

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 96-2992

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JESUS BARBARY,

PLAINTIFF-APPELLANT,

V.

CHARLES STOKES,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Affirmed; cause remanded with directions.*

Before Eich, C.J., Vergeront and Deininger, JJ.

PER CURIAM. Jesus Barbary appeals a trial court order dismissing his complaint for failing to state a claim. The issues are: (1) whether the allegedly defamatory statements were privileged; (2) whether the trial court properly exercised its discretion in awarding attorney's fees to Charles Stokes; and

(3) whether Stokes should be awarded attorney's fees on this appeal. We resolve all issues against Barbary.

Barbary and Stokes were custodians at Blackhawk Technical College. Barbary's employment was terminated after he had a fight with Stokes during work hours. After he was fired, Barbary commenced an action against Stokes for defamation, alleging that Stokes made defamatory statements about the altercation. The trial court dismissed the complaint for failing to state a claim upon which relief could be granted.

Barbary first argues that the trial court erred in dismissing his complaint for failure to state a claim. We disagree.

"[N]ot all defamations are actionable." *Zinda v. Louisiana Pacific Corp.*, 149 Wis.2d 913, 921, 440 N.W.2d 548, 552 (1989). "Some defamations fall within a class of conduct which the law terms privileged." *Id.* "The defense of privilege has developed under the public policy that certain conduct which would otherwise be actionable may escape liability because the defendant is acting in furtherance of some interest of societal importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff." *Id.* at 921-22, 440 N.W.2d at 552.

The statements made by Stokes were privileged. Stokes' comments were made in two contexts. First, Stokes told his supervisor his version of the altercation between Barbary and him during an investigatory interview. These statements were protected by the "common interest" privilege. See *id.* at 922, 440 N.W.2d at 552 (a matter is privileged where "the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common

interest is entitled to know”). Second, Stokes testified about the incident during the course of an administrative hearing held to determine whether Barbary should receive unemployment compensation benefits. These statements were privileged because they were made during “quasi-judicial” proceedings. *Vultaggio v. Yasko*, ___ Wis.2d ___, ___, 572 N.W.2d 450, 453-54 (1998).; *see also, Hartman v. Buerger*, 71 Wis.2d 393, 398, 238 N.W.2d 505, 508 (1976) (statements made during “judicial” and “quasi-judicial” proceedings are protected by an absolute privilege). Because the allegedly defamatory statements were privileged, the trial court properly dismissed Barbary’s complaint for failure to state a claim for defamation.

Barbary next argues that the trial court should not have awarded Stokes attorney’s fees and costs. Section 814.025, STATS., provides that the trial court may award reasonable attorney’s fees if an action is frivolous. An action is frivolous where it “was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another,” or where “[t]he party or the party’s attorney knew, or should have known, that the action ... was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.” Section 814.025(3)(a) and (b).

The trial court awarded Stokes attorney’s fees and costs because it concluded that Barbary had commenced the action “in bad faith solely for the purpose of harassing and maliciously endangering Mr. Stokes” and because Barbary “knew or should have known that this action was without any reasonable basis in law or equity.” It is clear from the face of the complaint that the allegedly defamatory statements were made in privileged settings, during an investigatory interview conducted by a supervisor at work and at an administrative hearing.

Barbary made no reasonable argument why privilege would not apply in these situations. The trial court reasonably exercised its discretion in concluding that Barbary should have known that the action was without a reasonable basis in law and was commenced to harass Stokes.

Finally, Stokes argues he should be awarded attorney's fees for this appeal. "[T]he reviewing court need not determine whether the appeal itself is frivolous before it can award appellate costs and reasonable attorney's fees." *Riley v. Isaacson*, 156 Wis.2d 249, 262, 456 N.W.2d 619, 624 (Ct. App. 1990). "Rather, if the claim was correctly adjudged to be frivolous in the trial court, it is frivolous *per se* on appeal." *Id.* (emphasis in original). Accordingly, we conclude that Stokes is entitled to reasonable attorney's fees on appeal. We remand to the trial court to determine and award Stokes his appellate attorney's fees.

By the Court.—Order affirmed; cause remanded with directions.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

