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RECENT DEVELOPMENT

NORMAN V. BORISON: ABSOLUTE PRIVILEGE APPLIED TO PLEADINGS DISTRIBUTED TO THE PRESS AND REPUBLISHED ONLINE, AND TO ALLEGED DEFAMATORY STATEMENTS MADE BY ATTORNEYS OF RECORD DURING THE COURSE OF, AND RELEVANT TO, JUDICIAL PROCEEDINGS IN A PROPOSED CLASS ACTION SUIT.

By: A. Lauren Cramer

The Court of Appeals of Maryland held that an absolute privilege applied to the publication of pleadings online and dissemination of the pleadings to the press, by attorneys filing a proposed class action suit. *Norman v. Borison*, 418 Md. 630, 17 A.3d 697 (2011). The court held that, assuming the attorneys of record provided the press with the pleadings and reprinted them online before filing them, they did so during the course of judicial proceedings, as an element for absolute privilege. *Id.* at 661-64, 17 A.3d 715-17. Further, the Court of Appeals of Maryland held that alleged defamatory statements made by the attorneys to the press were relevant to the judicial proceedings and thus protected by an absolute privilege. *Id.* at 665-66, 17 A.3d 717-18.

Stephen Norman (“Norman”) owned equal shares with three other partners in Sussex Title (“Sussex”), a limited liability company registered in Maryland. Along with other attorneys, Scott Borison (“Borison”) filed a proposed class action lawsuit against multiple companies, including Sussex. The proposed suit alleged that the defendant companies participated in a mortgage fraud scam. Borison filed the initial complaint in the Circuit Court for Prince George’s County, but then dismissed the action voluntarily to re-file it in the United States District Court for the District of Maryland. The initial state and federal complaints did not mention Norman, but an amended federal complaint did include Norman in certain allegations.

Norman subsequently filed two complaints for defamation in the Circuit Court for Montgomery County. Norman alleged that Borison and his colleagues defamed him by republishing the class action complaints on the Internet and in print, and by distributing the pleadings to the press. Norman further alleged that Borison defamed him through verbal statements he made to the press about the proposed class action suit.

The Circuit Court dismissed Norman’s complaint with prejudice, finding that absolute privilege protected Borison’s actions and statements. Norman appealed to the Court of Special Appeals of Maryland, which affirmed the Circuit Court and held that Norman had no standing for a

defamation action and, even if he did, an absolute privilege protected the alleged defamatory statements and actions. The Court of Appeals of Maryland granted Norman's petition for a writ of certiorari.

The Court of Appeals of Maryland began its analysis by propounding that the heart of this case centered on the doctrine of absolute privilege. *Norman*, 418 Md. at 650, 17 A.3d at 708. The court analyzed the doctrine's bounds and then proceeded to apply that jurisprudence to the instant case. *Id.* Preliminarily, the court highlighted three possible settings that could invoke an absolute privilege within the purview of this case. *Id.* at 650-61, 17 A.3d at 708-15.

The first situation concerned statements made during a judicial proceeding. *Norman*, 418 Md. at 650-52, 17 A.3d at 708-09. For witnesses, parties, and judges, Maryland follows the "English" rule, wherein alleged tortfeasors receive absolute immunity from civil liability in actions for defamation, even if the statement in question was entirely unrelated to the judicial proceeding. *Id.* at 650, 17 A.3d at 708 (citing *Keys v. Chrysler Credit Corp.*, 303 Md. 397, 404, 494 A.2d 200, 203 (1985)). For attorneys of record, Maryland follows the majority "American" rule, which requires that the defamatory statement have some rational relation to the pending litigation in order for the privilege to attach. *Norman*, 418 Md. at 650, 17 A.3d at 709 (citing *Korb v. Kowaleviocz*, 285 Md. 699, 402 A.2d 897 (1979)).

