COURT OF APPEALS
DECISION
DATED AND FILED

August 28, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP470-FT **Cir. Ct. No. 2006CV5**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

MICHAEL J. RILEY,

PLAINTIFF-APPELLANT,

V.

JEFF SCHULTZ AND LOUISIANA-PACIFIC CORPORATION,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Sawyer County: NORMAN L. YACKEL, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Michael Riley appeals a summary judgment in favor of his former employer, Louisiana-Pacific Corporation, and Jeff Schultz,

Louisiana-Pacific's plant manager.[1] Riley argues the court erred in granting summary judgment on his defamation claim because a factual dispute exists over whether Schultz abused his common interest privilege. We disagree and affirm the judgment.

BACKGROUND

¶2 Louisiana-Pacific operates a plant in Hayward, Wisconsin, that manufactures a product commonly known as waferboard or chipboard. The company uses dry ice as a cleaning agent for some of the plant machinery.

¶3 In February 2004, a Louisiana-Pacific employee told management that some of her co-workers on one of the night shifts were making "dry ice bombs."[2] The employee said she had seen a co-worker barely outrun a gallon dry ice bomb thrown at him. After the bomb went off, Riley had emerged from around a corner laughing. The employee said a number of other bombs had gone off during the shift and named several people, including Riley, who she said had been involved.

¶4 Riley and other employees were put on leave while Louisiana-Pacific investigated the allegations. Riley denied having anything to do with the bombing. However, Louisiana-Pacific concluded dry ice bombs had in fact been

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] A dry ice bomb is made by combining water and dry ice in a closed plastic container. A chemical reaction then causes the bottle to explode. The employee who reported the bombings said the sound of the bomb exploding was loud enough to scare employees and be "hard on the ears," and when a bomb exploded it sent pieces of plastic "flying everywhere."

made and a number of employees, including Riley, had been involved. Louisiana-Pacific terminated five employees, including Riley, as a result of the incident.

¶5 Shortly after the firings, Schultz, the plant manager, held five meetings, one for each of the four production shifts and one for the office staff. At the meetings, Schultz explained the seriousness of the violations and told employees that the firings were meant to send a clear message that violations of that sort would not be tolerated. He also told employees that had anyone been injured, the plant could have been involved in a criminal investigation. Riley, relying on accounts by employees present during the meetings, contends Schultz also said the terminated employees had engaged in "criminal" and "terroristic" activities.[3]

¶6 Riley sued Schultz and Louisiana-Pacific[4] for defamation, alleging Schultz had falsely labeled him a criminal and a terrorist. Louisiana-Pacific moved for summary judgment on four independent grounds, including the common interest privilege. The court granted Louisiana-Pacific's motion for summary judgment but did not explain whether the motion was granted based on privilege or one of Louisiana-Pacific's alternative arguments.

[3] Schultz denies using any form of the word "terrorist" or labeling the employees criminals.

[4] In the remainder of this opinion, we refer to the defendants collectively as Louisiana-Pacific.

DISCUSSION

¶7 We review summary judgments without deference to the circuit court, using the same methodology. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2); ***Green Spring Farms***, 136 Wis. 2d at 315.

¶8 The parties agree Schultz's statements were subject to a conditional common interest privilege because the statements served both Louisiana-Pacific's interest and its employees' interest in keeping the plant safe. *See* ***Zinda v. Louisiana Pacific Corp.***, 149 Wis. 2d 913, 924, 440 N.W.2d 548 (1989). They disagree over whether Schultz's statements constituted an abuse of that privilege.[5]

¶9 As relevant here, a party abuses its common interest privilege—and therefore forfeits it—when (1) it makes a statement with reckless disregard for its truth or falsity; or (2) part or all of its statement is "not reasonably believed to be necessary for the accomplishment of the purpose of the particular privilege." ***Olson v. 3M Co.***, 188 Wis. 2d 25, 38, 523 N.W.2d 578 (Ct. App. 1994). A statement is made with reckless disregard for truth or falsity when the party has "a high degree of awareness of probable falsity or serious doubt as to the truth of the statement." ***Id.*** at 39.

[5] Louisiana-Pacific also argues it is entitled to summary judgment on three other independent grounds. Because Louisiana-Pacific is entitled to summary judgment based on its conditional privilege, we need not address its alternative arguments. *See* ***Patrick Fur Farm, Inc. v. United Vaccines, Inc.***, 2005 WI App 190, ¶8 n.1, 286 Wis. 2d 774, 703 N.W.2d 707 (court of appeals decides cases on the narrowest possible grounds).

