

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 04-29-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DEAN MICHAEL CARDIS,) 1 CA-CV 09-0497
)
Plaintiff/Appellant,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication
GOODWILL INDUSTRIES OF CENTRAL) - Rule 28, Arizona
ARIZONA,) Rules of Civil
) Appellate Procedure)
Defendant/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-050625

The Honorable Robert A. Budoff, Judge

AFFIRMED

Dean Michael Cardis, *In Propria Persona* Carefree
Potts & Associates Phoenix
By Christopher L. Wilson
Attorneys for Defendant/Appellee

N O R R I S, Judge

¶1 Dean Michael Cardis appeals from the superior court's grant of summary judgment in favor of Goodwill Industries of Central Arizona on Goodwill's defense its statements about Cardis to the Better Business Bureau ("BBB") were protected by a

qualified privilege. On appeal, Cardis argues the superior court should not have granted Goodwill's motion for summary judgment because a genuine issue of material fact existed as to whether Goodwill's statements were made with actual malice. We disagree with Cardis and affirm the superior court's judgment in favor of Goodwill.

FACTS AND PROCEDURAL BACKGROUND¹

¶2 Cardis was in the business of buying items at Goodwill and reselling them for profit. On July 10, 2007, Cardis purchased a slot machine at the Goodwill store on 32nd Street and East Greenway Road in Phoenix for \$49.99, less a 25% senior discount. According to Goodwill, the machine was "priced and coded" at \$149.99. After the sale, Goodwill permanently banned Cardis from all its retail stores in Central Arizona.

¶3 On July 10, 2007, Cardis submitted a consumer complaint with the BBB against Goodwill asserting he "WAS NOT GIVEN A VALID REASON" for being banned. He claimed the manager told him to get the "HELL OUT" and asserted he "MUST BE GIVEN A SOLID REASON WHY [he] WAS ASKED TO LEAVE." The BBB asked Goodwill to respond to Cardis's complaint, and it did. In its response, Goodwill stated Cardis was "discreetly

¹We view the facts and reasonable inferences in a light most favorable to Cardis. See *Hall v. Smith*, 214 Ariz. 309, 311, ¶ 2, 152 P.3d 1192, 1194 (App. 2007).

trespassed . . . after being told that our investigation indicated that he was involved in changing the price of an item resulting in a loss to the organization of \$100 in revenue." Subsequently, Cardis sued Goodwill for defamation based on its response to the BBB. The superior court granted Goodwill's motion for summary judgment because Cardis made "no showing" Goodwill had acted with actual malice and had lost its qualified privilege.

¶14 Cardis timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21 and -2101(B) (2003).

DISCUSSION

¶15 Cardis argues summary judgment was improper because Goodwill abused its qualified privilege by acting with actual malice. Summary judgment may be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). We review a superior court's grant of summary judgment de novo. *Hall*, 214 Ariz. at 312, ¶ 7, 152 P.3d at 1195.

¶16 The qualified or conditional privilege is a defense to a defamation action based on the social utility of protecting

statements required to be made in response to a legal, moral, or social duty. *Green Acres Trust v. London*, 141 Ariz. 609, 616, 688 P.2d 617, 624 (1984). For the privilege to apply, the "court must first determine whether a privileged occasion arose, and, if so, whether the occasion for the privilege was abused." *Id.* To establish a privileged occasion arose, a defamation defendant must prove the circumstances in which the communication was made created an obligation to speak. *Id.*

¶17 Upon such a showing, the plaintiff may then establish an abuse of that privilege by proving publication with "actual malice." *Id.* (quoting *Selby v. Savard*, 134 Ariz. 222, 225, 655 P.2d 342, 345 (1982); Restatement (Second) of Torts § 600 (1977)). "The actual malice standard is reached when there is clear and convincing evidence that defendant published either knowing that the [information] was false and defamatory or that it published with 'reckless disregard of whether it was false or not.'" *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 487, 724 P.2d 562, 573 (1986) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S. Ct. 710, 726, 11 L. Ed. 2d 686 (1964)). To prove reckless disregard, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his

publication." *Id.* (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 1325, 20 L. Ed. 2d 262 (1968)).

¶18 Here, Cardis did not dispute Goodwill enjoyed a qualified privilege to respond to the BBB's inquiry based on his complaint, but asserted Goodwill had forfeited the privilege's protection because it had "completely disregarded" the "information of what happened from [its] own people" when it responded to the BBB. Although Goodwill employees' report of the incident, dated the day of the transaction, criticized the cashier for not verifying the slot machine's price code, they also reported,

The slot machine was priced at 49.99. We decided that the machine be priced at 149.99. Team member then changed the price and Ruben checked the code and it went to the sales floor.

I saw a customer looking at the machine. (Camera Furniture)I [sic] then pass [sic] by the same area and saw that the machine was gone. [I] Check[ed] [sic] the camera (reg4) [and] saw that the same customer bought the machine and the cashier (Julie) had sold it. I asked Julie how much was the machine sold for and she said 49.99[.]

We then asked her if she new [sic] that the machine was 149.99. Julie said that the tag was 49.99. Julie did not check the code for the amount of 149.99. . . .

We did confirm with the pricier [sic] that the machine was priced and coded correctly at 149.99[.]

¶19 While the report does not explicitly state Cardis "was involved in changing the price of an item" as reported by Goodwill to the BBB, it supports Goodwill's belief he was involved in altering the price. Based on its investigation, Goodwill learned its employees had "changed the price" of the machine to \$149.99 before it "went to the sales floor," observed Cardis with the machine, and when he purchased the machine, the cashier read the tag at a different price, \$49.99. That Cardis asserted the "TRANSACTION WAS DUE TO THE CASHIER READING THE CODES WRONG" does not mean Goodwill knew its statement to the BBB was false or that it made the statement with reckless disregard for its truth. See *Aspell v. Am. Contract Bridge League*, 122 Ariz. 399, 401, 595 P.2d 191, 193 (App. 1979) (board of directors' knowledge appellant did not think she had misappropriated funds did not mean directors' conclusion was false). Because Cardis did not present clear and convincing evidence Goodwill's statement to the BBB was made with actual malice, he failed to show the existence of a triable issue of fact on that issue. See *supra* ¶ 7. Therefore, the superior court properly granted Goodwill's motion for summary judgment in its favor.

CONCLUSION

¶10 For the foregoing reasons, we affirm the superior court's judgment in favor of Goodwill.

/s/

PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/

DANIEL A. BARKER, Judge

/s/

PETER B. SWANN, Judge