SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2550-21

ABIRA MEDICAL
LABORATORIES, LLC,
d/b/a GENESIS DIAGNOSTICS,

Plaintiff-Respondent,

v.

NEAL E. WIESNER and
WIESNER LAW FIRM, P.C.,

Defendants-Appellants.

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Argued March 13, 2023 — Decided March 27, 2023

Before Judges Whipple, Mawla and Smith.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-3511-19.

Timothy K. Saia argued the cause for appellants (Bennett, Bricklin & Saltzburg, LLC, attorneys; Timothy K. Saia, of counsel and on the briefs).

David W. Ghisalbert (Law Office of David Ghisalbert) of the Texas and Pennsylvania bars, admitted pro hac vice, argued the cause for respondent (Sills Cummis &

Gross, PC, and David W. Ghisalbert, attorneys; Joseph B. Fiorenzo and David W. Ghisalbert, on the brief).

PER CURIAM

We granted defendants Neal Wiesner and Wiesner Law Firm, P.C. leave to appeal from a November 19, 2021 order, which denied in part their motion for summary judgment dismissal of a complaint filed by plaintiff Abira Medical Laboratories, LLC d/b/a Genesis Diagnostics. We also granted leave to appeal from a March 4, 2022 order denying defendants' motion for reconsideration. We reverse and direct the trial court to dismiss plaintiff's remaining claims against defendants with prejudice for the reasons expressed in this opinion.

Defendants represented Comtron, Inc., a computer integrated systems design company based in Great Neck, New York, which provides web-based electronic medical records and billing and laboratory information system software. Plaintiff is a medical testing laboratory company based in Langhorne, Pennsylvania.

In 2015, plaintiff and Comtron contracted for plaintiff to purchase computer hardware, software, and medical-technology services from Comtron, including four file servers. The servers ran Comtron's proprietary software, which stores medical and billing files for its clients. In 2018, Comtron and

plaintiff entered into two services agreements under which Comtron agreed to perform administrative and clinical functions, including management, and collection of revenues related to laboratory services performed for Genesis clientele.

Plaintiff asked Comtron for administrative access[1] to the servers to maintain them and perform security upgrades, but its requests were denied. Nonetheless, plaintiff's head of information technology (IT) was able to gain limited access for himself and created an account named "Admin G." According to plaintiff's head of IT, plaintiff sought access because its relationship with Comtron was "broken" by litigation and Comtron could not be trusted to properly maintain the servers.

The litigation plaintiff's head of IT referenced were three lawsuits—two in New Jersey state court and one in the United States District Court for the District of New Jersey—between Comtron and plaintiff.

[1] "Administrative access" or "administrative privileges" grants a user the status of an "administrator" which "can make changes to the system's configuration, add and remove programs, access any file and manage other users on the system." Administrative Privileges, Techopedia, https://www.techopedia.com/definition/4961/administrative-privileges (last updated Jan. 4, 2017).

Additionally, as Comtron's representatives, defendants were served with a search warrant issued by a Florida court at the request of the Florida State Attorney's Office (FSAO). The warrant sought records, data, communications, and patient records belonging to plaintiff in Comtron's control as part of a healthcare fraud investigation of two of plaintiff's former executives and salespersons.

Plaintiff filed a motion in Florida to quash the search warrant. It argued it had standing because the servers were housed on its premises, not Comtron's. The Florida court disagreed and denied the motion. Thereafter, plaintiff and the Florida Assistant State Attorney (ASA) handling the investigation agreed to stay the warrant pending an appeal by plaintiff.

Shortly afterwards, the ASA sent an email to plaintiff's counsel rescinding the agreement, because she "received concerning information from [defendants] regarding destruction of evidence." In a follow-up email, the ASA informed plaintiff's counsel: "Neil Wiesner just informed my office that Comtron has evidence that [plaintiff] is tampering with records. Which is exactly what I thought would happen now that they know they are being investigated. I am going to look into filing something to freeze the records."

