COURT OF APPEALS
DECISION
DATED AND FILED

January 17, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-1861 **Cir. Ct. No. 98-CV-228**

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

CAROL KEIP,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

DUANE KEIP,

PLAINTIFF-RESPONDENT,

V.

JAMES NICEWANDER, STEVENS POINT AREA SCHOOL DISTRICT, AND EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Portage County: FREDERIC W. FLEISHAUER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 LUNDSTEN, J. Carol Keip sued the Stevens Point Area School District; the district's transportation director, James Nicewander; and the district's insurer, Employers Insurance of Wausau, alleging defamation and, pursuant to 42 U.S.C. § 1983 (1994), a federal due process violation for failing to provide a name-clearing hearing. Keip's husband, Duane, sued for loss of society and companionship of his wife. The case proceeded to trial and the jury returned a verdict in favor of Keip on both of her claims and in favor of her husband. The trial court denied various pretrial, trial and post-trial dismissal motions brought by the defendants. The defendants appeal. Keip cross-appeals a trial court decision reducing the damages awarded by the jury on her § 1983 claim. Keip also seeks attorney fees incurred in connection with this appeal pursuant to 42 U.S.C. § 1988(b) (1994).

¶2 We affirm the trial court with respect to the defamation claim, but reverse the judgment imposing liability under 42 U.S.C. § 1983 and imposing related damages and attorney fees. Accordingly, we reject Keip's cross-appeal and her request for attorney fees related to this appeal.

BACKGROUND

¶3 At all times pertinent to this litigation, Riteway Bus Service was under contract with the Stevens Point Area School District to provide bus service for district students. During 1996, Carol Keip was employed by Riteway as a school bus driver; she was not an employee of the school district. James Nicewander is the school district's transportation director.

¶4 Evidence presented at trial revealed the following. On December 6, 1996, a principal in the school district informed Nicewander that some students reported that Keip used inappropriate language while transporting students. Nicewander investigated immediately and spoke with ten students from three schools that same morning.

¶5 Some students told Nicewander that Keip told R.P., a student on the bus, that she hoped he would fall on his "ass" when he exited the bus. Several students told Nicewander that Keip stopped the bus to allow students to smoke cigarettes and that sometimes she got off the bus and smoked with students. Several students also said that Keip flirted with boys and that Keip told students she thought T.G., a male student, was cute and that he had a "nice butt." Those same students told of an incident in which T.G. was paid or dared by one of the other students to bend over for Keip. Nicewander was told that Keip took T.G. out for breakfast and made unscheduled bus runs for him.[1]

¶6 After hearing these allegations, Nicewander contacted a Riteway manager named Linda Laffe and requested an immediate meeting with Keip. A meeting took place at the local Riteway office the same day, December 6. Present were Nicewander, Keip, Laffe and Larry Trelka, a former manager of Riteway who provided consultation services to the bus company.

¶7 During the meeting, Keip was confronted with the smoking allegations and she admitted she stopped the bus on occasion to allow students to

[1] With a couple of exceptions relating to specific students, Keip admits in her appellate brief that students made allegations of a sexual nature to Nicewander. What was disputed at trial was whether these allegations were true.

smoke. She also admitted that she sometimes smoked with the students, leaving other students on the bus unattended with the motor running. Keip also acknowledged that she regularly gave T.G. unscheduled bus rides and went to breakfast with him multiple times and that both of these activities occurred without other students present. Keip denied she had anything to do with T.G. bending over for money. Keip also denied that she flirted with or had an improper relationship with any boy. She denied making any improper sexual comments to any student.

¶8 In the course of the meeting, Nicewander said that if Keip were a man, she would be charged and would be in jail. He told her she was not a fit person to be around children. Nicewander talked about teachers in Milwaukee and Seattle who had been charged because of misconduct with minors. Nicewander told Keip that he would expose her sexual misconduct, and charges would be pressed if she did not stop transporting district students. Nicewander made these statements even though he conceded at trial he had not heard any allegations which he thought would constitute criminal conduct if true.

