UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2387

September Term, 2013

RITU WALIA

v.

KIM WITKOWSKI, ET AL.

Meredith,
Arthur,
Leahy,

JJ.

Opinion by Arthur, J.

Filed: February 18, 2015

This is a defamation case. The plaintiff is Ritu Walia, M.D.; the defendants are Dr. Walia's neighbors, Kim Witkowski ("Ms. Witkowski") and her teenaged daughter, Zoe.

Dr. Walia alleged that Kim and Zoe Witkowski had defamed her by falsely telling her employer that she had "assisted Zoe . . . in obtaining alcoholic beverages directly, and/or by supplying Zoe with false identification." According to Dr. Walia, this allegedly defamatory statement caused her to lose her job.

The Circuit Court for Baltimore City granted summary judgment in the Witkowskis' favor after Dr. Walia had failed to file a timely opposition to their motion. The circuit court subsequently denied a motion to alter or amend, to which Dr. Walia had attached her untimely opposition (as well as an affidavit that purported to contradict the Witkowskis' assertions).

QUESTION PRESENTED

On appeal, Dr. Walia presents us with a single issue, which we have rephrased as follows: did the court err by granting defendant's motion for summary judgment on the ground that there were no disputes of material fact?[1]

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[1] Walia originally phrased her question as follows:

> The non-movant bears no burden of proof at the summary judgment stage, and the failure of a non-movant to file a response does not authorize the grant of summary judgment without consideration of whether there is a dispute of material fact. Did the circuit court err in granting the Witkowski's motion for summary judgment, where the motion and exhibits demonstrated disputes of material fact regarding whether Dr. Walia played any role in Zoe Witkowski obtaining alcoholic beverages?

Because we see genuine disputes of material fact even on the face of the unopposed summary judgment papers, we shall reverse.

FACTUAL AND PROCEDURAL HISTORY

As recounted in the Witkowskis' motion for summary judgment, the pertinent facts are as follows:

Ms. Witkowski and Kim lived in the same building as Dr. Walia, which is how Ms. Witkowski met Dr. Walia and came to know her socially. Dr. Walia and Zoe became friendly because of their shared ethnic heritage. Both Dr. Walia and Zoe are of Indian descent.

In March 2012, Dr. Walia, a pediatric gastroenterologist, treated Zoe. Zoe's mother, Ms. Witkowski, chose Dr. Walia as Zoe's physician because of their social connection.

The events that gave rise to the allegedly defamatory statements in this case took place on the evening of Saturday, August 18, 2012. Zoe was 17 at the time.

On that evening, Dr. Walia invited Ms. Witkowski and Zoe to join her and her boyfriend, Ken Sneed, to go to dinner. Ms. Witkowski opted not to go, but allowed Zoe to accompany Dr. Walia, Mr. Sneed, and one of Dr. Walia's other friends to Talara's, a restaurant in the Harbor East section of Baltimore. Although the precise timing is unclear, text messages between Ms. Witkowski and Dr. Walia suggest that Dr. Walia, her friends, and Zoe left home at some time around 10:00 p.m.

At about 12:17 a.m. on the morning of Sunday, August 19, 2012, Ms. Witkowski sent to Dr. Walia a text message that said, "I was expecting Zoe back around 11:30 – cam [sic] you let me know what is happening?" Dr. Walia responded about half an hour later, at 12:43 a.m., with a text message saying that she, her friends, and Zoe were at Bond Street Social, a bar and restaurant in Fell's Point, and would be back in half an hour.

Within two minutes, Ms. Witkowski responded: "Where? I thought you were going to Talaras? That's where I sent her – she's 17 and should be home." About 15 minutes later, after an additional exchange of text messages, Ms. Witkowski wrote:

> Ok but no one is officially supervising her – and she knows I don't want her there – so she should have come back. If anything happens whose [sic] supervising? I didn't give her permission to go to places with much older people. She's a teenager and in high school. She knows she should have come here.

