COURT OF APPEALS
DECISION
DATED AND FILED

February 21, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0484

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

RICHARD VULTAGGIO,

PLAINTIFF-RESPONDENT,

V.

CARYL YASKO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Caryl Yasko appeals from the judgment of the circuit court entered after a jury concluded that certain statements Yasko made at a public meeting held by the Whitewater City Council, where Yasko criticized the upkeep of several rental properties owned by Richard Vultaggio, were defamatory,

substantially untrue, abused her conditional privilege, and were made with express malice. The jury awarded Vultaggio both compensatory and punitive damages.

¶2 The facts giving rise to this appeal are set forth in the Wisconsin Supreme Court's opinion ***Vultaggio v. Yasko***, 215 Wis. 2d 326, 572 N.W.2d 450 (1998) (***Vultaggio I***), which addressed the level of privilege accorded Yasko's comments. They are repeated here in substantially the same form, for convenience.

¶3 On October 18, 1994, the Whitewater City Council held a public meeting to consider, among other things, a recommendation by the Ad Hoc Municipal Building and Facilities Committee pertaining to the city's need for additional office and meeting space. The committee had recommended that the council accept a proposal that provided for an addition to the public safety building and increased space for the police and fire departments. ***Id.*** at 328.

¶4 Yasko attended this meeting and testified in favor of a proposal that would have remodeled a former middle school in her neighborhood for the office space. She felt that renovating the middle school would reverse the "destabilization" of her neighborhood. During her testimony, Yasko highlighted her neighborhood's transition from family housing to college student housing, and

openly criticized the upkeep of several buildings owned by Vultaggio.[1] The meeting was broadcast in its entirety on a local television station. ***Id.*** at 329.

¶5 Vultaggio sued Yasko for defamation based on the statements she made during the city council meeting. Yasko moved for summary judgment, arguing that her statements before the Whitewater City Council were absolutely privileged or, in the alternative, that they were conditionally privileged and that she had not abused that privilege. The circuit court denied Yasko's motion. Yasko appealed the circuit court's nonfinal order to this court. We granted leave to appeal and certified to the supreme court the question of whether Wisconsin law should afford an absolute privilege, or a conditional privilege, for witnesses testifying in legislative proceedings. The supreme court accepted the certification and held that, under the circumstances presented here, such witnesses are entitled to a conditional privilege. ***Id.*** at 344-47. The case was remanded to the circuit court and proceeded to trial in November 1999.

¶6 Yasko filed a motion to dismiss at the close of Vultaggio's case. The court denied her motion, ruling that sufficient evidence had been produced to warrant submitting the case to a jury. The jury determined that Yasko's statements were defamatory, were not substantially true, and that Yasko had abused her conditional privilege. The jury further found that her statements were

[1] For example, referring to one home in the area, Yasko said, "It's one of our pig sties. It was designed to house pigs. It's owned by Richard Vultaggio." ***Vultaggio v. Yasko***, 215 Wis. 2d 326, 328-29 n.1, 572 N.W.2d 450 (1998) (***Vultaggio I***). With respect to another property she announced, "[L]ast year it was a pool hall, for pay. That belongs to Richard Vultaggio. He's real proud of our community. He respects the people who built those houses." Concerning still another property, Yasko posed, "Guess what? It belongs to Richard Vultaggio, the proud owner of this slum property. This house has been now three years with students and it's on its last stages. I call them parasites of the university." ***Id.*** Finally, "for a further glimpse of the destabilization of our community," Yasko directed her audience's attention to "another sub-human habitation place 'that was' owned by Richard Vultaggio." ***Id.***

made with express malice and awarded Vultaggio $33,920 in compensatory damages and $11,250 in punitive damages. The circuit court denied Yasko's postverdict motions and this appeal ensued.

¶7 Yasko raises several arguments on appeal, most of which focus on her contention that the circuit court erred in submitting the case to the jury. We address her arguments seriatim, turning first to the issue of liability for defamation.

¶8 Yasko essentially argues that her remarks were not, as a matter of law, defamatory for a number of reasons, such that the circuit court erred by submitting the case to the jury rather than dismissing the claim, either before trial or at the close of the plaintiff's case.

