IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

LORI JILL GROSS,
Plaintiff/Appellant,

v.

CRAIG GLENN GROSS,
Defendant/Appellee.

No. 2 CA-CV 2019-0171
Filed April 23, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20173801
The Honorable Brenden J. Griffin, Judge

AFFIRMED

COUNSEL

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By Leonard Karp

and

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MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

E C K E R S T R O M, Judge:

¶1 Lori Gross appeals from the trial court's grant of summary judgment against her on grounds of judicial privilege in a civil action against her former husband, Craig Gross. She also argues the court erred in denying her motion for partial summary judgment on the ground of collateral estoppel. For the reasons that follow, we affirm the judicial privilege ruling and do not reach the collateral estoppel issue.

Factual and Procedural Background

¶2 Prior to their separation in May 2015, Lori and Craig were both involved in developing and operating several interrelated medical entities. Craig held either a sole or a majority interest in each of these entities. In 2015, Craig filed for divorce. The divorce negotiations were acrimonious and prolonged, culminating in a ten-day trial.

¶3 As part of the divorce proceedings, the trial court considered Craig's allegations that Lori had engaged in "significant financial misconduct" in her management of the interrelated businesses. Specifically, the court considered Craig's argument that Lori was responsible for the "demise" of two of the medical entities because she had "mismanaged" them by "inflating the rent charged"; "misallocated utilities" between them; "misallocated employees responsible for billing between the two entities"; overcharged the physicians for overhead costs; included payments to the couple's nanny on the entities' books; and delayed patient refunds for several years.[1]

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[1]Lori also brought waste claims against Craig. The most relevant claims asserted that Craig's allegedly defamatory statements led to the reduction in value of two of the medical entities.

¶4 In considering these allegations of waste, the trial court reviewed, among other things, depositions and testimony from witnesses, including three physicians who were Craig's partners, as well as reports submitted by the parties' respective forensic accountants. The court accepted Lori's admission that she had "erred in not appropriately accounting for billing employees" between entities. It further found that "[a]ll other financial management decisions" Lori made "were reasonable and appropriate."[2]

¶5 Before the divorce proceedings ended, Lori filed her complaint in the action that forms the basis for this appeal. There, Lori alleged that in November 2016, Craig slandered her in front of the partner physicians who ultimately became witnesses in the divorce proceedings. Specifically, the complaint alleged Craig had told them that Lori had "engaged in 'financial malfeasance' against the medical corporations," that Craig "had valid basis to suspect and investigate that [Lori] had engaged in 'fraud . . . concerning collected sums of money from'" the partner doctors, and that she "had 'willingly and knowingly overcharged and collected sums of money concerning overhead expenses and that she also did not reveal accurate expenditure reports.'" Craig denied this allegation in his answer. However, he admitted that he "sought to use the company funds to pay for the accounting" of the entities' finances to be used in the divorce action.

¶6 Before the close of discovery in the matter, Lori filed a motion for partial summary judgment asking the trial court to (a) strike Craig's affirmative defense that the challenged statements were true and (b) find that Craig was collaterally estopped from relitigating the allegations of financial malfeasance and mismanagement already largely rejected in the dissolution proceeding. Craig cross-moved for summary judgment, arguing that, assuming he had made the statements, they would have been protected by an absolute judicial privilege and thus immune from a defamation claim.[3]

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[2]The dissolution case was the subject of a previous appeal to this court. *In re Marriage of Gross & Gross*, No. 2 CA-CV 2019-0081 (Ariz. App. Jan. 24, 2020) (mem. decision).

[3]Craig also argued at the trial court and again here on appeal that if the statements were not covered by judicial privilege, they were alternatively covered by a qualified common-interest privilege. Like the

¶7 After a hearing on the cross-motions, the trial court granted Craig's motion for summary judgment and denied Lori's motion for partial summary judgment. This timely appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

¶8 We review *de novo* a trial court's grant of summary judgment. *Hall v. Smith*, 214 Ariz. 309, ¶ 7 (App. 2007). We consider facts and factual inferences in favor of Lori, against whom summary judgment was entered. *Green Acres Trust v. London*, 141 Ariz. 609, 611 (1984). We "determine *de novo* whether there are any genuine issues of material fact." *Hall*, 214 Ariz. 309, ¶ 25 (quoting *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 8 (App. 1998)).

¶9 We must first determine whether the trial court erred in ruling that Craig's comments, made to the non-party doctors, were protected by judicial privilege and thus immune from a defamation claim.[4] "Whether a communication is privileged is a question of law for the court; we are not bound by the trial court's conclusions of law, which we review *de novo*." *Johnson v. McDonald*, 197 Ariz. 155, ¶ 2 (App. 1999).

