

Circuit Court for Montgomery County  
Case # 148686 Civil

IN THE COURT OF APPEALS OF MARYLAND

No. 103

September Term, 1997

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ROLAND IMPERIAL

v.

WAYNE A. DRAPEAU

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Bell, C. J.  
Eldridge  
Rodowsky  
Chasanow  
Raker  
Wilner  
Cathell

JJ.

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Dissenting Opinion by Chasanow, J.  
in which Bell, C.J., and Wilner, J. join

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Filed: August 27, 1998

The majority, in effect, creates a new absolute judicial proceedings privilege to maliciously write knowingly false and defamatory letters to high executive and legislative officials as long as the defamation relates to a matter that might conceivably be investigated by some state or federal administrative hearing board or agency. Instead of claiming these letters are protected by the judicial proceedings privilege, the majority should recognize that these libelous letters are not incident to any judicial proceedings and that its decision creates a previously unrecognized “absolute constituent services privilege.” There is no basis for immunizing these maliciously libelous letters through the judicial proceedings privilege because there is no nexus between these letters and any judicial-type proceedings.

Since the circuit court granted summary judgment in favor of the defendant Dr. Roland Imperial on plaintiff Wayne Drapeau’s libel complaint, we must take all facts and their reasonable inferences in the light most favorable to the plaintiff Wayne Drapeau. This means we must assume that Imperial’s allegations of “unethical and illegal misconduct” by Drapeau were maliciously made with full knowledge of their falsity, that their target was an individual who was not a public official or a public figure, and that they were disseminated in a manner that assured the maximum damage to their victim. We can imagine the distress Drapeau felt when he was informed by his rescue squad chief that the Governor, his Congressperson, and his County Executive had all demanded an investigation because they were “concerned” by the allegations of his “unethical and illegal misconduct.” It is clear from the record, and is apparently conceded, that Drapeau did his job competently and properly and that he has never had any sort of hearing where he had an opportunity to

present his side of the story. Imperial should have known that the Governor and a member of Congress would not personally conduct an investigation, but would circulate the letters to others for action. Furthermore, Imperial had no reason to believe that he would ever have to testify under oath or be cross-examined about his allegations at any judicial-type proceeding, and in fact, there never was any hearing of any kind.

What is the judicial proceeding that provides a basis for Imperial's absolute judicial proceedings privilege? The majority suggests that the judicial proceeding that gives rise to the absolute judicial proceedings privilege is a judicial-type hearing before the Maryland Institute for Emergency Medical Services System (MIEMSS) and that "there are procedural safeguards that adequately protected the reputation of a subject of a complaint about emergency medical service." \_\_\_ Md. \_\_\_, \_\_\_, \_\_\_ A.2d \_\_\_, \_\_\_ (1998)(Majority Op. at 14). This is based on the conclusion that "[a]ny action, adverse to Drapeau, resulting from the investigation by MIEMSS could not be taken without Drapeau's consent or without complying with the contested cases subtitle of the Maryland Administrative Procedure Act, [Maryland] Code (1984, 1995 Repl. Vol.), §§ 10-201 through 10-227 of the State Government Article...." \_\_\_ Md. at \_\_\_, \_\_\_ A.2d at \_\_\_ (Majority Op. at 14). What the majority does not seem to appreciate is that the more blatantly false and irrelevant the allegations, the less likely that the person libeled will get any judicial-type hearing or any judicial vindication. The only way there could be any MIEMSS judicial-type hearing would be if: 1) the Governor or Congresswoman Morella forwarded the letters to MIEMSS contrary to Imperial's request that any investigation not be performed by any established

rescue squad agency; 2) Drapeau had MIEMSS certification that could be revoked as the result of the alleged conduct; 3) a complaint about non-emergency transportation came under MIEMSS jurisdiction; and 4) a MIEMSS preliminary examination of the complaint disclosed that the allegations had enough substance to warrant a hearing. There is no reason to believe the latter three prerequisites were met, and a hearing did not occur. It was unlikely that Imperial sought or expected a judicial-type proceeding, but according to the majority, he is nevertheless entitled to the absolute judicial proceedings witness privilege.