¶9 A communication is defamatory if it tends to harm the reputation of another so as to lower him or her in the estimation of the community or deter third persons from associating or dealing with him or her. ***Zinda v. Louisiana Pac. Corp.***, 149 Wis. 2d 913, 921, 440 N.W.2d 548 (1989). The first inquiry in evaluating a defamation claim is whether the remark is capable of a defamatory meaning, that is, whether the words complained of are "reasonably capable of conveying a defamatory meaning to the ordinary mind and whether the meaning ascribed by [the] plaintiff[ ] is a natural and proper one." ***Meier v. Meurer***, 8 Wis. 2d 24, 29, 98 N.W.2d 411 (1959). The words used must be construed in the plain and popular sense in which they would be naturally understood. ***Id.***

¶10 Whether a statement is capable of a defamatory meaning is a question of law that we decide de novo. ***Wozniak v. Local 1111 of UE***, 57 Wis. 2d 725, 732, 205 N.W.2d 369 (1973). If the statements are capable of a nondefamatory as well as a defamatory meaning, then a jury question is presented

as to how the statement was understood by its recipients. ***Id.***; ***Hoan v. Journal Co.***, 238 Wis. 311, 329, 298 N.W. 228 (1941).

¶11 We hold that Yasko's remarks were capable of conveying a defamatory meaning. Thus, the circuit court properly denied Yasko's motion to dismiss the defamation claim. In so holding, we reject Yasko's argument that her remarks merely expressed her opinion of the condition of Vultaggio's rental properties, and that her disparaging comments regarding those properties stopped short of maligning Vultaggio himself. We also reject Yasko's assertion that her comments were too vague and indefinite to constitute defamation.

¶12 It is true that an expression of opinion generally cannot be the basis of a defamation action. *See* ***Gertz v. Robert Welch, Inc.***, 418 U.S. 323, 339-40 (1974); WIS JI—CIVIL 2500. However, "communications are not made nondefamatory as a matter of law merely because they are phrased as opinions, suspicions or beliefs." ***Converters Equip. Corp. v. Condes Corp.***, 80 Wis. 2d 257, 263-64, 258 N.W.2d 712 (1977). Here, Vultaggio's name was repeatedly mentioned by Yasko and was inextricably intertwined with her quite pointed comments about the alleged condition of Vultaggio's various rental properties. Based on our review, we hold that a reasonable fact finder could conclude that Yasko's statements might tend to harm the reputation of another so as to lower the person in the estimation of the community or deter others from associating or dealing with the person. *See* WIS JI—CIVIL 2501. The circuit court did not err by submitting the question of defamation to the jury.

¶13 Yasko suggests the circuit court erred by submitting the defamation claim to the jury for another reason as well. A defamation claim requires that special damages be pleaded unless the defamation was slander per se. Yasko

argues that her remarks did not rise to the level of slander per se, such that the circuit court should not have submitted the defamation claim to the jury. Again, we disagree.

¶14 Originally, slander was not actionable in the absence of actual pecuniary or "special" damages. ***Martin v. Outboard Marine Corp.***, 15 Wis. 2d 452, 459, 113 N.W.2d 135 (1962). Over the years, four categories of slander became actionable without alleging or proving special damages: those imputing a criminal offense, "loathsome" disease, some conduct or characteristic affecting the plaintiff in his or her business or profession, or "unchastity" or serious sexual misconduct if the plaintiff is a woman. ***Id.***; RESTATEMENT (SECOND) OF TORTS § 570 (1977). Such statements were, in effect, considered slanderous as a matter of law. ***Martin***, 15 Wis. 2d at 459. All other slander not falling into these seemingly artificial categories, no matter how obvious or apparent, is not actionable without alleging and proving special damages.[2] ***Id***.

¶15 Yasko asserts that her comments did not affect Vultaggio in his business or profession because she claims that he is a "drywaller" by trade, not a rental property manager. She notes that Kathy Nelson, Vultaggio's business partner and companion, was actually the official rental property manager for the properties in question. It is true that Vultaggio operated a separate plastering and stucco business during the period Yasko made the comments under review. However, the record supports the circuit court's finding that there was sufficient

[2] The reason for the slander per se rule is that "certain words are by their nature especially likely to cause pecuniary loss and ... proof of the defamation itself is sufficient to establish the existence of some damages so that the jury may, without other evidence, estimate the amount of damages." ***Starobin v. Northridge Lakes Dev. Co.***, 94 Wis. 2d 1, 13, 287 N.W.2d 747 (1980) (citing WILLIAM L. PROSSER, THE LAW OF TORTS § 112, at 754-56 (4th ed. 1971)).

evidence that Vultaggio was in the property management business. The leases for the rental properties were titled "Vultaggio Properties" and the testimony of Nelson and Vultaggio indicates that the two managed the rental properties together.

