

Court of King's Bench of Alberta

Citation: Burns v Osuji, 2026 ABKB 108

Date: 20260217
Docket: 2401 09668; 2401 09677
Registry: Calgary

Between:

2401 09668

Robert Brody Burns

Plaintiff/Respondent

- and -

Charles Osuji, Amanda Ovaici, Charles Osuji Professional Corp. operating as Osuji & Smith Lawyers

Defendants/Appellants

And Between:

2401 09677

Nicole Lynn Green

Plaintiff/Respondent

- and -

Charles Osuji, Amanda Ovaici, Charles Osuji Professional Corp. operating as Osuji & Smith Lawyers

Defendants/Appellants

**Reasons for Decision
of the
Honourable Justice A. L. Froese**

I. Introduction

[1] This is an appeal from an Applications Judge’s decision dismissing two applications to strike under Rule 3.68 of the *Alberta Rules of Court*, Alta Reg 124/2010.

[2] The Respondents commenced separate claims against Amanda Ovaici, Charles Osuji and Charles Osuji Professional Corporation operating as Osuji & Smith Lawyers (**Lawyers**) and Leanne Burns, the Lawyers’ client, as a result of a video recorded by Ms. Burns and played by the Lawyers at a family law Early Intervention Case Conference (**EICC**) before this Court.

[3] The facts pled in support of the Respondents’ claims arise out of a divorce action involving now separated spouses, Robert Burns and Leanne Burns. In July 2022, Mr. Burns and Ms. Burns participated at an EICC as part of their divorce proceedings. At that EICC, the Lawyers played a video that had been recorded by Ms. Burns at the family home where both Mr. and Ms. Burns resided post-separation. The video is alleged to depict Mr. Burns and his then girlfriend, Ms. Green, engaged in intimate acts.

[4] In each action, the Respondents allege that the recording constituted a significant invasion of privacy, was illegal, and its dissemination caused mental and physical health issues, significant emotional distress, embarrassment and humiliation. They claim that the dissemination of the video during the EICC constituted three torts: (i) breach of confidence; (ii) intentional infliction of mental distress; and (iii) public disclosure of private facts.

[5] The Lawyers applied to strike or summarily dismiss the claims on the basis that they did not disclose a reasonable claim and had no merit. The applications were heard concurrently by the Applications Judge on November 6, 2024. The Applications Judge dismissed the Lawyers’ applications to strike the actions under Rule 3.68 and adjourned the Lawyers’ application to summarily dismiss the actions under Rule 7.3 (**AJ Decision**).

[6] Ms. Burns was not a party to the Lawyers’ application to strike, as she retained separate counsel for these claims and filed her own applications to strike in September 2024.

[7] The Lawyers appeal the AJ Decision, primarily on the basis that a decision relied upon by the Applications Judge was overturned by the Court of Appeal on July 28, 2025, after the AJ Decision was pronounced. I heard the appeal at a half-day Special Application on September 3, 2025.

[8] For the following reasons, I allow the appeal of the AJ Decision.

II. Background

A. Procedural History

[9] On July 12, 2024, Mr. Burns and Ms. Green each filed a Statement of Claim against the Lawyers and Ms. Burns.

[10] On July 18, 2024, Ms. Green filed an Amended Statement of Claim, while Mr. Burns filed an Amended-Amended Statement of Claim.

[11] The Lawyers applied to strike each action on August 21, 2024 (**Strike Applications**).

[12] On October 8, 2024, Ms. Green filed an Amended Amended Statement of Claim.

[13] On October 9, 2024, Mr. Burns filed an Amended Amended Amended Statement of Claim.

[14] On October 10, 2024, Ms. Green filed an Amended Amended Amended Statement of Claim, and Mr. Burns filed an Amended Amended Amended Amended Statement of Claim.

[15] In their Amended Amended Amended Statement of Claim and Amended Amended Amended Amended Statement of Claim, filed October 10, 2024 (**Actions**), each Respondent pled the following, nearly identical, facts:

- (a) Mr. and Mrs. Burns separated after 16 years of marriage on October 6, 2021, but continued residing together in the family home;
- (b) Mr. Burns began a relationship with Ms. Green some time around October 15, 2021;
- (c) at some point their relationship began, Mrs. Burns began surveilling Mr. Burns and Ms. Green, going as far as installing hidden cameras in his bedroom;
- (d) in December 2021, Ms. Burns surreptitiously recorded personal and intimate activities between Mr. Burns and Ms. Green (**Intimate Video**);
- (e) Mrs. Burns shared the Intimate Video with the Lawyers;
- (f) the Lawyers disseminated the Intimate Video to Mr. Burns' lawyer and others involved in Court proceedings, submitting the Intimate Video to the Court for use in the upcoming EICC;
- (g) on July 15, 2022, Mr. Burns informed Ms. Green that Mrs. Burns had installed recording devices to monitor his activities in his bedroom;
- (h) Mr. Burns showed Mrs. Green the Intimate Video, and the initial frames depicted Ms. Green's exposed buttocks;
- (i) Ms. Green immediately requested that the Intimate Video be stopped; and
- (j) the resulting emotional impact caused both Mr. Burns and Ms. Green to suffer emotional distress, straining their relationship.

[16] The relief sought in the Actions are almost identical, save for the differing amounts claimed in damages.

[17] On November 6, 2024, the Applications Judge dismissed the Strike Applications.

[18] The Lawyers filed their Statements of Defence on November 15, 2024.

[19] On November 19, 2024, the Lawyers filed Notices of Appeal of the AJ Decision. The appeals were consolidated by an Order of this Court pronounced on December 17, 2024.

B. AJ Decision

[20] The Applications Judge issued her oral decision following the submissions of the parties on November 6, 2024. She began by acknowledging that the Strike Applications were brought under Rule 3.68(2)(b), and as such, the parties could not submit or rely on any evidence. The Applications Judge agreed with counsel for the Lawyers that certain transcripts that were filed could not be relied on for the purpose of the application.

[21] The Applications Judge stated that the Court had to look at the pleadings in the Statements of Claim and assume that they were true in order to decide whether it was plain and obvious that the Actions would fail. She then went on to consider the nature of the claims, noting that the claims alleged several torts, including breach of privacy and public disclosure of private facts.

[22] Further, she noted that the Actions arose out of the decision to play the surreptitiously recorded video at the EICC and that the Respondents plead that the video was shown to counsel, the Court, and others. She also noted that it was undisputed that an EICC is a without prejudice proceeding. The Applications Judge accepted the pleadings as true, finding that the elements of public disclosure of private facts, intentional infliction of mental distress, and the other privacy related torts were sufficiently plead.

[23] She then went on to consider the Lawyers' position. She understood the Lawyers to be advancing two defences, either of which was determinative of the claims, as they would make it plain and obvious that the actions would fail if the defences were accepted. The Applications Judge understood the Lawyers' defences as follows: first, counsel for one party does not owe a duty of care to the opposing party; and second, absolute privilege applied to conduct or statements made in Court.

[24] The Respondents argued that counsel should not be shielded from liability by saying that their potentially tortious conduct was committed in furtherance of their client's interests.

[25] The Applications Judge focused on the issue of absolute privilege. Relying on *Tuharsky v O'Chiese First Nation*, 2024 ABKB 511 [*Tuharsky*], the Applications Judge noted that the *Tuharsky* decision carved out a narrow exception to absolute privilege. Specifically, the judge in *Tuharsky* questioned whether absolute privilege extended to irrelevant or gratuitous statements, especially when those statements were made about a non-party.

[26] The Applications Judge quoted the following passage from *Tuharsky* at para 34:

... In the end, whether an occasion is privileged depends upon a contextual analysis of whether the statements were made during, incidental to, and in the processing and furtherance of the proceedings. It may also require a deeper analysis of the proceedings itself, particularly where the statements are made in a quasi-judicial context.

[27] In following *Tuharsky*, the Applications Judge concluded that in certain circumstances a Court may need to make further inquiries into the occasion, which requires further evidence, making it not plain and obvious that the claims will fail. Although she acknowledged that there

were certain aspects of the EICC that would never be evidence before the Court due to its without prejudice nature, the Applications Judge was of the view that there was other context related to the EICC that could be relevant to the Actions. Ultimately, she found as follows:

...I'm not satisfied that it's plain and obvious the claims will fail on the face of the pleadings based on the defence's – largely as a result of the *Tuharsky* decision. So I'm going to dismiss the applications ... in both actions.

[28] The Applications Judge did not make any finding on the duty of care argument, given her findings on the limits to absolute privilege. The Applications Judge adjourned the alternative relief for summary judgment.