¶10 A party to litigation "is absolutely privileged to publish defamatory matter concerning another in communications preliminary to," or in the course of, "a judicial proceeding in which he participates, if the matter has some relation to the proceeding." Restatement (Second) of Torts § 587 (1977). To be protected by judicial privilege, "both content and manner of extra-judicial communications must bear 'some relation to the proceeding.'" *Green Acres*, 141 Ariz. at 613-14 (quoting Restatement (Second) of Torts § 586).[5] This requirement recognizes that such statements should be made only "in furtherance of the litigation and to promote the

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trial court, because we find judicial privilege applies, we do not address whether a conditional privilege also applies.

[4]We need not address Lori's collateral estoppel argument because we uphold the trial court's grant of summary judgment in Craig's favor.

[5]Because *Green Acres* considered the oral and written statements of attorneys published during a press conference prior to their filing of a class action litigation, 141 Ariz. at 611-12, it refers to § 586 of the Restatement (Second) of Torts. The language describing the judicial privilege afforded to parties, found in § 587, is materially identical to § 586.

interest of justice."[6] *Id*. (emphasis omitted) (quoting *Bradley v. Hartford Accident & Indem. Co.*, 106 Cal. Rptr. 718, 723 (Ct. App. 1973)). "The purpose of the privilege is to ensure 'the fearless prosecution and defense of claims which leads to complete exposure of pertinent information for a tribunal's disposition.'" *Hall*, 214 Ariz. 309, ¶ 8 (quoting *Green Acres*, 141 Ariz. at 613).

¶11 Our courts have routinely applied judicial privilege to defamatory statements made in court filings. *See Green Acres*, 141 Ariz. at 613 (collecting cases). When such statements have been made outside the record of judicial proceedings, our courts have only found privilege—and then only warily—when the statement bore sufficient connection to the underlying litigation. *See, e.g.*, *Sobol v. Alarcon*, 212 Ariz. 315, ¶¶ 4, 13-16 (App. 2006) (finding letter to state bar reporting allegedly unethical behavior by legal document preparer to be protected by privilege); *Hall*, 214 Ariz. 309, ¶¶ 3, 14, 18-21 (same result for letter, which urged settlement of plaintiff's lawsuit against subsidiary corporation, delivered to non-party parent corporation that had "close and direct" relationship to litigation); *but see Green Acres*, 141 Ariz. at 612, 622-23 (finding no privilege for defamatory statements and drafted complaint shared with uninvolved news reporter during press conference prior to filing of lawsuit).

¶12 When, as here, a party to litigation makes an allegedly defamatory statement to a non-party, the recipient must also bear "close connections to the judicial proceedings" for judicial privilege to apply to the statement. *Johnson*, 197 Ariz. 155, ¶ 15. This condition exists when the recipients are "connected to a pending judicial proceeding by discovery or evidentiary matters, recovery of assets, settlement negotiations, or as a potential party." *Id*. ¶ 19. We determine on a case-by-case basis "[e]xactly how close or direct that relationship must be," and we retain "a focus on the underlying principle that the privilege should be applied to 'promote candid and honest communication between the parties and their counsel in

[6]We disagree with Lori's characterization that the requirement a statement must be made "in furtherance of" a judicial proceeding forms a separate "prerequisite" in a multi-factor test, each element of which must be satisfied for privilege to attach. Courts have, indeed, reiterated this phrase in analyzing judicial privilege, but they have done so in the process of clarifying how a statement might bear "some relation" to a judicial proceeding, *Green Acres*, 141 Ariz. at 613-14, rather than separately analyzing whether a statement furthers litigation. *See Johnson*, 197 Ariz. 155, ¶¶ 12-13. And, more recent jurisprudence in this area has omitted the "in furtherance of" language altogether. *See Hall*, 214 Ariz. 309, ¶ 8.

order to resolve disputes.'" *Hall*, 214 Ariz. 309, ¶ 13 (quoting *Krouse v. Bower*, 20 P.3d 895, ¶ 15 (Utah 2001)); *see also Johnson*, 197 Ariz. 155, ¶ 19 (connection insufficient as to "legislators considering a bill potentially affecting a possible future lawsuit, among other possible suits," who "lack a direct relationship to the future suit sufficient to warrant application of this absolute privilege").

