IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 12/18/2012
RUTH A. WILLINGHAM, CLERK
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ANTHONY T. YEUNG, M.D.,	)	1 CA-CV 11-0735
	)	
Plaintiff/Appellant,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
CURTIS DICKMAN, M.D. and JANE,	)	Rule 28, Arizona Rules of
DOE DICKMAN, husband and wife,	)	Civil Appellate Procedure)
Defendants/Appellees.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2006-014014

The Honorable Eileen S. Willett, Judge

AFFIRMED

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G O U L D, Judge

¶1 Anthony Yeung ("Yeung") appeals the grant of summary judgment in favor of Curtis and Celeste Dickman (the "Dickmans"), as well as the denial of Yeung's motion for new trial. We affirm the judgment dismissing Yeung's defamation lawsuit against the Dickmans on the ground the statements made by Curtis Dickman in his letter to the Arizona Medical Board are protected by the qualified privilege set forth in Arizona Revised Statutes ("A.R.S.") Section 32-1451(A).

FACTS AND PROCEDURAL BACKGROUND

¶2 Yeung, an orthopedic and spine surgeon, performed spinal surgery on J.L. to treat J.L.'s spondylolisthesis, a condition where one vertebra slips forward over the lower vertebra. Yeung used a procedure known as "thermal annuloplasty," whereby a heating probe is inserted into the spinal disc space to heat the area's ligaments. During the surgery J.L. suffered permanent nerve damage that caused numbness, weakness, and debilitating pain in his right leg and foot. The procedure also failed to alleviate J.L.'s pre-surgery chronic lower back and leg pain.

¶3 In November 1999, J.L. sought further treatment for his recurrent back pain from Curtis Dickman, a neurosurgeon whose sub-specialty is spinal surgery. Dickman diagnosed J.L. with both spondylolisthesis and spinal stenosis, a condition that involves compression of the nerves in the spine. Dickman

surgically fused three of J.L.'s vertebrae, in addition to performing a laminectomy to relieve pressure on J.L.'s spinal nerves.

¶4 In June 2000, J.L. filed a medical malpractice claim against Yeung and retained Dickman as an expert. At trial, Dickman testified that Yeung's treatment fell below the applicable standard of care. Specifically, Dickman testified that Yeung's thermal annuloplasty treatment should not have been used, and was in fact harmful to J.L.'s spondylolisthesis and spinal stenosis. On September 29, 2005, the jury found Yeung had committed malpractice and awarded damages to J.L. in the amount of $1.4 million.

¶5 Following the trial, on December 13, 2005, Dickman filed a formal complaint letter against Yeung with the Arizona Board of Medical Examiners, now known as the Arizona Medical Board ("AMB"). In the AMB letter, Dickman listed several reasons why disciplinary action should be taken against Yeung based on his "grossly negligent care" of J.L. The AMB ultimately declined to investigate Dickman's complaint because J.L. had already reported Yeung to the AMB and the matter had been decided.

¶6 In July 2006, Yeung filed ethics complaints against Dickman with the North American Spine Society ("NASS") and the American Association of Neurological Surgeons ("AANS"), charging

Dickman with unprofessional conduct in relation to his expert testimony in J.L.'s malpractice case. After learning of Yeung's complaint against him, in early August 2006 Dickman sent out a survey to his colleagues in the field of spinal surgery. Dickman sent out the survey because he "wanted to get feedback because Dr. Yeung had filed [a] complaint with the AANS and NASS" and he "wanted to get opinions whether [other physicians would] be collaborative or not collaborative." The survey itself states that Dickman wanted "additional independent opinions from expert spine surgeons" regarding the standard of care in treating a patient for spondylolisthesis with spinal stenosis.

¶7 On September 13, 2006, Yeung brought this action for defamation against Dickman based on Dickman's statements in the AMB letter.[1] Dickman filed a motion for summary judgment arguing he was entitled to absolute privilege, as well as qualified privilege pursuant to A.R.S. § 32-1451(A). The court granted summary judgment based solely on the issue of absolute privilege. Yeung appealed, and we reversed and remanded on the

[1] In his original complaint, Yeung also filed a claim for false light/invasion of privacy. However, during the February 27, 2008 oral argument on Dickman's motion for summary judgment on absolute privilege, Yeung apparently abandoned this claim on the ground the AMB letter was never published. *Yeung v. Dickman*, 2009 WL 2850752, at *2, ¶ 6 n.3, No. 1 CA-CV 08-0364 (Ariz. App. Sept. 3, 2009)(mem.).

ground Dickman's statements in the AMB letter were subject to qualified privilege under A.R.S. § 32-1451(A), but not absolute privilege.[2]

¶8 After remand, Dickman filed a motion for summary judgment based on qualified privilege. The court granted Dickman's motion, finding Yeung had failed to present clear and convincing evidence that Dickman's statements were made with actual malice. Yeung then moved for a new trial pursuant to Arizona Rule of Civil Procedure ("A.R.C.P.") 59(a), which was subsequently denied by the court. Yeung timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(5).

