COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP556 **Cir. Ct. No. 2014CV69**

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

JAMES KROEGER,

PLAINTIFF-APPELLANT,

V.

BOB MOTT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Oneida County: MICHAEL H. BLOOM, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. James Kroeger appeals an order granting Bob Mott's motion for summary judgment in this defamation action. The parties agree the alleged defamatory statements, which were contained in an email from Mott directed to the Oneida County Planning and Development Committee, were

protected by a conditional privilege, such that Mott established a prima facie case for summary judgment. However, Kroeger argues he is entitled to a trial on his defamation claim either because Mott abused the privilege as a matter of law or because there are disputed factual issues regarding such abuse. We reject Kroeger's arguments and affirm.

BACKGROUND

¶2 Kroeger operated an outdoor firewood sales business from his Oneida County property near Pelican Lake. He would pick up wood off-site, bring it to his property, cut, split and stack it, and then haul it away to customers. Kroeger also cut wood on his property for personal use.

¶3 In September 2011, the Oneida County Planning and Development Committee granted Kroeger a conditional use permit (CUP) to cut wood on certain days of the week and during certain hours. Soon after the CUP was granted, a dispute arose regarding whether the conditions attendant to the CUP, including limitations on hours and location of wood cutting, applied to all of Kroeger's wood cutting or merely his business wood cutting.

¶4 In November, Robert and Sue Brautigam, Kroeger's neighbors, challenged the permit, and the Oneida County Board of Adjustment held a public hearing on the matter. Karl Jennrich, the Oneida County Planning and Zoning Director, testified at the hearing that he believed the CUP applied to all woodcutting because "it would be hard to differentiate between personal wood cutting and business wood cutting." Jennrich testified Kroeger did not object to this understanding at the time. However, there was also evidence that the Planning and Development Committee was concerned about regulating personal

wood cutting. At the conclusion of the hearing, the Board of Adjustment voted to affirm the original grant of the CUP without any changes.

¶5 The Board of Adjustment's action did not resolve the underlying issue of whether the CUP applied to Kroeger's personal wood cutting as well as his business wood cutting. On June 18, 2012, the Brautigams and other Pelican Lake residents wrote to the Planning and Development Committee. The residents expressed their belief that the two CUP conditions regarding the permissible location and times of woodcutting were "virtually unenforceable as written." Although the residents came away from the November hearing with the belief that the CUP conditions applied to all wood cutting, the final permit did not expressly state as such. The neighbors complained that Kroeger had been cutting wood at times and locations not allowed under the CUP,[1] and requested that the Committee amend the CUP to state unequivocally that the conditions "apply to [Kroeger's] personal wood as well as his business wood, and that the area permitted does not include his private drive and garage." Mott, who represented constituents in the area as an elected member of the Oneida County Board of Supervisors, was sent a copy of the letter.

¶6 After receiving the letter, Mott spoke with Sue Brautigam and relayed the Brautigams' concerns to Peter Wegner, the assistant zoning director. During Mott's conversation with Wegner, Wegner played a voicemail received from one of Kroeger's neighbors complaining that Kroeger was engaged in

[1] Specifically, the neighbors alleged Kroeger was cutting wood on his driveway "at will," and had cut wood during prohibited times on holidays and weekends, including "on Memorial Day weekend beginning at 7am on two consecutive days, and again on Sat. June 16 and Sunday June 17 early in the morning."

unauthorized wood cutting. Ultimately, a meeting of the Planning and Development Committee was scheduled for August 1, 2012, to address the Kroeger CUP.

¶7 Mott was unable to attend the August 1 meeting, so on July 25, 2012, he sent an email to members of the Committee, as well as Jennrich and the Brautigams. This email is the source of the allegedly defamatory statements at issue in this case. Mott wrote, in substantial part:

> A conditional use permit (CUP) was issued to Mr. [Kroeger] on Pelican Lake so that he could: (a) continue his wood cutting business on Pelican Lake; [and] (b) maintain conditions that would give his neighbors mostly the peace and quiet that they want in their lakeside living.
>
> There was no differentiation made in the CUP between private wood cutting and cutting for his business. There is the problem.
>
> Mr. [Kroeger] has been cutting on weekends and holidays early in the day and claiming that wood is for private use. He is not following the conditions of the CUP. He is in fact violating the spirit of the CUP in that he is cutting and disturbing the neighborhood.
>
> Some people think that it is wrong to try to enforce any rules on private wood cutting since many people cut wood. I think this case is different because everyone does not have a business with a CUP that allows wood cutting at certain times. Mr. [Kroeger] could have been a good neighbor and cut his personal wood at the times in the CUP and avoided further aggravating his neighbors. He chose to aggravate.
>
> The further concern that I have is that something stupid (violent) will happen if there is not a resolution here. Emotions are high and I'm concerned that if there is not enforcement taken by saying that all wood cutting is managed by the CUP, individuals may act on their own.
>
> I am asking this—if the CUP is to have the desired effect of giving Mr. [Kroeger] the right to run his business and the neighbors the right to having peace from the noise for most of the time as stated in the CUP, then the CUP should apply

> to all wood cutting activities at Mr. [Kroeger's property]. It has been shown that the zoning department can't enforce the CUP without this clarification.

(Formatting and punctuation altered.) Mott's email was made part of the record at the August 1 meeting. After taking public comments, the Committee voted not to amend, suspend or revoke Kroeger's CUP.

¶8 Kroeger filed this action against Mott on March 14, 2014, alleging that Mott's email contained libelous statements that damaged Kroeger's reputation and caused "shame, mortification and injury to his feelings." Mott answered, acknowledging his sending of the email but denying that it contained libelous statements or damaged Kroeger. Mott also raised a number of affirmative defenses, including that his statements were opinions and were conditionally privileged as having been made in his representative capacity as a member of the Oneida County Board of Supervisors.

¶9 Mott filed a motion for summary judgment, which the circuit court granted. The court stated there was "a technical basis in the record" to conclude that the allegedly defamatory statements—and in particular the statement that Kroeger was "not following the conditions of the CUP"—were substantially true and therefore did not constitute actionable defamation. However, the court declined to base its ruling on that conclusion. Instead, the court held that Kroeger was a "limited purpose public figure," requiring Kroeger to demonstrate that Mott's statements were made with either knowledge of their falsity or reckless disregard as to their truth or falsity. The court concluded, as a matter of law, that the record did not support a finding in Kroeger's favor under either standard, and it dismissed Kroeger's action.

DISCUSSION

¶10 We review a grant of summary judgment de novo, applying the same methodology employed by the circuit court. ***Burgraff v. Menard, Inc.***, 2016 WI 11, ¶20, 367 Wis. 2d 50, 875 N.W.2d 596. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).[2] The first task is to determine whether the plaintiff has stated a claim for relief. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 317, 401 N.W.2d 816 (1987). If so, the inquiry then shifts to whether any factual issues exist. ***Id.*** at 315. If the pleadings show the existence of factual issues, we examine the moving party's affidavits and other proof to determine whether that party has made a prima facie case for summary judgment. ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980), *abrogated on other grounds by* ***Meyers v. Bayer AG, Bayer Corp.***, 2007 WI 99, 303 Wis. 2d 295, 735 N.W.2d 448. If a prima facie case is made, we examine the opposing party's affidavits and other proof to determine whether there are disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn, that are sufficient to entitle the opposing party to a trial. ***Id.***

¶11 We first consider whether Kroeger's complaint states a claim for relief. "In an action for libel the court must first determine whether the writing complained of is defamatory." ***Lathan v. Journal Co.***, 30 Wis. 2d 146, 151, 140 N.W.2d 417 (1966). This determination is a question of law. ***Id.*** at 153; *see also*

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Laughland v. Beckett, 2015 WI App 70, ¶21, 365 Wis. 2d 148, 870 N.W.2d 466 (determining whether a communication is capable of a defamatory meaning is a question of law for the circuit court, which the appellate court reviews de novo). Kroeger asserts Mott's email contained three actionable defamatory statements, namely, that Kroeger: (1) was "not following the conditions of the CUP"; (2) was not being a "good neighbor"; and (3) "chose to aggravate" his neighbors.