III. Standard of Review

[29] Under Rule 6.14(3) of the *Rules*, an appeal of an Applications Judge's decision may be based on the record of proceedings and on additional evidence. The appeal is a hearing *de novo*: *Kadco Construction Inc v Sterling Bridge Mortgage Corp*, 2021 ABCA 52 at para 11. The standard of review on all issues is correctness: *Bahcheli v Yorkton Securities Inc*, 2012 ABCA 106 at para 30.

[30] The only material or evidence relied on in the Strike Applications before the Applications Judge were the pleadings filed in the Actions.

[31] In this case, the record of proceedings before me contains:

1. the pleadings filed in the Actions;
2. the Applications to Strike the Actions, filed August 21, 2024;
3. the Transcript of the November 6, 2024 hearing before and reasons of the Applications; and
4. the Order of the Applications Judge, filed November 25, 2024.

[32] The Intimate Video was not in evidence before the Applications Judge, nor was it part of the record before me.

[33] Written and oral submissions were also provided by counsel for the parties on appeal. In their written submissions, the Respondents relied heavily on *Tuharsky*. The Court of Appeal's decision on appeal from *Tuharsky* had not yet been released at the time the parties provided their written submissions.

IV. Law

[34] Rule 3.68 sets out the Court's authority to strike pleadings:

3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:

- (a) that all or any part of a claim or defence be struck out;

[...]

- (2) The conditions for the order are one or more of the following:

(b) a commencement document or pleading discloses no reasonable claim or defence to a claim;

[...]

(d) a commencement document or pleading constitutes an abuse of process;

[...]

(3) No evidence may be submitted on an application made on the basis of the condition set out in subrule (2)(b).

[35] A Statement of Claim will be struck under Rule 3.68(2)(b) “if it is ‘plain and obvious that it does not disclose a valid claim’”: *Tuharsky v O’Chiese First Nation*, 2025 ABCA 267 at para 16 [*Tuharsky ABCA*], rev’g *Tuharsky*.

[36] Further, the threshold to strike pleadings for disclosing no reasonable claim is high: *Carbone v Burnett*, 2019 ABQB 98 at para 10, aff’d 2020 ABCA 328. No evidence is permitted under Rule 3.68(3). A Court must treat the allegations in the Statement of Claim as true and assess the legal sufficiency of the claim: *Tuharsky ABCA* at para 16.

V. Position of the Parties

[37] The Lawyers submit that the Actions must be struck as they are bound to fail. The Lawyers argue that the Respondents commenced the Actions in breach of Rule 4.20 governing judicial dispute resolution conferences, as the impugned evidence was disclosed and used solely for the EICC, which is a without prejudice Court proceeding. Further, they argue that absolute privilege applies and that there is no exception to absolute privilege in this case because the Intimate Video was shown in an EICC in advancement of a family law action.

[38] They argue that they cannot be civilly liable to the Respondents for their alleged conduct because they do not have a broad duty to the Respondents, as the Respondents are adverse in interest. Finally, the Lawyers argue that the Respondents’ submission to the Applications Judge that the Intimate Video has been released to the world at large is a red herring due to Rule 4.20 and the implied undertaking rule.

[39] The Respondents submit that the Applications Judge was correct to dismiss the Strike Applications, as the Actions disclose reasonable causes of actions and are not frivolous or an abuse of process. They argue that they were referred to EICC to address parenting issues; thus, the dissemination of the Intimate Video for the purpose of the EICC was not material, relevant, or necessary to advancing the family law action. Further, the Respondents submit that absolute privilege does not apply, as the conduct of the Lawyers falls outside the protection afforded by absolute privilege.

[40] On the issue of lawyers’ duties and the adversarial model, the Respondents submit that lawyers’ duties also include the protection of third-party rights when appropriate. They argue that the lawyers breached duties of privacy and confidentiality by disseminating the Intimate Video.

VI. Analysis

A. Rule 4.20 and Early Intervention Case Conferences

[41] Rule 4.20 describes the purpose of judicial dispute resolution and the privilege that attaches to submissions and materials used in the process:

4.20(1) A judicial dispute resolution process is a confidential process intended to facilitate the resolution of a dispute.

(2) Unless the parties otherwise agree in writing, statements made or documents generated for or in the judicial dispute resolution process with a view to resolving the dispute

(a) are privileged and are made or generated without prejudice,

(b) must be treated by the parties and participants in the process as confidential and may only be used for the purpose of that dispute resolution process, and

(c) may not be referred to, presented as evidence or relied on, and are not admissible in a subsequent application or proceeding in the same action or in any other action, or in proceedings of a judicial or quasi-judicial nature.

