

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 20, 2016

Diane M. Fremgen
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP1831

Cir. Ct. No. 2013CV3306

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

AARON MARJALA,

PLAINTIFF-APPELLANT,

v.

**FOX NEWS NETWORK LLC D/B/A FOX NEWS CHANNEL, LEE
ARMSTRONG, MEGYN KELLY AND ROBERT C. WHITAKER,**

DEFENDANTS-RESPONDENTS,

AUTO CLUB INSURANCE ASSOCIATION,

INTERVENOR.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. CONEN, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Aaron Marjala appeals from an order of the circuit court that dismissed his defamation claims against Fox News Network, LLC (“Fox News”), Lee Armstrong, Megyn Kelly, and Robert Whitaker. Marjala claims that the circuit court erred when it dismissed his claims because the defendants’ claims are false and capable of defamatory meaning, which should defeat their respective dispositive motions. We conclude the circuit court reached the appropriate result, so we affirm.

BACKGROUND

¶2 Marjala became a firefighter with the North Shore Fire Department in May 2002. Some time prior to February 2007, while on duty, he sustained injuries to the ulnar nerve in his right arm, causing numbness and tingling in his fingers.

¶3 In February 2007, Marjala underwent an ulnar nerve transposition—surgical movement of the nerve—to try to restore function. In June 2007, he underwent a surgical procedure to remove scar tissue from around the injured nerve. Despite the surgical interventions, Marjala’s condition worsened. The damage to the nerve apparently means that Marjala cannot lift a ladder or tie a knot, incapacities which prevent him from working as a firefighter. He attempted to obtain a “desk job” with the fire department, but was told that no such position was available. Marjala was advised by the Department to find a different job or apply for duty disability benefits, so he applied for the disability benefits.

¶4 In January 2008, independent physicians for the State diagnosed Marjala with persistent ulnar nerve neuropathy and ongoing demyelization of the right ulnar nerve. Neuropathy is the degeneration of the nerve cells causing loss of function, and demyelization is the loss of the protective layer of myelin needed

for proper nerve function. Marjala suffers pain, tingling, and numbness in his arm as a result of his conditions, and he was certified to be permanently disabled as a firefighter by the State's physicians. His application for duty disability benefits was approved on March 20, 2008.

¶5 In March 2009, he was removed from a wait list for job placement services and enrolled at Waukesha County Technical College. In June 2010, he passed a national home inspector examination; in July 2010, he became a licensed inspector. Despite his injuries and inability to work as a firefighter, though, Marjala continued to participate in strenuous physical activities, including at least seven marathons and an Ironman triathlon, which involves biking, swimming, and running.

¶6 In August 2011, Robert Whitaker, the chief of the North Shore Fire Department, agreed to be interviewed by a reporter for television station WITI, known locally as Fox 6.¹ Whitaker made statements, which will be discussed in greater detail herein, that Marjala claims defamed him. Marjala was also interviewed by the reporter. The resulting story was broadcast on WITI on September 5, 2011.

¶7 On September 8, 2011, during the *America Live* television show, a recurring segment called Kelly's Court, hosted by Megyn Kelly, was broadcast. This particular segment discussed "'disabled' firefighter" Marjala and the fact that he collects disability benefits. Appearing in the segment with Kelly were attorneys Lee Armstrong and Lis Wiehl. This segment also aired a small excerpt

¹ Although WITI is the Fox affiliate station in Milwaukee, Fox News Network, LLC, does not own or control WITI.

of Marjala from the WITI story. Marjala claims that Kelly and Armstrong made defamatory comments about him during the Kelly’s Court segment.

¶8 Marjala sued Fox News, Armstrong, Kelly, and Whitaker for defamation.² Ultimately, Fox News, Armstrong, and Kelly moved to dismiss the complaint for failure to state a claim, while Whitaker moved for judgment on the pleadings.³ The circuit court granted the two motions and dismissed Marjala’s complaint against all of the defendants. Marjala appeals.