¶9 Later that day, Nicewander informed students on Keip's regular bus route that Keip would no longer be the driver. Two students and Nicewander testified that he referred to the tobacco problem, but no one testified that Nicewander made reference to any other allegations.

¶10 During the December 6 meeting and in a follow-up letter to Riteway, Nicewander informed Riteway officials that Keip was not to transport students. At the meeting and in the letter, Nicewander indicated that his decision was based on the smoking incidents, which violated state law and school district policy. Riteway responded by initially suspending Keip for one month and then assigning

her to other driving duties. There was no trial evidence that Riteway ever actually fired Keip.[2]

¶11 Keip testified that she later attempted to get a bus-driving job with three different companies (Lamers, Safeway and a company owned by Leonard Simkowski) without success. Keip said neither Lamers nor Safeway gave her a reason for failing to hire her. She said Leonard Simkowski came to her farm during the summer of 1997 and said he would attempt to get Nicewander to give her a second chance so she could drive for Simkowski, but Nicewander "forbid it." Keip testified that Leonard Simkowski, or perhaps his son, told Keip he had heard she had been in jail for "child molestation."

¶12 Keip testified that she became depressed and reclusive. She said she did not have any energy to get up in the morning, shower, dress or cook for herself or her family. She began taking Prozac. Keip stated that because she was made to feel like a "pervert," she was hesitant to kiss or hug her own kids or to drive her son's friends over to her home for a birthday party. She also stopped volunteering as a teacher's aide and for the Special Olympics.

¶13 The jury returned verdicts in favor of Keip, awarding her $43,000 on the defamation claim and $50,000 for failing to provide a name-clearing hearing. Duane was awarded $15,000 for loss of society and companionship. In response to the defendants' motion, the trial court reduced the damages award on Carol Keip's § 1983 claim from $50,000 to $15,000.

[2] In a pretrial deposition, Keip's supervisor at Riteway, Laffe, said that Riteway offered Keip continuing "charter" work, but that Keip eventually said she "couldn't do the charter work."

DISCUSSION

¶14 Nicewander's appellate brief raises several legal challenges to the defamation verdict without much regard to whether his challenges are directed at the denial of his summary judgment motion, the denial of his motion to dismiss at trial after evidence was presented, or the denial of his motion after the verdicts.[3] In his reply brief, Nicewander acknowledges his failure to segregate his arguments, but asserts it does not matter because his arguments for summary judgment and for dismissal during and after trial are "virtually identical." We see no reason to attempt segregation on our own. Thus, we decline to address Nicewander's arguments in the context of summary judgment and note that this has no effect on the outcome in light of the arguments Nicewander advances.

Defamation Verdicts

¶15 We first consider whether the trial court erred in regard to Keip's defamation claim.

Waived Challenges to the Defamation Verdicts

¶16 Nicewander asks this court to hold as a matter of law that statements he made during the December 6 meeting were not defamation. Nicewander asserts that the trial evidence supports the following conclusions: (1) his statements were "opinions" or "hyperbole," not statements of fact; (2) his statements were not defamatory because the Riteway officials present at the meeting did not believe the allegations of sexual misconduct; (3) his statements

[3] We will frequently use "Nicewander" in the remainder of this decision as shorthand for all three defendants. When we refer to Nicewander as an individual, it will be apparent.

were not false in the sense required for defamation because Nicewander was "concerned that the allegations made by the children -- if believed -- could result in criminal prosecution of Ms. Keip and liability for sexual misconduct or sexual harassment of school district children."

¶17 These arguments are waived because they appear for the first time on appeal. *See* ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992); ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983). Nicewander has not responded to Keip's waiver arguments and we do not independently find good reason to ignore waiver. *See* ***State v. Erickson***, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999) ("The waiver rule exists to cultivate timely objections. Such objections promote both efficiency and fairness."). We also note that Nicewander's waived arguments are based on factual inferences from the testimony most favorable to him, not to Keip. This is a fatal flaw because, as explained later in this opinion, we must review such arguments under a view of the evidence most favorable to Keip.