Dr. Walia responded that she had been "sitting with" Zoe. When Ms. Witkowski wrote back that "[t]his is not a place for a 17 year old," Dr. Walia replied that Zoe "did not drink." "I did not let her," Dr. Walia stated. The exchange concluded with Ms. Witkowski's statements that she "really appreciate[d]" what Dr. Walia had done and that Dr. Walia is a "loving person," but that Zoe has "gone against" her mother's "wishes."

The messages resumed early the following morning, when Ms. Witkowski reiterated that Zoe had gone against her wishes. Dr. Walia responded that she had been "watching" Zoe "like a hawk" and that Zoe did "not even go to the bathroom" without Dr. Walia watching.

A few hours later, however, after Ms. Witkowski had complained that Zoe had disobeyed her, Dr. Walia volunteered that Zoe had disobeyed her as well. Dr. Walia added that she was quite "upset." Even though Dr. Walia had told Zoe "no drinking" "100 times," Dr. Walia had learned from her friend Lakshmi, who had been with them at Bond Street Social, that Zoe "asked for one" and had "also forced a sip from [Lakshmi's] glass." After some additional messages, in which Ms. Witkowski assured Dr. Walia that "it's not [her] fault" and apologized that she was "in the middle of this," Dr. Walia reiterated that Zoe "went around asking Lakshmi for sips of drinks." "She totally ignored me there," Dr. Walia wrote.

The record contains a plethora of text messages that were exchanged over the next several days between Ms. Witkowski and Dr. Walia, between Zoe and Dr. Walia, and between Ms. Witkowski and Dr. Walia's boyfriend, Ken Sneed. The exchanges between Ms. Witkowski and Dr. Walia contain statements that could be construed as apologies by Dr. Walia ("I am sorry"; "we were wrong"; "[w]e are all to blame") and statements of praise by Ms. Witkowski (Zoe "needs to rise to your standards"; "[y]ou've been a huge help to me and her"). The exchanges between Zoe and Dr. Walia include Dr. Walia's statement that she told Zoe "not to drink," but that Zoe "still did," as well as a statement that Dr. Walia and her friends "almost went to jail" apparently because some unidentified person gave Zoe a "fake ID." The exchanges between Ms. Witkowski and Ken Sneed contain Ms. Witkowski's accusations about the use of a "fake ID," Sneed's assertion that Dr. Walia "had nothing to

do with that," and a response from Ms. Witkowski that evidences uncertainty about who supplied Zoe with the false identification ("it's better for Zoe to visit in a format that doesn't require fake ID – from whomever gave it to her"). The last exchange contains an ambiguous statement by Sneed, in which he seems to imply that Ms. Witkowski, for some reason, had gone to Dr. Walia's place of employment ("u cross the friendship line by showing up to someone's job").

Dr. Walia alleged that shortly thereafter, in September 2012, the Witkowskis told Dr. Walia's employer, Sinai Hospital, that Dr. Walia had a doctor-patient relationship with Zoe, that Zoe was a minor, and that Dr. Walia had "assisted Zoe Witkowski in obtaining alcoholic beverages directly, and/or by supplying Zoe with false identification." Dr. Walia claimed to have lost her job as a result of those allegedly defamatory statements.

Dr. Walia filed suit for defamation on July 25, 2013. On November 21, 2013, two months after the case came to issue with the filing of an answer, and before either party had conducted any discovery, the Witkowskis moved for summary judgment. The motion included the text messages with both Walia and Sneed, as well as documentation regarding the medical care that Dr. Walia had provided to Zoe Witkowski.

Under Md. Rule 2-311(b), Dr. Walia's response to the motion was due within 15 days of service (*i.e.*, by approximately December 6, 2013), but Dr. Walia filed a consent motion to extend the deadline to December 18, 2013. The court granted the consent motion, but Dr.

