Circuit Court for Baltimore City
Case No. 24-C-21-003417

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 514

September Term, 2023

URU IHIM

v.

IAN MAGAMBO, ET AL.

Friedman,
Kehoe, S.,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: December 13, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to MD. RULE 1-104(a)(2)(B).

Appellant Uru Ihim appeals from a judgment in the Circuit Court for Baltimore City finding her liable for defamation and intrusion upon seclusion for statements she made about Ian Magambo and Karachi Achilihu. Ihim argues the circuit court erred in (I) admitting statements over her hearsay objections and in (II) finding her liable for defamation. Because we reject Ihim's claims of error, we affirm.[1]

[1] Each side questions the justiciability of this appeal, but neither side's argument is persuasive. *First*, Ihim argues Achilihu lacked standing to bring an action in the circuit court. Maryland appeals courts typically abstain from considering a party's standing if the "piggy-back" standing doctrine applies. Under this doctrine, "where there exists a party having standing to bring an action … we shall not ordinarily inquire as to whether another party on the same side also has standing." *Garner v. Archers Glen Partners, Inc.*, 405 Md. 43, 54 (2008) (cleaned up) (collecting cases). A party has standing if the party's interest "is *arguably* within the zone of interests to be protected" by the claim at issue. *120 W. Fayette St., LLLP v. Mayor & City Council of Baltimore*, 407 Md. 253, 270 (2009) (citation omitted). Here, Magambo has an interest in addressing the harm caused by the defamatory statement referencing him, and Ihim does not challenge his standing on appeal. Thus, we adhere to the "piggy-back" doctrine and abstain from addressing Achilihu's standing.

Second, Magambo and Achilihu ask us to affirm because Ihim failed to challenge the intrusion upon seclusion claim on appeal, a claim which may have independently supported the circuit court's judgment. In *Bailiff v. Woolman*, 169 Md. App. 646 (2006), this Court held that when an appellant fails to challenge one of the two grounds for the circuit court's decision in their brief, they waive any claim of error with respect to that issue. *Id.* at 653. We further held that, having waived the issue, affirmance is required if the unraised ground "provided an adequate and independent basis for the circuit court's decision." *Id.* at 654. We hold that *Bailiff* is inapplicable here because the hearsay argument Ihim raises (discussed in Section I) involves evidence touching on both defamation and intrusion upon seclusion. If Ihim's hearsay argument is meritorious, it could lead to reversal on both claims. As a result, Ihim has sufficiently attacked the intrusion upon seclusion claim such that she has not waived any argument against it, and we cannot affirm based on *Bailiff*.

BACKGROUND

In May 2021, an anonymous user on Instagram sent a direct message to Achilihu suggesting that her fiancé, Magambo, had commented on her body odor. Several days later, Whitney Chukwurah, a friend of both Achilihu and Ihim, told Achilihu that Ihim had made two remarks about Achilihu's body odor—that (1) "Karachi Achilihu's vagina stinks" and that (2) "Ian Magambo told me that Karachi Achilihu's vagina stinks." These two statements are the sole basis for the defamation and invasion of privacy claims in this case. Achilihu shared these statements with Magambo.

Chukwurah sent another message to Achilihu in June. This time, Chukwurah said she was told by Ihim that Ihim had screenshots confirming that Magambo made the second statement about Achilihu's body odor. Achilihu and Magambo discovered one final anonymous online post about a year later. The user, this time posting on the gossip website Lipstick Alley, also alleged that Magambo had criticized Achilihu's body odor.

In response to these statements, Magambo and Achilihu sued Ihim, alleging claims for defamation, false light, intrusion upon seclusion, and unreasonable publicity to private life. After a two-day bench trial, the Circuit Court for Baltimore City found Ihim liable for defamation and intrusion upon seclusion. Based on both the defamation and intrusion upon seclusion claims, the court awarded $25,000 in damages to Magambo and Achilihu, of which Magambo received $5,000 in actual damages and $5,000 in punitive damages and Achilihu received $10,000 in actual damages and $5,000 in punitive damages. Ihim then filed this appeal.

DISCUSSION

We review bench trials on both the law and evidence. MD. R. 8-131(c). We examine the circuit court's interpretation of the law without deference and will not disturb its judgment of the evidence unless clearly erroneous, "giv[ing] due regard to the opportunity of the trial court to judge the credibility of the witnesses." *Id.* Below, we hold that the circuit court did not err in admitting two alleged hearsay statements and in finding Ihim liable for defamation.