Other Challenges to the Defamation Verdicts

¶18 Nicewander argues that his statements were not defamatory as a matter of law because they were only communicated to Keip and people covered by the "common interest" privilege. In effect, he argues that even if his statements were otherwise defamatory, they are not actionable because they were only heard by Keip and people with a "common interest." This argument is faulty because it ignores the defamation theory advanced by Keip at trial. The jury did not find that Nicewander defamed Keip by any communication outside the December 6 meeting. Rather, the jury found that Nicewander abused his conditional privilege to make defamatory statements during the December 6 meeting.

¶19 Defamation is a false statement communicated to a third person which tends to harm the reputation of another so as to lower him in the estimation of the community or deter third persons from associating or dealing with him. *See* WIS. JI-CIVIL 2501 (1991); ***Converters Equip. Corp. v. Condes Corp.***, 80 Wis. 2d 257, 262, 258 N.W.2d 712 (1977). However, not all defamatory statements are actionable. Some statements fall within a class which the law terms "privileged." ***Zinda v. Louisiana Pac. Corp.***, 149 Wis. 2d 913, 921, 440 N.W.2d 548 (1989). One such privilege is the "common interest" privilege. ***Id.*** at 922. The common interest privilege is "based on the policy that one is entitled to learn from his associates what is being done in a matter in which he or she has an interest in common." ***Id.*** at 923. Thus, "defamatory statements are privileged which are made in furtherance of common property, business, or professional interests." ***Id.***

¶20 The common interest privilege is conditional and may be forfeited if abused. ***Id.*** at 922, 924. Wisconsin courts have recognized several ways the privilege can be abused:

1) when a declarant knows the statements are false or makes them with reckless disregard as to the truth or falsity of them;

2) when the defamatory matter is published for some purpose other than the one for which the particular privilege is given;

3) when publication is made to some person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege;

4) when 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 925. Once a court determines that a defendant has a conditional privilege, the burden shifts to the plaintiff to affirmatively prove abuse of the privilege. ***Olson v. 3M Co.***, 188 Wis. 2d 25, 38, 523 N.W.2d 578 (Ct. App. 1994).

¶21 In this case, the parties eventually agreed before trial that Nicewander had a "common interest" with the two people representing Riteway at the December 6 meeting. Keip asserted that Nicewander abused his limited privilege during the meeting. Accordingly, the jury was instructed that Nicewander had a common interest with the Riteway officials and was privileged to make defamatory statements during the meeting unless he abused his privilege by making defamatory statements: (1) with knowledge of falsity or reckless disregard for truth or falsity; (2) without a reasonable belief that making the defamatory statements was necessary to review Keip's performance and take disciplinary action; (3) not necessary to accomplish review or disciplinary action; or (4) he believed were true and then adding statements he knew to be false. Nicewander does not argue that the jury instructions or the related verdict questions were erroneous.

¶22 It follows that Nicewander's argument, that his statements were not defamatory as a matter of law because they were only communicated to Keip and people covered by the "common interest" privilege during the December 6 meeting, must fail. Once the jury determined that Nicewander made a defamatory statement during the December 6 meeting, the next question was whether Nicewander abused his privilege during the meeting. Under the theory of liability presented to the jury regarding defamation, Keip was not required to prove that Nicewander communicated with any person outside the meeting.

¶23 Nicewander also argues that the evidence was insufficient to support a finding that he abused his common interest privilege during the meeting. He argues that he did not act with reckless disregard for the truth, but instead acted out of concern that the allegations against Keip, if believed, might result in the criminal prosecution of Keip and liability for the school district. The flaw in this argument is that it is based on disputed testimony. Nicewander relies on an interpretation of the evidence he hoped the jury would adopt rather than on undisputed evidence or evidence viewed in a light most favorable to Keip.

¶24 The standard applied to challenges to the sufficiency of the evidence was recently summarized in ***Allied Processors, Inc. v. Western National Mutual Insurance Co.***, 2001 WI App 129, 246 Wis. 2d 579, 629 N.W.2d 329:

> A motion challenging the sufficiency of the evidence may not be granted unless, considering all credible evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a verdict in that party's favor. This standard applies both to the trial court and to the appellate court reviewing the trial court's ruling. Because the trial court is in a better position to decide the weight and relevancy of the testimony, an appellate court must give substantial deference to the trial court's better ability to assess the evidence and may not reverse unless the trial court is clearly wrong.