(3) Subrule (2) does not apply to the documents referred to in rule 4.19.

(4) Subrule (2) does not prevent the use of statements made or documents generated for or in the judicial dispute resolution process to prove the fact that a settlement was reached or the terms of a settlement.

[42] Rule 4.19 addresses documents resulting from a judicial dispute resolution process:

4.19 The only documents, if any, that may result from a judicial dispute resolution process are

(a) an agreement prepared by the parties, and any other document necessary to implement the agreement,

(b) a consent order or consent judgment resulting from the process, and

(c) a transcript of proceedings made in open court at the time of the judicial dispute resolution process which records the outcome of the judicial dispute resolution process.

[43] At paragraphs 8-9 of the Court of Queen's Bench of Alberta, "Notice to the Profession and Public: Mandatory Early Intervention Case Conference Pilot Project for Family Matters" (31 October 2016), online: < https://albertacourts.ca/docs/default-source/qb/npp/notice-to-the-profession---mandatory-early-intervention-case-conference-pilot-project---2016-08.pdf?sfvrsn=22dac80_5 > [NP#2016-08] (applicable at the relevant time), the Court set out rules for the EICC pilot project:

8. As disclosure is an integral part of the process, it will be necessary for the applicable disclosure to have been exchanged by the parties prior to the

completion and exchange of the EICC Summaries in order to enable meaningful settlement discussions at the EICC.

9. EICC's will take place in a courtroom and the parties must be present. The EICC will have two components to it – a procedural component, for which an Order may be made - and a settlement discussions component, which will be without prejudice. The EICC will be held “in camera”. A report will be completed by the EICC Justice and provided to the parties following the EICC. In addition, Counsel will be asked to prepare any procedural order arising from the EICC. Where neither party has counsel, use will be made of the Court Generated Orders Clerks to prepare any procedural order arising from the EICC. [emphasis added]

[44] In *SC v JC*, 2022 ABQB 318 [SC] at paragraph 12, Justice Feasby likened the EICC process to the judicial dispute resolution process in terms of the privilege that attaches to those proceedings. Justice Feasby considered this consistent with the “principle that settlement discussions, including mediations, whether facilitated by a judge or otherwise, are privileged”: *SC* at para 12.

[45] Further, he recognized that an exception to settlement privilege is that “privileged communications may be disclosed to prove the existence or scope of a settlement, including a settlement arising from mediation”: *SC* at para 13. Ultimately, in that case, the parties included the agreement they had reached in EICC in the materials in the application before Justice Feasby.

[46] Justice Feasby had to determine whether settlement privilege attached to the materials showing the parties' agreement. He concluded that the exception to settlement privilege applied, and that even if he was incorrect, the parties waived that privilege by intentionally disclosing the agreement: *SC* at para 15.

[47] The Lawyers rely on *SC* for the proposition that the EICC process is entirely privileged. Further, they argue that the Intimate Video is evidence used for the purpose of the EICC on a without prejudice basis and that the Intimate Video remains confidential and inadmissible in the Actions. On that basis, the Lawyers say a review of the Intimate Video or a review of what occurred at the EICC to ensure that absolute privilege applies cannot occur, contrary to the Applications Judge's conclusion.

[48] The Respondents submit that in the Family Docket Court appearance in which they were referred to the EICC, the Lawyers did not make any submissions that they were going to refer to the Intimate Video. They argue that the dissemination of the Intimate Video for the purpose of the EICC was not material, relevant, or necessary to the issues in the family law proceedings

[49] As outlined above, Rule 4.20 governs confidentiality and use of information in a judicial dispute resolution process. Rule 4.18 provides that “[a]n arrangement for a judicial resolution process may be made only with the agreement of the participating parties...” In contrast, before the Court's move to the Family Focused Protocol in January 2026, a Court could refer parties to a mandatory EICC: NP#2016-08.

[50] Thus, it cannot be said that Rule 4.20 necessarily applies to EICCs, as they are different processes governed by different provisions under the *Rules*. An EICC is a form of conference, which the Court may, at any time, direct the parties and any other person to attend and does not require the parties' consent: see Rules 4.10–4.11. Generally, parties engage in judicial dispute resolution processes by consent.

[51] With respect to *SC*, in that case, Justice Feasby was dealing with the issue of whether an agreement reached in an EICC was privileged. That is not the situation in this case. There is no settlement agreement before the Court.

