

2507 DEFAMATION: PRIVATE INDIVIDUAL VERSUS PRIVATE INDIVIDUAL WITH CONDITIONAL PRIVILEGE

(As to Question 1, give the definition of “defamation” from Wis JI-2501.)

Question 2 asks whether (defendant), in making (publishing) the statements about (plaintiff), abused (his) (her) privilege.

Under certain circumstances, a person has a privilege to make (publish) defamatory statements about another. However, the privilege does not protect the speaker (author) if it is abused.

In this case, (defendant) had the privilege of making (publishing) statements about (plaintiff) for the reason that (insert the purpose for which the court has determined a conditional privilege exists - e.g., advising a prospective employer about the work capabilities of a former employee). However, it is for you to determine whether (defendant)’s privilege to make (publish) statements about (plaintiff) was abused under the circumstances of this case.

(Select the appropriate paragraphs.)

[1. An abuse of (defendant)’s privilege occurred if (he) (she) at the time of making (publishing) the statements knew that such statements were false or made (published) them in reckless disregard as to the truth or falsity of them.

(Give that portion of Wis JI-Civil 2511 that deals with reckless disregard of the truth or falsity of defamatory statements.)]

[2. An abuse of privilege occurred if (defendant) made (published) the statements solely from spite or ill will. However, ill will or spite does not abuse the privilege if the statements were made for the purpose (insert purpose).]

[3. An abuse of (defendant)’s privilege occurred if (defendant) made the statements (made publication of the statements available) to persons who had no interest in or connection to (insert purpose).

In some cases, the statements, to be effective, must be made at a time and place even though third persons are present and likely to overhear the statements. That does not constitute an abuse of the privilege. However, the privilege is abused if the statements are unnecessarily made in the presence of third persons even though the information is given to the party who is entitled to receive it.]

[4. An abuse of (defendant)’s privilege occurred if (he) (she) did not reasonably believe that the making (publishing) of the statements was necessary to accomplish the purpose for which the privilege was given, that is (insert purpose).]

[The facts and circumstances available to (defendant) at the time the statements were made (published) must have been sufficient to cause a person of reasonable caution and prudence to believe that the information, in its entirety, was necessary to accomplish the purpose for which the privilege was given.]

[5. An abuse of (defendant)’s privilege occurred if (he) (she) made (published) statements necessary for the purpose (insert purpose - e.g., (plaintiff)’s work habits to a prospective employer) and then made additional defamatory statements not necessary to accomplish that purpose.]

[6. If the (defendant) made (published) statements believed by (him) (her) to be true and then added statements known by (him) (her) to be false, the privilege would be abused.]

(Plaintiff) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (defendant) abused (his) (her) privilege in making (publishing) the statements.

(As to Question 3, the damage question, give COMPENSATORY DAMAGES, WIS JI-CIVIL 2516, and BURDEN OF PROOF: ORDINARY, WIS JI-CIVIL 200.)

(As to Question 4, express malice, give EXPRESS MALICE, WIS JI-CIVIL 2513, and BURDEN OF PROOF: MIDDLE, WIS JI-CIVIL 205.)

(As to Question 5, punitive damages, give PUNITIVE DAMAGES, WIS JI-CIVIL 2520.)

SPECIAL VERDICT: (Proof of falsity assumed)

Question 1: Were the statements made (published) by (defendant) defamatory?

Answer: _____

Yes or No

Question 2: If you answered “yes” to Question 1, then answer this question: In making (publishing) the statements, did (defendant) abuse (his) (her) privilege?

Answer: _____

Yes or No

Question 3: If you answered “yes” to Question 2, then answer this question: What sum of money will fairly and reasonably compensate (plaintiff) because of such defamatory statements?

Answer: _____

Question 4: If you answered “yes” to Question 2, then answer this question: Did (defendant) act with express malice in making (publishing) the statements?

Answer: _____

Yes or No

Question 5: If you answered “yes” to Question 4, then answer this question: What sum of money, if any, do you assess against (defendant) for punitive damages?

Answer: _____

COMMENT

This instruction was approved in 1986 and revised in 2002. The comment was updated in 2003 and 2020.

See Restatement, Second, Torts § 619 (1977).

Whether a privilege exists at all is a question for the court. If the facts are in dispute, the jury determines the issues of fact, and the court decides whether the facts found by the jury make the publication privileged.

The jury determines whether the defendant abused the privilege.

For occasions in which a conditional privilege would arise, see Restatement, Second, Torts §§ 594-598A, (1977).

