COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP489 **Cir. Ct. No. 2008CV60**

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

THOMAS KRANS,

PLAINTIFF-APPELLANT,

V.

ROBERT WICKLUND AND DENNIS NEWINGHAM,

DEFENDANTS-RESPONDENTS,

ROBERT HEDMARK AND AMERICAN ALTERNATIVE INSURANCE CORPORATION,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Florence County: LEON D. STENZ, Judge. *Affirmed.*

Before Vergeront, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Thomas Krans appeals a summary judgment order dismissing his defamation claims against Robert Wicklund and Dennis Newingham. Krans contends that there are genuine issues of material fact as to whether a pamphlet authored and distributed by Wicklund and Newingham at an Aurora town board meeting contained statements defamatory to Krans, precluding summary judgment. We are persuaded, however, by Wicklund and Newingham's arguments that, even assuming the pamphlet is defamatory to Krans, summary judgment was properly granted because: (1) Krans is a limited purpose public figure and there are no facts showing that Wicklund acted with actual malice, and (2) the statute of limitations against Newingham has run.[1] We affirm.

¶2 We review orders granting summary judgment *de novo*, applying the same methodology as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). Summary judgment is properly granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2) (2009-10).[2]

¶3 Krans contends that there are genuine issues of material fact as to whether a pamphlet Wicklund and Newingham created and distributed at an Aurora town board meeting in April 2006 defamed Krans by asserting that Krans' development site posed health hazards to the community. We will assume that the pamphlet was defamatory to Krans. We turn to Wicklund and Newingham's

[1] We may affirm a summary judgment order on different grounds than those relied on by the circuit court. ***International Flavors & Fragrances, Inc. v. Valley Forge Ins. Co.***, 2007 WI App 187, ¶23, 304 Wis. 2d 732, 738 N.W.2d 159.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

alternative argument that summary judgment was properly granted because the summary judgment submissions establish they are entitled to judgment based on their affirmative defenses to Krans' defamation action.

¶4 Wicklund asserts that he is entitled to summary judgment because Krans is a limited purpose public figure and, therefore, Krans must be able to establish that Wicklund acted with actual malice to support a defamation action.[3] Under the First and Fourteenth Amendments to the United States Constitution, in addition to the elements of a common law defamation claim—a false statement communicated to a third party that tends to harm the subject's reputation—a defamation claim by a public figure must also show actual malice. *See* ***Donohoo v. Action Wisconsin, Inc.***, 2008 WI 56, ¶¶37-38, 309 Wis. 2d 704, 750 N.W.2d 739. "[A]ctual malice requires that the allegedly defamatory statement be made with 'knowledge that it was false or with reckless disregard of whether it was false or not.'" ***Id.***, ¶38 (citation omitted).

¶5 Wicklund asserts that Krans is a limited purpose public figure for purposes of this action. Whether a plaintiff is a limited purpose public figure is a question of law, which we decide *de novo*. ***Bay View Packing Co. v. Taff***, 198 Wis. 2d 653, 675-76, 543 N.W.2d 522 (Ct. App. 1995). To determine whether

[3] The parties do not address whether the actual malice requirement applies to both media and non-media defendants. *See* ***Bay View Packing Co. v. Taff***, 198 Wis. 2d 653, 674-75 n.5, 543 N.W.2d 522 (Ct. App. 1995) (noting that neither the United States Supreme Court nor the Wisconsin Supreme Court has stated definitively whether the constitutional requirement of actual malice applies to non-media defendants); *see also* ***Underwager v. Salter***, 22 F.3d 730, 734-35 (7th Cir. 1994) (finding no indication in Wisconsin case law that Wisconsin intends a distinction between media and non-media defendants for purposes of applying the constitutional actual malice requirement in public figure defamation cases). Because Wicklund asserts the privilege, and Krans has not filed a reply brief to refute the assertion, we will assume, without deciding, that the privilege applies.

Krans is a limited purpose public figure in this case, we first determine whether there was a public controversy. We then (1) isolate the controversy; (2) examine Krans' role in the controversy to determine whether his role was more than tangential; and (3) determine if the claimed defamation was germane to Krans' participation in the controversy. *See* ***id.*** at 677-78.