[52] As the Notice to Profession makes clear, settlement discussions in EICCs are without prejudice, and EICCs are conducted *in camera*. It cannot be said from this that all communications or materials in an EICC are privileged or that an exception may not apply to defeat settlement privilege.

[53] I need not decide those issues in this case. To dispose of this ground of appeal, it is enough to say that the commencement of the Actions does not breach Rule 4.20, as Rule 4.20 does not apply.

[54] However, the fact that the events giving rise to the Actions occurred in an EICC, an *in camera* judicial proceeding, is critical to the issue of absolute privilege.

B. Absolute Privilege

[55] The general rule is that “[a]bsolute privilege attaches to the occasion on which a statement is made, not the words used to make it”: *Tuharsky ABCA* at para 21. The purpose of absolute privilege is to permit those involved in the administration of justice to speak candidly, free from the fear of being sued, by providing immunity for statements made in Court: *Tuharsky ABCA* at para 22.

[56] Further, “[a] statement need not be ‘during’ and ‘incidental to’ and ‘in the processing and furtherance of’ a proceeding for absolute privilege to apply”: *Tuharsky ABCA* at para 25 [emphasis in original]. Absolute privilege attaches to communications made within a “step” of a judicial or quasi-judicial proceeding that has been recognized as affording absolute privilege: *Tuharsky ABCA* at para 26.

[57] The central focus of the analysis is the occasion, not the content of or intention underlying a statement: *Tuharsky ABCA* at para 28. Where it is not obvious that a communication was made within a “step” recognized as affording absolute privilege, “a contextual analysis may be required to assess whether the communication was made incidental to or in furtherance of the underlying proceeding”: *Tuharsky ABCA* at para 29.

[58] In some cases, the determination of whether privilege attaches to a particular occasion may be highly contextual: *Tuharsky ABCA* at para 32. It may be appropriate to conduct a close inquiry into how the occasion fits within the judicial or quasi-judicial process and its purpose in those cases: *Tuharsky ABCA* at para 32.

[59] With respect to statements about non-parties, no exception to absolute privilege exists with respect to statements made in filed Court pleadings or during oral submissions: *Tuharsky ABCA* at para 39.

[60] The immunity is not restricted to “defamatory statements or actions; ‘it attaches to anything said or done by anybody in the course of judicial proceedings whatever the nature of the claim made in respect of such behavior or statement’ ”: *Big Bear Hills Inc v Bennett Jones Alberta Limited Liability Partnership*, 2010 ABQB 764 at para 22, citing Raymond E. Brown, *The Law of Defamation in Canada*, Volume 2, Carswell, 1999 at 12.4.

[61] In this case, a finding that absolute privilege attaches to the dissemination of the videos effectively determines all other issues, as it would mean it is plain and obvious that the Actions

do not disclose a valid claim: *Tuharsky ABCA* at paras 16 and 40. To determine whether absolute privilege attaches, I must look to the occasion in which the impugned conduct occurred: *Tuharsky ABCA* at para 32.

[62] The Lawyers submit that the impugned conduct occurred in a protected occasion, as the pleadings state that the Intimate Video was disclosed for the purpose of an EICC, and the Respondents did not allege any other use of the Intimate Video. Further, they submit the EICC is a Court led process and part of the judicial proceedings. They argue that, as a result, absolute privilege applies to all causes of action asserted by the Respondent, and no exceptions to absolute privilege apply in this case.

[63] The Respondents submit that absolute privilege does not apply to the dissemination of the Intimate Video because the Lawyers have failed to establish the Intimate Video's relevance to the family law proceedings. They argue that absolute privilege is limited to circumstances where the communication or material is relevant to a proceeding and is made in good faith during that proceeding.

[64] The Respondents say that the Intimate Video was released to the Court, counsel for the Respondents, and counsel for the children. They argue that absolute privilege is not a defence when the documents are shared with individuals who have no direct interest in the litigation. The Respondents assert that this principle is applicable in this case because (i) the Lawyers disseminated the Intimate Video to "the third party"; (ii) the Lawyers were aware the Intimate Video was illegally obtained; (iii) the Intimate Video was not relevant to the family proceedings; and (iv) Ms. Green was not party to the family proceedings.

[65] As stated above, no evidence is permitted in application to strike under 3.68(2)(b), and I must treat the allegations contained in the Statements of Claim as true: *Tuharsky ABCA* at para 16; Rule 3.68(3). Ms. Green's Amended Amended Amended Statement of Claim provides that "the Defendants submitted hidden camera videos from the night of the December 30, 2021, to the Court for use in the upcoming Early Intervention Case Conference..." [emphasis added].