DISCUSSION

I. Actual Malice

¶9 We review a grant of summary judgment de novo, viewing the facts and reasonable inferences in the light most favorable to the non-prevailing party. *Andrews v. Blake*, 205 Ariz. 236, 240, 69 P.3d 7, 11 (2003). Summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons*, 201 Ariz. 474, 482, ¶ 14, 38 P.3d 12, 20 (2002).

[2] *Yeung v. Dickman*, 2009 WL 2850752, No. 1 CA-CV 08-0364 (Ariz. App. Sept. 3, 2009)(mem.).

¶10 Both parties agree that Dickman's statements in the AMB letter are protected by the qualified privilege set forth in A.R.S. § 32-1451(A). This privilege serves to encourage doctors and other members of the public to report to the AMB "any information that appears to show that a doctor of medicine is or may be medically incompetent." A.R.S. § 32-1451(A). This duty to report, which is mandatory for doctors, promotes the primary purpose of the AMB: to protect the public "from unlawful, incompetent, unqualified, impaired or unprofessional practitioners . . ." A.R.S. § 32-1403(A).

¶11 It is Yeung's burden to show, by clear and convincing evidence, that a material fact dispute exists as to whether Dickman abused his qualified privilege. *Advanced Cardiac Specialists, Chartered v. Tri-City Cardiology Consultants, P.C.*, 222 Ariz. 383, 387, ¶ 13, 214 P.3d 1024, 1028 (App. 2009); *Heuisler v. Phoenix Newspapers*, 168 Ariz. 278, 282, 812 P.2d 1096, 1100 (App. 1991). A plaintiff may establish an abuse of a qualified privilege by proving actual malice. *Advanced Cardiac Specialists,* 222 Ariz. at 387, ¶ 13, 214 P.3d at 1028; *Selby v. Savard*, 134 Ariz. 222, 225, 655 P.2d 342, 345 (1982). An abuse of a qualified privilege through "actual malice" occurs when the defendant makes a statement with knowledge that it was false, or when the defendant actually entertains serious doubts about the truth of the statement. *Advanced Cardiac Specialists,* 222 Ariz.

at 388, ¶ 14, 214 P.3d at 1029; *Selby*, 134 Ariz. at 225, 655 P.2d at 345.

¶12 A negligence standard is not applied in determining whether a defendant acted with actual malice. *Advanced Cardiac Specialists,* 222 Ariz. at 388, ¶¶ 14-15, 214 P.3d at 1029; *Heuisler*, 168 Ariz. at 283, 812 P.2d at 1101. Since it is the defendant's subjective state of mind that is at issue, the objective reasonableness of a defendant's statements is not relevant to proving actual malice. *Advanced Cardiac Specialists,* 222 Ariz. at 388, ¶¶ 14-15, 214 P.3d at 1029; *Selby*, 134 Ariz. at 225, 655 P.2d at 345. Thus, for a defamation plaintiff to prove actual malice, he must prove the state of mind of the defendant when the allegedly defamatory statement was made, as opposed to the state of mind of a reasonable person. *See Antwerp Diamond Exch. of Am., Inc. v. Better Bus. Bureau of Maricopa Cnty., Inc.*, 130 Ariz. 523, 528, 637 P.2d 733, 738 (1981)(negligence is not enough to defeat a conditional privilege). Likewise, carelessness, "failure to investigate, sloppy investigation . . . and the like" do not constitute proof of actual malice. *Heuisler*, 168 Ariz. at 283, 812 P.2d at 1101 (citing *Dombey v. Phoenix Newspapers*, 150 Ariz. 476, 488, 724 P.2d 562, 574 (1986)).

¶13 A defamation defendant cannot escape liability by merely avowing he believed the statements he made were true.

Currier v. Western Newspapers, Inc., 175 Ariz. 290, 294, 855 P.2d 1351, 1355 (1993); *Selby*, 134 Ariz. at 225, 655 P.2d at 345. Moreover, proof of a defendant's state of mind may be shown circumstantially through the actions of the defendant and other "objective circumstances," such as the defendant's animosity towards the plaintiff. *Currier*, 175 Ariz. at 294, 855 P.2d at 1355; *Selby*, 134 Ariz. at 225-26, 655 P.2d at 345-46.

