
NO. A07-1353

State of Minnesota
In Supreme Court

LeRoy Bahr,

Appellant,

v.

Boise Cascade Corporation aka
Boise Paper Cascade Corporation,
Stacy Rasmussen and Eural Dobbs,

Respondents.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS SHOULD BE REVERSED BECAUSE THE COURT OF APPEALS VIEWED AND ANALYZED THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO BOISE/RASMUSSEN AND IGNORED ESTABLISHED LAW REGARDING PROOF OF MALICE IN A DEFAMATION CASE.

The case of Frankson v. Design Space International, 394 N.W.2d 140 (Minn. 1986) involved defamation claims of a private individual (as opposed to a public figure) arising from an employment/workplace setting. In Frankson, this Court recognized as established law that a finding of malice could be sustained when “there was some evidence from which it might be inferred that the defendant knew of the falsity of some of the statements [and] * * * also some evidence of ill feeling between [defendant’s employee] and plaintiff.” Id. at 144 citing Froslee v. Lund’s State Bank, 131 Minn. 435, 438, 155 N.W. 619, 620 (1915).

In this case, Boise management officials had tangible, objective information showing that Rasmussen’s accusations against Bahr were false, but Boise management purposely disregarded that information in order to find fault against Bahr. Gary Underdahl was an actual eyewitness to the supposed October 18th incident. Underdahl’s eyewitness testimony fully corroborates Bahr’s version of what transpired. When Boise ultimately adopted Rasmussen’s version of events and falsely accused Bahr of harassing, threatening and hostile behavior, Boise

completely disregarded and ignored Underdahl's eyewitness account. To highlight this point, consider the manner in which Barb Johnson attempted to gloss over this information and intentionally mislead the jury during her testimony at trial:

Q. And the reason you wanted to talk to Mr. Underdahl?

A. In the conversations that I had with Stacy, Gary's name came up that he was standing nearby the – I don't know if he was standing or, you know, in the truck or whatever, he was nearby when the confrontation occurred³⁴ between those two.

Q. So you wanted to get information?

A. I wanted to see if he heard anything or saw anything.

Q. Did he?

A. **He said no.**

Tr. 559 (emphasis added). However, when you actually read what Gary Underdahl told Barb Johnson, it is clear that he was right there (20 to 30 feet away) when the supposed incident occurred, and he didn't observe any of what was described and alleged by Rasmussen. Underdahl heard them talking; there were no raised voices and he did not hear or observe any shouting. He also said that if he had heard any screaming or shouting, he would have said something to them at that point. In other words, if he had observed any inappropriate behavior by either of them at that time, he would have said something to them, but he didn't have to do

that because he didn't hear any shouting or screaming and he didn't observe any inappropriate behavior.

Clearly, from this evidence, a jury could reasonably infer and conclude that Boise management knew Rasmussen's allegations were false but proceeded with disciplinary actions and the related defamatory statements against Bahr regardless of the corroborating, eyewitness evidence which exonerated Bahr from any wrongdoing. While Boise management may have had a qualified privilege to conduct an investigation into Rasmussen's complaint; that qualified privilege was lost and nullified when management conducted an investigation designed to find fault as opposed to an investigation conducted with good faith objectivity and for the purpose of finding out what actually occurred.

As further evidence that Boise acted in excess of the qualified privilege and abused the privilege by conducting an investigation for the central purpose of finding fault against Bahr, consider Boise's gross exaggerations and false information regarding Robin Begg also having harassment issues with Bahr. According to Betty Leen's typewritten notes from the October 18 meeting with Stacey Rasmussen and Robin Begg, Leen states that Robin Begg also was claiming harassment charges against Bahr. According to Betty Leen's notes, Robin and Stacey stated, "they like their jobs; they want the harassment stopped and want to be able to do their jobs; they believe that LeRoy needs a wake-up call." Betty

Leen's notes also indicate that Rasmussen and Begg stated, "LeRoy will do as little as possible because he is mad at Boise for taking away one of the positions." They also stated to Leen that Bahr is "persuasive, conniving and twists stories."

However, at trial, Robin Begg testified that she never complained about harassment from LeRoy Bahr and she never had any harassment issues or complaints against Bahr. Begg also testified that she felt Bahr had good work habits; that she has no recollection of ever expressing concerns or making statements to others that Bahr was a conniving person or somebody who twists stories. Begg testified that, when she and Rasmussen met with Betty Leen, it was regarding Rasmussen's harassment accusations against Bahr, but Begg herself did not have any harassment issues with Bahr, and she has never had any such issues with Bahr's behavior as a co-worker. Robin Begg also testified that, in the years she worked with LeRoy Bahr, she never observed Bahr yelling or shouting at anybody, and she has never observed or experienced Bahr acting in a physically violent manner. Begg testified that, over the years working with Bahr, she feels that he has good work habits and she has never observed him engage in any work slowdowns. Begg testified that the only real disagreement she has ever had with Bahr had to do with an issue over vacation scheduling.