Later that day, Wiesner emailed the ASA "Hi," to which she responded: "Just let me know what you think the letter should say, if anything, besides that it is in our interest that [plaintiff] not have access to the records." Wiesner responded an hour later, stating: "Your letter was good anyway. As I understand it, the stay expires Monday. If you wish, I'll ask [Comtron] to get you the material Tuesday." The letter Wiesner was referring to was written by the ASA to the Law Division judge presiding over litigation between Comtron and plaintiff in Passaic Vicinage. The letter stated "[i]t is in the interest of the State of Florida that [plaintiff] not be able to access records at this time" out of concern regarding the destruction of evidence.

Wiesner denied he told the ASA plaintiff was destroying evidence or that he had any evidence of such conduct. Rather, "what [he] told [the ASA] was based upon what [Comtron's IT] expert discovered and [the expert's] concerns arising from that. . . . [The ASA] had concerns about tampering with records."

The parties deposed the IT expert. He testified he did not "know one way or the other" if any employee of plaintiff went onto the server and altered, modified, or deleted any medical billing data. Also, he "never told anyone that there was such an alteration, modification[,] or deletion." The expert

considered plaintiff's access to the server using the Admin G account a "break-in because [of the] proprietary software on the server. The expert opined the Admin G account had the ability to change data in the database.

Plaintiff sued defendants, alleging: two counts of slander, namely slander for Wiesner's statements to the ASA (counts one) and slander for repeating the statements to the Law Division judge (count two); trade libel and/or commercial disparagement (count three); and malicious use of process (count four). Relevant to this appeal, count one alleged "[d]efendants represented to [the] ASA . . . that [plaintiff] had committed criminal conduct, including that [plaintiff] purportedly 'destroyed evidence' and 'tampered' with records." Count three alleged "defendants published derogatory statements concerning [plaintiff's] business to several third-parties, including [the] ASA . . . and [the Law Division] judge." Plaintiff alleged defendants' statements: were designed to prevent other parties from dealing with plaintiff and interfered with plaintiff's business; and "clearly played a material part in causing the [FSAO] to take immediate adverse action" by revoking its consent to the stay and intervening in the Law Division action to obtain an order preventing plaintiff from accessing its own records.

Defendants moved for summary judgment to dismiss the complaint arguing, in pertinent part, plaintiff lacked a cause of action because Wiesner's statements were protected by the litigation privilege. The motion judge dismissed counts two and four but declined to dismiss counts one and three. She reasoned the litigation privilege did not extend to statements made to the ASA "in her investigative capacity" and were made outside of a judicial proceeding. The judge found "there is enough of a genuine dispute of material fact for a competent jury to find that, in his own statements, . . . Wiesner made defamatory statements . . . through the allegations of criminal activity." She concluded the statements were made to the ASA in the criminal manner

> to allegedly obtain an advantage in the litigation pending elsewhere, going so far as to republish the statements to this [c]ourt as well as to the District of New Jersey. Further, [d]efendant[s] represented Comtron as being the object of the search warrant; however, it was not a party to that criminal matter. There was the potential of some inferable benefit for Comtron in any of the pending litigations—as further supported by . . . Wiesner's continued claims—by representing [plaintiff] as a party who could not be trusted in any legal matter because they had already tampered with evidence to protect itself and/or its former salespersons facing criminal prosecution.
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> . . . It was not the place of . . . Wiesner to take statements from his expert, twist them, and then

> republish them in a manner that was potentially self-serving to gain advantages elsewhere.

The judge found a sufficient dispute in facts for count three to survive summary judgment because there were

> material issues of fact regarding malice . . . , the conflicting reports of what did or [did] not occur in this circumstance, and the allegations of "breaking in" and potentially tampering made by . . . Wiesner. There are substantial questions raised by witnesses . . . as to even if . . . Wiesner had enough "evidence" to make these brazen allegations against . . . [p]laintiff.