¶14 Yeung argues the court erred in granting summary judgment because it failed to consider several factual issues that, when viewed as a whole, create a genuine issue of material fact about whether Dickman's statements were made with actual malice. Dickman counters that he believed in the truth of the statements in his letter, and that Yeung failed to come forward with any evidence to support a reasonable jury finding he abused his privilege.

¶15 Viewing the facts and reasonable inferences in favor of Yeung, we conclude, for the reasons set forth below, that the record does not show the existence of a triable issue of fact regarding actual malice.

¶16 In support of his claim, Yeung first argues that Dickman admitted to making a false statement in the AMB letter. In the AMB letter, Dickman states: "[n]either percutaneous discectomy nor thermal annuloplasty [the treatments rendered by Yeung to J.L.] will treat spinal stenosis." At his deposition,

Dickman was questioned about the accuracy of this statement. Dickman conceded that under some circumstances thermal annuloplasty will treat spinal stenosis.

¶17 After reviewing the deposition transcript, Dickman corrected this answer, explaining that he misunderstood the question when it was asked. Dickman claims the clear intent of his letter, viewed as a whole, was to discuss Yeung's treatment of J.L., a patient presenting *both* spinal stenosis and spondylolisthesis. Dickman asserts the intent of the letter was never to discuss the treatment of spinal stenosis apart from spondylolisthesis. Thus, his failure to more carefully craft the subject sentence was an oversight, as shown by the fact the rest of the letter always mentions both conditions in conjunction with each other.

¶18 Viewed in the light most favorable to Yeung, Dickman's deposition testimony does not prove he wrote the AMB letter with actual malice. Even disregarding Dickman's post-deposition corrections, Dickman's concession during the deposition shows, at most, that at the time of the deposition he conceded making a mistake in stating that percutaneous discectomy and thermal annuloplasty will never treat spinal stenosis. His concession does not, however, show that Dickman seriously doubted the truth of the statement when he wrote the letter.

¶19 Yeung next addresses another allegedly false statement in the AMB letter. In the letter, Dickman states the treatment used on J.L. (percutaneous lumbar discectomy and thermal annuloplasty) "has never been described in the medical literature for spinal stenosis and spondylolisthesis." Yeung claims Dickman knew this statement was false, because prior to writing the letter, Yeung's attorneys provided Dickman with a list of medical literature allegedly supporting the use of thermal annuloplasty in patients with spondylolisthesis. Dickman does not recall receiving this list prior to sending his letter to the AMB.

¶20 Dickman also addresses Yeung's medical literature in his letter, stating that Yeung's articles do not constitute true peer-reviewed "medical literature" and the articles discuss laser foraminoplasty, not thermal annuloplasty. Dickman also asserts the publications provided by Yeung were authored wholly or partially by Yeung himself. Finally, Dickman notes that during his deposition for the J.L. malpractice trial, Yeung stated he had not seen any literature where a physician had written about utilizing thermal annuloplasty for addressing spondylolisthesis.

¶21 Assuming Yeung did in fact send the literature to Dickman, this evidence does not prove actual malice. Viewed in a light most favorable to Yeung, a trier of fact might conclude

that Dickman's research/investigation was careless, sloppy, and/or that his opinions were not objectively reasonable. However, the literature does not show, by clear and convincing evidence, that Dickman knew his statements were false, or that he seriously doubted the truth of his statements at the time he wrote the AMB letter.

¶22 Next, Yeung presents evidence that "no reasonable physician in December 2005 would have believed the statements Dr. Dickman made to the AMB." Yeung bases this statement on the testimony of his expert, Dr. Yuan, who reviewed Yeung's and Dickman's medical records regarding the care of J.L. Dr. Yuan concluded no reasonable physician could believe that Yeung's treatment caused complete foot drop or severe reflex sympathetic dystrophy.

¶23 Dr. Yuan's testimony addresses the accuracy of Dickman's statements and opinions, not his mental state at the time he wrote the AMB letter. While Dr. Yuan's testimony addresses what a "reasonable physician" believes, such evidence is not relevant to Dickman's subjective belief his statements were true when he wrote the letter.

¶24 Yeung also asserts that in sending out the survey, Dickman was conceding the fact he had doubts about the truth of his statements to the AMB. Yeung argues, based on the holding in *Selby*, that the survey is probative of Dickman's state of

mind not only after Yeung filed his complaint, but also his state of mind at the time he wrote the AMB letter.