[66] Mr. Burns' Amended Amended Amended Amended Statement of Claim provides that "Ms. Burns shared the recorded videos with Mr. Osuji and Ms. Ovaici", and "Mr. Osuji and Ms. Ovaici knowingly disseminated the recorded videos to Mr. Burns's lawyer and others involved in court proceedings related to the divorce..." [emphasis added]. Both Respondents state that the Intimate Video was sent to the Lawyers, the Court, counsel for the children, and Mr. Burns' counsel.

[67] The Intimate Video was shared with the above-named parties for use in the upcoming EICC, which Mr. and Ms. Burns were directed to as part of their divorce proceedings. The pleadings do not identify anyone that was not a party to the EICC or the family law proceeding. This is not a situation like *Rizvi v Syed*, 2016 ABQB 400, where the defendants' potentially defamatory statements were alleged to have been shared with members of an association. The pleadings do not state that the video was shared with anyone that is not involved with the divorce proceedings, except by Mr. Burns, who showed the Intimate Video to Ms. Green.

[68] EICCs were a Court-mandated process that a Justice would direct parties to in order to facilitate settlement discussions or to determine procedural next steps. The goals of EICCs included reducing interlocutory applications, reducing the number of files that require case

management, and ensuring that matters that must go to trial get to trial within a reasonable period of time: NP#2016-08 at para 2.

[69] There is no dispute that the EICC was a judicial or quasi-judicial proceeding. As such, the Intimate Video was shared within a step recognized as affording privilege: *Tuharsky ABCA* at para 26. It does not matter what the content or motive was behind sharing the Intimate Video: *Tuharsky ABCA* at para 28. Contrary to the Respondents' assertions, there is no need to look further to determine whether the Intimate Video was irrelevant or gratuitous. Absolute privilege attaches to the occasion. The analysis must end here: *Tuharsky ABCA* at para 27.

[70] The Respondents rely on *Liboiron v Majola*, 2007 ABCA 18 for the proposition that statements made during judicial proceedings must be necessary to the proceeding for absolute privilege to apply as a defence. In *Liboiron*, the defendant appended a letter to his speeding ticket payment, which was submitted to Court. The defendant made various allegations about the treatment he received from police in the letter. The Court found that the letter was not required, did not directly or indirectly fit within the process prescribed under the legislation for the payment of speeding tickets, did not further proceedings, nor was it an essential step to the process: *Liboiron* at para 16.

[71] This case is distinguishable from *Liboiron*. The Intimate Video was shared for the purpose of an EICC, which was an *in camera*, without prejudice process. Disclosure was recognized as an important part of the EICC process in order to enable meaningful settlement discussions: NP#2016-08 at para 8. Further, parties were encouraged to exchange applicable disclosure: NP#2016-08 at para 8.

[72] The disclosure of the Intimate Video, however ill-judged and gratuitous it may have been, was within the process for EICCs set out by the Court, and “it makes no difference that the words may be totally and knowingly false and spoken *mala fide* and with actual malice, without justification or excuse, or that they may be irrelevant to all the issues in the judicial proceeding”: Raymond E Brown, Erika Chamberlain & Karen Eltis, *Law of Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, 2nd ed (Toronto: Thomson Reuters Canada, 2021) at §12:17.

[73] In her reasons, the Applications Judge noted that this case was unlike most of the absolute privilege cases because most other cases provided by the parties involved defamation claims. Here the Respondents allege three main causes of action: breach of confidence; intentional infliction of mental distress; and public disclosure of private facts.

[74] Crucially, the Respondents both seek punitive, aggravated, and exemplary damages for reputational damage which, in effect, would be one of the same remedies they would seek for defamation. This issue is addressed in Brown, Chamberlain & Eltis at §12:17:

The immunity is not confined to defamatory statements or actions; “it attaches to anything said or done by anybody in the course of judicial proceedings whatever the nature of the claim made in respect of such behavior or statement”, at least where the action sounds in defamation although framed under some other name. [emphasis added; citations omitted]

[75] In *Sauvé v Merovitz*, 2006 CanLII 35986 (ONSC), aff'd 2008 ONCA 70, leave to appeal to SCC ref'd 32564, Justice Smith concluded that a solicitor's filing and serving of an affidavit, factum, and courtroom statements did not breach the plaintiff's right to privacy under the

Charter of Rights and Freedoms, as the materials and submissions were part of a judicial proceeding. Justice Smith also did not accept the plaintiff's arguments that the solicitor engaged in criminal conduct or that the solicitor conspired with third parties to injure the plaintiff.