Defendants moved for reconsideration. Wiesner filed a certification denying he colluded with the ASA and that he told her plaintiff tampered with, or destroyed, evidence. He explained he stated there was a break-in to Comtron's servers because Comtron never granted plaintiff administrative rights "and had specifically denied such authority to [plaintiff]." Further, the IT expert stated someone bypassed the Comtron security systems and created a new administrator, which constituted a break-in according to legislative history of the Digital Millennium Copyright Act.[2]

Defendants argued the motion judge: 1) accepted plaintiff's claim Wiesner told the ASA plaintiffs had tampered or destroyed evidence on the

[2] Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860-918 (codified as amended in scattered sections of 17 U.S.C.).

servers, which was relayed in the ASA's email to plaintiff rescinding the stay agreement; 2) could not rely on the ASA's emails because they were hearsay and she was never deposed; 3) erroneously concluded Wiesner disregarded the IT expert's findings; 4) ignored the fact the purchase of software by plaintiff's employee to bypass the security on Comtron's servers constituted a break-in; 5) should consider correspondence between Wiesner and plaintiff's counsel disputing whether he made the alleged slanderous comments; and 6) ignored the fact there was no evidence Wiesner colluded with the ASA by assisting her in drafting a letter to the Law Division judge because he never responded to the ASA's email asking what should be in the letter.

Defendants cited DeVivo v. Ascher[3] and argued the litigation privilege applied because the Florida proceedings constituted a judicial proceeding. Furthermore: a Florida grand jury was convened resulting in the issuance of the search warrant, which was signed by a Florida judge; plaintiff asked a Florida court to quash the warrant and appealed from the court's order denying its motion; and defendants were responsible to respond to the warrant.

The motion judge denied reconsideration on grounds defendants adduced new evidence they could have provided on the initial motion for summary

[3] 228 N.J. Super. 453 (App. Div. 1988).

judgment. She denied she had made findings of fact, noting that whether there was a break-in, whether evidence was tampered with or destroyed, and the identity of who owned the data were all disputes for a jury to resolve.

The judge reiterated the email correspondence between Wiesner and the ASA showed there was a "potential interference with an on-going investigation to obtain a benefit in other litigation." The inference that "Wiesner's suggestion of criminal activity led to the composition of the [ASA's] letter and, at worst, . . . Wiesner conspired with [the] ASA . . . in the out-of-state criminal litigation . . . to achieve some advantage in the on-going . . . litigations in New Jersey" was "strengthened" by Wiesner's submissions on summary judgment in which he referenced "what [the] expert discovered and [the] concerns arising from that."

The motion judge rejected defendants' hearsay argument concerning the ASA's emails, finding they were authenticated under N.J.R.E. 901 because they were "part of a much larger story including a three-minute phone call, a writing to a federal judge, and a presentment of the letter discussed in the emails to" the Law Division judge in the underlying suit involving plaintiff and Comtron. Further, whether Wiesner saw the ASA's emails and responded was a question for the jury.

The judge summarized the issue as follows:

> This [c]ourt does not dispute that there was a duty for Comtron or . . . Wiesner to turn over the documents when directed to by statute. The issue is that . . . Wiesner "uncovered" an alleged falsehood that [p]laintiffs were tampering with and/or destroying evidence and stated same to an [ASA] who was acting as an investigator in the document retrieval process.
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> . . . As a matter of law, the allegations were made in the course of an investigation and not a judicial proceeding. . . . As the statements here were made to the investigator and concerned the production of documents, and alleged further criminal actions which could trigger further criminal consequences for [p]laintiffs, this [c]ourt does not agree that its holding is inconsistent with De[V]ivo . . . .

I.

We review a trial court's decision to deny a motion for reconsideration under an abuse of discretion standard. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996). An abuse of discretion occurs "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467-68 (2012) (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007)). Reconsideration should be granted where "1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or

failed to appreciate the significance of probative, competent evidence." Dennehy v. E. Windsor Reg'l Bd. of Educ., 469 N.J. Super. 357, 363 (App. Div. 2021) (alterations in original) (quoting Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010)).

