

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 18, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 95-1385 & 95-2316

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

CATHERINE J. FARREY,

Plaintiff-Appellant,

v.

**RUSSELL S. GONNERING, JANICE KREBS,
OCULOPLASTIC & ORBITAL CONSULTANTS, S.C.,
ST. LUKE'S MEDICAL CENTER, INC.,
MARK AMBROSIUS, CATHY PTAK,
SUSAN ARNOLD and AURORA HEALTH CARE, INC.,**

Defendants-Respondents.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Judgment affirmed in part and reversed in part.*¹

Before Sullivan, Fine and Schudson, JJ.

¹ As noted in footnote 3, the appeal from the order is moot and, therefore, dismissed.

PER CURIAM. Catherine J. Farrey appeals from a judgment granting summary judgment and dismissing her claim against Russell S. Gonnering, Janice Krebs, Oculoplastic and Orbital Consultants, S.C., St. Luke's Medical Center, Inc., Mark Ambrosius, Cathy Ptak, Susan Arnold, and Aurora Health Care, Inc. Farrey also appeals from an order denying her motion seeking relief from the judgment pursuant to § 806.07, STATS.

This action arises out of alleged defamatory statements made by Gonnering, a physician, and others about Farrey, one of Gonnering's patients. On appeal, Farrey argues that the trial court erred in granting the motions for summary judgment.² We reverse.³

Farrey received treatment from Gonnering for recurrent eye problems. Subsequently, she became dissatisfied with the treatment she received and with what she contended were certain discrepancies in her medical records. During the months following her treatment, Farrey repeatedly contacted Gonnering and his staff with questions regarding the care she received from Gonnering. After months of letters and phone calls, Gonnering became concerned with what he perceived to be excessive contact from Farrey. Gonnering told others that Farrey was essentially "stalking" him and that they should be careful. After learning of this, Farrey initiated a defamation lawsuit against Gonnering and others who allegedly heard and repeated Gonnering's remarks. In response, Gonnering and the other defendants claimed, among other things, that the alleged defamatory statements were conditionally privileged because they were communications with others with whom they had a "common interest" concerning the statements.

Gonnering and the other defendants filed summary judgment motions seeking dismissal of Farrey's claim. The trial court granted the motions, concluding that although the statements made by Gonnering were

² Krebs and Gonnering were represented by the same attorneys and relied on the same briefs and affidavits in support of their summary judgment motions. The St. Luke's defendants adopted the brief filed by Krebs and Gonnering.

³ Farrey also argues that the trial court erred in denying her § 806.07, STATS., motion. In light of our decision reversing the trial court's grant of the defendant's motion for summary judgment, we do not address this issue.

capable of a defamatory meaning, the statements were privileged by virtue of the common interest between Gonnering and the other defendants. The trial court also determined that Farrey had not presented sufficient facts “to show that there is any abuse of that conditional privilege.”

We review the grant or denial of summary judgment in the same manner as the trial court. See *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Summary judgment is appropriate when there is no dispute of material fact and the moving party is entitled to judgment as a matter of law. RULE 802.08(2), STATS. On review, we must decide whether a genuine issue of fact exists as to whether Gonnering abused his conditional privilege.⁴ We must also decide whether the other defendants established the existence of a conditional privilege.⁵

I. Gonnering

A defamatory statement is conditionally privileged if it is “made on a subject matter in which the person making the statement and the person to whom it is made have a legitimate common interest.” *Zinda v. Louisiana Pacific Corp.*, 149 Wis.2d 913, 922, 440 N.W.2d 548, 552 (1989). The privilege may be lost, however, if it is abused. *Id.*, 149 Wis.2d at 924, 440 N.W.2d at 553. The privilege may be abused: (1) because of the defendant's knowledge of, 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 privilege is given; (3) because the publication is made to some person not

⁴ Gonnering argues that, during the hearing, Farrey did not dispute the fact that the communications were privileged and, therefore, cannot raise any argument on appeal regarding the existence of a conditional privilege. Farrey rejoins that any alleged failure to contest the existence of a conditional privilege does not prevent her from asserting that Gonnering and the others abused their conditional privilege. We agree.