In Ranous v. Hughes, 30 Wis.2d 452, 468, 141 N.W.2d 251 (1966), the supreme court listed the four conditions which constituted an abuse of conditional privilege under the Restatement rules. Since that time, the Restatement had changed the wording of the first abuse of privilege from:

- (1) The defendant either did not believe in the truth of the defamatory matter or, if believing the defamatory matter to be true had no reasonable grounds for so believing; . . . Ranous, at 468.

to:

- (a) knows the matter to be false; or
- (b) acts in reckless disregard as to its truth or falsity.” Restatement, Second, Torts § 600 (1977).

In addition, the Restatement, Second, Torts § 605A (1977), has added a fifth rule constituting an abuse of conditional privilege. See also Restatement, Second, Torts Appendix, § 605, p. 117, Reporter’s Note.

The five occasions giving rise to abuse of conditional privilege, as stated in the Restatement, Second, Torts §§ 600, 603-605A (1977) are:

1. The defendant knew the matter to be false or acted in reckless disregard as to the truth or falsity.
2. The defamatory matter is published for some purpose other than for which the privilege is given.
3. The publication is to some person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege.
4. The publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the privilege is given.
5. The publication includes unprivileged matter as well as privileged matter.

Every person has a lawful right to act for the protection of his or her (own bodily security, property, business or profession). When so acting, a person has the privilege, if such privilege is not abused, of making statements about another which may later turn out to be false and defamatory without being subjected to liability for the making of such statements. This privilege, however, is a conditional privilege which, if abused, does not shield a defendant from the liability imposed upon one who makes false and defamatory statements about another. Also, a person has a right to act for the protection of a third person, when either the life or property of such third person is imperiled by a threatened serious crime. When so acting, a person has the privilege, if such privilege is not abused, of making statements which may later turn out to be false and defamatory without being subjected to liability for the making of such statements.

A person also has a lawful right to act with respect to a matter which affects an important public interest when such public interest requires the communication of defamatory matter to a public officer or private citizen.

Employee References: Statutory Privilege Under Wis. Stat. § 895.487(2) for Employers. Wisconsin courts have long recognized a common law conditional privilege that protects communications that enable a prospective employer to evaluate an employee’s qualifications. See Hett v. Ploetz, 20 Wis.2d 55, 59, 121 N.W.2d 270 (1963). The Wisconsin legislature has also codified this privilege under Wis. Stat. § 895.487, which permits an employer to make statements about a former employee. This statute reads:

An employer who, on the request of an employee or a prospective employer of the employee, provides a reference to that prospective employer is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from all civil liability that may result from providing that reference. The presumption of good faith under this subsection may be rebutted only upon a showing by clear and convincing evidence that the employer knowingly provided false information in the reference, that the employer made the reference maliciously or that the employer made the reference in violation of s. 111.322. (Emphasis added.)

In Gibson v. Overnite Transportation Company, 2003 WI App 210, ¶11, 267 Wis.2d 429, 671 N.W.2d 388 the employer/defendant argued that, to abuse the statutory privilege, statements by the employer must be made with actual malice, *i.e.* with knowledge of falsity or with reckless disregard for the truth. The court of appeals concluded that the Wisconsin Legislature intended to keep the same standard of malice as existed in the common law-express malice and, therefore, actual malice is not required. The court said:

§ 17. Our conclusion is further supported by the jury instructions. See State v. Olson, 175 Wis.2d 628, 642 n. 10, 498 N.W.2d 661 (1993) (“[W]hile jury instructions are not precedential, they are of persuasive authority.”). Like Wis. Stat. § 895.487(2), Wis JI-Civil 2507 lists ways in which the jury can find that an employer abused its privilege to make statements about former employees. First, the jury may find that the defendant made the statements knowing that they were false or in reckless disregard as to the truth or falsity of them. This is actual malice. However, the jury may also find defamation where the defendant made statements solely from spite or ill will. This is express malice, which is what the jury found here. Actual malice is not required.

In this context, “express malicious” requires a “showing of ill will, bad intent, envy, spite, hatred, revenge, or other bad motives against the person defamed.” Gibson v. Overnite Transportation Company, *supra*, at ¶11.

In Hussain v. Ascension Sacred Heart – St. Mary’s Hosp., No. 18-cv-00529-wmc, 2019 WL 5310677 (W.D. Wisc. October 21, 2019), the plaintiff appeared to argue that malice should be inferred from the mere fact that the “forever letter” evaluation drafted by his employer was overall negative. The court, however, concluded that such an argument “not only falls short of the legal standard for malice, it would also read out of existence any privilege extended in section 895.487(2).” Hussain, *supra*.