COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 98-3327

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

WARREN L. BLAKSLEE,
D/B/A ACCESSORIES FOR LIVING,

PLAINTIFF-APPELLANT,

RONALD QUESENBERRY,
D/B/A CLASSIC AUTO TRIM,

PLAINTIFF,

V.

GENERAL MOTORS CORPORATION,
RICK KALISH AND MICHAEL DODGE,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Warren L. Blakslee, d/b/a Accessories for Living ("AFL"), appeals from an order granting summary judgment to General Motors Corporation ("GM"), Rick Kalish and Michael Dodge. AFL contends, in its suit seeking damages, that Kalish, a GM employee, allegedly defamed it in a memo and a conference call. It argues that the trial court erred in determining that: (1) the statement that AFL "has a major scam going on" was incapable of a defamatory meaning; (2) the statement was, as a matter of law, true; and (3) GM could avail itself of the defense of privilege because the statement fell within the conditional "common interest" privilege, making it a protected statement. We decline to determine whether the term "scam" is defamatory under these circumstances because regardless of whether or not the use here of the term "scam" was capable of defaming AFL, here the statement was true. Consequently, we are satisfied that GM was properly granted summary judgment. Accordingly, we affirm.[1]

I. BACKGROUND.

¶2 General Motors Corporation offered an incentive program called the GM Mobility Program for Persons with Disabilities ("Mobility Program"). The incentive program was designed to encourage persons with physical disabilities, in the market for a new car, to choose GM cars. The program offered qualifying purchasers the cost and installation of certain safety devices. Among the safety features included in the Mobility Program were "alerting devices." These devices are designed to warn deaf or hard of hearing drivers of approaching emergency

[1] Because of our decision, it is not necessary for us to address the remaining argument. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed.

vehicles. The guidelines of the Mobility Program in place at the time Blakslee's action arose provided that if a potential customer for a GM car was physically disabled and inquired about additional safety features, he or she would be informed of the program. If the customer qualified under the program and purchased an automobile, he or she would then be directed to an authorized installer of the desired safety feature.[2] A qualifying customer was directed to have the authorized party install the safety device in his or her vehicle.[3] Upon installation of the device in the new vehicle, the customer was required to present proof of payment for the installation to his or her dealer, as well as allowing the dealer to inspect the installation of the mobility device. After a satisfactory inspection and presentation of a valid proof of payment, the customer then had two options. The first option allowed the customer to be reimbursed through the dealer. A second option required the customer to submit the request for reimbursement under the program directly to GM, which would issue a check directly to the customer.

¶3 GM had approved the E.A.R.S. alerting device in connection with the Mobility Program.[4] G&G Sales, Inc. ("G&G") is the North American distributor of the E.A.R.S. alerting device. Blakslee's company, Accessories for Living, was the Wisconsin distributor for the E.A.R.S. alerting device. AFL both

[2] Qualification for an alerting device under the GM Mobility Program was dependent on a demonstrable loss of hearing of 30 Db or greater. The hearing loss was generally demonstrated by a standard hearing test.

[3] Prior to January 1, 1998, the Mobility Program guidelines provided that qualified customers would be entitled to up to $1,000 for the installation and cost of the alerting device. Also prior to this date, the guidelines of the program provided that customers had up to 12 months after the date they purchased the vehicle to request reimbursement under the program.

[4] In fact, GM identified the E.A.R.S. device in its promotional materials.

sold and marketed the device. Prior to the marketing or sale of the E.A.R.S. device to GM customers, Blakslee asked for and received a copy of the GM Mobility Program Guidelines. Though Blakslee was aware that the GM Mobility Program was intended to be an incentive program targeting prospective car purchasers, AFL targeted people who had already purchased GM vehicles by purchasing from the Wisconsin Department of Transportation lists of recent motor vehicle customers. Using these lists, AFL solicited existing GM customers by phone in order to interest them in the E.A.R.S. device.