I. HEARSAY

Ihim argues the circuit court erred by admitting anonymous online statements over her hearsay objections. Hearsay is a statement, made by the declarant outside a trial or hearing, "offered in evidence to prove the truth of the matter asserted." MD. R. 5-801(c). Hearsay is generally inadmissible unless an exception applies. MD. R. 5-802. We review whether evidence is hearsay or subject to a hearsay exception without deference to the circuit court. *Hall v. Univ. of Maryland Med. Sys. Corp.*, 398 Md. 67, 83 (2007).

Here, Ihim objected to two online statements. The first was a direct message on Instagram sent by the account "miguelmiguel9122." The circuit court overruled the objection to the Instagram message and admitted it as follows:

> There is a rumor around that your fiancé told people close to him that your privates smell foul. Not shade for me, just letting you know.

Soon after the circuit court admitted the Instagram message, Ihim objected to a post from the website Lipstick Alley. The post made statements similar to the direct message on Instagram:

> [Achilihu] will only say that she is suing for a bad statement but won't say what the statement is. I have heard from people who [Magambo] and [Achilihu] confided in apparently the lawsuit is about [Magambo] and others sharing that [Achilihu] can't properly clean herself.

While the circuit court found that both online statements were admissible hearsay, we conclude they are not hearsay at all. The online statements were not offered for their truth—that Achilihu did, in fact, have an odor or that Magambo did, in fact, make such an assertion—but to establish the fact that the defamatory statements were disseminated to others. The fact that Magambo and Achilihu's case is premised on the claim that these defamatory statements are false underscores how no truthful assertions could be gleaned from them. LYNN MCLAIN, MARYLAND EVIDENCE, STATE & FEDERAL § 801:9 (2024) ("The plaintiff in a defamation suit must prove that the defendant made a defamatory type of statement to a third person…. Clearly the plaintiff does not wish to prove that the statement was true: to do so would defeat her own case."). Because the online statements were being offered for a non-truth purpose, they are not hearsay. Accordingly, the circuit court did not err in admitting the online statements over Ihim's objections.

In holding that the online statements are admissible, we note that the admissibility errors alleged by Ihim would not have required reversal regardless. For an error to be reversible, the appellant must show the error caused prejudice. *Barksdale v. Wilkowsky*, 419 Md. 649, 660 (2011). Ihim does not explain why the admission of either online message is prejudicial, nor could she. The circuit court in this case did not rely on the online posts in its ruling. *See Nixon v. State*, 140 Md. App. 170, 189 (2001) ("In a bench trial[,] the issue is whether or not the trial judge relied on improper evidence."). Further, the

witnesses had already supplied evidence of the dissemination and damage caused by the defamatory statements. Accordingly, Ihim could not have met her burden of proving that the error, had there been any, was prejudicial. Thus, we would not reverse regardless of the admissibility of the online statements.

II. DEFAMATION

We turn to Ihim's claim that Magambo and Achilihu failed to prove defamation. To establish a claim for defamation, a plaintiff must prove "(1) that the defendant made a defamatory statement to a third person, (2) that the statement was false, (3) that the defendant was legally at fault in making the statement, and (4) that the plaintiff thereby suffered [damages]." *Offen v. Brenner*, 402 Md. 191, 198 (2007). Ihim argues the circuit court mistakenly found that the statements at issue were defamatory, that it failed to properly distinguish between defamation per se and defamation per quod (described below), and that it erroneously found Magambo and Achilihu suffered damages.[2]

A. Whether the Two Statements are Defamatory

Ihim claims the circuit court erred in finding the two statements at issue satisfied the first element of defamation. In other words, she alleges that they were not defamatory statements. We disagree. A defamatory statement, for purposes of satisfying the first

[2] Ihim also argues that the statement "Karachi Achilihu's vagina stinks" is merely an opinion and thus cannot be proven true or false for purposes of establishing the second element of defamation. A statement is false if it is "not substantially correct." *Piscatelli v. Smith*, 197 Md. App. 23, 37 (2011), *aff'd sub nom. Piscatelli v. Van Smith*, 424 Md. 294 (2012) (citation omitted). Whether an opinion is defamatory depends on whether the factual basis for the opinion is either disclosed or undisclosed and either true or false. *Id.* at 39-40. Regardless, we need not determine if this is an opinion because the argument was neither raised at trial nor decided by the circuit court. MD. R. 8-131(a).

element of defamation, is one "which tends to expose a person to public scorn, hatred, contempt or ridicule, thereby discouraging others in the community from having a good opinion of, or associating with, that person." *Offen*, 402 Md. at 198-99 (citation omitted). Whether a statement is defamatory is a question of law for the court. *Piscatelli v. Van Smith*, 424 Md. 294, 306 (2012).

