NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0155-16T4

W. JAMES MAC NAUGHTON,

Plaintiff-Appellant,

v.

SHAI HARMELECH a/k/a
ISHIAHU HARMELECH,

Defendant-Respondent.

Argued December 11, 2017 - Decided January 19, 2018

Before Judges Messano and Accurso.

On appeal from Superior Court of New Jersey, Law Division, Sussex County, Docket No. L-0716-14.

W. James Mac Naughton, appellant, argued the cause pro se.

Lynette Siragusa argued the cause for respondent (Siragusa Law Firm, LLC, attorneys; Lynette Siragusa, of counsel and on the brief; Robert D. Bailey, on the brief).

PER CURIAM

Plaintiff W. James Mac Naughton appeals from a final order dismissing his defamation action against his former client,

defendant Shai Harmelech. The trial court found the defamatory statement protected by the litigation privilege. We agree, and affirm.

The essential facts are easily summarized and essentially undisputed. Plaintiff, a New Jersey attorney, formerly represented defendant in a lawsuit in Chicago involving his company. Defendant disputed the bill, and plaintiff subsequently sued him in New Jersey, first in federal court and then in state court, to collect the fee.

The judge presiding over the state court action asked at some point whether the parties were interested in pursuing mediation. At about the same time, plaintiff was apparently in contact with another of defendant's creditors about banding together to force defendant into involuntary bankruptcy. Upon learning of that effort, defendant sent the following email to his lawyers:

> **Subject:** Case
>
> > Please I Am asking you to file a paper in the state court there WILL NOT BE AGREE NOT TO BE A MEDIATION MACNAUGHTON CALL TODAY AND ASK HIM TO TRY TO POT ME IN IN VALENTRY BANKRUPTCY AS YOU SEE HE IS A. LIAR THIEF AND NO GOOD DRUNK
> >
> > NO TO BE TRUSTED THANKS
> >
> > ANY THING YOU NEED CALL ME THANKS

Sent from my iPad

Defendant inadvertently included plaintiff among the recipients of his missive, resulting in plaintiff filing a one count complaint for defamation. After defendant's motions to dismiss and for summary judgment were denied,[1] the matter was scheduled for a N.J.R.E. 104 hearing on the privilege issues in advance of trial.

After hearing the testimony of defendant and his counsel, the Law Division judge concluded the statement was protected by the litigation privilege. Applying the four factor test[2] of Hawkins v. Harris, 141 N.J. 207, 216 (1995), the judge found the email was sent "in the course of a judicial proceeding," by defendant, a party, to advise his lawyers "that participation in mediation would harm and not advance his interests in the case," the logical relation of such communication to the litigation being "apparent on the face of the e-mail." Finding the email

[1] The separate judges hearing those motions noted defendant had failed to properly support his factual allegations with competent certifications.

[2] "The absolute 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)).

subject to an absolute privilege, the judge dismissed the complaint.

Plaintiff appeals, contending the trial court based its finding on the third Hawkins prong, that mediation would not advance defendant's interests, on his belief that "[p]laintiff was 'a liar, thief and no good drunk.'" Plaintiff contends the "Law Division erred because the [d]efendant's genuine belief in the truth of the [s]tatement is a finding of fact that should have been made by the jury." Plaintiff also argues the "logical relation" test of the fourth Hawkins prong was not met because the statement "related only to [p]laintiff's honesty and not to the merits of the [l]awsuit." Finally, plaintiff contends the litigation privilege does not apply because "the absolute privilege does not extend to statements 'made in situations for which there are no safeguards against abuse.'" (quoting Hawkins, 141 N.J. at 221). We reject those arguments.

It has long been the law of this state that statements made in judicial or quasi-judicial proceedings, having some relation thereto, are absolutely privileged against a defamation claim. See Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552, 558 (1955). "The privilege grows out of the strong public policy 'that persons in such circumstances be permitted to speak and write freely without the restraint of fear of an ensuing

defamation action.'" Middlesex Concrete Prods. & Excavating Corp. v. Carteret Indus. Ass'n, 68 N.J. Super. 85, 91 (App. Div. 1961) (quoting Fenning v. S.G. Holding Corp., 47 N.J. Super. 110, 117 (App. Div. 1957)). The privilege "is not limited to statements made in a courtroom during a trial; 'it extends to all statements or communications in connection with the judicial proceeding,'" Hawkins, 141 N.J. at 216 (quoting Ruberton v. Gabage, 280 N.J. Super. 125, 133 (App. Div. 1995)), and certainly protects a litigant "engaged in a private conference with an attorney regarding litigation," ibid.

Defendant's email to his lawyers directing them to refuse mediation with plaintiff obviously falls squarely within those statements protected by the litigation privilege. Plaintiff's claims to the contrary are baseless. Whether defendant maintained a genuine belief that plaintiff was "a liar, thief and no good drunk," is irrelevant. All that matters is that he made the statement to his lawyers in the course of directing them in the conduct of the case.

To say the statement "related only to [p]laintiff's honesty and not to the merits of the [l]awsuit," ignores that defendant was speaking to his lawyers about whether he would participate in court-sponsored mediation. As the trial judge noted, "there was a direct connection" between the statement and the

litigation. "Courts do not make paper-fine distinctions when analyzing whether a potentially privileged statement 'relates' to a judicial proceeding." Kanengiser v. Kanengiser, 248 N.J. Super. 318, 337 (Law Div. 1991). Relevancy is interpreted "broadly and liberally" to avoid having the speaker act "at his peril," at the cost of the policy considerations underlying the privilege. DeVivo v. Ascher, 228 N.J. Super. 453, 460-61 (App. Div. 1988) (quoting Fenning, 47 N.J. Super. at 118).

Finally, we reject plaintiff's claim that the litigation privilege does not apply because defendant's statement was made in a private conversation "for which there are no safeguards against abuse." The law is well settled that "the privilege clearly applies to all statements made 'in connection with' a judicial proceeding, including settlement negotiations and private conferences; it is not limited to statements made under oath." Williams v. Kenney, 379 N.J. Super. 118, 134 (App. Div. 2005). A court's "inherent power to sanction a party for behavior that is vexatious, burdensome and harassing," Segal v. Lynch, 211 N.J. 230, 255 (2012), provides ample opportunity for judicial oversight.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION