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NO. 65144-7-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ADIL LAHRICHI, REGINE CSPIKE, T.L., Y.L., A.L., Y.L. and AZIZA
BENAZZOZ,

Appellants,

v.

KEELIN A. CURRAN, ZAHRAA V. WILKINSON, MOLLY M.
DAILY, STOEL RIVES LLP, THOMAS D. MINO, TIMOTHY
LONDERGAN, TIMOTHY PARKER, RALUCA DINU, DAN JIN,
HENRY HU, HANNWEN GUAN, GIGOPTIX and MICROVISION,

Respondents.

MICROVISION'S RESPONSE BRIEF

Mark Berry, WSBA #16730
Boris Gaviria, WSBA #31251
Davis Wright Tremaine LLP
Attorneys for Microvision
777 – 108th Avenue NE, Suite 2300
Bellevue, Washington 98004-5149
(425) 646-6100 Phone
(425) 646-6199 Fax

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I. INTRODUCTION

Respondent Microvision respectfully requests the Court affirm the trial court's dismissal of Adil Lahrichi ("Lahrichi") and his family's lawsuit. Lahrichi briefly worked for a Microvision affiliate from 2001 to 2002. Following the termination of his employment, Lahrichi filed his first lawsuit in 2004, alleging wrongful termination and discrimination. The lawsuit was dismissed on summary judgment by United States District Judge Coughenour in 2006. The first lawsuit is currently on appeal to the Ninth Circuit Court of Appeals.

In 2009, Lahrichi filed a second lawsuit alleging discovery violations and wrongful disclosures that all occurred during his first lawsuit. He alleged a litany of claims, including that the defendants' attorneys in the first lawsuit defamed him, disclosed confidential information in pleadings and on the court's electronic document system, and interfered with witnesses. The trial court dismissed his second lawsuit based on the application of the litigation immunity doctrine and statute of limitations grounds. The Court of Appeals should affirm the trial court's decision on two grounds: (i) the acts of the attorneys in the first lawsuit are not subject to civil liability under well-established Washington law; and (ii) Appellants failed to identify any alleged wrongdoing that occurred within the applicable statute of limitations periods.

II. COUNTERSTATEMENT OF ISSUES

1. Did the trial court properly dismiss the Lahrichis' lawsuit based on the litigation immunity privilege and statute of limitations grounds?

2. Did the trial court properly dismiss the case without allowing amendment, where Appellants never made a motion to amend the Complaint and never submitted a proposed amended complaint?

III. STATEMENT OF FACTS

A. Respondent Microvision.

Microvision is a technology company that founded and provided management support for Lumera Corp., another technology startup company. CP 5.

B. Appellants.

Lahrichi briefly worked at Lumera in 2001 until he was terminated in 2002. CP 5, 7. He was the sole plaintiff in a wrongful termination case filed in 2004. Lahrichi filed a second lawsuit in 2009 based on alleged misconduct by defense counsel in the first lawsuit. In the second 2009 case, members of Lahrichi's immediate family were named as plaintiffs (plaintiffs are collectively referred to herein as "the Lahrichis") in his second lawsuit. CP 2.

C. 2009 State Court Claims.

The Lahrichis filed their Complaint against Keelin A. Curran, Zahraa V. Wilkerson, Molly M. Daily, Stoel Rives, LLP, Thomas D. Mino, Timothy Londergan, Timothy Parker, Raluca Dinu, Dan Jin, Henry Hu, Hannwen Guan, GigOptix, and Microvision on April 27, 2009. CP 1-5. The individual defendants and Stoel Rives LLP represented the corporate defendants in the first lawsuit.

The Lahrichis appear to allege the following claims against all Respondents: violation of privacy, intentional and negligent dissemination of information, libel and defamation, intentional misrepresentation of information to inflict harm, conspiracy to defame and harm, breach of contract, breach of trust, exploitation, negligence and infliction of emotional distress, bad faith, fraud, malpractice, obstruction of the course of justice, perjury, intentional and malicious acts to harm, misappropriation of others' identity to inflict harm and obstruct justice, exploitation of privileges and trust to inflict harm, and "intentional and bad faith acts to prevent Plaintiffs to mitigate ongoing damages." CP 18.

The basis of all the claims in the 2009 lawsuit involved allegations of misconduct by litigation defense counsel during the course of Lahrichi's 2004 employment case. CP 8-18. The Lahrichis now allege serious discovery violations, willful violations of protective orders, and

false statements made in court and in pleadings in the first lawsuit. *Id.* However, in the 2009 Complaint, the Lahrichis did not indicate which allegations support each of the numerous claims, nor did they indicate which claims are alleged against the various defendants. CP 18.