Any analysis of the majority's extension of the judicial proceedings privilege must include an examination of the libelous communication Imperial directed to the Governor and his Congresswoman. As Imperial indicates in his letters, he called the Bethesda-Chevy Chase Rescue Squad, Inc.'s (BCCRS) non-emergency telephone number to arrange non-emergency transportation for Ms. Ruth England to a hospital in the District of Columbia, and the dispatcher he spoke to was Drapeau. We know from the record that BCCRS is a privately funded, non-profit corporation that provides emergency transportation as well as private, non-emergency transportation services to a hospital of the patient's choice. It is not a governmental organization and receives no state funds. BCCRS is one of only two rescue squads in Montgomery County that provide this non-emergency service to a hospital of the patient's choice. Had Ms. England not lived in the Bethesda/Chevy Chase area, her non-emergency transportation to a hospital might have been by a private ambulance service or even a taxicab. Moreover, Imperial had no reason to suspect that Drapeau, whom Imperial knew to be the dispatcher who answered the non-emergency call, would leave his post as

dispatcher to participate in the transportation of Ms. England.

In searching for any nexus between Imperial's libelous letter and a MIEMSS hearing with sufficient judicial safeguards, we should examine the nature of Imperial's complaint. Imperial did not, and could not, complain that his patient failed to receive excellent medical care from the ambulance personnel or the hospital to which she was taken. The ambulance personnel may have saved Ms. England's life since when they arrived she was semi-conscious, non-verbal, and in a hypotensive condition. Ms. England's blood pressure had dropped to 65/30 as the result of a significant gastrointestinal hemorrhage. Ms. England could not communicate with the rescue squad personnel, and, based on Ms. England's condition, rescue squad procedures required that someone in her condition be taken to the closest hospital. If anything, Imperial's complaint almost seemed to be that Ms. England should not have been taken to the closest hospital because she and her son "did not want heroic measures to prolong life." Imperial cannot suggest that Drapeau's actions in any way caused patients and staff at Suburban Hospital to be exposed to a dangerous infectious condition, since Imperial did not think Ms. England's condition was contagious enough to inform the rescue squad of her infection. If Ms. England's condition was dangerous to others, then Imperial should have told the rescue squad of the condition and the need to take precautionary measures to protect ambulance personnel and other patients who might later be transported in the same ambulance. Imperial's primary complaint to Governor Glendening and Congresswoman Morella seemed to be his complaint that, because of her condition, Ms. England was taken to the closest hospital and that hospital did not grant him

privileges, and “as a result[,] I have lost revenue for almost 2 weeks that I am not attending Ruth [England] at a critical stage of her life.” If these libelous letters are absolutely privileged, any constituent letter maliciously libeling a private citizen is absolutely privileged as long as the letter ends with a vague request for an investigation and some unidentified administrative agency might conceivably have jurisdiction to hold a hearing.

The majority must recognize that in order to have a judicial proceedings privilege there must be a judicial proceeding or an administrative proceeding with sufficient judicial safeguards. The primary basis for the majority’s finding of an absolute judicial proceedings privilege is its speculation that Imperial was seeking a decertification hearing for Drapeau by MIEMSS. This is not only improper appellate fact finding, it is contradicted by the facts in the record. The only way the majority can conclude that MIEMSS had any investigatory authority over the matter of Ms. England’s transportation is to start with the assumption that Imperial knew that Drapeau had some sort of MIEMSS certification that could be withdrawn after a hearing, and that is what his letters sought. This initial assumption is unwarranted. It is based in part on the majority’s supposition, from a post-investigation letter, that one of the two responding ambulance personnel was an EMT-Cardiac and the other an EMT-Paramedic and that both categories could be decertified after a hearing. Imperial knew Drapeau, the person he libeled, was the dispatcher to whom he spoke. Neither Imperial nor MIEMSS had any basis for believing that the dispatcher was one of the people that actually transported Ms. England. To the contrary, it is highly unlikely that a dispatcher on duty would leave his post to participate in a non-emergency transport into another jurisdiction.

Even if such speculation was warranted, it is irrelevant because this complaint concerned the failure to provide a non-emergency transport.