¶4 AFL's phone solicitation used a scripted sales presentation that Blakslee had adapted from a model script provided to him by G&G. The AFL solicitor represented to the called party that the solicitation was a customer satisfaction survey and, although the callers identified themselves as being associated with AFL, the telemarketer also indicated that the purpose of the call was to "follow up on (type of vehicle) customers in order to rate their satisfaction level with new automobiles and their dealership." AFL's solicitors also indicated that they would "pass [the observations collected in the call] on to the dealer." Essentially, the script used the satisfaction inquiry as a springboard for a sales pitch of the E.A.R.S. device and its availability through the GM Mobility Program. No evidence was presented that AFL or G&G were authorized to conduct such a survey for GM, and none of the information collected in the calls was forwarded to GM or its dealers.

¶5 AFL did not require the customer to pay for installation of the alerting device. Rather, AFL fronted the cost of the installation and then Blakslee

would seek reimbursement from the customer's dealer.[5] Additionally, although the guidelines of the Mobility Program provided that a post-installation inspection was to be performed by the dealer through which the reimbursement was being sought, often Blakslee would submit his requests for reimbursement accompanied only by a photo of the customer with his or her vehicle as proof of installation.

¶6 Rick Kalish, a Field Executive of the Oldsmobile Division of GM, became aware of Blakslee's marketing and sales practices in August 1997. He promptly faxed a memorandum to all Oldsmobile retailers, service managers, and business managers in the Milwaukee area alerting them that AFL used marketing and sales practices which Kalish felt violated the letter and the spirit of the Mobility Program.[6] The memo bore the heading "The following company has a major scam going on and all Oldsmobile retailers are to stop reimbursing owners for this service." In addition to faxing the memo to various dealers within the region, Kalish reiterated his concerns about AFL to a number of GM field executives and regional service consultants during a conference call in September 1997.[7]

[5] The record shows that Blakslee paid $318.00 apiece for the E.A.R.S. units. Routinely, Blakslee requested reimbursement of $510.00 for each unit. Moreover, Blakslee did not charge or pay for sales tax on the E.A.R.S. units sold to GM customers.

[6] In October 1997, GM modified its Mobility Program. The program now allows for only $200 in reimbursement for installation of the alerting device. Also, under the new guidelines, requests for reimbursement must be made within sixty days of the customer's GM vehicle purchase.

[7] Though the depositions and affidavits of persons "in attendance" during the conference call are unclear as to whether Kalish used the word "scam" during the conference call, GM stipulated for the purpose of the summary judgment hearing that the word was used in the same manner and context as in the memo publication at issue.

¶7 Blakslee, on behalf of AFL, commenced an action for injunctive relief and damages on September 25, 1997. Joining in the action with Blakslee was Ronald Quesenberry, who was a regional distributor for G&G.[8] Together, Blakslee and Quesenberry sued GM and two of its area representatives, Rick Kalish and Michael Dodge, for defamation and tortious interference with contractual and prospective contractual relationships. All claims arose from the Kalish memorandum and conference call, both of which identified the business practices of AFL as a "scam." On February 24, 1998, the trial court granted GM's motion to dismiss Quesenberry's defamation and tortious interference with contractual and prospective contractual relationships claims and dismissed Blakslee's claim for tortious interference with contractual and prospective contractual relationships. The trial court did not dismiss Blakslee's claim for defamation.[9] Blakslee petitioned for leave to file an interlocutory appeal of the trial court's decision regarding his claim for tortious interference for contractual and prospective contractual relationships, which this court denied. Quesenberry appealed of right from the final judgment against him and, on June 8, 1999, this court affirmed the trial court's decision.[10] GM filed a counterclaim, alleging that Blakslee's marketing and sales practices violated WIS. STAT. § 100.18. On November 17, 1998, the trial court, finding that the relevant facts were undisputed,

[8] Quesenberry is a regional distributor of the E.A.R.S. device. He sells the product in Wisconsin, Iowa, and Illinois. Warren Blakslee is a distributor working within Quesenberry's territory, Wisconsin.