Notwithstanding the scope of review for reconsideration, we review "questions of law and the legal consequences that flow from the established facts . . . de novo." Granata v. Broderick, 446 N.J. Super. 449, 467 (App. Div. 2016) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). This includes our assessment of whether a litigation privilege exists. Williams v. Kennedy, 379 N.J. Super. 118, 134 (App. Div. 2005).

II.

Defendants argue the motion judge erred by holding the litigation privilege inapplicable because there was no concomitant judicial proceeding. They contend the court's ruling would unduly restrain litigants and their counsel to speak freely during litigation and argue the litigation privilege is not confined to the courtroom but applies to statements and communication in connection with a judicial proceeding.

"A statement made in the course of a judicial proceeding is absolutely privileged and wholly immune from liability." Williams, 379 N.J. Super. at 133. The litigation privilege applies to "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." Hawkins v. Harris, 141 N.J. 207, 216 (1995) (quoting Silberg v. Anderson, 786 P.2d 365, 369 (Cal. 1990)). "An absolute privilege may be extended to statements made in the course of judicial proceedings even if the words are written or spoken maliciously, without any justification or excuse, and from personal ill will or anger against the party defamed." DeVivo, 228 N.J. Super. at 457.

The privilege is not limited to statements made in a courtroom, but applies "to all statements made 'in connection with' a judicial proceeding, including settlement negotiations and private conferences . . . ." Williams, 379 N.J. Super. at 134 (quoting Hawkins, 141 N.J. at 216). However, the privilege does not exist where there are "statements made in situations for which there are no safeguards against abuse." Id. at 135 (quoting Hawkins, 141 N.J. at 221). Safeguards exist where there is a judicial proceeding because "[t]he potential harm which may result from [the] absolute privilege is mitigated by

the comprehensive control of the trial judge over judicial proceedings and the rules of professional conduct which govern attorney conduct." Ibid. (second alteration in original) (quoting Peterson v. Ballard, 292 N.J. Super. 575, 588 (App. Div. 1996)).

In Hawkins, our Supreme Court applied the privilege to statements made during pretrial discussions between an injured motorist and private investigators hired by the tortfeasor's insurer. 141 N.J. at 216. The Court reasoned the privilege applied because it was necessary to promote the development and free exchange of information and to foster judicial and extra-judicial resolution of disputes. Id. at 218.

DeVivo involved a travel agency that sued its former employee, DeVivo, for financial improprieties during her tenure as a sales representative at the agency. 228 N.J. Super. at 455. During the litigation, records were subpoenaed from one of the agency's customers, which in turn conducted its own review of its account with the agency and sent the agency's attorney, Ascher, a demand for a refund of the improper billing by the agency. Id. at 456. Ascher wrote back to the customer explaining the agency had discovered DeVivo was engaged in "unlawful activity," and a "skimming operation[,]" which resulted in the billing discrepancy discovered by the customer. Ibid.

DeVivo in turn sued Ascher for defamation. The trial court granted Ascher summary judgment based on the litigation privilege. Id. at 455.

On appeal, we affirmed, holding the privilege applied because the attorney's letter was "sufficiently connected" to a judicial proceeding, namely, the litigation between the agency and DeVivo. Id. at 459. Although

> [w]e . . . le[ft] open the question of whether the usual safeguards of a formal judicial proceeding need be present in all cases[,] . . . we . . . favor[ed] a broad interpretation of the phrase "in the course of a judicial proceeding[] "[so] . . . that an attorney may enjoy the utmost freedom of communication to secure justice for [their] client."
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> [Id. at 458.]

We have stated the privilege "requires that the 'defamatory matter uttered have some relation to the nature of the proceedings.' . . . This, however, is the only qualification to the rule of absolute immunity. Otherwise[,] it extends to witnesses, parties and their representatives, as well as other participants in such proceedings . . . ." Zagami, LLC v. Cottrell, 403 N.J. Super. 98, 104 (App. Div. 2008) (emphasis added) (citation omitted) (quoting Hawkins, 141 N.J. at 215). Parties and their counsel also need not be specifically named in the lawsuit for absolute immunity to apply, it is enough

that they have "a sufficiently significant interest in the communication . . . ." DeVivo, 228 N.J. Super. at 463.