Id. at ¶12 (citations omitted).

¶25 Nicewander fails to meet this standard. For example, during the December 6 meeting, Nicewander said that if Keip were a man, charges would be brought and she would be in jail. Keip testified that Nicewander also said he would expose her sexual misconduct, and charges would be pressed if she did not stop transporting district students. The jury could have construed these statements as assertions by Nicewander that students had made allegations of criminal sexual

misconduct. However, there was no evidence that Nicewander heard allegations of criminal conduct and Nicewander himself admitted he had heard no such allegations. Thus, the jury was entitled to find that when Nicewander implied that Keip had engaged in criminal behavior with students, Nicewander acted either with reckless disregard for the truth or with knowledge of the falsity of the information implied by his statements.[4]

¶26 Nicewander also argues that he did not abuse the privilege as a matter of law because he had a right to make an assessment of Keip's lapses in judgment and bring them to the attention of Keip and her supervisors at Riteway Bus Service. However, this argument adds nothing. There is no dispute that Nicewander was entitled to talk at the meeting about allegations of misbehavior he learned during his investigation, even if this included Nicewander making defamatory statements. The question was whether he abused his privilege in any of the four ways defined in the jury instructions.

¶27 Therefore, we affirm the trial court's ruling, leaving in place the jury's defamation verdicts and related damages awards.[5]

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[4] Relying on ***Strasburger v. Bd. of Education, Hardin County***, 143 F.3d 351, 356 (7th Cir. 1998), Keip asserts that statements of opinion which imply false facts may constitute defamation. While Nicewander argues that his statements were only opinions, he has never contested the legal proposition that opinions implying false facts may be defamatory. We do not decide the issue, but we observe that both ***Strasburger*** and logic appear to support Keip's legal position.

[5] We do not address the relationship between the jury's defamation verdicts and the related damages awards. We have carefully examined Nicewander's appellate brief and pleadings below and find that he only challenges the defamation and abuse of privilege verdicts themselves, not the damages awards relating to these verdicts. That is, Nicewander does not claim that the jury erroneously awarded damages based on harm caused to Keip by rumors in the community rather than on harm directly attributable to the content of the December 6 meeting.

§ 1983 Verdicts

¶28 The jury found in favor of Keip on her claim under 42 U.S.C. § 1983, in which she alleged that the school district denied her constitutional right to due process by failing to provide a name-clearing hearing. Nicewander asserts that the § 1983 claim should not have gone to the jury. We agree.

¶29 Nicewander argues that Keip needed to present proof that Nicewander damaged her reputation in the community by making defamatory statements outside the December 6 meeting. He contends the evidence was insufficient to show that he repeated any defamatory statements outside the meeting. Keip's response is twofold. First, Keip asserts she presented evidence showing that Nicewander must have made defamatory statements outside the meeting. Second, Keip says she did not need to prove that Nicewander spread defamatory information, only that there was a likelihood that defamatory statements made at the meeting would be disseminated widely enough to damage her job opportunities. We resolve this dispute in favor of Nicewander.[6]

¶30 Federal case law contains various formulations of Keip's particular § 1983 due process claim involving the failure to provide a name-clearing hearing,[7] and we do not endeavor to delineate the elements of this cause of action. Generally speaking, Keip claimed she had a protectable "liberty interest" in her

[6] Nicewander also complains that the trial court improperly found that Keip had a constitutionally protected property interest in her job. We do not address the merits of this claim because, regardless of the trial court's pretrial ruling on this topic, the property interest claim was not presented to the jury.