¶12 A communication is defamatory if it "tends to harm the reputation of another so as to lower that person in the estimation of the community or deter third persons from associating or dealing with him or her." ***Vultaggio v. Yasko***, 215 Wis. 2d 326, 330, 572 N.W.2d 450 (1998); *see also* ***Lathan***, 30 Wis. 2d at 152-53 (offering various similar definitions). Defamatory communications usually consist of a statement of fact; expressions of opinion are not actionable, unless they are couched as "mixed opinions" that contain implied statements of fact. ***Laughland***, 365 Wis. 2d 148, ¶27. In determining whether language is defamatory, the words used must be considered in context and must be construed in the "plain and popular sense in which they would naturally be understood." ***Frinzi v. Hanson***, 30 Wis. 2d 271, 276, 140 N.W.2d 259 (1966).

¶13 Here, Mott's statements that Kroeger "could have been a good neighbor" by cutting wood for personal use during times authorized by the CUP, but instead "chose to aggravate" his neighbors, are statements of opinion. Taken in context, however, these statements do imply a fact: that Kroeger was cutting wood, whether for business or personal use, during times that were not authorized by the CUP. *See* ***Laughland***, 365 Wis. 2d 148 (citing ***Converters Equip. Corp. v. Condes Corp.***, 80 Wis. 2d 257, 263-64, 258 N.W.2d 712 (1977)) (statements phrased as opinions, suspicions or beliefs may nonetheless have defamatory meaning); *see also* RESTATEMENT (SECOND) OF TORTS § 566 (1977) (defamatory

statements of opinion are actionable only if they imply the allegation of undisclosed defamatory facts as the basis for the opinion). This unstated factual basis for Mott's opinions mirrored his explicit statement that Kroeger was "not following the conditions of the CUP."

¶14 As a result, and given that Kroeger's briefing primarily focuses on Mott's explicit statement, we proceed to consider whether Mott's statement that Kroeger was "not following the conditions of the CUP" is capable of defamatory meaning in the context in which it was made. A statement can be defamatory if, when considered in its "natural and ordinary sense," it imputes to another person conduct constituting a criminal offense. ***Converters Equip. Corp.***, 80 Wis. 2d at 263; *see also* RESTATEMENT (SECOND) OF TORTS § 751 (1977). Although violating a CUP is typically not a criminal offense, allegations that another person is violating zoning regulations does carry the potential for reputational harm, particularly when the alleged violation pertains to the carrying on of one's business. *Cf.* ***Converters Equip. Corp.***, 80 Wis. 2d at 263 ("[W]ords spoken of an individual … which charge dishonorable, unethical or unprofessional conduct in a trade, business or profession are capable of defamatory meaning."). We therefore conclude the statement that Kroeger was "not following the conditions of the CUP" is capable of a defamatory meaning.

¶15 However, Kroeger cannot defeat a motion for summary judgment merely because Mott made a potentially defamatory statement. To succeed on the merits of a defamation claim, the plaintiff must also prove "unprivileged publication [of the statement] to a third party" and "fault amounting to at least negligence on the part of the publisher." ***Van Straten v. Milwaukee Journal Newspaper-Publisher***, 151 Wis. 2d 905, 912, 447 N.W.2d 105 (Ct. App. 1989). Although these are separate elements, the privileged nature of a statement can alter

the degree of culpability the plaintiff must prove. *See infra* ¶17. We therefore scrutinize whether Mott has established a prima facie case for summary judgment based on a privilege.[3] Whether a statement is privileged is a question of law that we review de novo. *See* ***Anderson v. Hebert***, 2013 WI App 54, ¶6, 347 Wis. 2d 321, 830 N.W.2d 704; ***Wildes v. Prime Mfg. Corp.***, 160 Wis. 2d 443, 450, 465 N.W.2d 835 (Ct. App. 1991).

¶16 An otherwise defamatory statement may nonetheless "fall within a class of conduct which the law terms privileged." ***Vultaggio***, 215 Wis. 2d at 330 (quoting ***Zinda v. Louisiana Pac. Corp.***, 149 Wis. 2d 913, 921, 440 N.W.2d 548 (1989)). Privilege defenses have developed as a result of judicial determinations that, as a matter of public policy, "certain conduct which would otherwise be actionable may escape liability because the defendant is acting in furtherance of some interest of societal importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff." ***Zinda***, 149 Wis. 2d at 921-22.