Pursuant to these principles, we have little difficulty concluding Wiesner's communications with the ASA were protected by the litigation privilege. The Florida investigation was clearly a judicial proceeding. A court was involved in the issuance of the search warrant, which was authorized by the grand jury, and in the litigation seeking to quash it. The motion judge misapplied the law when she concluded defendant's interactions with the FSAO were merely pursuant to an investigation. For these reasons, regardless of what Wiesner said to the ASA and the level of his involvement in fashioning the email to the Law Division, an absolute litigation privilege applied.

The "absolute privilege has generally been extended to defamatory statements made to third parties in the course of discovery." DeVivo, 228 N.J. Super. at 462. Therefore, the fact Comtron was subject to the Florida search warrant further cloaked defendants in the privilege, as they had an obligation to respond on behalf their client. That Wiesner may or may not have chosen the proper words to convey information he had regarding plaintiff's conduct does not convince us he was not entitled to the protections afforded by the

litigation privilege. Indeed, not affording attorneys the protection of the privilege in cases such as this seems to run contrary to precedent and our discovery rules, which are construed liberally and in favor of disclosure.[4]

"Pretrial investigation is 'necessary to a thorough and searching investigation of the truth' and, therefore, essential to the achievement of the objects of litigation." Hawkins, 141 N.J. at 217 (citations omitted). Courts should also avoid "paper-fine distinctions when analyzing whether a potentially privileged statement 'relates' to a judicial proceeding." Williams, 379 N.J. Super. at 136 (quoting Kanengiser v. Kanengiser, 248 N.J. Super. 318, 337 (Law Div. 1991)). The object of the subpoena was pretrial collection of evidence in connection with the Florida criminal investigation of plaintiff. Clearly, Wiesner's statement to the ASA and involvement in the matter bore "some relation" to the preservation of that evidence.

[4] Although it is not essential to the disposition of this case, we note attorneys also have an ethical obligation "to expedite litigation consistent with the interests of the client." Rules of Professional Conduct 3.2. Given the gravity of FSAO's investigation and that Comtron was the subject of the warrant, we can understand defendants' desire to provide the ASA with all the information they had regarding plaintiff.

For these reasons, the absolute litigation privilege applied here. We reverse the denial of summary judgment on counts one and four and direct the entry of judgment in defendants' favor dismissing plaintiff's complaint.

III.

Finally, defendants assert there was no evidence showing Wiesner made the alleged defamatory statements. They argue the motion judge erred because she denied summary judgment on counts one and three based on the ASA's hearsay emails. They assert the judge also erred when she denied reconsideration on grounds the emails were authenticated without adjudicating the hearsay issue.

Hearsay alone is insufficient to defeat a motion for summary judgment. Judson v. Peoples Bank & Tr. Co. of Westfield, 17 N.J. 67, 76 (1954). "[E]vidence submitted in support of a motion for summary judgment must be admissible." Jeter v. Stevenson, 284 N.J. Super. 229, 233 (App. Div. 1995). "Hearsay may only be considered if admissible pursuant to an exception to the hearsay rule." New Century Fin. Servs., Inc. v. Oughla, 437 N.J. Super. 299, 317 (App. Div. 2014) (Jeter, 284 N.J. Super. at 233-34).

On reconsideration, the motion judge eschewed adjudicating defendant's hearsay claims and instead concluded she could consider the emails pursuant

to N.J.R.E. 901 because they were a part of an ongoing communication between Wiesner and the ASA, and therefore authenticated. However, authentication is not a hearsay exception. N.J.R.E. 901's "only function is to indicate how authentication is to take place where it is otherwise required . . . and only references the requirement to authenticate." Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 1 on N.J.R.E. 901 (2022). The email correspondence was clearly hearsay, and the motion judge misapplied her discretion when she denied the reconsideration motion ruling the emails were admissible on the summary judgment motion.

Reversed. We do not retain jurisdiction.