D. 2004 Federal Employment Case.

Lahrichi filed his first complaint on September 14, 2004, in King County Superior Court (Case No. 04-2-23849-8 SEA). The initial defendants removed the case to the United States District Court, Western District (Case No. 04-02124). CP 7-8. On March 2, 2006, the federal district court granted defendants' Motion for Summary Judgment, dismissing all claims. CP 78, 112. The case was subsequently appealed to the Ninth Circuit and is still pending in that court. CP 84, 112.

In the 2004 employment case, Lahrichi alleged only one cause of action against Microvision—negligent supervision. CP 204. This lone claim was dismissed by Judge Coughenour on March 2, 2006, along with all other claims against the other defendants. CP 204.

E. Procedural History.

The Lahrichis filed a second Complaint on April 27, 2009 in King County Superior Court. The case was assigned to Superior Court Judge Regina Cahan. CP 1-20. In addition to Lahrichi, the Complaint included members of his immediate family as named plaintiffs. CP 2.

Microvision and the other defendants filed three separate Motions to Dismiss in January 2009, based on a failure to state a claim upon which relief could be granted under Civil Rule 12(b)(6). CP 173-189, 196-202, and 203-208. The Lahrichis filed a joint opposition on February 3, 2009. CP 209-225. Microvision filed a Reply in Support of Motion to Dismiss on February 4, 2009. CP 301-305.

On February 5, 2009, the trial court heard oral arguments on the Motions to Dismiss. RP 1. Following oral arguments, Judge Cahan granted Microvision's Motion to Dismiss and entered an order dismissing the case. CP 311-312; RP 30-33. The claims against Microvision were dismissed on the grounds that both the litigation privilege and statute of limitations doctrine applied to the Lahrichis' lawsuit. RP 30-33. Judge Cahan also dismissed the claims against all the other defendants. CP 306-310.

On February 6, 2010, the Lahrichis filed a Motion for Reconsideration. CP 313-326. The trial court denied the Motion For Reconsideration on March 1, 2010. CP 380. On March 29, 2010, the Lahrichis filed a Notice of Appeal. CP 381-383.

IV. ARGUMENT

A. Standards of Review.

1. Motion to Dismiss.

This Court reviews a trial court's decision to grant a motion to dismiss *de novo*. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). A motion to dismiss under 12(b)(6) is properly granted where "it appears beyond a reasonable doubt that no facts exist that would justify recovery." *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). This Court may affirm the trial court's decision on any basis supported by the record. *Deveny v. Hadaller*, 139 Wn. App. 605, 616, 161 P.3d 1059 (2007).

2. Motion to Amend.

A trial court's denial of a motion to amend is reviewed by this Court for an abuse of discretion. *Ensley v. Mollman*, 155 Wn. App. 744, 759, 230 P.3d 599 (2010). "The disposition of motions to amend the pleadings is discretionary with the trial court, and its refusal to permit such an amendment will not be overturned except for manifest abuse of discretion." *Id.*, quoting *Lincoln v. Transamerica Inv. Co.*, 89 Wn.2d 571, 577, 573 P.2d 1316 (1978).

B. The Court Properly Granted Microvision's Motion to Dismiss.

The Lahrichis contend that the acts of Microvision's counsel in the 2004 employment case can somehow form the basis of liability against the corporation itself. RP 27. However, the litigation attorneys are all immune from liability under common law litigation privilege. *See Jeckle v. Crotty*, 120 Wn.App. 374, 386, 85 P.3d 931 (2004) (litigation privilege precluded action against counsel for tort claims); *McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980) (same). As fully discussed below, there is no basis to impose any liability to Microvision's litigation counsel and no basis for any derivative liability.

1. Washington's Broad Litigation Privilege.

Washington has long recognized a litigation privilege that extends to participants in the entire judicial process. The broad immunity under Washington law extends to witnesses, attorneys, guardians, therapists, probation officers, judges, and prosecutors. *Bruce v Byrne-Stevens Assoc.*, 113 Wn.2d 123, 128, 776 P.2d 666 (1989) ("The various grants of immunity for judges and witnesses, as well as for prosecutors and bailiffs, are all particular applications of this central policy. They are best described as instances of a single immunity for participants in judicial

proceedings”). The Washington Supreme Court expressly held that the privilege applies to attorneys:

The privilege of attorneys is based upon a public policy of securing to them as officers of the court the utmost freedom in their efforts to secure justice for their clients. The attorney’s purpose in publishing defamatory matter, his belief in its truth, or even his knowledge of its falsity, are of importance only in determining the amenability of the attorney to the disciplinary power of the court of which he is an officer.