[9] The trial court declined to grant GM's motion to dismiss Blakslee's claim for defamation, noting that the proceedings were at an early stage of litigation. The court decided that, in the interest of justice, the parties had to be afforded the opportunity to develop the record more fully.

[10] See ***Blakslee v. General Motors Corp***., No. 98-0760, unpublished slip op. (Wis. Ct. App. June 8, 1999).

granted summary judgment to GM on Blakslee's defamation claim and dismissed GM's counterclaim without prejudice.[11]

¶8 The trial court determined that although a legal conflict existed as to whether the term "scam" was capable of defaming Blakslee, it determined that, in the context in which it was used here, it was not defamatory. The trial court went on to find that even if the word "scam" was defamatory, GM was still entitled to summary judgment because the statement was true. Finally, the trial court reasoned that "even if that argument failed that truth was not a defense, there is a claim of privilege which this Court finds valid."

II. ANALYSIS.

Standard of Review

¶9 "Summary judgment is appropriate to determine whether there are any disputed factual issues for trial and 'to avoid trials where there is nothing to try.'" ***Caulfield v. Caulfield***, 183 Wis. 2d 83, 91, 515 N.W.2d 278 (Ct. App. 1994) (citation omitted). Our review of a trial court's grant of summary judgment is de novo. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-16, 401 N.W.2d 816 (1987). We use the same summary judgment methodology as the trial court. *See* ***id***. That methodology has been described in many cases, *see, e.g.,* ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980), and need not be repeated here, save to observe that summary judgment must be granted if the evidentiary material demonstrates "that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." WIS. STAT.

[11] The trial court's order granting summary judgment to GM was filed on November 17, 1998, reflecting the court's oral ruling on October 26, 1998.

§ 802.08(2) (1997-98). While we apply the same methodology as the trial court when reviewing a summary judgment motion, we owe no deference to the conclusion of the trial court. *See* ***Kotecki & Radtke, S.C. v. Johnson***, 192 Wis. 2d 429, 436, 531 N.W.2d 606 (Ct. App. 1995). Indeed, summary judgment may be particularly germane in defamation actions "in order to mitigate the potential 'chilling effect' on free speech and the press that might result from lengthy and expensive litigation." ***Bay View Packing Co. v. Taff***, 198 Wis. 2d 653, 672, 543 N.W.2d 522 (Ct. App. 1995) (quoting ***Time, Inc. v. Hill***, 385 U.S. 374, 401-02 (1967) (Douglas, J. concurring)).

¶10 The Supreme Court has, moreover, explained that in defamation cases "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" ***Bose Corp. v. Consumers Union of the United States, Inc.***, 466 U.S. 485, 499 (1984) (citation omitted). Using this standard of review, after an independent review, we are satisfied that the statement in GM's memo and conference call that AFL "has a major scam going on" might be capable of a defamatory meaning, but here it is not actionable because the statement was true. Consequently, we affirm.

¶11 We are satisfied that summary judgment was appropriately granted because there are no material disputed facts.[12] Even if the word "scam" was capable of defaming AFL, here the word accurately described AFL's business

[12] We note that AFL devotes much of its brief to arguing that this matter was not ripe for summary judgment. AFL claims that the trial court ignored the deposition testimony of the recipients of the statement and there were credibility issues concerning Kalish's motives to be decided by a jury. Since we have determined that the statement was true, the opinions of the recipients of the statement and Kalish's motives are irrelevant.

practices. AFL's telemarketing calls fraudulently misrepresented the intent and purpose of the call and circumvented GM's program prerequisites for reimbursement.