Walia did not file her opposition to the motion until two days after her extended deadline, on December 20, 2013.[2]

Meanwhile, the circuit court, evidently unaware of the extension of time, signed an order by which it granted the Witkowskis' motion for summary judgment on December 13, 2013. The order, which was not docketed until December 21, 2013, noted that the summary judgment motion was "unopposed" even though Dr. Walia had actually filed her untimely opposition by the time the order was eventually docketed. The order also asserted that the pleadings and the exhibits thereto showed that there was no genuine dispute as to any material fact.

On December 30, 2013, Dr. Walia moved for reconsideration. The motion attached Dr. Walia's untimely opposition to the summary judgment motion, which included an affidavit in which she denied that she supplied alcohol to Zoe, assisted Zoe in obtaining alchohol, supplied Zoe with false identification, or witnessed Zoe consuming or attempting to obtain alcohol. Dr. Walia, however, did admit that she had treated Zoe in March 2012.

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[2] Dr. Walia mailed her opposition to the Witkowskis' counsel on December 18, 2013. But while a person may *serve* a "pleading or paper filed after the original pleading" simply by mailing it to opposing counsel (Md. Rule 1-321(a)), a person may *file* a "pleading or other item" only by delivering it to the clerk, or to a judge of the court. *See* Md. Rule 1-322(a); *see also Blundon v. Taylor*, 364 Md. 1, 11 (2001) ("to be filed, pleadings and papers must be actually delivered, either in person or by mail, to the clerk or a judge of the court"); *accord Mole v. Jutton*, 381 Md. 27, 33-34 (2004) (quoting *Blundon*, 364 Md. at 11); Paul V. Niemeyer & Linda M. Schuett, *Maryland Rules Commentary* 46 (3d ed. 2003). Hence, Dr. Walia did not file her opposition until the postal service actually delivered it to the clerk on December 20, 2013.

The circuit court denied the motion for reconsideration in an order that was docketed on January 17, 2014, and Dr. Walia took this timely appeal.

DISCUSSION

A. Standard of Review

For motions for summary judgment, the applicable legal standards are well known: under Rule 2-501(f), "[t]he court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." "A material fact is a fact that, if found one way or the other, will affect the outcome of the case." *Zitterbart v. Am. Suzuki Motor Corp.*, 182 Md. App. 495, 502 (2008) (citing *Miller v. Bay City Prop. Owners Ass'n*, 393 Md. 620, 631 (2006)).

"[T]he summary judgment standard is akin to that of a directed verdict, *i.e.*, whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Seaboard Sur. Co. v. Richard F. Kline, Inc*., 91 Md. App. 236, 244 (1992) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)); *accord May v. Air & Liquid Sys. Corp.*, 219 Md. App. 424, 429 (2014). Thus, a court must view the facts, and all reasonable inferences that may be drawn from them, in the light most favorable to the non-moving party. *May*, 219 Md. App. at 429 (citing *Dobkin v. Univ. of Baltimore Sch. of Law*, 210 Md. App. 580, 590-91 (2013)).

Because the moving party has the initial burden of establishing the absence of any genuine dispute of a material fact, he or she is not automatically entitled to summary judgment merely because the adversary fails to respond. *Thompson v. Baltimore Cnty.*, 169 Md. App. 241, 243 (2006). Instead, a court must inspect the summary judgment motion to ascertain whether the motion itself reflects a genuine dispute of material fact. *See id.* at 251-52. If a genuine dispute of material fact is apparent from the face of the summary judgment papers themselves, the court must deny the motion despite the absence of any opposition. *See id.*[3]

B. Analysis

To establish a claim for defamation in Maryland, "a plaintiff must ordinarily establish that the defendant made a defamatory statement to a third person; that the statement was false; that the defendant was legally at fault in making the statement; *and* that the plaintiff thereby suffered harm." *Gohari v. Darvish*, 363 Md. 42, 54 (2001) (italics in original); *accord Spengler v. Sears, Roebuck & Co.*, 163 Md. App. 220, 240 (2005). A statement that is "not substantially correct" is considered false. *See Batson v. Shiflett*, 325 Md. 684, 726 (1992); *Spengler*, 163 Md. App. at 240.