⁵ The defendants other than Gonnering argue that Farrey did not sufficiently contest before the trial court the issue of whether they had a conditional privilege. The trial court, however, performed a two-part analysis in granting the defendants' summary judgment motions. The trial court first determined that a conditional privilege was available to all of the defendants and then determined that Farrey did not show that the defendants abused the privilege. The conditional-privilege issue was sufficiently argued before the trial court to preserve Farrey's right to have us review it.

reasonably believed to be necessary for the accomplishment of the purpose of the privilege; (4) because the publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the privilege is recognized; or (5) because the publication includes unprivileged matter as well as privileged matter. *Id.*, 149 Wis.2d at 925, 440 N.W.2d at 553. Farrey argues that there are material issues of fact regarding whether Gonnering abused the conditional privilege under the first condition. We agree.

Farrey submitted sufficient evidentiary material that puts into question the veracity of Gonnering and the truthfulness of his submissions to the trial court in support of his claim that his statements were conditionally privileged. Gonnering claimed that he had good reason to believe that Farrey was “stalking” him and Dr. David Fingard because Cathy Ptak, an employee of St. Luke's, where Gonnering treated Farrey, told him that Farrey had asked about Dr. Fingard's home address. In her affidavit in support of her response to Gonnering's summary judgment motion, Farrey denied ever asking for Dr. Fingard's address. Also, Gonnering claimed that when he told Dr. Fingard about this, Dr. Fingard's wife and children stated that they had seen a light-colored van with an occupant “consistent with the physical description of Ms. Farrey” pull into the driveway. Gonnering claimed that his neighbors had also seen a similar van in his neighborhood. Further, Gonnering stated that he enlisted the help of a police officer friend to determine who owned the light-colored van. Gonnering stated that his police officer friend told him, among other things, that the van was registered to Oakhill Correctional Institution where Farrey worked and that Farrey had signed the van out from work on the days Gonnering's neighbors saw the van.

In her affidavit submitted in opposition to the defendants' motions for summary judgment, Farrey asserted that no one was allowed to take a van from Oakhill unless they are certified to drive a van. She stated that she was not so certified. Farrey also stated that she never requested and was never assigned a van registered to Oakhill. Further, Farrey stated that during the time when Gonnering supposedly confirmed that the light-colored van belonged to Oakhill, it only had red and blue vans for off-grounds use.

Inferences drawn from underlying facts should be viewed in the light most favorable to the party opposing the summary judgment motion. *Grams v. Boss*, 97 Wis.2d 332, 338-339, 294 N.W.2d 473, 477 (1980). If material

presented is subject to conflicting interpretation, summary judgment is inappropriate. *Id.* The evidence presented to the trial court on summary judgment is subject to conflicting interpretation. A reasonable jury could conclude that Farrey is telling the truth and that, accordingly, Gonnering is not.

II. Krebs and the St. Luke's defendants⁶

Regarding Krebs and the St. Luke's defendants, in order to establish the existence of a conditional privilege, they had to show: 1) that the speaker made statements to another person; 2) with whom the speaker had a common interest; and 3) that the speaker reasonably believed that the content of the statement was related to the common interest. *Zinda*, 149 Wis.2d at 922, 440 N.W.2d at 552.

Although Krebs admitted communicating with Dr. Lyon, another physician in Gonnering's office, she denied that she republished Gonnering's alleged defamatory statement. Accordingly, Krebs did not establish a conditional privilege; in order to do so, she was required to identify the person or persons to whom she made the defamatory statements and the circumstances of the communication that gave rise to the conditional privilege. RESTATEMENT (SECOND) OF TORTS § 596 (1977). Krebs is not entitled to summary judgment. See *Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis.2d 281, 290-292, 507 N.W.2d 136, 139 (Ct. App. 1993) (party with burden of proof on element in case must establish that there is genuine issue of fact on that element by submitting evidentiary material "set[ting] forth specific facts," RULE 802.08(3), STATS., material to element).

Similarly, the St. Luke's defendants also failed to submit any evidence establishing that their communications concerning Farrey "stalking" Gonnering were limited to persons with whom they had a common interest.

⁶ Although Mark Ambrosius, one of the St. Luke's defendants, was named as a defendant, the complaint does not allege that he defamed Farrey. Accordingly, that part of the trial court's order dismissing Farrey's complaint against him is affirmed.

The St. Luke's defendants, therefore, also failed to establish the existence of a conditional privilege and are not entitled to summary judgment. *See id.*

We reverse the trial court's award of summary judgment against Farrey, except insofar as it dismissed Farrey's claim against Ambrosius.

By the Court.—Judgment affirmed in part and reversed in part. Appeal from the order is dismissed as moot.

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