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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-203  
A07-606**

John J. O'Donnell,  
Appellant,

vs.

City of Buffalo, et al.,  
Respondents (A07-203),

Todd Rathbun, et al.,  
Respondents (A07-606).

**Filed February 5, 2008  
Affirmed in part, reversed in part, and remanded  
Dietzen, Judge**

Wright County District Court  
File Nos. 86-C3-05-2976; 86-CV-06-6604

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Considered and decided by Dietzen, Presiding Judge; Lansing, Judge; and Peterson, Judge.

## UNPUBLISHED OPINION

**DIETZEN**, Judge

In these consolidated appeals, appellant challenges the district court order granting summary judgment and dismissing his defamation claim against respondents City of Buffalo and Buffalo Fire Chief Robin J. Barfknecht, arguing that the district court erred in concluding that (1) appellant is a public official and that actual malice must be proven; (2) his claim was barred by absolute and qualified privilege; and (3) there are no genuine issues of material fact that preclude summary judgment. Appellant also challenges the district court order dismissing his defamation claim against the six respondent firefighters (six firefighters), arguing that the district court erred in dismissing appellant's claim as a matter of law. We affirm in part, reverse in part, and remand.

### FACTS

The City of Buffalo, a municipal corporation, maintains and operates a volunteer fire department. Firefighters respond to calls for medical emergencies and fires within the service area of the fire department; they become members of the fire department upon an affirmative vote of the membership.

The fire chief and two assistant chiefs are elected by the membership. The chief is responsible for the operation of the fire department and appoints three captains, who serve at his will. The fire chief reports to the city administrator and regularly communicates with him as to the various activities of the fire department. The captains are responsible for assuming command and control of the firefighters at fire scenes and for conducting in-house training provided to the firefighters. The fire department also

has an advisory fire board, which consists of the chief, the two assistant chiefs, and five members of the fire department elected by the membership.

Appellant John J. O'Donnell joined the Buffalo Fire Department in 1995 and was appointed a captain by Fire Chief Robin J. Barfknecht. Barfknecht has been a member of the fire department for 16 years and has been the fire chief for six years.

In October 2004, six firefighters sent a letter to Barfknecht, requesting that O'Donnell be removed as captain. The letter states:

As members of the Buffalo Fire Department we would like to inform Board members and other department members about some issues regarding Captain Jay O'Donnell.

As Buffalo firefighters we have witnessed many situations and actions by Captain Jay O'Donnell that are not acceptable in our department.

1. His attitude toward fellow members have can (sic) be described as negative, sarcastic and often "too good for us."
2. He has a habit of not following the Standard Operating Guides or Procedures that are mandatory in the department. Firefighters have had multiple truck response issues with him.
3. No personnel skills. Rude and controversial.
4. He lacks responsibility on a fire/rescue scene. Many Buffalo firefighters refuse to go in to (sic) any burning structures with Captain Jay O'Donnell because of his unsafe practices. He neglects some safety issues and has impulsive actions that impact the members around him. He acts before thinking.
5. Captain Jay O'Donnell has earned no respect from other firefighters and lacks confidence from members. It is hard to look up to him as a captain/officer when he does not have these qualities.

These are some reasons why we feel that Captain Jay O'Donnell should be demoted as Captain of Buffalo Fire

Department. As members we feel this action will significantly benefit our organization's future to better serve our community.

Barfknecht met with the city administrator to inform him of the letter; it was agreed that Barfknecht would handle the matter within the fire department. Barfknecht met with the two assistant fire chiefs and recommended that the advisory fire board meet separately with O'Donnell and the six firefighters to discuss the letter.

At the meeting with the fire board and O'Donnell, Barfknecht asked O'Donnell to temporarily step down as captain, but he declined to do so. O'Donnell argued that the complaints in the letter were vague and did not require a response. The fire board then met with the six firefighters to discuss the letter. As a result of this meeting, Barfknecht concluded that some of the concerns in the letter were serious, but others were merely differences of opinion.