¶17 Privileges are either absolute or conditional. ***Vultaggio***, 215 Wis. 2d at 330; *see also* ***Lathan***, 30 Wis. 2d at 151-52. An absolute privilege gives complete protection to the defendant without any inquiry into his or her motives. ***Zinda***, 149 Wis. 2d at 922; *see also* ***Lathan***, 30 Wis. 2d at 151-52. By contrast, a defamatory statement made under circumstances that cloak it with a conditional privilege are nonactionable unless the privilege is abused. ***Vultaggio***, 215 Wis. 2d at 331. A conditional privilege may be abused

[3] In the complaint, Kroeger alleged Mott's email was not privileged. Mott countered by asserting, as an affirmative defense, that his statements were entitled to a conditional privilege. Thus, privilege was a disputed issue before the circuit court.

> (1) because of the publisher's knowledge or reckless disregard as to the falsity of the defamatory matter; (2) because the defamatory matter is published for some purpose other than that for which the particular privilege is given; (3) because the publication is made to some person not reasonably believed to be necessary for the accomplishment of the purpose of the particular privilege; (4) because the publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged; or (5) [when] the publication includes unprivileged matter as well as privileged matter.

Id. at 331-32 (citations omitted).

¶18 On appeal, Kroeger concedes that Mott's statements were made under circumstances that conferred a conditional privilege. However, the parties disagree on what type of conditional privilege applies. Kroeger believes Mott's statements were conditionally privileged because they were made under circumstances similar to a witness's statement made during a legislative hearing. *See* ***Vultaggio***, 215 Wis. 2d at 345-46. Mott, on the other hand, asserts his statements are conditionally privileged under ***Otten v. Schutt***, 15 Wis. 2d 497, 113 N.W.2d 152 (1962). In ***Otten***, our supreme court effectively adopted the RESTATEMENT (SECOND) OF TORTS § 598 (1977), regarding a conditional privilege in favor of a person who communicates on a matter of public interest to one entitled to act on such a communication. *See* ***Otten***, 15 Wis. 2d at 500. Such an occasion is conditionally privileged

> when the circumstances induce a correct or reasonable belief that (a) facts exist which affect a sufficiently important public interest, and (b) the public interest requires the communication of the defamatory matter to a public officer or private citizen and that such person is authorized or privileged to act if the defamatory matter is true.

Id.

¶19 It is not essential for us to determine which conditional privilege applies to Mott's statements. Regardless of the nature of the conditional privilege, when a defendant has established a prima facie case of privilege, the burden shifts to the plaintiff to rebut this by demonstrating either a genuine issue of material fact regarding abuse of the privilege or that the privilege was abused as a matter of law. *See* ***Otten***, 15 Wis. 2d at 504; *see also* ***Vultaggio***, 215 Wis. 2d at 331-32. Here, Kroeger argues he has rebutted the privilege because: (1) a fact issue exists as to whether Mott's statements were made with reckless disregard as to the truth; (2) Mott's email included defamatory matters not reasonably believed to be necessary to accomplish the purpose for which the occasion was privileged; and (3) the email included unprivileged as well as privileged matters. We reject each of these arguments.

¶20 First, no reasonable factfinder could conclude, given this record, that Mott's statement regarding Kroeger's violation of the CUP was made with reckless disregard as to its truth or falsity. There is some superficial appeal to Kroeger's argument in this regard, as Mott testified at his deposition that he did not know for certain whether the wood cutting occurring at times not authorized by the CUP was for Kroeger's business or personal use. However, this admission alone is insufficient to establish Mott's reckless disregard for the truth.

¶21 Reckless disregard for the truth is a "subjective standard" and is "not measured by what the reasonably prudent person would publish or investigate prior to publishing." ***Storms v. Action Wis., Inc.***, 2008 WI 56, ¶39, 309 Wis. 2d 704, 750 N.W.2d 739. In the defamation context, reckless disregard requires showing (1) that the statement was made with a high degree of awareness of its probable falsity; or (2) that the defendant entertained serious doubts as to the truth

of the publication. ***Id.*** (citing ***Garrison v. Louisiana***, 379 U.S. 64, 74 (1964) and ***St. Amant v. Thompson***, 390 U.S. 727, 731 (1968), respectively).