DISCUSSION

A. Applicable Legal Standards

¶9 “We independently review a dismissal for failure to state a claim as a question of law.” *John Doe 1 v. Archdiocese of Milwaukee*, 2007 WI 95, ¶12, 303 Wis. 2d 34, 734 N.W.2d 827. “A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint.” *John BBB Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312, 331, 565 N.W.2d 94 (1997). We accept as true the facts as pled and reasonable inferences therefrom, but we are not required to assume any legal conclusion pled by the plaintiff as true. *See Doe 1*, 303 Wis. 2d 34, ¶12. “Dismissal of a claim is improper if there are any conditions under which the plaintiff[] could recover.” *BBB Doe*, 211 Wis. 2d at 331.

² Marjala entered a settlement with WITI for an undisclosed sum prior to commencing this suit; Wiehl was not named as a defendant.

³ Whitaker had also moved for summary judgment based on Marjala’s supposed reservation of claims within the settlement agreement with WITI. The circuit court concluded there were too many issues of fact to warrant summary judgment and denied the motion in the order that is now on appeal. Nevertheless, the decision to grant judgment on the pleadings was dispositive as to Whitaker, and no party discusses the summary judgment decision on appeal.

¶10 “A judgment on the pleadings is essentially a ‘summary judgment minus affidavits and other supporting documents.’” *Freedom From Religion Found., Inc. v. Thompson*, 164 Wis. 2d 736, 741, 476 N.W.2d 318 (Ct. App. 1991) (citation omitted). “Whether judgment on the pleadings should be granted is a question of law[.]” *Id.* The first step in our review is to examine the legal sufficiency of the complaint, accepting the facts pled and reasonable inferences therefrom as true.⁴ *See id.* “The complaint should be found legally insufficient only if ‘it is quite clear that under no circumstances can the plaintiff recover.’” *Schuster v. Altenberg*, 144 Wis. 2d 223, 228, 424 N.W.2d 159 (1988) (citation and one set of quotation marks omitted).

¶11 A person claiming defamation “must first establish that the words are not true and are capable of a defamatory meaning.” *Freer v. M&I Marshall & Ilsley Corp.*, 2004 WI App 201, ¶8, 276 Wis. 2d 721, 688 N.W.2d 756. This is a question of law that we review *de novo*. *See Laughland v. Beckett*, 2015 WI App 70, ¶21, 365 Wis. 2d 148, 870 N.W.2d 466.

¶12 The elements of a defamation claim are:

(1) a false statement, (2) communicated by speech, conduct, or in writing to a person other than the person defamed, and (3) the communication is unprivileged and is defamatory, that is, tends to harm one’s reputation so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her.

⁴ The second step requires us to examine the responsive pleadings for issues of material fact. *See Freedom From Religion Found., Inc. v. Thompson*, 164 Wis. 2d 736, 741, 476 N.W.2d 318 (Ct. App. 1991). We do not reach that step because Whitaker’s motion for judgment on the pleadings essentially asserts that Marjala’s complaint is insufficient, meaning that it fails from the first step.

Mach v. Allison, 2003 WI App 11, ¶12, 259 Wis. 2d 686, 656 N.W.2d 766. Generally, “the particular words complained of shall be set forth in the complaint,” *see* WIS. STAT. § 802.03(6) (2013-14),⁵ although defamatory statements may be implied, *see Mach*, 259 Wis. 2d 686, ¶12.

¶13 If we determine that a statement is not defamatory, that typically ends the matter. *See Ladd v. Uecker*, 2010 WI App 28, ¶8, 323 Wis. 2d 798, 780 N.W.2d 216. If a statement is defamatory, then we consider any defenses alleged. *See id.* Truth is a defense, as is substantial truth. *See Laughland*, 365 Wis. 2d 148, ¶¶22-23. Opinions are also considered a defense under certain circumstances. *See id.*, ¶22; *see also Terry v. Journal Broadcast Corp.*, 2013 WI App 130, ¶23, 351 Wis. 2d 479, 840 N.W.2d 255. “The principle of fair comment afford[s] legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact.” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13 (1990) (citation and internal quotation marks omitted). Stated another way, “[a] defamatory comment may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.” *See* RESTATEMENT (SECOND) OF TORTS § 566 (AM. LAW INST. 1977); *see also Terry*, 351 Wis. 2d 479, ¶23

B. The Circuit Court’s General Findings

¶14 We note that the circuit court determined that “Wisconsin’s duty disability system is an issue of public importance for state and local taxpayers[.]”