¶12 The elements for a common law claim of defamation are: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *See* ***Bay View Packing***, 198 Wis. 2d at 673. The first element sets up a threshold determination for all defamation claims. As discussed by the supreme court:

> In an action for [defamation] the court must first determine whether the [publication] complained of is defamatory. If it is not, that ends the matter. In the event of defamation, the court must consider the defenses alleged. A matter, though defamatory, is still not actionable if it is true, since truth is a complete defense.

Lathan v. Journal Co., 30 Wis. 2d 146, 151, 140 N.W.2d 417 (1966); *see also* ***Williams v. Journal Co.***, 211 Wis. 362, 370, 247 N.W. 435 (1933).

¶13 Blakslee first argues that the trial court erred when it held that the use of the word "scam" in the context of the GM memo was incapable of carrying a defamatory meaning. However, contrary to Blakslee's argument on appeal, the trial court did not find that the word "scam" was absolutely incapable of carrying a defamatory meaning; rather, it concluded that the term, as it was used here, examined in the totality of the circumstances, was not defamatory.

¶14 Determining whether a term is capable of being defamatory is a question of law. *See* ***Tatur v. Solsrud***, 174 Wis. 2d 735, 740, 498 N.W.2d 232

(1993); *see also* ***Schaefer v. State Bar***, 77 Wis. 2d 120, 122, 252 N.W.2d 343 (1977). In rendering its oral ruling on the matter, the trial court relied on ***McCabe v. Rattiner***, 814 F.2d 839 (1st Cir. 1987), and ***Dilworth v. Dudly***, 75 F.3d 307 (7th Cir. 1996), for its decision. Blakslee, relying on several older cases, contends that the use of the term "scam" is always defamatory. Although we have declined to determine whether the word "scam" was capable of defaming AFL, a brief overview of the relevant cases is instructive.

¶15 In ***McCabe***, the court had to decide whether the use of the word "scam" in the jumpline of a newspaper article was capable of defaming the owner of a condominium resort when the term was used to describe his sales tactics. *See* ***McCabe***, 814 F.2d at 840-41. In making its determination that the term "scam" was not defamatory, the Court adopted a "totality of the circumstances" approach. ***Id.*** at 842. This approach dictates that deciding whether or not a term is capable of defaming requires that the term be examined (1) on its own; (2) in its larger social context; and (3) in the context of the publication in which it was used. *See* ***id***. Considering the term "scam" in isolation, the court in ***McCabe*** determined that "'scam' does not have a precise meaning." ***Id***. Moreover, the court concluded "[w]hile some connotations of [scam] may encompass criminal behavior, others do not." ***Id***.

¶16 In ***Dilworth***, the Court was faced with whether the term "crank," when used in a book publication to criticize a fellow mathematician, was capable of carrying a defamatory meaning. *See* ***Dilworth***, 75 F.3d at 308. In its opinion, the court also opted for a contextual analysis. The ***Dilworth*** court's litany of terms which have been "held … to be incapable of defaming because they are mere hyperbole rather than falsifiable assertions of discreditable fact," ***id.*** at 310, included the term "scam." ***Id***. The court concluded that, in the larger social

context, each of the terms listed, including "scam," has "both a literal and a figurative meaning and whether [they are] capable of being defamatory depends on which meaning is intended, a question that can be answered only by considering the context in which the term appears." ***Id***.

¶17 Blakslee cites ***Kumaran v. Brotman***, 617 N.E.2d 191 (Ill. App. 1993), for its position that "scam" is capable of having a defamatory meaning. Blakslee also relies on the dictionary definition found in WEBSTER'S NEW WORLD DICTIONARY (2d coll. ed. 1982), which describes "scam" as meaning a swindle or fraud. Regardless of whether the term "scam" can be the basis of a defamation action, here GM is entitled to summary judgment because Blakslee's business practices constituted a fraud and the truth defeats Blakslee's claims.

¶18 Blakslee contends that, as a matter of law, GM's statement that AFL "has a major scam going on" was untrue. Blakslee argues that it did not misrepresent the quality of its product, its solicitors truthfully told consumers that the product was available at no extra cost under GM's Mobility Program, and AFL properly qualified customers under GM's guidelines. We disagree.