[76] At paragraphs 39-46 of *Sauvé*, Justice Smith considered cases where absolute privilege barred claims other than defamation:

[39] In the case of *Marrinan v. Vibart*, [1963] Q.B. 528, [1962] 3 All E.R. 380, the Court stated that it did not draw a distinction between actions framed in libel and slander or actions framed in defamation or conspiracy to defame. Sellers J.J. made the following statement at p. 535:

It has been sought in this case to draw a difference between the action of libel and slander, the action of defamation, and that which is set up in this case, one of conspiracy. I can see no difference in the principles of the matter at all. Whatever form of action is sought to be derived from what was said or done in the course of judicial proceedings must suffer the same fate of being barred by the rule which protects witnesses in their evidence before the Court and in the preparation of the evidence which is to be so given.

[...]

[40] In *Dooley, supra*, the Court also stated:

In my view, the same principles apply to the case at bar. It matters not whether the action is framed in libel or slander, in defamation, intentional infliction of mental suffering, intentional interference with economic interest, or abuse of process. To the extent that any action is based upon statements in a pleading, the claim will disclose no reasonable cause of action. Otherwise expressed, the action has no reasonable chance of success in law, and to permit it to continue would constitute an abuse of the process of the Court.

[...]

[46] *Sauvé* argues that the claim of absolute privilege of Mr. Merovitz should be defeated because his statements are alleged to have been made criminally through conspiracy, recklessness, dishonesty, ill will, bad faith, malice and for an improper purpose or motive. I find that based on the decisions previously referred to, it does not matter if the action is framed in libel slander, intentional infliction of mental suffering or in conspiracy: *Marrinan v. Vibart, supra* and *Dooley, supra...*

[77] In *Elliot v Insurance Crime Prevention Bureau*, 2005 NSCA 115 at paragraph 114, Justice Cromwell (as he then was) states the following with respect to the immunity granted by absolute privilege:

The immunity applies to words said or conduct performed on a protected occasion, the protected occasion being a judicial or a quasi-judicial proceeding: *Brown* at ¶ 12.4(2). Thus, publishing defamatory words is not actionable if done

in the course of judicial or quasi-judicial proceedings. It is critical to understand that it is not the nature of the conduct or the words which is the focus of the immunity, but the occasion on which the words are said or the conduct is performed. Saying exactly the same words will be either actionable or not depending on the occasion on which they are said. This is true whether the immunity is advanced as a defence in a defamation case or in other types of actions. The immunity applies only to a protected occasion. [emphasis added]

[78] In *Cinapri v Guettler*, 1997 CanLII 12432 (ONSC) at paragraphs 17-19, Justice Howden set out the rationale for the near-complete bar absolute privilege creates:

If this were not so, legal action would be grafted on legal action in an endless siege of litigation whereby each step in an action could be seen by someone as an attack or intrusion upon his or her reputation or economic interests. It has been felt for centuries by courts that its inherent powers to deal with contempt as well as cost sanctions can serve to properly control the conduct of litigation.

[79] In *BC Teachers' Federation v Thorne*, 2010 BCSC 953 at paragraphs 347-50, Justice Baker reiterates the underlying rationale behind absolute privilege applying to claims other than defamation:

[347] That the immunity is not limited to claims in defamation is also well established.

[...]

[350] The immunity exists for public policy reasons, to ensure that all participants in the justice system are undeterred by fear of reprisal. It would defeat the public policy justification if the immunity was limited to actions for defamation.

[80] The Intimate Video was shared during, incidental to, and in the furtherance of judicial proceedings. Although Ms. Green was not a party to the divorce proceedings, there is no exception for non-parties if absolute privilege attaches to the occasion: *Tuharsky ABCA* at para 39. Thus, since I have found that absolute privilege attaches, it is plain and obvious that the Actions disclose no valid claim.

[81] However, that does not mean litigants may act with impunity in judicial proceedings. In oral submissions, counsel for the Respondents argued that it would be absurd for absolute privilege to extend to protect all conduct in a courtroom. As an example, counsel for the Respondents argued that it would be inappropriate for a lawyer to assault a participant in a judicial proceeding then rely on absolute privilege to avoid liability.

