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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| AXEL HOLM,<br><br>Plaintiff/Appellant,<br><br>v.<br><br>LINCOLN & CONTINENTAL OWNERS CLUB, a corporation; DOUGLAS W. MATTIX and CAROLE MATTIX, husband and wife; and CHRISTOPHER MICHAEL BLACK and JANE DOE BLACK, husband and wife,<br><br>Defendants/Appellees. | 2 CA-CV 2008-0111<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 28, Rules of Civil Appellate Procedure |

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CV-04-033

Honorable James A. Soto, Judge

REVERSED AND REMANDED

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Droeger, Hale & Thomas
By Gregory L. Droeger
Nogales
Attorneys for Plaintiff/Appellant

Dwight M. Whitley, Jr., PLLC
By Dwight M. Whitley, Jr.
Tucson
Attorney for Defendants/Appellees

B R A M M E R, Judge.

**¶1** Appellant Axel Holm appeals from the trial court's order granting summary judgment against Holm on his defamation claim against appellees Douglas Mattix and Christopher Black and their spouses, hereinafter "Mattix" and "Black." Holm argues the trial court erred in entering judgment because there were material questions of fact about whether Mattix and Black were negligent in publishing an article allegedly defaming Holm and whether they had acted with actual malice. We reverse.

**Factual and Procedural Background**

**¶2** When reviewing a grant of summary judgment, we view the facts in the light most favorable to the party against whom judgment was entered. *Simon v. Safeway, Inc.*, 217 Ariz. 330, ¶ 13, 173 P.3d 1031, 1037 (App. 2007). In 2003, the Lincoln and Continental Owners Club (LCOC) published in its newsletter an article authored by Leland Shaeffer about the history of the LCOC. A section of the article discussed a past president of LCOC,[1] stating, in essence, that the former president had lost $10,000 in club funds as part of a foreign bond investment scheme and had run a vehicle restoration business that would improperly "trade[] parts from one [customer's] car to another." Regarding the lost funds, the article additionally asserted that the individual had "chose[n] not to go to trial and [face]

[1]The allegedly defamatory section of the article did not use Holm's name, instead ascribing the events to a former LCOC president. The trial court ruled the jury must determine whether a reasonable person would be able to identify Holm as the subject of that section. Holm was president of the LCOC at the relevant time.

a possible jail sentence" and had resigned as president "to avoid any personal responsibility" but ultimately repaid the lost funds "without interest."

**¶3** Before the article was published, the newsletter's editor, Tim Howley, sent an electronic mail message to the newsletter's publisher, Black, stating that Howley "consider[ed part of the article] libelous" and that Mattix, the current LCOC president, had asked Black, an attorney, to provide a "legal opinion" about the article. Black then contacted Shaeffer and asked him "what he knew to be the background [of the article], what he knew to be the history of these different elements." According to Black, Shaeffer responded that he "had proof" but failed to send Black that proof despite Black's request that he do so. Black also testified he had given Mattix his "personal opinion" that the article was not defamatory, although he declined to characterize that opinion as a "legal opinion" because he did not represent LCOC or any of its members.

**¶4** Holm sued LCOC, Mattix, Black, Howley, and Shaeffer, asserting three causes of action: defamation, intentional infliction of emotional distress, and invasion of privacy. A jury trial was held in April 2006.[2] On the third day of trial, the trial court granted Mattix's and Black's motion for judgment as a matter of law and dismissed the defamation and invasion of privacy claims against them. The court also determined that the common-interest conditional privilege applied to the article, and, therefore, the jury must determine whether

[2]Pursuant to stipulation, the court dismissed the claims against Howley before trial. The court also granted the defendants' motion for summary judgment on Holm's claim for intentional infliction of emotional distress.

the privilege had been abused by the remaining defendants, LCOC and Shaeffer. The jury then returned a verdict in favor of Holm, awarding $350,000 in damages on his defamation and invasion of privacy claims against LCOC and Shaeffer. The court, however, granted the defendants' motion for new trial after concluding the evidence did not support the jury's damage award.

**¶5** Black and Mattix were apparently reinstated as defendants. Before the second trial began, the defendants jointly filed a motion for summary judgment, asserting the newsletter was conditionally privileged under the common-interest privilege. Additionally, the motion argued Holm was unable to prove that Black and Mattix had known the publication to be false or that they had acted with reckless disregard for its falsity, therefore the defamation and invasion of privacy claims against them must fail. The trial court granted the motion, noting it had directed a verdict in favor of Mattix and Black at the close of Holm's case in the first trial and concluding Holm "ha[d] not presented any new evidence which would warrant inclusion of those two individuals as defendants in the second trial to be held."[3] The court also "affirm[ed] its previous order[]" concerning the common-interest privilege. After denying Holm's motion for reconsideration of that ruling, the court entered

[3]Holm did not timely file the trial transcripts in this court, failing to file them until several months after this appeal had been docketed. *See* Ariz. R. Civ. App. P. 11(b)(7). Because we prefer to resolve cases on their merits, *see Clemens v. Clark*, 101 Ariz. 413, 414, 420 P.2d 284, 285 (1966), and because Black and Mattix already had copies of the trial transcripts and have therefore suffered no discernible prejudice, we accepted the untimely filing. We recommend, however, that Holm's counsel comply with the rules of appellate procedure in the future.

judgment in favor of Mattix and Black, finding no just reason for delay and ordering final judgment entered pursuant to Rule 54(b), Ariz. R. Civ. P. This appeal followed.