[7] *See*, *e.g.*, ***Townsend v. Vallas***, 256 F.3d 661, 669-70 (7th Cir. 2001); ***Garcia v. City of Albuquerque***, 232 F.3d 760, 771-72 (10th Cir. 2000); ***Ludwig v. Board of Trustees***, 123 F.3d 404, 410 (6th Cir. 1997).

reputation for purposes of future employment and that the school district, as a government actor, was required to provide a name-clearing hearing so that she could respond to accusations in an attempt to clear her name.[8]

¶31 Nicewander asserts, and Keip does not dispute, that this claim requires a showing of public disclosure. We agree. "Stigmatizing statements by the government about an employee upon her discharge only implicate a liberty interest when there is also *public disclosure*." ***Donato v. Plainview-Old Bethpage Cent. Sch. Dist.***, 96 F.3d 623, 631 (2nd Cir. 1996) (emphasis added); *see also* ***Strasburger v. Bd. of Educ., Hardin County***, 143 F.3d 351, 356 (7th Cir. 1998). Oral statements to an employee which are not made public do not constitute "public disclosure." *See* ***Bishop v. Wood***, 426 U.S. 341, 348 (1976).

¶32 Keip argues that she met her burden of showing actual public disclosure because she presented the following evidence: (1) a prospective employer testified that he called Nicewander and Nicewander told him that Keip could not drive buses for school district children; (2) two bus companies, Lamers and Safeway, refused to hire Keip, but would not tell her why; (3) "the principal at Ben Franklin school, Mr. Pecha, was made aware of the accusations"; (4) "many of the students knew of the accusations"; (5) "Nicewander talked to students at the junior high school, at the high school and on the bus on the very day he issued his ultimatum" to Keip; and (6) while exploring a job opportunity with Leonard

[8] The parties stipulated, for purposes of the § 1983 claim, that the "actions and omissions about which [Keip and her husband] complain in this action were performed under color of state law," and that Nicewander "was acting within the scope and course of his [school district employment] with respect to [such] actions and omissions."

Simkowski, Keip was told by Simkowski that he heard she had been "put in jail as a child molester."[9]

¶33 At most, Keip's arguments amount to an assertion that if there were rumors in the community suggesting that Keip engaged in sexual misconduct with students, then Nicewander must have been the source of such rumors. However, our review of the evidence in a light most favorable to Keip reveals no credible evidence that Nicewander repeated defamatory statements outside the December 6 meeting. Apart from the tobacco allegations, there was no evidence that Nicewander made any allegations about Keip to anyone at any time outside the meeting. Moreover, the only rumor Keip refers to is the one she heard from Leonard Simkowski or his son: that Keip had been in jail for child molestation. That evidence was sufficient to show at least one rumor of sexual misconduct circulated in the community, but it utterly fails to prove the source of the rumor. [10]

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[9] Keip does not provide citations to the record for her cursory assertions that students and a principal were aware of "accusations" and does not explain why this awareness translates into "public disclosure" by Nicewander. Our own review discloses that Nicewander testified that the ten students were interviewed individually and that principal Pecha was present when Nicewander interviewed students at Ben Franklin school. However, there is no evidence that Nicewander told any students what other students had said and no evidence that Nicewander related to principal Pecha any information that Pecha did not hear directly from the students themselves. The record does reveal that Nicewander told his superiors about the allegations he heard, but Keip has never claimed that Nicewander's communications with his superiors constituted public disclosure and, in any event, it is evident that these superiors were covered by the "common interest" privilege.

[10] We note that the verdict questions were fashioned in such a way that the jury was never asked to make a finding on public disclosure. The first verdict question asked whether Nicewander made any defamatory statements at the December 6 meeting with Keip and Riteway officials. The jury instructions made clear that this question assumed that the Riteway officials were "third persons" for purposes of determining whether defamation occurred during the meeting. The second verdict question asked whether Nicewander abused his limited privilege to make defamatory statements during the meeting. Verdict questions "3a" and "3b" were directed at damages due to defamation. The fourth verdict question broached the topic of the § 1983 due process/name-clearing violation. The jury was told in the fourth verdict question that if it

(continued)