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[3] Dr. Walia contends that the circuit court erroneously granted the motion for summary judgment solely on the ground that it was unopposed. We disagree. The court's order recites that it had reviewed the "pleadings and exhibits," presumably including the motion and its exhibits, and had found "no genuine dispute as to any material fact." Nonetheless, that conclusion does not prohibit us from conducting a *de novo* review to determine whether the court was legally correct that there is no genuine dispute of material fact. *See*, *e.g.*, *Haas v. Lockheed Martin Corp.*, 396 Md. 469, 478-79 (2007).

A plaintiff bears the burden of establishing falsity, and her failure to discharge that burden destroys the defamation action. *See Spengler*, 163 Md. App. at 240; *Bagwell v. Peninsula Reg'l Med. Ctr.*, 106 Md. App. 470, 510-11 (1995). Truth is a complete defense. *See Restatement (Second) of Torts* § 581A (1977) ("One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true").

For purposes of their summary judgment motion, the Witkowskis assumed (without conceding) that they made the statement that Dr. Walia attributed to them, that the statement was defamatory (*i.e.*, that it tended to expose Dr. Walia to "public scorn, hatred, contempt, or ridicule"),[4] and that Dr. Walia suffered harm as a result. They claimed the right for summary judgment, at that stage, only on the ground that the alleged statement was indisputably true, or at least "substantially correct." Reviewing the summary judgment motion on a *de novo* basis, as we are required to do, we cannot agree with the circuit court's conclusion that it was.

The allegedly defamatory statement is that Dr. Walia "assisted Zoe Witkowski in obtaining alcoholic beverages directly, and/or by supplying Zoe with false identification."[5] As a matter of logic, that statement is true if (1) Dr. Walia "assisted Zoe Witkowski in

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[4] *Chesapeake Pub. Corp. v. Williams*, 339 Md. 285, 295-96 (1995) (quoting *Batson*, 325 Md. at 722-23).

[5] The statement also included the assertion that Dr. Walia "had maintained a doctor-patient relationship" with Zoe, but Dr. Walia appears to have abandoned any challenge to that aspect of it. Dr. Walia presumably did so because of her own affidavit, in which she admitted to having treated Zoe in the past.

obtaining alcoholic beverages directly," or (2) if Dr. Walia "assisted Zoe Witkowski in obtaining alcoholic beverages . . . by supplying Zoe with false identification," or (3) if Dr. Walia did both of those things. *See Local Div. 589 v. Massachusetts*, 666 F.2d 618, 627 (1st Cir. 1981) (Breyer, J.).[6]

The record, as it is currently constituted, contains little basis to conclude that Dr. Walia "assisted Zoe Witkowski in obtaining alcoholic beverages . . . by supplying Zoe with false identification." To the contrary, while the text messages contain some accusations about the use of a "fake ID" and the potential consequences thereof, it is completely unclear who (if anyone) provided the identification to Zoe and equally unclear whether Dr. Walia had any involvement in providing it. In one text message, Dr. Walia's boyfriend, Mr. Sneed, asserted that Dr. Walia "had nothing to do with" the use of a "fake ID." In response, Ms. Witkowski betrayed uncertainty about who had supplied the false identification, referring only to "whomever gave it to [Zoe]." In these circumstances, there is, at a minimum, a genuine dispute of material fact about whether Dr. Walia "assisted Zoe Witkowski in obtaining alcoholic beverages . . . by supplying Zoe with false identification."[7]

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[6] For informed criticism of the use of the often ambiguous term "and/or," see Bryan A. Garner, *A Dictionary of Modern Legal Usage* 44 (1987).