The second situation implicating an absolute privilege concerns statements made in quasi-judicial proceedings. *Norman*, 418 Md. at 652-53, 17 A.3d at 709-10 (citing *Gersh v. Ambrose*, 291 Md. 188, 434 A.2d 547 (1981)). Under the two-part *Gersh* test, a court evaluates both the nature of the public function of the quasi-judicial proceeding and the procedural safeguards in effect to minimize defamatory statements, in order to determine if an absolute privilege applied to statements made during the proceeding. *Norman*, 418 Md. at 653, 17 A.3d at 710 (citing *Gersh*, 291 Md. 188, 434 A.2d 547). Witnesses, parties, and judges receive protection if the quasi-judicial proceeding fits within the *Gersh* test, whereas statements made by attorneys of record must meet an additional requirement in that they must be relevant to the proceeding. *Norman*, 418 Md. at 652, 17 A.3d at 709-10.

The third situation the court examined regards statements made extrinsic to a judicial or quasi-judicial proceeding. *Norman*, 418 Md. at 653-60, 17 A.3d at 710-15. The court noted that an absolute privilege protects defamatory statements made during the course of a trial or contained in pleadings, depositions, affidavits, and other documents related to the case. *Id.* at 653, 17 A.3d at 710 (citing *Kennedy v. Cannon*, 229 Md. 92, 97, 182 A.2d 54, 57 (1962)). The concept extends to defamatory statements made prior to the beginning of a proceeding, since

such statements could directly relate to pending litigation. *Norman*, 418 Md. at 653, 17 A.3d at 710 (citing *Adams v. Peck*, 288 Md. 1, 8, 415 A.2d 292, 295 (1980)).

The court identified three instances where such extrinsic statements commonly occur. *Norman*, 418 Md. at 653-54, 17 A.3d at 710-11. The first instance occurs when statements are made with the direct purpose or effect of producing a judicial or quasi-judicial proceeding. *Id.* at 653, 17 A.3d at 710. The second category involves statements that are prepared for possible use in connection with a pending judicial proceeding, but remain unfiled at the time of the alleged injury. *Id.* (citing *Adams*, 288 Md. at 4, 415 A.2d at 294). The third category refers to statements that are connected contextually to a pending or ongoing proceeding. *Norman*, 418 Md. at 653, 17 A.3d at 710. The court extended the absolute privilege to the three preceding scenarios because the privilege itself encourages the free divulgence of information surrounding judicial proceedings. *Id.* at 654, 17 A.3d at 711. Further, the court stressed that the investigation of facts for the purpose of determining what is to be used in pending litigation is equally as important as the presentation of such facts in the proceeding itself. *Id.*

In the instant case, the court held that an absolute privilege protected Borison's dissemination of the complaints to the press because the underlying proceeding met the requirements of the *Gersh* test and the statement was related to, and made during, the course of the proceeding. *Norman*, 418 Md. at 661-64, 17 A.3d at 715-17. Specifically, the court stated that the press could be perceived as a tool assisting in the notification to potential members of the class action lawsuit. *Id.* at 662, 17 A.3d at 716. The court also noted that Borison had already filed the initial federal complaint before republishing the federal pleadings online, therefore making it a public document and fully eligible for publication. *Id.* at 664-65, 17 A.3d at 717.

The court further stated that Maryland law dictates no limits on who views public documents or in what manner. *Norman*, 418 Md. at 664-65, 17 A.3d at 717. Borison also provided verbal statements about the proposed class action suit to the press. *Id.* at 664-65, 17 A.3d 717-18. The Court of Appeals of Maryland held that an absolute privilege protected these statements as well, because they were made during the course of the judicial proceedings. *Id.* Borison uttered these statements while promoting the class action claim and informing the affected class of the suit. *Id.*

The court's holding in *Norman* encourages an unrestricted stream and exchange of public information to uncover the truth in judicial proceedings. Specifically, within the context of potential class action suits, the free flow of information is vital for the identification of

members of the potential class. Based upon the court's holding in this case, attorneys of record in class action suits, and in general litigation, now have more freedom to publicly disclose material concerning their cases without the fear of resulting civil defamation litigation. The holding may embolden attorneys to perform increased fact-finding both during suits and prior to filing, which could encourage lawyers to "try the case in the media" before any meaningful procedures take place.