¶16 Taken in context, Yasko's comments are more than merely words of "general disparagement" equally discreditable as applied to all persons. ***Bauer v. Murphy***, 191 Wis. 2d 517, 531, 530 N.W.2d 1 (Ct. App. 1995). Yasko made disparaging comments about several rental properties, identifying them quite specifically by address and location. She linked each of those properties with Vultaggio's name, clearly noting that Vultaggio was the owner of each property. She referred to Vultaggio as owning "slum property," a "sub-human habitation place" and "pig sties." We agree with the circuit court's finding that "a reasonable jury could look at [those comments] and say that this—these remarks were directed at Richard Vultaggio and designed to defame him personally." We further agree with the circuit court's determination that sufficient evidence was adduced to establish that Vultaggio was in the property management business and was known in this capacity by Yasko and throughout the community.

¶17 We are satisfied with the circuit court's finding that there was sufficient evidence that Yasko's remarks affected Vultaggio in his business, and that the remarks could constitute slander per se. As a result, Vultaggio was not required to plead special damages. *See* WIS JI—CIVIL 2516. On this basis as well, the circuit court properly denied Yasko's motions and properly submitted the question of defamation to the jury.

¶18 Yasko next contends that there was insufficient evidence that she abused her conditional privilege to speak freely at the city council meeting, such

that the circuit court erred in submitting the question of abuse of privilege to the jury. Again, we disagree.

¶19 In ***Vultaggio I***, the Wisconsin Supreme Court determined that a witness's testimony at legislative proceedings, such as the city council meeting involved here, is conditionally privileged when the statements are made during that proceeding. Thus, Yasko was, as a matter of law, afforded a conditional privilege with respect to her comments.[3] However, a conditional privilege is not absolute. *See* ***Vultaggio I***, 215 Wis. 2d at 331-32 (citing ***Zinda***, 149 Wis. 2d at 924-25). The conditional privilege may be forfeited if any one of the following occurs: (1) the witness knows the defamatory matter to be false, or acts in reckless disregard as to its truth or falsity; (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. ***Id.*** The supreme court stated that whether a speaker has abused his or her conditional privilege is a fact question for the jury, unless the facts are such that only one conclusion can be reasonably drawn. ***Id.*** at 346 (citing ***Zinda***, 149 Wis. 2d at 926).

[3] Yasko repeatedly asserts that she was speaking on a matter of "social importance." We must decline this apparent invitation to revisit the question of the level of privilege accorded Yasko's comments. The Wisconsin Supreme Court answered that question in ***Vultaggio I***, and we are bound by that decision. *See, e.g.,* ***Livesey v. Copps Corp.***, 90 Wis. 2d 577, 581, 280 N.W.2d 339 (Ct. App. 1979).

¶20 We cannot say that only one conclusion can be reasonably drawn from the facts of record. Vultaggio did introduce evidence intended to establish that Yasko had abused her conditional privilege—focusing particularly on the allegation that her comments were made with a reckless disregard as to their truth or falsity, and that they were broadcast on cable television. For example, Vultaggio introduced the testimony of Gene (Pete) Ackerman, a carpenter, who was acquainted with Yasko and occasionally performed work on Vultaggio's rental properties. Ackerman testified that two months before the city council meeting he discussed with Yasko various improvements that Vultaggio had made to some of the rental properties in question. He testified that during this discussion, Yasko referred to Vultaggio as a "slum parasite," despite Ackerman's description of routine maintenance projects on the properties which included painting and changing locks. Yasko herself also admitted that she had no relevant background with which to assess the habitability of the rental properties. The foregoing evidence supports a claim that Yasko spoke with reckless disregard as to the truth or falsity of her remarks. And it is undisputed that Yasko's remarks were televised locally. We thus hold that Vultaggio was entitled to have a jury determine whether Yasko abused her privilege at the Whitewater City Council meeting. The circuit court did not misuse its discretion in submitting the question of the abuse of the conditional privilege to the jury.

¶21 Yasko also challenges the jury's award of punitive damages. A party seeking recovery for punitive damages must demonstrate that the defamation occurred and that the words were uttered with express malice. ***Calero v. Del Chem. Corp.***, 68 Wis. 2d 487, 506, 228 N.W.2d 737 (1975). A finding of express malice thus serves as a basis for a punitive damages award. ***Id.*** Yasko contends that Vultaggio failed to adduce any evidence that she acted with express malice,

such that the circuit court erred in submitting the punitive damages instruction to the jury.