It is also unclear whether MIEMSS even had jurisdiction to hear Imperial's complaint. First, the request for transportation related to non-emergency services. If a taxicab or a private ambulance decided that Ms. England's condition and inability to communicate required changing plans and transporting her to the closest hospital, that transportation should be of no concern to MIEMSS. Second, MIEMSS's authority in 1995 did not extend to dispatchers. *See generally* Code of Maryland Regulations (COMAR) 30.09 *et seq.* Even emergency dispatchers will not be licensed by MIEMSS until December 31, 1998. *Cf.* Md. Code (1978, 1997 Repl. Vol., 1997 Supp.), Education Art., § 13-516. Moreover, any speculation that Imperial was seeking a MIEMSS hearing with its judicial safeguards is further contradicted by his own letters. Imperial expressly states in his letters that, "to avoid the allegation of a coverup," he does not want the investigation to be performed by any "Rescue Squad Agency."

Drapeau never was given any forum at all, let alone a judicial-type hearing, to respond to Imperial's libel. MIEMSS did not hold any hearing. The director simply wrote Imperial acknowledging he had reviewed the letter to Governor Glendening and conducted a "comprehensive review of your patient's care." The director explained that "[t]he emergency medical technicians that responded to your patient used the Maryland Medical Protocols for Cardiac Rescue Technicians...." The letter concluded, "it is my opinion that the emergency medical technicians acted in the best interest of the patient." The letter does not discuss

Drapeau except to note that he was the dispatcher who “received your call.” Drapeau has never had any “judicial proceedings” to present his defense and clear his name, yet the majority holds Imperial’s libel is somehow protected by the judicial proceedings privilege.

From this record a jury could reasonably conclude that Imperial’s libelous letters were not for the purpose of seeking a MIEMSS hearing, but instead were for the purpose of doing as much damage as possible without Drapeau having any opportunity to defend himself, and that is exactly what the letters accomplished. Congresswoman Morella is certainly a reasonable person, and she did not view Imperial’s letter to be a request for a hearing by any state agency or licensing board. She viewed the letter as questioning Drapeau’s ability to perform his job and sent the letter to the Montgomery County Executive, who then forwarded it to Drapeau’s employer. Any reasonable jury could reach the conclusion that Imperial’s goal was to have Drapeau disciplined or fired. Since BCCRS is a private, non-governmental corporation and since Drapeau was an at-will employee, he could be disciplined or fired in response to concerns expressed by the Governor, County Executive, and a member of Congress without any judicial-type hearing or due process protections and probably without a hearing of any kind. The majority does not attempt to say, and it could not say, that any disciplinary proceedings by a private rescue squad would have the due process protections of a judicial proceeding. I am also confident that the majority would recognize that, had Imperial sent this letter directly to Drapeau’s chief in an attempt to get him fired or disciplined, there would be no absolute judicial proceedings privilege, *see, e.g., McDermott v. Hughley*, 317 Md. 12, 561 A.2d 1038 (1989). The majority, however, holds

that routing the letter through a Congressperson and/or the Governor apparently gives rise to the judicial proceedings privilege. Even if I were to accept the majority's absolute judicial proceedings privilege extension, there is still a question of fact that makes summary judgment inappropriate. It would be for the trier of fact, not an appellate court, to decide whether Imperial's letters were dispatched for the purpose of initiating a MIEMSS administrative hearing or for the purpose of having Drapeau disciplined or fired by the private corporation that employed him.

The law of defamation balances the need for people to be able to speak freely against the right of a person to seek redress for the injury inflicted by another. In some circumstances, the right to redress for injury yields to the public need for free and unrestrained speech. *Miner v. Novotny*, 304 Md. 164, 498 A.2d 269 (1985), is the primary authority for the majority's extension of the absolute judicial witness immunity to the instant case. In *Novotny*, we discussed when that absolute privilege will be extended and said:

“[[T]he question of] whether absolute witness immunity will be extended to any administrative proceeding will have to be decided on a case-by-case basis and will in large part turn on two factors: (1) the nature of the public function of the proceeding and (2) the adequacy of procedural safeguards which will minimize the occurrence of defamatory statements.”

304 Md. at 172, 498 A.2d at 273 (quoting *Gersh v. Ambrose*, 291 Md. 188, 197, 434 A.2d 547, 551-52 (1981)). For at least three separate reasons, that test should not provide absolute judicial witness immunity in the instant case.