Also, in his main brief, Appellant already has set forth the extensive evidence of Dobbs' obvious spite, ill will and ill feelings towards Bahr, including Dobbs' blatant smugness towards Bahr's son on October 18th after Dobbs had escorted Bahr out of the mill. This clearly constitutes sufficient extrinsic evidence of ill will to allow the issue of malice to be submitted to the jury for determination. Respondents contend that Dobbs' ill will towards Bahr should not be imputed to Boise because Dobbs was not directly involved in the investigation, disciplinary action and defamatory statements against Bahr. Respondents' argument on this point is pure nonsense, especially when one considers that all of the evidence and all reasonable inferences from the evidence have to be viewed in the light most favorable to Bahr. Dobbs' ill will and spite towards Bahr were demonstrated and manifested on a regular basis at the workplace; during work time; and in the course and scope of Dobbs' management position as Superintendent of Stores. Dobbs was a direct, active participant in the investigative and disciplinary meetings with Bahr. Dobbs conferred and caucused with Barb Johnson in deciding on the disciplinary action to be taken against Bahr. With Dobbs' direct involvement in and influence over this entire process as a management level employee, the jury clearly had a reasonable evidentiary basis to impute Dobbs' malice to the corporation, as well as a jury instruction from the trial judge which allowed them to do so.

Respondents erroneously contend that, since the jury found that Dobbs made no defamatory statements, it is impossible for Appellant to establish that Dobbs made any such statements with malice. During its deliberations over the Special Verdict Form applicable to the claims against Dobbs in his individual capacity, the jury may have simply concluded that everything Dobbs did was within the course and scope of his employment as a management level official of Boise and therefore decided to not hold him liable in his individual capacity. However, with regard to the Special Verdict Form applicable to the claims against Boise, the jury certainly could have found malice on the part of Boise by and through the evidence of Dobbs' harsh treatment of Bahr and his smug behavior towards Bahr's son, all of which occurred while Dobbs was at work and acting in his capacity as a management level employee of Boise.

II. TAKEN AS A WHOLE, RASMUSSEN'S "LAZY FAT FUCKER" COMMENT; HIS EXAGGERATED STATEMENTS TO BETTY LEEN REGARDING BAHR'S CONDUCT; HIS STATEMENT TO BETTY LEEN THAT BAHR NEEDS A "WAKE-UP CALL"; AND HIS MISTAKEN, ONGOING BELIEF THAT BAHR HAD STARTED THE RUMOR ABOUT RASMUSSEN AND ROBIN BEGG HAVING AN EXTRA MARITAL AFFAIR CONSTITUTE SUFFICIENT INTRINSIC AND EXTRINSIC EVIDENCE OF MALICE ON THE PART OF RASMUSSEN FOR THAT ISSUE TO BE SUBMITTED TO THE JURY FOR DETERMINATION.

First, it should be noted that Rasmussen's "lazy fat fucker" comment is, in and of itself, sufficient extrinsic evidence of Rasmussen's ill will towards Bahr so as to allow the issue of Rasmussen's malice to be submitted to the jury for

determination. This is especially true given the context in which the comment was made, with Rasmussen still apparently harboring the mistaken belief or understanding that Bahr was responsible for starting the rumor about Rasmussen and Robin Begg. Respondents cite Bauer v. State, 511 N.W.2d 447, 449 (Minn. 1994), for the proposition that not every personality conflict wherein the parties trade insults suffices as malice. The actual quote from Bauer is:

Malice can be shown, of course, by direct proof of personal spite, but not every personality conflict where the parties simply in exasperation trade insults, suffices in this regard.

Id. at 451 (emphasis added).

The statement by the Bauer court that “not every personality conflict where the parties simply in exasperation trade insults, suffices in this regard” is mere dicta. The recitation of the factual record in Bauer does not contain any information or references to the parties in that case trading insults, and this appears to be nothing more than an off hand, extraneous comment by the court that had no bearing on the final decision reached by the court. Nonetheless, while it may be true that not every personality conflict where the parties trade insults necessarily or automatically equates to malice, there certainly are personality conflicts where even a single, insulting statement made in anger (such as in this case) could reasonably and properly be considered as direct evidence of personal spite.