**Discussion**

**¶6** Holm argues on appeal that the trial court erred by entering summary judgment on his defamation claim in favor of Mattix and Black.[4] Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); Ariz. R. Civ. P. 56(c)(1). Accordingly, a trial court properly grants summary judgment when a party raises no genuine issues of material fact and produces evidence having so little probative value, given the quantum of evidence required, that no reasonable person could find in the party's favor. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008. We review a trial court's grant of summary judgment de novo and view the facts in the light most favorable to the party against whom judgment was entered. *Simon*, 217 Ariz. 330, ¶ 13, 173 P.3d at 1037.

**¶7** To recover in a defamation action where the plaintiff is a private person, the plaintiff must prove the defendant published a false and defamatory statement either (1) knowing the statement was false and defamatory, (2) in reckless disregard of the statement's character, or (3) negligently failing to ascertain the statement's character. *See*

[4]On appeal, Holm challenges only the court's entry of judgment on his defamation claim, not on his invasion of privacy claim.

*Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 315, 560 P.2d 1216, 1222 (1977); *see also* Restatement (Second) of Torts § 580B (1977). Such statements may be subject to a qualified privilege such as the common-interest privilege, which the trial court found applicable here. *See Green Acres Trust v. London*, 141 Ariz. 609, 617, 688 P.2d 617, 625 (1984). The common-interest privilege applies "where an occasion arises in which 'one is entitled to learn from his associates what is being done in a matter in which he has an interest in common with them.'" *Id., quoting* Restatement (Second) of Torts § 596 cmt. c.

**¶8** Once the court determines as a matter of law that a qualified privilege has arisen, the plaintiff may overcome that privilege either by proving the defendant acted with actual malice or by demonstrating "excessive publication." *Green Acres Trust*, 141 Ariz. at 616, 688 P.2d at 624. Excessive publication occurs when the defamatory statement is published "to an unprivileged recipient [and the publication is] not reasonably necessary to protect the interest upon which the privilege is grounded." *Id.*

**¶9** The thrust of Black's and Mattix's motion for judgment as a matter of law was that they had no duty to investigate the truth of Shaeffer's article. In granting their motion, the trial court agreed "they did not have the duty to investigate[,] to actually believe those allegations in the article were, in fact, true." It then went on to discuss the application of the common-interest privilege to the remaining defendants—LCOC and Shaeffer. Black's and Mattix's motion for summary judgment, however, did not raise the duty argument, instead asserting that Holm could not prove they had acted with actual malice. However, in granting

summary judgment, the court did not address actual malice but instead confirmed its earlier ruling, stating only that Holm had not produced any new evidence. Thus, as we understand the court's rulings, it did not hold that Holm had failed to demonstrate actual malice but, instead, that Black and Mattix simply had no obligation—irrespective of the conditional privilege—to ensure the truth of the article.[5]

**¶10** A person publishing a statement has a duty to ensure that it is not false and defamatory. *See Peagler*, 114 Ariz. at 315, 560 P.2d at 1222. "Publication for defamation purposes is communication to a third party." *Dube v. Likins*, 216 Ariz. 406, ¶ 36, 167 P.3d 93, 104 (App. 2007); Restatement (Second) of Torts § 577. Nothing in the record suggests Black and Mattix did not publish the article in question. The newsletter containing the article was sent to over 3,500 LCOC members. Black and Mattix had discussed the article's content and were directly involved in distributing the article; indeed, they testified it was their decision to do so. The fact they were acting in their roles within LCOC does not insulate

[5]Black's and Mattix's argument that they had no duty to investigate the truth of the article was based on two United States Supreme Court cases, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), and *St. Amant v. Thompson*, 390 U.S. 727 (1968). Neither case suggests that, under these facts, Black and Mattix would have had no duty to investigate. Instead they state that a failure to investigate is not, standing alone, sufficient proof of actual malice. *See Harte-Hanks*, 491 U.S. at 688; *St. Amant*, 390 U.S. at 733. But, even were we to presume the trial court had found insufficient evidence of actual malice, that conclusion would not justify judgment in favor of Black and Mattix. As we have noted, the court determined the jury must decide whether the common-interest privilege had been abused. If the jury concluded the privilege had been abused by excessive publication, it properly could award damages against Black and Mattix for negligent defamation if warranted by the evidence without finding that they had acted with actual malice. *See Green Acres Trust*, 141 Ariz. at 616, 688 P.2d at 624.

them from liability. *See Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, ¶ 9, 180 P.3d 986, 992 (App. 2008); Restatement (Third) of Agency § 7.01 (2006). Neither does the fact that they did not author the article; defamation requires publication, it does not necessarily require authorship. *See Dube*, 216 Ariz. 406, ¶ 36, 167 P.3d at 104. Before publishing the article, Black and Mattix had a duty to use reasonable care in ascertaining that its content was not false and defamatory, and the trial court erred by concluding otherwise.[6]

**Disposition**

**¶11** We reverse the trial court's grant of summary judgment in favor of Black and Mattix on Holm's defamation claim. We remand the case to the trial court for further proceedings consistent with this decision.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge

[6]Therefore, we need not reach the issues Holm raises in his opening brief. Nothing in this decision, however, precludes Black and Mattix from renewing their motion for summary judgment on any issue except the one we address here.