The first reason why Imperial should not have absolute judicial proceedings witness

immunity is that, because the libel was so obviously false, there never were any proceedings, judicial or otherwise, for Drapeau to clear his name. As previously discussed, the only way Drapeau might conceivably receive a MIEMSS hearing would be if Imperial's allegations of incompetency and misconduct had some basis in fact and were relevant to providing emergency services; only then would there be a hearing to decertify Drapeau and only then would he have an opportunity to be heard and formally exonerated. Because the allegations of wrongdoing by Drapeau were obviously false and/or irrelevant to the business of MIEMSS, there was only a cursory investigation by the director and there has never been any judicial-type hearing or any adjudicatory finding that Imperial's libel was unfounded. There were no judicial-type proceedings, and it was unlikely that, based on these complaints, there ever would be a judicial-type proceeding by MIEMSS.

The second reason why these libelous letters should not enjoy absolute immunity is that there is little or no societal benefit to constituent services letters that would justify an absolute immunity rather than a qualified immunity. Public access to the judicial system without fear of being sued is important, but public access to the Governor and members of Congress to complain about non-government officials whose activities might possibly come under the jurisdiction of some board or agency is far less important. Any social benefit derived from encouraging free and candid requests for investigations made to the Governor or a member of Congress is far less than the social benefit derived from free and candid access to judicial proceedings. I doubt if members of Congress or high public officials would think it desirable that people who send them complaints or ask for investigations

should know that there is absolute immunity, even if the communications are knowingly false and maliciously dispatched. The time of public officials should not be squandered on investigations of false charges made maliciously or with no belief in their truth. On the other hand, the damage to the individual defamed in such a communication is obvious since a conscientious public official will probably forward the libelous communication to others for appropriate action along with their expression of concern. We can assume that a libelous letter forwarded to one's private employer by the Governor or a member of Congress together with an expression of concern does far more damage than the libelous letter alone. There is no public need for the extension of the absolute judicial proceedings immunity to requests for constituent services, even if those services might include administrative investigations of private individuals.

The third reason why there should be no absolute immunity is that there are no procedural safeguards surrounding Imperial's request that the Governor and Congresswoman Morella take action against Drapeau. Since Congresswoman Morella knew Imperial's complaint did not implicate Congress or the federal government, she did what Imperial might have hoped she would do — she forwarded it, along with her expression of concern, to the County Executive who forwarded it to Drapeau's employer. What procedural safeguards or opportunity to respond did Drapeau have with Congresswoman Morella, with the County Executive, or even with his corporate employer? The answer is none. The safeguards in a judicial proceeding or in some administrative hearings that permit absolute witness immunity include the oath witnesses take, the opportunity for cross-examination, and the opportunity

to be heard by the party maligned. In addition, the party maliciously initiating a knowingly false judicial proceeding can often be liable for sanctions that can include costs, attorneys' fees, and even a malicious prosecution recovery in some instances. No such safeguards were afforded Drapeau for these libelous letters.

Because Imperial did not make his complaint directly to MIEMSS, he avoided any potential criminal liability for a bad faith malicious complaint. *See* COMAR 30.09.12.02 (prohibiting groundless, malicious, or bad faith complaints to MIEMSS); COMAR 30.09.12.08 (establishing criminal sanctions for violations of complaint provisions contained in subtitle 9 of MIEMSS regulations). This is a further reason why judicial proceedings immunity should only be given to complaints made directly to MIEMSS.

The majority quotes from *McDermott, supra*, where this Court declined to extend the absolute judicial proceedings privilege to a psychological report prepared at the request of a probationary police officer's supervisor as part of an administrative investigation. The report ultimately led to the probationary employee's termination. The reason why this Court held that the psychologist's letter was not given absolute immunity by the judicial proceedings privilege was that "[t]here was no legally cognizable tribunal administering the proceeding; there was no public hearing adversary in nature; no compellable witnesses were sworn or cross-examined; no reviewable opinion or analysis was generated; and, most significantly, [the plaintiff] did not have the opportunity to present his side of the story." \_\_\_ Md. at \_\_\_, \_\_\_ A.2d at \_\_\_ (Majority Op. at 12)(quoting *McDermott*, 317 Md. at 26, 561 A.2d at 1045). That quote is directly applicable to the instant case, and the reasons why

the letter used in the administrative investigation in *McDermott* was not absolutely privileged and the same principles are equally applicable to the letters in the instant case.

