

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

SLESS RILEY

Appellant

v.

DEWAINE RILEY AND VIRGINIA RILEY

Respondents

DOCKET NUMBER **WD72317**

DATE: April 26, 2011

Appeal From:

Circuit Court of Jackson County, MO
The Honorable Robert Lynn Trout, Judge

Appellate Judges:

Division One
Mark D. Pfeiffer, P.J., Thomas H. Newton, and Alok Ahuja, JJ.

Attorneys:

Daniel H. Miller, Columbia, MO

Counsel for Appellant

Attorneys:

Thomas R. Bellmann, Independence, MO

Counsel for Respondents

**MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

SLESS RILEY, Appellant, v. DEWAINA RILEY
AND VIRGINIA RILEY, Respondents

WD72317

Jackson County

Before Division One Judges: Pfeiffer, P.J., Newton, and Ahuja, JJ.

Sless filed a petition for an order of protection against Dewaine, her former husband. Thereafter, Dewaine and his mother, Virginia, filed petitions for orders of protection against Sless. After the hearing, Sless filed a petition for damages against Dewaine and Virginia based on their alleged defamatory statements made during the hearing. She alleged that the statements were made maliciously with the sole purpose to place her in a bad light. Dewaine and Virginia filed a motion to dismiss the petition for failure to state a claim upon which relief could be granted. They argued, *inter alia*, that the alleged defamatory statements were absolutely privileged because they were uttered in a judicial proceeding and Sless's damages were not adequately pleaded. The trial court dismissed the petition with prejudice. Sless appeals.

REVERSED AND REMANDED.

Division One Holds:

A motion to dismiss for failure to state a claim upon which relief may be granted, only tests the adequacy of a petition. A petition is sufficient if it alleges facts constituting the elements of the cause of action. Because Sless alleged facts supporting that her reputation was damaged by the defamation, the damage element of defamation was sufficiently pleaded. Proof of that allegation will require more than a conclusory statement. However, whether a party will satisfy her burden of proof is not determined on a motion to dismiss. The trial court erred to the extent it dismissed the petition on this basis.

The judicial proceeding privilege, which is an affirmative defense, exempts a witness from liability for defamatory statements pertinent to the underlying judicial proceeding, even if the statements were maliciously made. If a plaintiff's pleading establishes the elements of the affirmative defense, the motion to dismiss may properly be granted.

The judicial proceeding privilege is absolute but pertinence must be shown before the privilege will apply. Here, the allegations within the petition established the statements were made during a judicial proceeding, but did not establish their pertinence to the underlying proceeding. Thus, the petition did not establish an absolute privilege. The trial court also erred in dismissing on this basis. Therefore, we reverse and remand for further proceedings consistent with this opinion.

Opinion by Thomas H. Newton, Judge

April 26, 2011

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