¶10 If the common interest privilege applies as an initial matter, the burden of proving abuse of the privilege shifts to the plaintiff. ***Id.*** at 38. At the summary judgment stage, this means that once the burden shifts the plaintiff must identify facts or reasonable inferences from which a jury could conclude the defendant abused the privilege. ***Id.*** at 38, 46. If the plaintiff fails to do so, the defendant is entitled to summary judgment. ***Id.*** at 46-47.

¶11 Riley argues Louisiana-Pacific abused its privilege in three ways. First, he argues Schultz acted with reckless disregard for the truth when he indicated Riley had been involved in the dry ice bombing activity despite his denials.

¶12 This argument is contrary to ***Olson***. ***Olson*** also involved alleged defamation by an employer dealing with workplace misconduct—in that case, sexual harassment. ***Id.*** at 37. The court concluded 3M's statements implicating the plaintiffs were not recklessly made, even though the plaintiffs had denied engaging in inappropriate conduct:

> Faced with a large amount of information from numerous employees, much of it conflicting, 3M had to make credibility determinations to decide whether its harassment policy was violated. 3M retains its conditional privilege even if it disbelieved [plaintiffs], rejected their definition of harassment, and did not speak to everyone who might have had negative things to say about [the victim.]

Id. at 42-43. Like 3M, Louisiana-Pacific was not required to accept Riley's denial as true; instead, it was entitled to find other witnesses' testimony more credible. It did not abuse its privilege when it did so.[6]

¶13 Second, Riley argues Schultz acted with reckless disregard for the truth when he called Riley's behavior "criminal" and "terroristic." However, Riley does not develop any argument refuting Louisiana-Pacific's position that his use of a dry ice bomb was a violation of WIS. STAT. § 941.31(2)(b) (prohibiting use of improvised explosive device). Riley also does not develop any argument explaining why Schultz should have believed Riley's activities were legal. One need not be an attorney to know that throwing a bottle about to explode at someone is probably a violation of some criminal law.[7] Riley does not attempt to convince us otherwise.

¶14 As to Schultz's comment that the dry ice bombing was "terroristic," one definition of "terrorize" is simply to "fill with terror or anxiety." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2361 (unabr. 1993). Louisiana-Pacific submitted uncontroverted testimony that between fifteen and twenty ice bombs went off over the course of the night, including one in the women's bathroom, and

[6] Riley makes much of a statement by Schultz at Riley's unemployment compensation hearing. At the hearing, Schultz said Riley was terminated solely for failing to cooperate with the company investigation into the bombings. However, Schultz qualified his statement later in the same line of questioning, noting Riley had also been terminated in part for throwing a dry ice bomb. Regardless of the precise reason for Riley's termination, Schultz has consistently maintained that he believed Riley threw a dry ice bomb.

[7] Riley argues there is a dispute on this issue because Schultz never actually involved the police. However, the lack of a criminal investigation does not mean that a crime was not committed. To the extent Riley is arguing Schultz did not actually believe the ice bombing was criminal, his argument is negated by his own failure to explain how a reasonable person could believe Riley's actions were legal, by Schultz's choice to make the comment, and by Louisiana-Pacific's treatment of the bombing as a serious event.

that the loud explosions frightened a number of employees, who would duck for cover when they heard them. While the dry ice bombing may not have been a terrorist attack as that term is understood in the context of world events, Schultz could reasonably conclude the bombing caused terror or anxiety in his employees.

¶15 Finally, Riley contends Schultz abused the privilege because the purpose of the meetings was to explain the importance of plant safety, and "one can certainly make that point without accusing their employees of engaging in criminal and terroristic behavior." Riley asks the wrong question. The question is not whether Schultz could have made his point without singling out the terminated employees; instead, it is whether Schultz reasonably believed the language he used was necessary to ensure plant safety. *See* ***Olson***, 118 Wis. 2d at 38. Here, Schultz believed the dry ice bombing was a serious safety violation, as evidenced by his comments and Louisiana-Pacific's decision to terminate five employees. We see nothing unreasonable in that belief, or in his belief that sending a strong message was needed to discourage similar violations in the future.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.