[7] Technically, Mr. Sneed's statements, unlike the admissions in the statements of Dr. Walia, Ms. Witkowski, and Zoe, are hearsay if offered to prove that Dr. Walia "had nothing to do with" supplying Zoe with false identification. Nonetheless, the Witkowskis have waived any hearsay objection, at least for purposes of their motion, because they cite Mr. Sneed's statements about false identification. *See* Appellees' Brief at 17 n.5. In any case, even without Mr. Sneed's denial of Dr. Walia's involvement in supplying false identification,
(continued...)

Similarly, at this early juncture in the case, there is a genuine dispute of material fact about whether Dr. Walia "assisted Zoe Witkowski in obtaining alcoholic beverages directly" rather than "by supplying [her] with false identification." While Dr. Walia certainly might be said to have "assisted" Zoe *in some way* "in obtaining alcoholic beverages" merely by allowing her to go into a bar in Fell's Point at some point at or after 11:00 p.m. in the evening, it is not at all clear that Dr. Walia thereby "*directly*" assisted Zoe "in obtaining alcoholic beverages." A jury, however, could reasonably infer that Dr. Walia would "directly" assist Zoe "in obtaining alcoholic beverages" only by, for example, buying a drink for Zoe or knowingly allowing Zoe to have a drink, which there is no evidence that she did. Similarly, a jury could reasonably infer that Dr. Walia did not "*directly*" (as opposed to *indirectly*) assist Zoe in obtaining alcoholic beverages merely by allowing her to enter a bar, where Zoe actually obtained a drink (or a "sip" of a drink) on her own, without Dr. Walia's knowledge and in contravention of Dr. Walia's instructions. In view of these permissible inferences in Dr. Walia's favor, summary judgment was improper.

Furthermore, Ms. Witkowski's statements, as reflected in the text messages, undercut the notion that she believed that Dr. Walia had acted wrongfully. Just after learning that Dr. Walia had allowed Zoe to accompany her into the bar at Fell's Point, Ms. Witkowski told Dr. Walia that she "really appreciate[d]" what Dr. Walia had done and that Dr. Walia is a "loving

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[7](...continued)
the record is, at best, ambiguous about what role, if any, she may have had.

person." The following day, after learning that Zoe had managed to drink some alcohol at the bar, Ms. Witkowski told Dr. Walia that it was "not [her] fault" and apologized that the doctor was "in the middle of this." Even after Dr. Walia had apologized for her role in the incident, Ms. Witkowski spoke admiringly of Dr. Walia, saying that Zoe "needs to rise to your standards." While a better-developed factual record might limit or even eliminate the force of these admissions, they permit an inference, on the record as it currently stands, that Dr. Walia did *not* "assist[] Zoe Witkowski in obtaining alcoholic beverages directly, and/or by supplying Zoe with false identification." Otherwise, why would Ms. Witkowski have praised Dr. Walia or told her that she was not at fault?

In summary, on the record as it stood at the time of the Witkowskis' motion for summary judgment, with no evidence other than the Witkowskis' affidavits and a flurry of often terse and abbreviated text messages, there are genuine disputes of material fact about whether it is true, or at least "substantially correct," that Dr. Walia "assisted Zoe Witkowski in obtaining alcoholic beverages directly, and/or by supplying Zoe with false identification." Accordingly, we must reverse the entry of summary judgment in the Witkowskis' favor and remand for further proceedings. Our ruling, however, should not be understood to preclude the court from entering summary judgment either on that issue or on other issues (including whether the Witkowskis actually made the statements in question or whether the statements

caused any harm), if summary judgment appears to be warranted after the completion of discovery and the full development of the factual record.[8]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.

[8] In view of our ruling regarding the propriety of summary judgment, it is unnecessary to decide whether the court abused its discretion in denying Dr. Walia's post-judgment motion.