¶19 Truth is an absolute defense to a claim of defamation. *See* ***Denny v. Mertz***, 106 Wis. 2d 636, 643, 318 N.W.2d 141 (1982). Moreover, it is not necessary that the statement in question "be true in every particular." ***Lathan***, 30 Wis. 2d at 158. "All that is required is that the statement be substantially true." ***Id.***; *see also* ***DiMiceli v. Klieger***, 58 Wis. 2d 359, 363, 206 N.W.2d 184 (1973). We agree with the trial court's holding that Kalish's statement was true, in large part, because the script used by AFL employees in their telephone solicitations "shows the plan of the plaintiff."

¶20 The E.A.R.S. script, utilized by AFL in its phone solicitations, reads in pertinent part:

> Hello (Mr./Mrs.) _____ this is (Verna Blakslee) with Accessories for Living and I am calling you today in regards to the new (type of vehicle) that you purchased this year.
>
> ***We follow up on (type of vehicle) customers in order to rate their satisfaction level with new automobiles and their Dealership***.
>
> May I ask you a few questions?
>
> (1) How do you like your new (type of vehicle) overall?
>
> (2) What Dealership did you purchase your new vehicle from?
>
> (3) What are your observations about the quality of service you received from (name of Dealer)?
>
> ***Thank you. We will pass your observations on to the dealer***.
>
> I would also like to take this opportunity to make you aware that (name of manufacturer) is making available to their customers, who qualify, an added safety feature.
>
> It is available to you at no additional cost.
>
> The item is a small computer that produces an LED light display on your dash in response to a siren sound.
>
> (car manufacturer) is making this available because new cars are very well made and for some people who have experienced even a small amount of hearing loss it is very difficult sometimes to hear emergency vehicles in time to safely move out of the way.
>
> Could you or a family member benefit from this siren alert device?
>
> Has any driver in your family had a hearing test?
>
> We can provide you with a FREE hearing test that will determine if you qualify for the siren alerting device under (name of car manufacturer) Mobility Program. The person most likely to have a hearing loss needs to take the hearing test.
>
> May I schedule an appointment for your family to take the FREE hearing test?

(Emphasis added.) Regarding Blakslee's plan, we adopt the trial court's analysis:

> There is no dispute [GM] was not in fact conducting the survey. [Blakslee] had no authority to do so from GM or its dealers. [Blakslee] didn't communicate any responses to GM or its dealers. [Blakslee] didn't complete or compile the responses in any format. This was merely a way to make a sales pitch. And I think anyone who receives telemarketing calls would recognize this as a scam or a plan to get someone into conversation, to engage in conversation. It sounds like someone is trying to find out if the customer is satisfied with that product. So the actions by [Blakslee] were deceptive. He misled individuals for the purpose of selling his product.

AFL represented to telemarketing recipients that AFL was operating on behalf of the dealership, and that the caller was primarily interested in customer satisfaction with the vehicle. This was not true. AFL cared not at all whether customers were satisfied with their cars. They had no permission to call on behalf of GM or its dealers, and they did not tally the customer satisfaction replies and forward them to GM. What AFL employees were doing in their script to the recipient of the call was, at best, asking misleading questions concerning the customer's "satisfaction level" with their new car and their dealer. Their calls were a pretext to encourage the sale of their product.

¶21 Thus, we are satisfied that the record supports the conclusion that Blakslee's business practices were a "scam" as that word has been defined by Blakslee because the calls deceived the recipient into believing the call was principally associated with GM's concern over their new car purchase. It misrepresented who was calling and why the call was being made. Consequently, it was a "fraud." Kalish's statements are thus protected from a claim of defamation by virtue of being true.

¶22 For all the above reasons, we conclude that the trial court properly determined that GM was entitled to summary judgment.

By the Court.—Order affirmed.

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