A final, perplexing aspect of the majority's opinion is its determination that immunity is based on to whom the libelous communication might ultimately be forwarded, rather than on to whom the libel is actually addressed and sent. The majority characterizes as too "technical a restriction" the fact that the complaint was not made to the appropriate body exercising disciplinary authority. \_\_\_ Md. at \_\_\_, \_\_\_ A.2d at \_\_\_ (Majority Op. at 17). Even if Imperial had an absolute privilege for communications to MIEMSS, it would not be unduly burdensome to require that, in order to maintain the privilege, he ascertain the appropriate agency to investigate the complaint, rather than permitting unnecessary publication of libel to high executive and legislative officials who obviously would not investigate or hold any type of hearing. By not sending his complaint directly to MIEMSS, he avoided the potential for criminal liability for a false and malicious complaint. Even if a complaint to MIEMSS would be privileged, Drapeau should be entitled to have a trier of fact, not an appellate court, decide whether Imperial used an inappropriate method of publication. In *Hanrahan v. Kelly*, 269 Md. 21, 305 A.2d 151 (1973), this Court stated that where there is a privilege,

“[a]ny reasonable and appropriate method of publication may be adopted which fits the purpose of protecting the particular interest. \*\*\* In all such cases, the fact that the communication is incidentally read or overheard by a person to whom there is no privilege to publish it will not result in liability, if the method adopted is a reasonable and appropriate one under the circumstances.”

269 Md. at 37, 305 A.2d at 160-61 (quoting PROSSER, LAW OF TORTS § 110, at 820 (3d ed. 1964)). A jury in the instant case could easily find that sending these letters to the Governor and/or a member of Congress constituted unreasonable and inappropriate methods of publication, even if the same letters would have been privileged if sent directly to MIEMSS.

The error of failing to consider the actual addressee of the libelous communication and instead considering only a secondary recipient is compounded by holding that the letters are absolutely immunized by the judicial proceedings privilege rather than perhaps given qualified immunity by a privilege such as fair comment on matters of public concern or a similar qualified privilege. The majority holds that Imperial's letters were absolutely privileged, so it does not discuss qualified privilege. The Court of Special Appeals found there was sufficient evidence of malice to defeat a qualified privilege, but also reversed the trial judge's decision that there was a qualified privilege for these letters. I do not necessarily agree with that portion of the Court of Special Appeals opinion dealing with qualified privilege and would note that it is possible that these letters enjoy a qualified privilege. PROSSER AND KEETON ON TORTS lists several qualified privileges adopted by other courts that might conceivably provide qualified immunity for Imperial's letters. Those qualified privileges include "communications made to those who may be expected to take official action of some kind for the protection of some interest of the public \*\*\* [as well as] fair comment on matters of public concern." W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 115, at 830-31 (5<sup>th</sup> ed. 1984). Any qualified immunity that Imperial might have would of course be limited.

“The condition attached to all such qualified privileges is that they must be exercised in a reasonable manner and for a proper purpose. The immunity is forfeited if the defendant steps outside of the scope of the privilege, or abuses the occasion. Thus, qualified privilege does not extend, in any of the above cases, to the publication of irrelevant defamatory matter with no bearing upon the public or private interest which is entitled to protection; nor does it include publication to any person other than those whose hearing of it is reasonably believed to be necessary or useful for the furtherance of that interest.” (Footnotes omitted).

W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 115, at 832 (5<sup>th</sup> ed. 1984).

If Imperial did enjoy qualified immunity for his letters, Drapeau would finally have an opportunity for a judicial proceeding to clear his name, since the record establishes that there was sufficient evidence for a jury to find malice. To have a qualified privilege, Imperial would have to show he was motivated by public interest or public concern, and not merely by retribution because his orders were not carried out and he lost income as a result. In addition, any privilege would be defeated by a showing of malice.

For the reasons stated, this Court should not give Imperial absolute immunity for his maliciously libelous letters. I respectfully dissent.

Chief Judge Bell and Judge Wilner have authorized me to state that they join in the views expressed in this dissenting opinion.