plaintiff to recover its attorneys' fees and legal expenses incurred as a result of a defendant's alleged misstatements made in connection with or in contemplation of legal proceedings.

Thus, the trial court erred as a matter of law in rejecting S&L's absolute privilege defense on the ground that S&L had a motive to lie. The undisputed facts here show that the present cast is exactly the type of situation for which the privilege was designed. S&L was investigating the cause of damage to the precipitators and ductwork in order to allow KU to fix blame in anticipation of contemplated litigation. For that reason, the judgment below should be reversed and judgment should be entered in S&L's favor.

B. S&L's Raising of the Absolute Privilege Defense Was Not Untimely.

The district court treated S&L's motion in limine as a motion for judgment on the pleadings. (R. 543: Order at p. 2.) The court then denied the motion on the ground that the absolute privilege defense had not been raised by S&L in a timely manner. (R. 543: Order at p. 4.) This ruling was error. The absolute privilege defense was raised by S&L only nine months

after GE received permission to file its injurious falsehood charges.[2] Moreover, GE suffered no prejudice by any delay in raising the defense. There was no additional discovery GE could have taken, nor were there any other witnesses GE could have called at trial. The privilege either applied or it did not apply. The answer to that legal question was not affected by when S&L raised the defense.

Federal Rule of Civil Procedure 15(a) provides that leave to amend a pleading should be "freely given when justice so requires." Furthermore, the thrust of the rule is to reinforce the principle that cases "should be tried on their merits rather than the technicalities of pleadings." Tefft v. Seward, 689 F.2d 637, 639 (6th Cir. 1982). Though the decision to grant leave to amend is committed to the trial court's discretion, that discretion is limited by the rule's liberal policy of permitting amendments to ensure the determination of claims on their merits. Marks v. Shell Oil Co., 830 F.2d 68, 69 (6th Cir. 1987). This is especially true where, as here, "neither the parties to nor the theory of the lawsuit will be altered." Alberto-Culver Co. v. Gillette Co., 408 F. Supp. 1160, 1162 (N.D. Ill. 1976).

In line with the foregoing principles, it has been held by many courts that delay is an insufficient ground to deny an amendment, unless the delay unduly prejudices the non-moving party. As this Court has stated:

> Delay that is neither intended to harass nor causes any ascertainable prejudice is not a permissible reason, in and of itself, to disallow an amendment of a pleading, Buder v. Merrill Lynch, Pierce, Fenner & Smith, 644 F.2d 690 (8th Cir. 1981); Davis v. Piper Aircraft, 615 F.2d 606 (4th Cir. 1980); Hageman v. Signal L.P. Gas, Inc., 486 F.2d 479, 484 (6th Cir. 1973).

Tefft v. Seward, 689 F.2d at 639; Moore v. City of Paducah, 790 F.2d 557 (6th Cir. 1996). See

[2] During that nine month period, the parties were involved in taking a number of depositions as well as in briefing numerous motions, including discovery motions, motions to dismiss, and motions for summary judgment by all parties.

also Butcher & Singer, Inc. v. Kellam, 105 F.R.D. 450 (D. Del. 1984); Pierside Terminal Operators, Inc. v. M/V Floridian, 423 F. Supp. 962 (E.D. Va. 1976).

Several of these cases, as well as others, involved delays in seeking amendments to pleadings as long as, or longer than, what is at issue here. For example, in Tefft, an additional claim was filed four years after the original complaint and after an appeal and remand. In Butcher, the defendant was allowed to add the affirmative defense of estoppel nearly seven months after the completion of discovery. In Howard v. Kerr Glass Mfg. Co., 699 F.2d 330 (6th Cir. 1983), the court allowed the plaintiff to add a new claim in the final pretrial order. In Estee v. Kentucky Util. Co., 636 F.2d 1131 (6th Cir. 1980), the defendant was permitted to assert a legal defense forty-one months after the plaintiff's claim was filed. In Pierside Terminal, 423 F. Supp. 962, the court allowed the defendant to raise a statute of frauds defense for the first time at the final evidentiary hearing before the court. What the Pierside Terminal court had to say is particularly relevant here:

> The addition of the statute of frauds question does not prejudice plaintiff. It does not arise from additional evidence to which plaintiff has lodged an objection. It is not outside his knowledge of the true facts; indeed it is within the facts pleaded by him, and consequently, we feel he should certainly be deemed on notice that he should be prepared to meet any claim involving it.

423 F. Supp. at 964.

In the instant case, the lower court's rejection of S&L's absolute privilege defense must be reversed. There could have been no possible prejudice to GE in granting S&L's motion, since the absolute privilege defense presented only a question of law. There were no new questions of fact to be explored, and GE had already discovered all of the facts relating to S&L's alleged statements and the circumstances in which they were allegedly made. Indeed, just as in Pierside

Terminal, the basis for the absolute privilege defense was completely within the facts pleaded by GE. The amendment should have been allowed since it did not alter the parties or the theories of the case, nor could it in any way result in the need for additional discovery.

In essence, S&L's motion in limine with regard to absolute privilege had the same effect as its motion to add an additional statute of limitations defense, which motion was granted by the district court only a few weeks before it denied the motion in limine. (R. 464: Order.) It is impossible to divine any possible prejudice to GE with regard to the absolute privilege defense when the court found none with regard to the limitations defense. Consequently, the trial court erred in using delay as a reason for rejecting S&L's absolute privilege defense.