¶13 We conclude the trial court correctly held that judicial privilege applied to the statements Craig allegedly made to his partner physicians.[7] At the time Craig conferred with his partner physicians, he had filed for divorce and litigation surrounding the division of assets was ongoing. The alleged discussion, regardless of the truth or falsity of Craig's remarks, was thus pertinent to assessing the value of the marital community's assets upon dissolution.[8] In litigation, Craig maintained that Lori had mismanaged the business, and such mismanagement would necessarily require a reckoning with the business partners. Thus, the statements were arguably motivated by, and related to, Craig's waste claim in the underlying litigation. Indeed, the conversation between Craig and the partner physicians ultimately led to the hiring of the forensic

[7]Lori also argues the trial court improperly ruled on the issue of judicial privilege because there were genuine issues of material fact in dispute and thus summary judgment was improper. *See Farmers Ins. Co. of Ariz. v. Vagnozzi*, 138 Ariz. 443, 448 (1983). Specifically, Lori argues that by denying making the allegedly defamatory statements, Craig injected a genuine dispute of material fact into the record. However, we agree with Craig that the question of whether he made the statements was immaterial to the court's determination that such statements, if made, would have been privileged based on their connection to the proceedings. *See Hirsch v. Cooper*, 153 Ariz. 454, 457-58 (App. 1986) (resolving whether privilege attached despite recognizing dispute over whether statement had been made at all).

[8]Not only was the forensic accountant's total valuation of the entities pertinent to the Grosses' assets at the time of their divorce, but any discovery of misfeasance was also related because Craig apparently agreed to reimburse his partner physicians from his "share" if a misappropriation of money was uncovered, and such a reimbursement would impact the sum the Grosses were entitled to upon dissolution of the businesses.

accountant, which directly informed the court's resolution of material issues in the divorce proceedings.[9]

¶14 The record likewise supports the conclusion that the physicians to whom Craig made the challenged comments possessed evidentiary information relevant to the divorce proceedings. All three physicians were deposed or testified in the divorce trial about their knowledge of the financial situation of the entities. And, as partners in the medical entities, each physician had a stake in the trial court's valuation of the entities. Furthermore, although it is possible Craig might have hired the forensic accountant without informing his partners of his suspicions about Lori's behavior, it is unlikely the accountant could have made a thorough investigation of the businesses without contact with Craig's financial partners. Therefore, the circumstance of Craig communicating his suspicions to his partners was likely inevitable once a forensic accountant became necessary to litigating his waste claims. Under these specific facts, we conclude the recipients of the statements were sufficiently connected to the litigation to justify application of the privilege and that any such statements related to and furthered the divorce proceedings.

¶15 In so holding, we recognize that application of the privilege here imposes some societal costs while protecting societal interests. As we noted in *Hall*, the purpose of the privilege is to advance free communication during judicial proceedings, but it would be improper to apply the privilege to communications such as "defamatory letters written to shareholders, employees, or vendors of large, publicly traded companies" with no connection to such a proceeding. 214 Ariz. 309, ¶¶ 13, 22. And, we recognize that the application of privilege here ultimately advances the "successful administration of justice" at the expense of a private individual's reputation. *Green Acres*, 141 Ariz. at 612-13. We do not take

[9]Lori also argues the trial court erred because there was no evidence that Craig *intended* for the statements to advance the litigation, but rather he sought to defray his litigation expenses by securing his partners' approval in permitting the medical entities to pay for the forensic accountant and to "protect the goodwill of his company." However, we do not look to the parties' intent when analyzing judicial privilege. *See Green Acres*, 141 Ariz. at 613 ("speaker's motive, purpose or reasonableness in uttering a false statement do not affect" privilege); *Johnson*, 197 Ariz. 155, ¶ 20 ("fact that the communication was made with an intent to achieve an advantage in litigation is insufficient to trigger the privilege").

this trade-off lightly, and we emphasize that the application of the privilege involves a "case-specific, fact-intensive inquiry." *Hall*, 214 Ariz. 309, ¶ 22.

¶16 Lori further argues the trial court erred in ruling on privilege because the precise content of the communications were not yet in evidence, as discovery had not yet been conducted in the defamation case. However, the parties did not dispute the general subject or nature of the comments in their pleadings and arguments before the trial court, nor do they do so here. The trial court was thus able to develop a sufficiently substantial understanding of the nature and content of the alleged statements to rule on whether judicial privilege applied. *See Green Acres*, 141 Ariz. at 613 (privilege defense properly raised on motion for summary judgment "if the facts establishing the occasion for the privilege appear in the pleadings"); *Drummond v. Stahl*, 127 Ariz. 122, 125 (App. 1980) (summary judgment on privilege ground proper when record provided "sufficient undisputed facts" to "constitut[e] the defense").

Disposition

¶17 For the foregoing reasons, we affirm.