McNeal, 95 Wn.2d at 267.

The immunity serves the judicial process by encouraging open and complete testimony. “The purpose of granting immunity to participants in judicial proceedings is to preserve and enhance the judicial process.”

Bruce, 113 Wn.2d at 128. The immunity protects participants from “the chilling effect of the threat of subsequent litigation.” *Id.* at 132.

The immunity doctrine applies to defamation lawsuits as well as other tort claims. “[T]here is nothing in the policy rationale underlying witness immunity which would limit its applicability to defamation cases.” *Bruce*, 113 Wn.2d at 132; *see also*, *Kearney v. Kearney*, 95 Wn.App. 405, 974 P.2d 872 (1999) (Privacy Act lawsuit against attorney dismissed based on the application of litigation privilege); *see also*, *Jeckle*, 120 Wn.App. at 386 (claims against attorneys for intentional interference with a business expectancy, outrage, infliction of emotional distress, and civil

conspiracy all properly dismissed by the trial court based on the litigation privilege).

Some jurisdictions have expressly concluded that the litigation privilege also extends to conduct outside of the courtroom:

Lawyers necessarily exercise a wide degree of discretion in performing their duties in the course of judicial proceedings, and must be free to pursue the best course charted for their clients without the distraction of a vindictive lawsuit looming on the horizon. The litigation privilege must have sufficient breadth to advance the best interests of the administration of justice. For that reason, courts have extended the reach of the litigation privilege even to statements made by attorneys outside the courtroom, such as in attorney interviews and settlement negotiations.

Loigman v. Township Cmte. of Middletown, 185 N.J. 566, 588, 889 A.2d 426 (N.J. 2006). Thus, the claims against Microvision attorneys during the course of prior litigation are barred by the litigation privilege.

2. Conduct in Dispute Arose During First Lawsuit.

The Lahrichis allege that lawyers in Lahrichi's first lawsuit improperly disclosed confidential documents on the federal court electronic document system, made false and defamatory statements, and interfered with witnesses during the federal case. Opening Brief at 8-10. All the alleged wrongful conduct took place during the course of litigation in the federal lawsuit. The alleged misconduct by counsel directly related to the discovery in the prior lawsuit. For example, the Lahrichis allege:

In his deposition, Ms. Curran abused, exploited, humiliated, and disgraced Dr. Lahrichi, falsely accused him, pressured him, and attacked his character and integrity. She t[a]mpered with and concealed evidence in order to falsely accuse Dr. Lahrichi. Ms. Curran required Dr. Lahrichi to answer questions about his beliefs outside the scope of the agreement she made with Ms. Frank before the deposition and disparaged him and his beliefs.

CP 9-10. All of the claims in the second lawsuit were based on alleged discovery violations, statements made in court, or statements made in pleadings in the first lawsuit.¹ Thus, any alleged misconduct by Microvision's counsel in the prior lawsuit falls squarely under the litigation privilege, and the trial court properly dismissed all claims. *Bruce*, 113 Wn.2d at 132; *Kearney*, 95 Wn.App. at 412; *Jeckle*, 120 Wn.App. at 386.

The claims against Microvision, as well as its counsel, were properly dismissed. The litigation immunity extends to an attorney's clients. *Bruce*, 113 Wn.2d at 125 (cites omitted) (“The **immunity of parties** and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established in English common law”) (emphasis added). In addition, under Washington law, if an

¹ The Lahrichis now argue that the act of filing confidential documents is a purely administrative or “secretarial” procedure, and not a judicial one. Opening Brief 24. However, the specific allegations regarding the disclosure of confidential documents, violations of protective orders, and misconduct at depositions are all clearly based on judicial acts related to his prior lawsuit.

employee or agent is not liable, then there is no liability for the employer or principal. *See e.g. Orwick v. Fox*, 65 Wn.App. 71, 88, 828 P.2d 12 (1992) (dismissal of patient's respondeat superior claims against hospital and state was proper based on dismissal of claims against hospital employees). There is no derivative liability because Microvision's lawyers were not liable.