¶25 Dickman's survey, sent out approximately nine months after he wrote the AMB letter, does not constitute relevant evidence of actual malice at the time Dickman wrote the AMB letter. Generally, post-publication behavior is not probative of actual malice at the time of publication. *See N.Y. Times v. Sullivan*, 376 U.S. 254, 286 (1964)(newspaper's post-publication statement that a publication was only "substantially correct" raised inference of doubt but did not indicate malice at the time of publication); *see also Herbert v. Lando*, 781 F.2d 298, 309 (2nd Cir. 1986)(stating that *N.Y. Times v. Sullivan* does not support the theory that a mere inference of actual malice derived from post-publication behavior could defeat a motion for summary judgment); *Dupler v. Mansfield Journal Co., Inc.*, 413 N.E.2d 1187, 1193 (Ohio 1980)(holding that the fact defendant changed his opinion one year after he wrote his editorial when he was presented with additional facts was not evidence of his state of mind at the time he wrote the editorial).[3]

¶26 Yeung's reliance on *Selby* is misplaced. *Selby* did not involve, as in this case, the use of *post-publication* statements

[3] Moreover, the probative value of the surveys is questionable, given the fact they were sent in the context of buttressing Dickman's defense against the ethical charges filed by Yeung, and not as part of his research/investigation prior to writing the AMB letter.

to prove actual malice; rather, it involved the use of *pre-publication* statements to show actual malice. *Selby*, 134 Ariz. at 224-26, 655 P.2d at 344-46. The plaintiff in *Selby* based his defamation action on statements the defendant made to plaintiff's supervisor in 1976. In an effort to show the defendant knew the statements were false or that he seriously doubted their truth at the time he made them, the plaintiff introduced evidence showing that beginning in 1967, defendant repeatedly published the same false information despite the fact several people had told him the information was false. *Id.* Under these circumstances, our supreme court concluded the pre-publication statements were properly admitted to show the defendant acted with actual malice at the time he subsequently published the false statements against the plaintiff. *Selby*, 134 Ariz. at 225-26, 655 P.2d at 345-46.

¶27 Finally, Yeung asserts that Dickman's animosity towards Yeung for the treatment he rendered to J.L. also shows actual malice. However, while feelings of ill will are circumstantial evidence of actual malice, animosity alone is insufficient to establish actual malice. *Heuisler*, 168 Ariz. at 282-83, 812 P.2d at 1100-01.

II. Spoliation

¶28 Yeung also asserts the court erred in determining he was not entitled to an adverse inference based on spoliation of

evidence. We review a court's refusal to impose a spoliation sanction for an abuse of discretion. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 957-58 (9th Cir. 2006).

¶29 The spoliation issue focuses on Dickman's failure to preserve computer hard drives containing Dickman's electronic communications with his peers concerning the August 2006 surveys. Based on Dickman's failure to preserve the hard drives, Yeung argues that as a sanction he should have been granted an adverse inference that Dickman seriously doubted the truthfulness of his statements in the AMB letter.

¶30 When a party loses or fails to preserve evidence, a court may impose several sanctions. These sanctions include dismissal of a claim, preclusion of evidence, or a jury instruction. *Howell v. Maytag*, 168 F.R.D. 502, 505 (M.D.Pa. 1996); *Beers v. Bayliner Marine Corp.*, 236 Conn. 769, 775 & n.9, 675 A.2d 829, 831-32 & n.9 (1996). Sanctions are decided on a case-by-case basis. *Souza v. Fred Carries Contracts, Inc.*, 191 Ariz. 247, 250, 955 P.2d 3, 6 (App. 1997); *Stubli v. Big D Intern. Trucks, Inc.*, 107 Nev. 309, 313, 810 P.2d 785, 787 (1991). A court must weigh all the relevant circumstances before imposing sanctions. *Souza*, 191 Ariz. at 250, 955 P.2d at 6; *Stubli*, 107 Nev. at 313, 810 P.2d at 787; *Gates Rubber Co. v. Bando Chemical Indus., Ltd.*, 167 F.R.D. 90, 102-106 (D.Colo. 1996). Sanctions must be narrowly tailored to impose the least

severe sanction required by the specific circumstances of the case. *Souza*, 191 Ariz. at 251, 955 P.2d at 7; *Stubli*, 107 Nev. at 313, 810 P.2d at 787; *Gates*, 167 F.R.D. at 105-106.

