

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 28, 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. 97-0313

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

JOHN A. P.,

PLAINTIFF-APPELLANT,

V.

**FAMILY SERVICE OF WAUKESHA AND MARGARET
SANBORN,**

DEFENDANTS-RESPONDENTS,

LEE ANNETTE N.,

DEFENDANT,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

**PROPOSED-INTERVENOR-
DEFENDANT.**

APPEAL from a judgment of the circuit court for Waukesha County:
PATRICK L. SNYDER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

BROWN, J. This appeal from the trial court's granting of summary judgment against John A.P. concerns the law of defamation and the common law defense of conditional privilege. At law, a defamatory statement is conditionally privileged if both the person making the statement and the person to whom it is made share a common professional interest in the subject matter. John claims that a letter sent by Margaret Sanborn, a social worker at Family Service of Waukesha (FSW), to Dr. Lisa Biemann, the mediator of a dispute between John and his daughter over visitation rights with his granddaughter, Lindsey P., contained false and defamatory information. At issue in this case is whether Sanborn and Biemann shared a common professional interest in Lindsey's welfare so that a conditional privilege attached. We conclude that because professional assistance was sought out by a family member for the sole purpose of helping Lindsey in the visitation dispute, both Sanborn and Biemann shared a common professional interest in Lindsey's welfare. Also, we conclude that the conditional privilege was not abused. We affirm.

The pertinent facts are as follows. In 1991, John brought an action against his daughter, Elizabeth Ann P., for the purpose of obtaining visitation rights with his granddaughter, Lindsey. The court ordered mediation of the visitation dispute between John and Elizabeth. A psychologist with Catholic Social Services, Biemann, was appointed by the court to mediate the dispute.

Elizabeth subsequently contacted her sister, Lee Annette N., for help in the visitation dispute. Apparently, both Elizabeth and Lee Annette believed

that John had previously sexually abused Lindsey and feared that if he were given visitation rights, he would have renewed access to Lindsey. Lee Annette thus sought professional assistance “for the purpose of seeking help for Elizabeth and Lindsey as Elizabeth asked for it.” She first contacted the Waukesha Women’s Center, which in turn referred her to Sanborn, a social worker at FSW. Lee Annette did not seek Sanborn’s professional help for her own personal therapy or benefit.

During her first visit, Lee Annette made it clear to Sanborn that she was seeking help for Elizabeth and Lindsey. Lee Annette gave Sanborn a historical account alleging that John had sexually abused both her and Elizabeth. She told Sanborn that she and Elizabeth suspected that John had also sexually abused Lindsey and were afraid he would do so again if given renewed access. After listening to Lee Annette’s concerns about Lindsey’s welfare, Sanborn asked if she should write a letter to Biemann. Sanborn believed that it would be in Lindsey’s best interests if Biemann, as the mediator of the dispute, was informed of Elizabeth’s and Lee Annette’s suspicions that John had sexually abused Lindsey so that she could pursue the matter further. Lee Annette agreed and Sanborn then wrote a letter to Biemann which stated in relevant part:

It is out of my deep concern for [Lindsey] that I am writing you

[Lee Annette] ... is a client of mine and is just now beginning to deal with the physical and emotional abuse which [John] subjected her to as a child. Lindsey’s mother, and sister to [Lee Annette], underwent sexual abuse at the hands of [John] from the time she was a young child. It is suspected, from some of the things Lindsey has told her mother that some of this abuse has already occurred with Lindsey.

After writing the letter, Sanborn had Lee Annette read the letter before sending it to Biemann. Sanborn also sent a copy of the letter to Lee Annette and Elizabeth,

as well as the court commissioner for Waukesha county where John originally filed the visitation action.

As a result of this letter John brought a lawsuit against Sanborn and FSW in December 1995. John claimed that the statements in Sanborn's letter that he had sexually abused Elizabeth were false and defamatory. Sanborn and FSW moved for summary judgment, contending, inter alia, that the statements, even if defamatory, were covered by a conditional privilege. The trial court found that because Sanborn and Biemann had a common interest in Lindsey's welfare, the statements in the letter were conditionally privileged. Further, the trial court found that Sanborn had no reason to dispute the validity of Lee Annette's information; therefore, the privilege was not abused. The trial court opined that it would have been "gross malfeasance" on Sanborn's part if she had not sent the information to Biemann. John appeals this decision.

We review determinations of summary judgment applying the methodology set forth in § 802.08, STATS., in the same manner as the trial court. *See Bantz v. Montgomery Estates, Inc.*, 163 Wis.2d 973, 977, 473 N.W.2d 506, 508 (Ct. App. 1991). Whether a privilege exists is a question of law which we review independent of the trial court's conclusions. *See Wildes v. Prime Mfg. Corp.*, 160 Wis.2d 443, 450, 465 N.W.2d 835, 838 (Ct. App. 1991).

Our supreme court has defined the common interest conditional privilege:

"An occasion makes a publication conditionally privileged if 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."

Zinda v. Louisiana Pac. Corp., 149 Wis.2d 913, 922, 440 N.W.2d 548, 552 (1989) (quoting RESTATEMENT (SECOND) OF TORTS § 596 (1977)). One form of common interest is a professional interest between two persons in a particular subject matter. *See id.* at 923, 440 N.W.2d at 552. The common interest privilege exists because one should be able to learn from others that information in which he or she has an interest in common. *See id.* at 922, 440 N.W.2d at 552. Without the common interest privilege, those with true information would be discouraged from communicating it out of fear that they would be held liable for defamation if their statements were proved untrue. *See* RESTATEMENT (SECOND) OF TORTS § 592A.