Finally, for the first time on appeal, the Lahrichis raise the argument that defendants disclosed medical information that was protected by the Uniform Health Care Information Act (RCW 70.02) and HIPPA. Opening Brief at 26. However, the Complaint and Opposition to Microvision's Motion to Dismiss never alleged any violation of the UHCIA or HIPPA. CP 18; CP 256-20. Arguments that were not made at the trial court level are not considered on appeal. *Sneed v. Barna*, 80 Wn App. 843, 847, 912 P.2d 1035 (1996); RAP 2.5(a) (Court of Appeals does not consider claims raised for the first time on appeal). In addition, the Lahrichis submitted no evidence that health care records were improperly disclosed. CP 277-281.

C. The Lahrichis' Claims Do Not Fall Within the Statute of Limitations.

Even if any of the claims alleged by the Lahrichis are not barred by the litigation privilege, their claims were still properly dismissed by the

trial court because they all fall outside the statute of limitations.

RCW 4.16.100 allows a two-year statute of limitations for claims of libel, slander, defamation and false light invasion of privacy, and

RCW 4.16.080(2) allows a three-year statute of limitations for claims of fraud, negligence and conspiracy. *See Milligan v. Thompson*, 90 Wn.

App. 586, 592, 953 P.2d 112 (1998) (intentional infliction of emotional distress subject to three-year statute of limitations under RCW

4.16.080(2)); *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 474, 722

P.2d 1295 (1986) (false light invasion of privacy claim is governed by the two-year statute of limitations for libel and slander under RCW 4.16.100).

All of Lahrichis' claims are, therefore, untimely.

The Lahrichis filed their second lawsuit on April 27, 2009. CP 1.

The alleged events forming the basis of the second case occurred during the course of the 2004 employment case litigation (September 14, 2004 to March 2, 2006). CP 5-18. For example, the Lahrichis specifically alleged in their Complaint that they were aware of alleged improper disclosures, discovery violations and "false" pleadings in 2005:

In 2005, in her summary judgment motion, Ms. Curran included Dr. Lahrichi's and his family's confidential and protected information and continued to incorporate in her pleadings false statements that were already proven false in discovery and misrepresentations and distortions of facts and information about Dr. Lahrichi.

CP 13.

The Lahrichis also allege that counsel in the prior case “produced false declarations” and engaged in other misconduct during a mediation that occurred in 2005. CP 9, Opening Brief, Appendix B (letter describing 2005 mediation attached by the Lahrichis). The Lahrichis make similar allegations of misconduct regarding a motion filed “in [the] beginning of 2006.” CP 77 (describing another 2006 motion that allegedly included confidential and protected information and false and defamatory statements). According to the Lahrichis’ own Complaint, they were aware of alleged wrongdoing in 2005 and earlier. Their claims are stale.

In response to Microvision’s Motion to Dismiss, Lahrichi submitted a declaration that did not include any evidence in support of conclusory assertions of a timely claim. CP 277-281. In addition, the Lahrichis did not submit any documents that would constitute a written contract and would be the basis of a possible breach of contract claim. *Id.* Accordingly, the trial court properly dismissed the case based on statute of limitations grounds.

D. The Lahrichis Never Made a Proper Motion To Amend.

The trial court properly denied the Lahrichis’ informal request to amend their Complaint. During oral argument, Lahrichi made vague statements suggesting that he needed to add more information to the

Complaint. RP 29, 33. The Lahrichis also made a passing reference to being allowed to pursue discovery and amend their claims in their Motion for Reconsideration. CP 324. However, the Lahrichis never filed a motion expressly requesting leave to file an amended complaint. In addition, the Lahrichis never submitted a copy of any proposed complaint as required by Civil Rule 15(a). *See* CR 15(a) (“If a party moves to amend a pleading, a copy of the proposed amended pleading, denominated ‘proposed’ and unsigned, shall be attached to the motion”). The trial court did not err because the Lahrichis failed to make a proper motion to amend.

V. CONCLUSION

For the reasons stated above, Microvision respectfully requests that the Court deny Appellants’ appeal and uphold the trial court’s dismissal of the case.

RESPECTFULLY SUBMITTED this 3rd day of November,
2010.

Davis Wright Tremaine LLP
Attorneys for Respondent Microvision

By 

Mark Berry, WSBA #16730
Boris Gaviria, WSBA #31251
Davis Wright Tremaine LLP
777 – 108th Avenue NE, Suite 2300
Bellevue, Washington 98004-5149
(425) 646-6100 Phone
(425) 646-6199 Fax