Ihim alleges there is insufficient evidence to show the two statements exposed Magambo and Achilihu to any reputational damage. To satisfy the first element of defamation, however, Magambo and Achilihu are not required to show actual reputational damage. A defamatory statement need only be of the type that "tend[s]" to expose a person to scorn, hatred, and the like. *Offen*, 402 Md. at 198-99 (citation omitted). The test is simply "whether the words, taken in their common and ordinary meaning … are capable of defamatory construction." *Batson v. Shiflett*, 325 Md. 684, 724 n.14 (1992).

That test is satisfied here. The statement "Karachi Achilihu's vagina stinks" tends to expose Achilihu to contempt or ridicule regarding both her health and her hygiene. The statement "Ian Magambo told me that Karachi Achilihu's vagina stinks," coupled with the extrinsic fact that the two are engaged, tends to expose Magambo to contempt or ridicule by communicating a breakdown in the relationship between the couple or a lack of discretion on the part of Magambo. Each statement discourages others from having a good opinion of both parties and satisfies the first element of defamation. Thus, the circuit court did not err in finding that the two statements were defamatory statements.

B. Defamation Per Se and Per Quod

Ihim alleges the circuit court mishandled the distinction between defamation per se and defamation per quod. The circuit court found the statement "Karachi Achilihu's vagina stinks" was defamation per se and the statement "Ian Magambo told me Karachi Achilihu's vagina stinks" was defamation per quod. Ihim contends that (1) the former statement is not defamation per se, (2) that the circuit court erroneously designated each statement as a different type of defamation, and (3) that the statements should be read as only one defamatory statement. We reject each of these arguments in turn.

As a matter of background, whether a statement is defamatory per se or per quod is based on the proof needed to establish that the statement is defamatory. *Samuels v. Tschechtelin*, 135 Md. App. 483, 549 (2000). A statement is defamatory per se if it is defamatory on its face; a statement is defamatory per quod if extrinsic facts are needed to establish that it is defamatory. *Id.* at 549. "Whether an alleged defamatory statement is per se or per quod is a question of law." *Id.*[3]

We now examine Ihim's three claims of error on this issue.

[3] The parties also discuss how the distinction between defamation per se and per quod is often necessary to determine whether presumed damages are recoverable. If a statement is defamatory per se, the court can award three types of damages: actual, punitive, or presumed. *McClure v. Lovelace*, 214 Md. App. 716, 739-40 (2013). If a court finds a statement defamatory per quod, however, it can only award two types of damages, actual or punitive, and the plaintiff cannot recover presumed damages. *See Samuels,* 135 Md. App. at 549-50 (holding, for statements that are defamatory per quod, plaintiff must prove a special, actual injury and that the court will not presume an injury). Here, however, the circuit court did not award presumed damages, so we need not address presumed damages further.

First, Ihim argues that the statement "Karachi Achilihu's vagina stinks" is not defamation per se. But we do not need additional facts to understand how a criticism of Achilihu's body odor tends to defame her. Accordingly, we uphold the circuit court's finding that this was defamation per se.

Second, Ihim argues that the circuit court made an inconsistent ruling by designating one of the defamatory statements defamation per se and the other defamation per quod. To justify this argument, Ihim claims a court must "review[] the statement as a whole" to determine whether a statement is defamatory per se or per quod. *Batson*, 325 Md. at 723. That rule exists because "words have different meanings depending on the [whole] context in which they are used," and courts use this analytical rule to determine whether a statement has a defamatory meaning. *Id.* at 723-24 (holding that a flyer, viewed as a whole, impliedly accused plaintiff of misusing union funds). That rule, however, does not mandate we find that separate, embedded statements are the same type of defamation. We hold that the circuit court did not rule inconsistently in distinguishing the two statements as defamation per se and per quod.