Obviously, Biemann, as the mediator of the visitation dispute, had a professional interest in Lindsey's welfare. John contends, however, that no conditional privilege exists because Sanborn did not share a common professional interest with Biemann. He claims that Sanborn's sole professional interest was in the welfare of Lee Annette, her client. Because neither Elizabeth nor Lindsey came to Sanborn for help, he concludes that Sanborn did not have a professional interest in their welfare.

We reject John's attempt to characterize Sanborn's interests as solely limited to Lee Annette's welfare because it does not accurately reflect the facts. This is a case in which one family member (Lee Annette) had turned to outside professional assistance (Sanborn) to protect the interests of another family member (Lindsey) in a family dispute. Notably, John's argument ignores the fact that Lee Annette did not visit Sanborn as a patient looking for therapy; instead, she sought Sanborn's professional assistance "for the purpose of seeking help for Elizabeth and Lindsey as Elizabeth asked for it." Moreover, Lee Annette immediately informed Sanborn that she sought professional help to protect Lindsey at the request of her sister, Elizabeth. Thus, Sanborn was apprised of the fact that Lee

Annette was not seeking therapy but was asking for assistance in protecting Lindsey's welfare in the visitation dispute. As a result, Sanborn, as a social worker, had a professional interest in both Lindsey's welfare and the possibility that Lindsey might be placed in a potentially sexually abusive situation as a result of the visitation dispute. Moreover, this is information that Sanborn could reasonably believe Biemann, as the mediator of the visitation dispute, was entitled to know. We conclude, therefore, that Sanborn and Biemann shared a common professional interest in Lindsey's welfare and affirm the trial court's finding that a conditional privilege attached.

A conditional privilege is not absolute and may be lost if the person conveying the information abuses the privilege. Once it is determined that an allegedly defamatory communication was made under a conditional privilege, the burden shifts to the plaintiff to affirmatively prove abuse. See *Zinda*, 149 Wis.2d at 926, 440 N.W.2d at 544. A question of whether a conditional privilege has been abused is one of fact for the jury *unless* the facts are such that only one reasonable conclusion can be drawn. See *id.* at 924, 440 N.W.2d at 553-54. In those cases in which only one reasonable conclusion can be drawn, the question is one of law that we review de novo.

A conditional privilege is abused, and therefore forfeited, if the plaintiff proves one of the following: (1) the defendant's knowledge or reckless disregard as to the falsity of the defamatory matter; (2) the defamatory matter is published for some purpose other than that for which the particular privilege is given; (3) the publication is made to some person not reasonably believed to be necessary for the accomplishment of the purpose of the particular privilege; (4) the publication includes defamatory matter not reasonably believed to be necessary to

accomplish the purpose for which the occasion is privileged; or (5) the publication includes unprivileged matter as well as privileged matter. *See id.*

The only reasonable conclusion we can draw from the summary judgment record is that John has not shown how any of the above factors are arguably present here. There is no evidence in the record to support a claim that Sanborn knowingly made false statements about John. Moreover, Sanborn did not publish the letter in reckless disregard for the truth. In fact, it was entirely reasonable for Sanborn to believe that Lee Annette was telling the truth as she was a close family member of the parties to the visitation dispute and presumably would have knowledge of intimate family matters.

Also, Sanborn wrote the letter to Biemann out of her “deep concern” over Lindsey’s welfare in the visitation dispute. As we concluded above, Sanborn and Biemann shared a common professional interest in Lindsey’s welfare. Therefore, because the letter merely passed information concerning Lindsey’s welfare between those with a common professional interest, Sanborn did not publish the information for some purpose other than that for which the privilege is given.

Further, Sanborn did not publish the information to people not reasonably believed to be necessary for the accomplishment of the purpose for which the privilege is given. In fact, publication was limited to those who shared a common interest in the visitation dispute and Lindsey’s welfare. Sanborn sent copies of the letter to Biemann, Lee Annette, Elizabeth and a court commissioner for Waukesha county. We have already concluded that Biemann shared a common interest in Lindsey’s welfare. Lee Annette was Lindsey’s aunt, and as a close family member she had a strong interest in her welfare. Moreover, she was

Sanborn's source of information for the letter and even reviewed its content prior to it being sent to Biemann. Elizabeth, as Lindsey's mother, had an obvious interest in the content of the letter. Also, it was at Elizabeth's request that Lee Annette contacted Sanborn for assistance. Finally, given the fact that John initiated the visitation dispute in the Waukesha County Circuit Court, and it was the circuit court which ordered the mediation, the court commissioner shared a common interest in Lindsey's welfare and the content of the letter.

Sanborn's letter, moreover, did not include defamatory matter not reasonably believed necessary to accomplish the purpose for which the letter was sent. John claims that the sentence in the letter stating he had sexually abused Elizabeth as a child was untrue and not necessary to accomplish the purpose of the letter. We reject this argument. The information was relevant to confirming Lee Annette's fears that Lindsey could be placed in a potentially sexually abusive environment and to John's request that he be allowed visitation rights with his granddaughter.

Finally, the letter did not contain unprivileged as well as privileged matter. As we previously noted, Sanborn wrote the letter out of her "deep concern" for Lindsey and all of the information contained in the letter was relevant to that concern. Therefore, the whole letter is privileged.¹

¹ Sanborn and Family Service of Waukesha also claim that under § 48.981, STATS., they are immune from liability. Because we affirm the trial court's judgment that a conditional privilege attached, we decline to address this argument.

By the Court.—Judgment affirmed.

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