¶34 During a postconviction hearing, the trial court said it agreed with Nicewander that there was no evidence that Nicewander's statements "went beyond the room in which this discussion took place." Nonetheless, the trial court affirmed the § 1983 verdict on a theory not advanced in any meaningful way by Keip, either at the trial court level or on appeal. The trial court reasoned that the "nature of those allegations" combined with the school district's "hurried response ... raised an inference of stigma" supporting the jury finding that Keip was improperly denied a name-clearing hearing. We do not adopt this reasoning because Keip provides no legal authority for it and we find no clear support. *Compare* ***Hadley v. County of Du Page***, 715 F.2d 1238, 1247 (7th Cir. 1983), *with* ***Melton v. City of Oklahoma City***, 928 F.2d 920, 935-37 (10th Cir. 1991) (Logan, J., dissenting). In the absence of both briefing by the parties and express or implicit fact finding on the topic, we decline to adopt and apply a rule requiring a name-clearing hearing to address unconfirmed allegations when the government conducts an investigation that produces both confirmed and unconfirmed allegations and then takes prompt action based on the confirmed allegation.

¶35 Keip also argues that even if she did not present evidence showing that Nicewander made defamatory statements outside the meeting, she still met her burden because the "public disclosure" requirement can be satisfied if there is a likelihood of disclosure. Nicewander does not respond to this argument. We reject it, nonetheless, because Keip provides no support for her more specific

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answered "yes" to the first verdict question, it should answer the following question: "Did the school district deprive Carol Keip of her right to due process of law by failing to provide her with a meaningful opportunity to respond to the students' allegations against her?" None of the verdict questions asked the jurors to address whether Nicewander was the source of rumors in the community.

implicit assertion that a likelihood of disclosure may exist based solely on the existence of an oral meeting between an employer and an employee.

¶36 The cases Keip relies on, ***Brandt v. Board of Cooperative Educational Services***, 820 F.2d 41 (2nd Cir. 1987), and ***Donato***, both involve information that was put into a permanent personnel record. These cases stand for the proposition that a name-clearing hearing is required when stigmatizing allegations are placed in an employee's personnel file because personnel files are likely to be disclosed to future employers. ***Donato***, 96 F.3d at 631-32; ***Brandt***, 820 F.2d at 44-45. In this case, apart from the undisputed smoking allegations, no allegations made by Nicewander were reduced to writing and maintained in a manner so as to be available to potential employers. Rather, this case involves oral comments made in a private meeting. Private oral statements do not constitute "public disclosure" for purposes of this § 1983 claim. *See*, *e.g.,* ***Bishop***, 426 U.S. at 348-49.

¶37 Accordingly, the judgment of liability on the § 1983 claim is reversed. We also reverse the related damages award of $15,000, as reduced by the court's May 12, 2000, order, and we reverse attorney fees ordered by the trial court in the amount of $33,942. [11]

[11] Neither party has addressed, either in this court or in the trial court, whether Keip's particular § 1983 liberty interest claim applies to her situation in which she was neither employed nor terminated by the government. Therefore, our opinion should not be read as suggesting that a person in Keip's position may insist on a § 1983 name-clearing hearing. Also, neither party has addressed whether a plaintiff in Keip's situation must have requested a name-clearing hearing in order to prevail. We do not address this issue either.

Cross-Appeal and Motion for Attorney Fees

¶38 In her cross-appeal, Keip complains that the trial court erroneously exercised its discretion when it reduced the damage award relating to her § 1983 claim from $50,000 to $15,000. Keip also requests attorney fees incurred in connection with this appeal, pursuant to 42 U.S.C. § 1988(b) (1994). Because we reverse the trial court with respect to the § 1983 claim, we reject Keip's cross-appeal and deny her request for attorney fees incurred in connection with this appeal, which is statutorily dependent on her prevailing on the § 1983 claim.[12]

Conclusion

¶39 For the reasons stated, the judgment is affirmed in part and reversed in part. On remand, the trial court should issue an amended judgment consistent with this opinion.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

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[12] The jury awarded Keip's husband $15,000 for loss of society and companionship. Nicewander does not suggest that this verdict must be overturned if the defamation verdicts are affirmed. Accordingly, this decision leaves that award in place.