⁵ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Marjala does not dispute this public policy pronouncement, and we agree that the matter is one of public import.

¶15 The circuit court also found that both the WITI and Kelly’s Court broadcasts “give a full factual background about [Marjala’s] injury and about the receipt of duty disability.” Specifically, it noted:

Both broadcasts inform the viewers that Mr. Marjala was never medically cleared to return to full duty as a firefighter; he requested a desk job but the fire department did not have one available; the fire department told Mr. Marjala either to get a new job or apply for disability; two independent doctors for the State found Mr. Marjala disabled; and because he was certified as disabled, he is legally eligible to receive those benefits.

....

[The WITI] broadcast additionally informed viewers that the state disability system does not require annual exams to determine whether those who receive benefits are still disabled. The fire department never objected to the findings of disability and that Mr. Marjala damaged his ulnar nerve, which is also known as the funny bone.

The [Kelly’s Court] broadcast informed viewers that disability law does not consider what a person can do, such as running marathons, but it does consider what a person cannot do, such as in this case lifting ladders or tying knots. It also indicated that the phrase “permanently disabled” is a medical/legal term, not a phrase that Mr. Marjala invented.

Both broadcasts show clips of Mr. Marjala discussing his injuries He describes himself and he’s got the opportunity to defend himself as having minor limitations, saying the minor limitations do not stop him from running marathons, he would return to firefighting if he was able, and indicated ... that he’s 15 percent permanently paralyzed.

We agree with these characterizations of the broadcasts, and we make our determination against this factual backdrop.

C. Whitaker's Statements

¶16 Marjala complains of the following specific statements made by Whitaker in the WITI story:

- “[W]e are continually looking into that whether the information [concerning Marjala’s injury and level of disability] we are being provided is accurate”
- “To even have that activity come up and questioned, begs in my mind, what is [Marjala’s] current physical status”
- “[Marjala’s receipt of disability] needs to be exposed”
- “The system may need some reform” (implying that Marjala is abusing and defrauding the system)

(Brackets and parentheses as in complaint.)

¶17 The circuit court correctly noted that it should “not parse out individual pieces of a defendant’s statement” and that it should “take a look at these statements as a whole[.]” *See, e.g., Mach*, 259 Wis. 2d 686, ¶31 (“[W]e consider the broadcast as a whole, ‘not in detached fragments.’”) (citation omitted).⁶ Further, an appellate court should examine for itself the statements in issue and the circumstances in which they were made. *See Torgerson v. Journal/Sentinel, Inc.*, 210 Wis. 2d 524, 537, 563 N.W.2d 472 (1997). When Whitaker’s statements are considered in context, unedited and juxtaposed with other portions of the broadcast, they are clearly not actionable.

⁶ The parties agreed that both broadcasts “were incorporated and made part of the complaint in this case[.]”

¶18 After approximately three and a half minutes of introductory commentary, the narrator/reporter of the WITI story notes that Marjala “taught a spin class, hit the slopes, even went waterskiing.” Whitaker is then shown responding, “To have even that activity come up and questioned, begs in my mind, you know, what is his current physical status?” Marjala complains that this statement “impute[s] dishonesty” to him and implies that he is or was lying about his injury, even though Whitaker was aware of the State’s doctors’ diagnoses. However, this statement is clearly Whitaker’s opinion based on true, disclosed facts: the State considered Marjala disabled as a firefighter because of his inability to do things like lift a ladder and tie knots, but Marjala was still able to participate in activities that seemingly required use of the ulnar nerve, like grasping waterskiing ropes. Indeed, the WITI story shows Marjala himself explaining that “it’s hard to hold stuff” because of his injury.

¶19 The narrator proceeds to explain that once a firefighter is deemed permanently disabled under the State duty disability system, there is “almost no way” to overturn that decision. The narrator notes that unlike the City of Milwaukee, which requires an annual medical evaluation for duty disability recipients, the State duty disability system requires no medical check-ups. Whitaker is then shown saying, “The system may need of some reform.” This statement is not defamatory towards Marjala because it is not a comment about Marjala but, rather, the system itself. *See Milkovich*, 497 U.S. at 20 (statements that cannot be interpreted as stating facts about an individual are protected).