Third, we reject Ihim's argument that the circuit court should have read the two defamatory statements as one, singular defamatory statement. Generally, "each communication of the same defamatory matter by the same defamer, whether to a new person or to the same person, is a separate and distinct publication, for which a separate cause of action arises." RESTATEMENT (SECOND) OF TORTS § 577A cmt. a. There are at least two publications here. Chukwurah testified that, in May 2021, Ihim said "Ian Magambo told me that Karachi Achilihu's vagina stinks," which Chukwurah then texted

to Achilihu. A month later, Chukwurah messaged Achilihu over LinkedIn, and she stated that Ihim had screenshots of Magambo saying "Karachi Achilihu's vagina stinks." Because Ihim made two separate publications to Chukwurah, we reject her argument and conclude Ihim is liable for two separate defamatory statements.

C. Damages

Ihim argues that Achilihu and Magambo failed to prove both actual and punitive damages, but these arguments lack merit.

A court may award actual damages based on anxiety and other mental and emotional harms. *McClure v. Lovelace*, 214 Md. App. 716, 747 (2013). There was evidence that these defamatory statements frayed the relationship between Magambo and Achilihu to such a point that they paused their wedding planning. Testimony revealed that Achilihu experienced severe stress from the statements, which was compounded by her studying for the bar exam at the same time. For his part, Magambo stated he suffered from depression and panic attacks. Each also attended therapy at least in part because of the defamatory statements. Based on this evidence, the circuit court did not clearly err in awarding Achilihu and Magambo actual damages based on "humiliation, embarrassment, [and] stress."

Next, Ihim argues the circuit court's punitive damages award was erroneous because, she alleges, Achilihu and Magambo failed to prove actual malice. To be awarded punitive damages, a plaintiff must prove actual malice by clear and convincing evidence. *Le Marc's Mgmt. Corp. v. Valentin*, 349 Md. 645, 653 (1998). Actual malice is "a person's actual knowledge that his or her statement is false, coupled with his or her intent to deceive

another by means of that statement." *Seley-Radtke v. Hosmane*, 450 Md. 468, 496 (2016) (citation omitted).[4] Actual malice can be inferred from circumstantial evidence. *Garcia v. Foulger Pratt Dev., Inc.*, 155 Md. App. 634, 685 (2003). Ihim knew by clear and convincing evidence that the defamatory statements were false and attempted to deceive others about its falsity. First, the circuit court found that Ihim fabricated the screenshot that allegedly captured Magambo messaging Ihim about Achilihu's body odor. This screenshot was never introduced, and every witness—including Ihim—denied ever seeing the screenshot. Second, testimony supported, and the circuit court found, that Ihim attempted to influence the deposition of Chukwurah by texting her—as the deposition was happening—to answer questions vaguely and to deny that Ihim communicated the defamatory statements to her. These findings are sufficient to infer that Ihim knew and attempted to deceive others about the falsity of the defamatory statements because they display Ihim's attempts to conceal her involvement in and insulate herself from the

[4] Both parties assert that the correct standard for determining actual malice for purposes of punitive damages is knowing falsity or reckless disregard for the truth. We note that reckless disregard is no longer the correct standard for proving actual malice in Maryland. To recover punitive damages in a defamation action, the U.S. Constitution requires a plaintiff to prove actual malice defined as knowing falsity or reckless disregard of the truth. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). In the 1990s, Maryland courts began imposing a stricter standard for proving actual malice. *See, e.g.*, *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 460 (1992) (requiring conscious wrongdoing to prove actual malice and award punitive damages in a products liability case). Accordingly, in *Valentin*, Maryland's highest court held that actual knowledge of falsity, and not merely reckless disregard of truth, is required to prove actual malice in the context of recovering punitive damages in defamation actions. *Valentin*, 349 Md. at 653. This definition of actual malice is now the standard in Maryland defamation law generally. *See, e.g.*, *Seley-Radtke*, 450 Md. at 493-496 (defining actual malice as requiring actual knowledge in the context of a conditional defamation privilege).

defamatory statements. As a result, the circuit court did not err in awarding punitive damages to Magambo and Achilihu.

The circuit court properly admitted two anonymous online statements despite Ihim's hearsay objections. The circuit court also did not err in finding Ihim liable for defamation. The statements made against Magambo and Achilihu were defamatory statements, the circuit court correctly distinguished between defamation per se and per quod, and it did not err in awarding actual and punitive damages. Thus, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.