¶22 Express malice exists when a defamatory statement is published for motives of ill will, bad intent, envy, spite, hatred, revenge, or other bad motives against the person defamed. ***Polzin v. Helmbrecht***, 54 Wis. 2d 578, 587-88, 196 N.W.2d 685 (1972). Based on our review of the entire record, including Yasko's own testimony and the videotape of her remarks, we hold that there was sufficient evidence of express malice to justify the circuit court's decision to submit the punitive damages instruction to the jury. Whether Yasko acted with express malice so as to justify a punitive damages award thus became a question of fact for the jury. *See* ***Madsen v. Threshermen's Mut. Ins. Co.***, 149 Wis. 2d 594, 609, 439 N.W.2d 607 (Ct. App. 1989). The jury concluded that not only were Yasko's statements defamatory, they were also made with express malice.

¶23 As Yasko concedes, a jury verdict will be sustained if there is any credible evidence, viewed in the light most favorable to the verdict, that supports it. ***Nolden v. Mut. Benefit Life Ins. Co.***, 80 Wis. 2d 353, 359, 259 N.W.2d 75 (1977). To recover punitive damages in a common-law defamation action of this sort, the plaintiff must show express malice by a preponderance of the evidence. The jury was so instructed and so found. *See* ***Calero***, 68 Wis. 2d at 506; WIS JI—CIVIL 2520. We hold that there is sufficient credible evidence to sustain the jury's finding that Yasko's remarks were indeed defamatory and were made with express malice.

¶24 Yasko also asserts that there was inadequate record evidence concerning her ability to pay the punitive damages awarded by the jury. The amount of punitive damages rests initially in the discretion of the jury. *See, e.g.,*

Wangen v. Ford Motor Co., 97 Wis. 2d 260, 302, 294 N.W.2d 437 (1980). The jury determines the amount of punitive damages with the view to having the punitive damages accomplish their purposes, namely, punishment and deterrence. ***Id.*** It is true that the wealth of the wrongdoer is a factor that may be considered by the jury in determining the amount of punitive damages to award. *See, e.g.,* ***Fahrenberg v. Tengel***, 96 Wis. 2d 211, 234, 291 N.W.2d 516 (1980); ***Malco v. Midwest Aluminum Sales***, 14 Wis. 2d 57, 66, 109 N.W.2d 516 (1961).[4] However, Yasko's financial status in this case is not a significant consideration in reviewing the punitive damages award on appeal because neither party introduced sufficient evidence to show Yasko's net worth, net earnings, or financial resources. Failure to show net worth does not invalidate the award of punitive damages, but merely eliminates one factor by which the reasonableness of the award can be gauged. ***Fahrenberg***, 96 Wis. 2d at 235.[5]

¶25 We are reluctant to set aside an award because it is large or because we would have awarded less. As we have said in cases involving compensatory damages, all "that the court can do is to see that the jury approximates a sane estimate, or, as it is sometimes said, see that the results attained do not shock the judicial conscience." ***Jones v. Fisher***, 42 Wis. 2d 209, 217, 166 N.W.2d 175 (1969) (citation omitted). The jury's award in this case is not, under the

[4] Factors to be considered in determining the proper amount to be awarded as punitive damages include: the grievousness of the defendant's acts, the degree of malicious intention, the potential damage which might have been done by such acts as well as the actual damage, and the defendant's ability to pay. ***Fahrenberg v. Tengel***, 96 Wis. 2d 211, 234, 291 N.W.2d 516 (1980).

[5] Indeed, in ***Dalton v. Meister***, 52 Wis. 2d 173, 181, 188 N.W.2d 494 (1971), the court noted that "there is no arithmetic proportion to which punitive damages should relate to the wealth of the defendant or to the damage done the plaintiff."

circumstances, shocking to the conscience of the court.[6] Quite simply, there is no basis in the record to challenge the punitive damages award.

¶26 We conclude that the record contains sufficient credible evidence to sustain the jury's verdict, and therefore, we affirm.

By the Court.—Judgment affirmed.

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

[6] Indeed, this court has recognized that criminal fines may be relevant to assessing the reasonableness of a punitive damages award. *See* ***Wozniak v. Local 1111 of UE***, 57 Wis. 2d 725, 731, 205 N.W.2d 369 (1973); ***Meke v. Nicol***, 56 Wis. 2d 654, 664, 203 N.W.2d 129 (1973); ***Lisowski v. Chenenoff***, 37 Wis. 2d 610, 634, 155 N.W.2d 619 (1968). The legislature has determined that the fine for defamation in violation of WIS. STAT. § 942.01 (1999-2000) shall not exceed $10,000. WIS. STAT. § 939.51. The statute thus contemplates a fine comparable to the $11,250 awarded by the jury.