¶20 Later, the interviewer inquires of Whitaker, “Is there some question in your mind about whether or not he’s being truthful?” Whitaker answers, “Yeah, I mean, I think that what we’ve discussed today builds on a question that we continually are looking into about whether the information that we’re being

provided is accurate.” Marjala complains that this answer implies that that he “is being untruthful about his disability” and that Whitaker and the reporter have discussed Marjala and the circumstances of his duty disability without making it clear what was discussed.

¶21 However, this comment appears unrelated to the disability itself. Preceding the interviewer’s question is information that in 2010, a newspaper article reported Marjala had been hired full-time by Tri-County Home Inspection, LLC. When Whitaker asked Marjala about it, Marjala told the chief that the article was “inaccurate” and that he had received no compensation from Tri-County. The report goes on to say that at the time, Tri-County was registered to Marjala’s wife, but she told WITI that she never performed any inspections and Marjala ran the business from the start. According to the narrator, Marjala confirmed to him that it is indeed his business and that he has reported all income therefrom. When the reporter asked why the income was not listed in Marjala’s divorce filing, Marjala told the reporter that the divorce record was a “mistake.” Marjala does not indicate that any of these facts are untrue. Nevertheless, it is not defamatory for Whitaker to indicate he questions the accuracy of information provided by Marjala when the disclosed facts indicate that Marjala acknowledged prior inaccuracies or mistakes in information available about him.

¶22 In the closing seconds of the broadcast, Whitaker is shown commenting, “Is there a small part of me that says I’m glad Brian [the reporter] got a tip to this? Yeah, because it needs to be exposed.” Marjala complains that this “clearly implied that Marjala’s receipt of benefits was improper or illegal[.]” We disagree. First, it is not clear what “it” is to be exposed; the circuit court noted that “it” might have referred to the income information regarding Tri-County and divorce filings. But, second, to the extent that “it” refers to Marjala’s collecting

disability, we note that in context of the entire report, Whitaker’s comment implies only Whitaker’s opinion that the existing duty disability system may be flawed.

¶23 Thus, Whitaker’s statements are either not defamatory or they are opinions on a matter of public interest based on true, disclosed facts.⁷ The circuit court properly granted Whitaker’s motion for judgment on the pleadings.

D. Kelly’s and Armstrong’s Comments

¶24 The Kelly’s Court segment is formatted as a mock trial or judicial debate: this is suggested by Kelly’s opening comment that court is “back in session” to address an issue “on the docket,” along with an image of scales in the graphic below her. Kelly introduced the premise of the day’s segment—“the Ironman too injured to fight fires”—before introducing Armstrong and Wiehl. In broad terms, Armstrong opposed Marjala’s collecting disability benefits while Wiehl spoke in support of Marjala. At the end of the segment, Kelly rendered an opinion, so indicated by an on-screen graphic declaring “Kelly’s Opinion.” It is within this context that Marjala claims that Kelly and Armstrong, but not Wiehl, defamed him.

¶25 Marjala takes issue with the following segments of commentary—specifically, those comments below that are contained within quotation marks.⁸ In

⁷ We do note that, contrary to the general tenor of Whitaker’s respondent’s brief, “communications are not made nondefamatory as a matter of law merely because they are phrased as opinions, suspicions or beliefs.” See *Laughland v. Beckett*, 2015 WI App 70, ¶27, 65 Wis. 2d 148, 870 N.W.2d 466 (citation omitted). Nevertheless, we are satisfied that Whitaker’s statements in this case are indeed protected opinions.

⁸ This opinion provides what we consider a more accurate context for the comments than the complaint.

the opening moments of the segment, Kelly described “the Ironman too injured to fight fires. Aaron Marjala was one of Wisconsin’s bravest until he banged his funny bone on a countertop in a kitchen at a Milwaukee firehouse. Oh, the horror.” After providing some additional background information about the topic, Kelly introduced Armstrong and Wiehl before addressing Armstrong with, “Ever hit your funny bone? Cause it hurts a lot. I mean, it would be tough to lift a ladder after that.”