¶22 Kroeger has not presented sufficient evidence to meet either standard, as a matter of law. Kroeger asserts that Mott "did no real investigation to determine the accuracy" of his statements. That bald assertion does not withstand scrutiny. It is undisputed that in response to the Brautigams and other residents' written concerns, and prior to writing his July 25 email, Mott spoke with Sue Brautigam and Peter Wegner, the assistant zoning director, regarding Kroeger's wood cutting. Mott also heard a voicemail Wegner had received from an area resident containing the sound of a chainsaw purportedly operating at a time not authorized by the CUP.[4] Mott's investigative efforts, unrebutted by anything to the contrary submitted by Kroeger, demonstrate, as a matter of law, that Mott did not possess a "high degree of awareness" that his statement regarding Kroeger's violation of the CUP was probably false, nor that Mott entertained "serious doubts" as to the truth of that assertion.[5]

¶23 Second, Kroeger argues the defamatory material in Mott's email (i.e., Mott's assertion that Kroeger was "not following the conditions of the CUP")

[4] Kroeger argues Mott could not rely on the voicemail message because it was "acknowledged to be from Robert Brautigam," who, Kroeger claims, had previously complained of wood cutting at a time when Kroeger's time cards showed him to be at work. However, Kroeger has not presented any evidence to suggest the report in this instance was false, nor does he argue as such on appeal.

[5] Kroeger is correct that intent typically is a matter left for determination by the trier of fact. *See* ***Lecus v. American Mut. Ins. Co. of Boston***, 81 Wis. 2d 183, 190, 260 N.W.2d 241 (1977). However, this is the case only when there are competing reasonable inferences that can be drawn by the trier of fact based on the evidence presented. *See* ***id.*** Nothing Kroeger has presented in this appeal persuades us that a factfinder could reasonably infer the requisite degree of knowledge based on the record in this case when the circuit court decided Mott's motion for summary judgment.

was not reasonably necessary to accomplish the purpose of the Planning and Development Committee's August 1, 2012 meeting regarding Kroeger's CUP. Kroeger contends the purpose of this meeting was solely to determine whether the CUP was enforceable. However, he provides no record citation for this assertion. Further, because the CUP's suspension or revocation were apparently on the table, it is clear the Committee's consideration was not limited to whether the CUP was enforceable as drafted. The hearing appears to have been scheduled to address numerous issues with the CUP, including area residents' numerous complaints about Kroeger's wood cutting.

¶24 Third and finally, Kroeger argues Mott's email mixed privileged and unprivileged statements, and therefore the privilege was lost as to all statements. *See* ***Vultaggio***, 215 Wis. 2d at 331-32. However, this argument relies solely on Kroeger's conclusion, which he does not adequately explain on appeal, that Mott's statement regarding Kroeger's violation of the CUP was "clearly an unprivileged matter." As far as we can tell, Kroeger believes this statement was unprivileged because the purpose of Mott's email was to urge the Committee to consider clarifying the CUP's parameters. Thus, Kroeger apparently argues the degree to which a statement relates to a communication's overall purpose is the controlling principle for privilege purposes. However, a conditional privilege is granted with respect to a particular *occasion*, which is a broader concept. *See* RESTATEMENT (SECOND) OF TORTS § 593 (1977). Regardless of whether the ***Vultaggio*** or ***Otten*** conditional privilege applies, the "occasion" in this case was the Committee hearing regarding Kroeger's CUP. All the statements in Mott's email related to that occasion. The email did not, for instance, also accuse Kroeger of shorting his customers on firewood, which would truly have been mixing privileged and

unprivileged defamatory material. *See* RESTATEMENT (SECOND) OF TORTS § 605A (1977).

¶25 Given the foregoing, we conclude the circuit court properly granted summary judgment in Mott's favor, although we rely on different grounds than the circuit court. *See* ***Mercado v. GE Money Bank***, 2009 WI App 73, ¶2, 318 Wis. 2d 216, 768 N.W.2d 53 (court of appeals may affirm on grounds other than those relied upon by the circuit court). No reasonable factfinder could conclude, on this record, that Mott abused the conditional privilege to which his statements were entitled.

By the Court.—Order affirmed.

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