¶6 Wicklund asserts that there was a public controversy surrounding Krans' development, established by deposition testimony as to the public debate about the project in Aurora and its role in town board elections. *See* ***id.*** at 679 (explaining that "'[i]f the issue was being debated publicly and if it had foreseeable and substantial ramifications for non-participants, it was a public controversy'" (citation omitted)). Wicklund asserts that Krans' role in the controversy was more than tangential because Krans was the central figure in the controversy as the developer of the site. *See* ***Wiegel v. Capital Times Co.***, 145 Wis. 2d 71, 87-88, 426 N.W.2d 43 (Ct. App. 1988) (holding that plaintiff's role in controversy was not tangential because, "voluntarily or not, he became the center of the controversy" at issue). Finally, Wicklund asserts that the claimed defamatory statements were germane to the controversy, because all of the statements related to Krans' development of the site. *See* ***id.*** Krans does not dispute any of these assertions. We are persuaded by Wicklund's reasoning, and conclude that Krans was a limited purpose public figure in this case.

¶7 We turn, then, to whether there is a genuine issue of material fact as to whether Wicklund acted with actual malice in publishing the pamphlet. To establish a genuine issue of material fact on the actual malice element, there must be facts in the record that would establish by clear and convincing evidence that Wicklund published false information about Krans "with 'knowledge that it was false or with reckless disregard of whether it was false or not.'" *See* ***Donohoo***,

309 Wis. 2d 704, ¶38 (citation omitted). Further, "[r]eckless disregard for the truth is not measured by what the reasonably prudent person would publish or investigate prior to publishing." ***Id.***, ¶39. Rather, reckless disregard is evaluated by a subjective standard. ***Id.*** "It requires showing that the false statement was made 'with a high degree of awareness of ... probable falsity,' or that the defendant 'in fact entertained serious doubts as to the truth of his publication.'" ***Id.*** (citations omitted).

¶8 Wicklund points to his deposition testimony, where he stated that he prepared the pamphlet using information provided by Newingham, without verifying whether that information was accurate. Wicklund argues that the most Krans will be able to show from the evidence in the record is that Wicklund failed to investigate the information before publishing it, which does not rise to the level of actual malice. *See* ***id.***, ¶78 ("'[M]ere proof of failure to investigate the accuracy of a statement, without more, cannot establish the reckless disregard for the truth necessary for proving actual malice.'" (citation omitted)). Krans has not refuted that assertion, and we therefore take it as conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979). Summary judgment was properly granted as to Wicklund.

¶9 Newingham asserts that he is entitled to summary judgment because the statute of limitations has run on a defamation claim against him. *See* WIS. STAT. § 893.57 (two-year statute of limitations on defamation claims). He points out that the allegedly defamatory pamphlet was distributed at an Aurora town board meeting in April 2006, and that this action was commenced in November

2008.[4] Newingham contends that Krans' claim that he only learned that Newingham participated *in preparing* the pamphlet in May 2008 does not implicate the discovery rule to toll the statute of limitations. *See* ***Pritzlaff v. Archdiocese of Milwaukee***, 194 Wis. 2d 302, 315, 533 N.W.2d 780 (1995) ("[T]he discovery rule … tolls the statute of limitations until the plaintiff discovers or with reasonable diligence should have discovered that he or she has suffered actual damage due to wrongs committed by a particular, identified person."). Newingham asserts that the undisputed facts in the record establish that Krans knew that Newingham *personally distributed* the pamphlets at the April 2006 Aurora town board meeting, and thus his claim against Newingham accrued at that time. Krans does not dispute that his claim against Newingham accrued in April 2006.[5] We agree that the facts in the record establish that Krans' action against Newingham is now barred. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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

[4] Wicklund concedes that Krans' defamation action against him is timely because the statute of limitations was tolled by Krans' prior defamation action against Wicklund, which was filed in November 2007, removed to federal court, and then dismissed without prejudice. *See* WIS. STAT. §§ 893.13 and 893.15.

[5] In the circuit court, Krans asserted he has two separate defamation claims against Newingham: one for distributing the pamphlet, which accrued in April 2006, and one for participating in preparing the pamphlet, which accrued when Krans discovered that participation in May 2008. Krans does not pursue that argument on appeal.