[82] That, however, is not the case before me. The Actions that are the subject of this appeal raise civil causes of action, and are not criminal proceedings. There are means and processes for dealing with criminal acts inside or outside a courtroom. In the Actions that are the subject of this appeal, the underlying policy rationale for absolute privilege must be remembered. The immunity provided by absolute privilege “allows those involved in the administration of justice, including litigants, witnesses, advocates and judges, to speak freely without fear of being sued. It protects the vigorous and undistracted advocacy that is essential to our adversarial system”: *Tuharsky ABCA* at para 22.

[83] I recognize that this provides little comfort to Mr. Burns and Ms. Green, who undoubtedly have experienced a great deal of distress as a consequence of the Lawyers' conduct. It is difficult to conceive of a circumstance in which the playing of the Intimate Video could be conceived as anything other than unseemly and ill-considered, regardless of whether it was done in the advancement of a client's case. Counsel must exercise good judgment when determining what to put as evidence before a Court and how they do that.

[84] As the Lawyers acknowledged, their conduct is governed by the Law Society. There are procedures through which the Lawyers may be held accountable for their decision to rely on the Intimate Video as evidence in the EICC; however, no civil action lies against them for such conduct in this case, as absolute privilege attaches to the occasion.

C. Lawyer's Legal Duties

[85] In order to ensure the efficacy of the adversarial system, "the duties that a lawyer owes to the opposing party are viewed very restrictively": *ESA Holdings Ltd v Shea Nerland Calnan LLP*, 2007 ABQB 78 at para 15, citing *Martel v Andrew*, 2005 ABCA 63. Ultimately, "[a]ny duty owed is to the Court and to the governing body of the legal profession and not to the Plaintiff": *ESA Holdings* at para 17.

[86] Although there are some situations where a lawyer may be liable to a non-client, as has been found in some negligence claims, generally speaking, lawyers do not owe a duty to a party adverse in interest to their client: see *Hanson v Hanson*, 2009 ABCA 222 at para 15; *Rana v Baker*, 2022 ABCA 180 at para 6.

[87] The Lawyers submit that all the allegations arise from the advancement of their client's interests in family law proceedings. They argue that under the adversarial model they only owe duties to their client, the Law Society, and the Court. Further, the duty of loyalty to clients has no bounds, except to be honest and respectful. Thus, the Lawyers argue that the only party a lawyer owes an actionable duty to is their client.

[88] Additionally, the Lawyers submit that the numerous amendments in these Actions are a disingenuous attempt to prolong these Actions; however, none of the allegations added by amendment are sufficient to defeat the Lawyers' defences. They argue that all three causes of action create a conflict for the Lawyers, as the Lawyers' disclosure of the Intimate Video was done to advance their client's interests.

[89] Finally, the Lawyers note that the conduct of lawyers is governed by the Law Society, not by parties adverse at interest.

[90] The Respondents submit that although lawyers owe a duty of loyalty to their clients, this does not give them an unqualified right to act in a manner that harms non-parties or breaches established legal principles. They argue that the Lawyers breached duties of privacy and confidentiality by disseminating the Intimate Video. Further, they assert that it is unreasonable to suggest that such conduct can be shielded from liability on the basis that the Lawyers were acting in their client's best interests.

[91] Finally, the Respondents submit that the amendments were proper, as the pleadings were open and all amendments were made before Statements of Defence were entered.

[92] I find that the Lawyers do not owe a duty to the Respondents. The Respondents did not provide any legislation or jurisprudence that imposes a broad duty of privacy or confidentiality

on lawyers in relation to opposing parties whose interests are adverse to that lawyer's own client. Further, as stated above, absolute privilege is a complete defence to the Respondents' claims.

VII. Conclusion

[93] As a result of the foregoing, the appeal is allowed and the Actions are struck in their entirety pursuant to Rules 3.68(1)(a) and 3.68(2)(b). The Actions disclose no reasonable claim, as absolute privilege applies in this case.

[94] Should the parties not be able to agree upon costs, they may contact my office to make arrangements to argue costs.

Heard on the 3rd day of September, 2025.

Dated at the City of Calgary, Alberta this 17th day of February, 2026.

A.L. Froese
J.C.K.B.A.

Appearances:

A. Sadat
for the Respondents/Plaintiffs, Robert Brody Burns, Nicole Lynn Green

C. Sandquist
for the Defendant, Leanne Burns

L. Feehan
for the Appellants/Defendants, Charles Osuji, Amanda Ovaici, Charles Osuji Professional Corporation operating as Osuji & Smith Lawyers