¶26 Armstrong responded to that comment, stating, “It takes out a lot of firefighters. It’s the number one cause or reason that firefighters stop fighting fires.” Armstrong then made some additional comments before stating, “He’s exploited this supposed injury.... [F]irefighters are genuinely injured, really hurt, mentally and physically, and then you have this guy. It’s just not right. There has to be an investigation here. Something needs to be done. This guy should no longer get this money.... Somebody has to look into this. It’s disgusting.” Kelly then observed, “And he’s only 28 years old, he’s going to get this money for life, tax free, I think it’s about fifty grand a year plus benefits, for life.”

¶27 Wiehl then had an opportunity to weigh in, explaining things like Marjala’s attempt to get desk duty and the fact that duty disability considers what one cannot do rather than what one can do. Armstrong then made a few additional comments before speculating about whether the doctor that certified Marjala’s injuries might be Marjala’s “cousin” or “brother.” When Wiehl suggested that the problem was with the system and that Marjala as an individual should not be blamed for that, Kelly asked, “Why should he be excused from the fraud?”⁹

⁹ Because all three commentators were speaking at once, it is unclear whether that is actually what Kelly said, although it appears that the parties are treating the quote as accurate.

Armstrong added, “I will blame him.... But you blame him because he started this domino. He’s the one who ... hit his elbow, his pinky became numb and then all of a sudden, he’s permanently and totally disabled. He’s the one who went to the doctor and told them about this supposed limitation so I think the buck does stop with him.”

¶28 Out of time, Kelly thanked Armstrong and Wiehl for their appearances before concluding, “He’s too hurt to push paper but he can run Ironman triathlons. We’ve seen this time and time again, people taking advantage of the system and it’s wrong, period. He should be forced back to his job, I think that fourteen million Americans would love to have it.”

¶29 Marjala complains that these statements “are false, both literally and in their implication.” Among other things he contends that he did not “claim to be totally disabled due to ‘bumping’ or ‘hitting’ his funny bone and did not claim to be disabled from all activity,” nor did he claim to be “too hurt to push paper,” and he did not commit fraud. However, having viewed the Kelly’s Court broadcast, we are satisfied that the program is simply a collection of opinion statements based on fully disclosed true or substantially true facts, making the opinions nonactionable.

¶30 Marjala does not identify, in the complaint or in his appellant’s brief, how he came to injure his ulnar nerve. According to the WITI broadcast, though, he did indeed suffer his first injury to the nerve when he hit his elbow on the kitchen counter at the fire station. The ultimate result from this injury was a finding of permanent disability as a firefighter. Thus, any implication that Marjala claimed total disability because of hitting his funny bone is substantially true.

¶31 Of particular concern to Marjala was Kelly’s question about why he should be excused from the fraud. He suggests this is defamatory because it suggests he actively committed the crime of fraud. Omitted from Marjala’s analysis is the context of the question. Armstrong and Kelly had been explaining to Wiehl that New York—where Kelly and Fox News are based—has had a particular problem with fraudulent disability claims. This is what prompted Wiehl to suggest they should critique the system, not the individual. Kelly’s question merely asks why the individual should get a pass notwithstanding systemic issues. The comment about being too hurt to push paper also harks back to concerns about the system.

¶32 Marjala further complains about the implication he was living off tax-free duty disability benefits to participate in marathons and triathlons with no mention of the offset required by law for any income earned. As the circuit court noted, though, Kelly’s observation about his benefits was also substantially true. Indeed, Marjala does not dispute that for at least the time between his award of disability benefits in March 2008 and his certification as a home inspector in July 2010, he had no income other than his disability benefits. Meanwhile, he trained for and completed an Ironman triathlon in September 2010. Further, Marjala does not document that he has ever earned other income to offset those disability benefits. It is Marjala’s burden to demonstrate the statements in question are false. *See Mach*, 259 Wis. 2d 686, ¶13.

¶33 Ultimately, the circuit court observed that the coverage “probably was embarrassing and unflattering” to Marjala, but Marjala had put much of the

information on the internet himself.¹⁰ And, while the commentary may have been sarcastic, belittling, and impolite, that does not make it defamatory. “[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions.” *Bridges v. California*, 314 U.S. 252, 270 (1941) (footnote omitted). The Fox News piece simply delivered an opinion on the faults of duty disability systems. The circuit court properly granted the Fox defendants’ motion to dismiss.

By the Court.—Order affirmed.

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

¹⁰ Marjala tracked his workouts through a public website called “Daily Mile.”