Rasmussen's "lazy fat fucker" comment occurred on September 27, 2001, just a couple of weeks prior to the supposed "incident" of October 18th. In the time period between September 27th and October 18th, Rasmussen apparently still had the mistaken belief that Bahr was the one responsible for starting the rumor about Rasmussen and Robin Begg. Clearly, in this relevant time frame, Rasmussen harbored ill will towards Bahr because he believed that Bahr had started the rumor. The "lazy fat fucker" comment certainly was an expression of Rasmussen's ill will towards Bahr; and Rasmussen's ill will further manifested and expressed itself when Rasmussen unloaded all of his exaggerated accusations against Bahr during his meeting with Betty Leen on October 18th. When viewed and considered in this context, and when viewed in the light most favorable to Bahr, the "lazy fat fucker" comment clearly rises to the level of credible, viable direct evidence of personal spite, upon which a jury could reasonably conclude that Rasmussen acted with malice when he leveled his false allegations against Bahr. If the "lazy fat fucker" comment made in this context is simply going to be discarded and disregarded by the appellate courts in analyzing this issue of malice, then Appellant respectfully submits that, short of an outright admission by a defendant that he/she acted with malice, proof of malice will be an impossibility for a plaintiff in almost every defamation case.

III. RESPONDENTS' CONTENTION THAT A RULING IN FAVOR OF BAHR WILL HAVE A CHILLING EFFECT ON THE ABILITY OF EMPLOYERS TO CONDUCT WORKPLACE INVESTIGATIONS IS AN OVERBLOWN, SLIPPERY SLOPE SCARE TACTIC WHICH IS BELIED BY THE UNIQUE FACTS OF THIS CASE. FURTHER, THE COURT SHOULD REJECT RESPONDENTS' ATTEMPTS TO ERECT UNREALISTIC AND UNREASONABLE EVIDENTIARY BARRIERS FOR PLAINTIFFS TO PROVE MALICE IN WORKPLACE DEFAMATION CASES.

Respondents' contention that reversal of the Court of Appeals decision in this case would eviscerate the qualified privilege is just exaggerated nonsense. This case involves a unique set of factual circumstances, where the party (Rasmussen) initiating the defamatory allegations against the plaintiff did so out of personal spite apparently motivated by a mistaken belief that Bahr was responsible for starting the rumor. The defamatory statements were then taken up and adopted by the corporate defendant, Boise, through a process where one of the principal management level officials (Dobbs) actively involved in that process also happened to be one who harbored personal spite towards Bahr. The issue of malice in this matter will be decided upon the unique factual circumstances of this case, and the specific, factual evidence of malice submitted by Bahr; as opposed to fanciful theories, conclusions, conjecture or speculation.

If the specific, factual evidence submitted and argued by Bahr in this case is simply disregarded as not being worthy of any consideration on the issue of malice, then the evidentiary standards for a plaintiff to successfully establish

malice in a defamation case are effectively insurmountable. Instead of continuing to allow plaintiffs to prove malice by direct evidence, circumstantial evidence, or both, the Court essentially would be establishing a narrow, evidentiary standard where malice could be established only by an outright admission of malice by the defendant. Such a standard simply would be unrealistic. Defendants, whether they be individuals or corporations, rarely make an outright admission that they acted with malice towards the plaintiff. Since malice is a state of mind, proof of malice, by its very nature, often must rest on indirect, circumstantial evidence; and this Court should not allow this case to be a platform by which that method of proof is effectively taken away from plaintiffs in defamation cases.

CONCLUSION

This is not a case where the plaintiff's attempt to prove malice is based merely on a general theory, conclusion or conjecture. In this case, Bahr has submitted and argued specific factual evidence, both direct and circumstantial, showing and proving malice on the part of Boise and Rasmussen. Respondents have, throughout this case, repeated time and time again that Bahr's evidentiary arguments are just speculative theories that must be disregarded. Respondents' arguments on this point are just plain wrong. In attempting to effectively apply a reverse summary judgment and reverse directed verdict/JMOL/JNOV standard,

Respondents seem to think that only their view and interpretation of the evidence should be allowed.

Bahr has taken a specific, factual evidentiary record and has made legitimate, credible arguments as to the proper interpretation of the evidence and reasonable inferences which can be drawn from the evidence. Appellant suspects that, with any evidentiary record (even if there was an outright admission of malice by the defendants), defense counsel would still continue in their ridiculing attempt to characterize any and all of the plaintiff's arguments as just fanciful theories and conclusions.

This case is not devoid of evidence of malice. In viewing all of the evidence and all reasonable inferences from the evidence in the light most favorable to Bahr, the trial court properly exercised its "gatekeeping" function and decided that Bahr had sufficient, specific evidence to allow the issue of malice to be submitted to the jury. In reversing the trial court, the Court of Appeals erroneously applied the reverse standard by essentially disregarding Bahr's view and interpretation of the evidence, and, instead, viewed the evidentiary record in the light most favorable to Boise and Rasmussen.

For the foregoing reasons, Appellant respectfully requests that the Minnesota Supreme Court reverse the decision of the Court of Appeals and that the District Court judgment in favor of Bahr be reinstated in its entirety.

Dated: 12/31/08

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, Subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 2,629 words, and the font size is 14 point. This brief was prepared using Microsoft Word 2007 software.

Dated: 12/31/08

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