¶31 The most important factors for a court to consider when imposing sanctions are the offending party's degree of fault and the corresponding prejudice suffered by the non-offending party. *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3rd Cir. 1994); *Shaffer v. RWP Group, Inc.*, 169 F.R.D. 19, 25 (E.D.N.Y. 1996); *accord Souza*, 191 Ariz. at 250, 955 P.2d at 6. Sanctions can serve to remedy the prejudice suffered by a party and/or to punish wrongful conduct by the offending party. *Stubli*, 107 Nev. at 313, 810 P.2d at 787; *Schmid*, 13 F.3d at 79; *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 74-75 (S.D.N.Y. 1991). In most jurisdictions, a court may impose sanctions even if there is no bad faith/intentional misconduct. *Marrocco v. Gen. Motors Corp.*, 966 F.2d 220, 224 (7th Cir. 1992); *Unigard Sec. Ins. Co. v. Lakewood Engineering & Mfg. Corp.*, 982 F.2d 363, 366 n.2 (9th Cir. 1992).

¶32 Assuming Dickman was at fault for failing to preserve the hard drives, and that he did so knowing the hard drives may have contained evidence relevant to this case, we conclude no adverse inference was warranted because Yeung failed to establish he suffered actual prejudice. In spoliation cases, prejudice focuses on the importance of the lost evidence to

proving or defending the case. The prejudicial impact of the evidence cannot be speculative. *Souza*, 191 Ariz. at 251, 955 P.2d at 7; *Stubli*, 107 Nev. at 313, 810 P.2d at 788. The court must examine whether the lost evidence was cumulative, only slightly probative, or so central to the case that its loss significantly impaired the ability of the non-offending party to prove/defend its case. *Shaffer*, 169 F.R.D. at 27; *Welsh*, 844 F.2d at 1244-45.

¶33 Prejudice also addresses the ability of the non-offending party to prove/defend the case without the lost/destroyed evidence. *Souza*, 191 Ariz. at 251, 955 P.2d at 7. One factor considered is whether the evidence has been completely destroyed, merely altered, or some portions of the evidence have been preserved. *Maytag*, 168 F.R.D at 505-506 (lesser sanction imposed where evidence was altered but not completely destroyed); *Schmid*, 13 F.3d at 79 (lesser sanction imposed where evidence was altered but not completely destroyed); *Unigard*, 982 F.2d at 369-70 (trial court's preclusion of evidence affirmed where evidence was completely destroyed). If there is other relevant evidence available, the court must weigh the probativeness of this evidence against the evidence that was lost/destroyed. *Thomas v. Bombardier-Rotax Motorenfabrik, GmbH*, 909 F.Supp. 585, 588 (N.D.Ill. 1996); *Farley Metals, Inc., v. Barber Colman Co.*, 269 Ill.App.3d 104,

113-14, 645 N.E.2d 964, 970 (Ill. App. 1994); see *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, 411, ¶ 30, 207 P.3d 654, 664 (App. 2008)(holding court did not abuse its discretion by refusing to instruct jury on adverse inference for evidence destroyed by plaintiff when defendants did not establish they were prejudiced in any meaningful way and defendants could gather evidence through other means).

¶34 Here, an adverse inference is not warranted for several reasons. First, the surveys are irrelevant to Dickman's state of mind at the time he wrote the AMB letter. Dickman sent the surveys to his colleagues *after* he wrote the letter to the AMB. Thus, in viewing the evidence in a light most favorable to Yeung, even assuming Dickman sent the surveys to his colleagues because he doubted the veracity of his letter, the surveys do not prove Dickman harbored those doubts when he wrote the AMB letter.

¶35 In addition, it is speculation to assume the information on the hard drives would have supported Yeung's case. There is an equally strong inference the information would have supported Dickman's statements. Based on the record, we cannot speculate as to which inference is stronger.

¶36 Finally, Yeung has an alternative avenue to obtain the information from the hard drives, because Dickman provided a copy of the survey to Yeung and the names of the physicians he could

remember sending it to. Although Yeung could have contacted these physicians to verify whether Dickman voiced any doubts when he sent out the survey, he chose not to.

III. Motion for New Trial

¶37 We review a motion for new trial for an abuse of discretion. *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, ¶ 12, 961 P.2d 449, 451 (1998). Here, Yeung asserts the court erred in denying his motion for new trial because the grant of summary judgment was contrary to law and against the weight of the evidence. For the reasons discussed above, we find the court did not err in denying Yeung's motion for new trial.

CONCLUSION

¶38 Accordingly, we affirm the trial court's grant of Dickman's motion for summary judgment and the court's denial of Yeung's motion for new trial.

/S/
ANDREW W. GOULD, Judge

CONCURRING:

/S/
MICHAEL J. BROWN, Presiding Judge

/S/
MARGARET H. DOWNIE, Judge