At a subsequent fire board meeting, Barfknecht removed O'Donnell from his position as captain, but offered to keep the position open so that O'Donnell could attend leadership training. O'Donnell resigned his position on the fire board as well as other committees on which he served. At the next fire department meeting, O'Donnell read the firefighters' letter and his response disputing their complaints.

O'Donnell commenced a lawsuit against the City of Buffalo and Barfknecht alleging defamation, due process violations and open-meeting-law violations. O'Donnell later moved to amend the complaint to add the six firefighters as defendants, which the district court denied. The City of Buffalo and Barfknecht then moved for summary

judgment on O'Donnell's claims. Following a hearing, the district court granted their motion for summary judgment.

O'Donnell then commenced a separate action against the six firefighters who signed the letter, alleging defamation. The six firefighters brought a motion to dismiss the second lawsuit for failure to state a claim, and the district court granted the motion. O'Donnell filed appeals in both cases. We consolidated the cases for appeal purposes.

## D E C I S I O N

### I.

O'Donnell argues that the district court erred in granting summary judgment dismissing his claim against the City of Buffalo and Barfknecht. "A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). On appeal from summary judgment, we review de novo whether there are any genuine issues of material fact and whether the district court erred in applying the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

To prevail on a claim for common law defamation, a plaintiff must prove that the defendant made: (1) a false and defamatory statement about the plaintiff; (2) in an unprivileged publication to a third party; (3) that harmed the plaintiff's reputation in the community. *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 673 (Minn. 2003). When the plaintiff is a public official and the statement relates to the plaintiff's official

conduct, the plaintiff must not only show that the statement is false, but also that the statement was made with actual malice. *Id.* A statement is made with actual malice when it is made with the knowledge that it is false or with reckless disregard of whether it is false or not. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 726 (1964); *see also Britton v. Koep*, 470 N.W.2d 518, 520 (Minn. 1991). The Supreme Court has determined “that the *New York Times* test should apply to criticism of ‘public figures’ as well as ‘public officials.’” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 336-37, 94 S. Ct. 2997, 3005 (1974) (discussing *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975 (1967)). This constitutional actual malice requirement grows from our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times*, 376 U.S. at 270, 84 S. Ct. at 721.

#### **A. Public Official**

Initially, O’Donnell argues that he is not a public official and, therefore, was not required to show the additional element of constitutional actual malice. The question of whether a person is a public official is a question of law, which we review de novo. *Britton*, 470 N.W.2d at 520.

Minnesota follows *Rosenblatt v. Baer*, 383 U.S. 75, 86 S. Ct. 669 (1966), in determining whether a person is a “public official.” *Britton*, 470 N.W.2d at 521-22. The “public official” designation applies to a person who is

in a position significantly to influence the resolution of [public] issues . . . who [has], or appears to the public to have, substantial responsibility for or control over the conduct of government affairs . . . [such] that *the public has an independent interest in the qualifications and performance of the person . . . beyond the general public interest in the qualifications or performance of all government employees.*

*McDevitt v. Tilson*, 453 N.W.2d 53, 57-58 (Minn. App. 1990) (emphasis and alterations in *McDevitt*) (quoting *Rosenblatt*, 383 U.S. at 85-86, 86 S. Ct. at 675-76), *review denied* (Minn. May 23, 1990). “Functionally, the most relevant inquiry is not into a government employee’s visibility, prestige, or even power to set policy; rather, it is whether that employee is able to assert the authority of the government while performing his duties.” *Britton*, 470 N.W.2d at 523. Minnesota courts have concluded that grand jurors, police officers, public school teachers, and probation officers are public officials for purposes of defamation actions. *Standke v. B. E. Darby & Sons, Inc.*, 291 Minn. 468, 471-75, 193 N.W.2d 139, 142-44 (1971) (concluding that grand jurors are public officials); *Mahnke v. Nw. Publ’ns, Inc.*, 280 Minn. 328, 160 N.W.2d 1 (1968) (implicitly concluding that a police officer is a public official); *Elstrom v. Indep. Sch. Dist. No. 270*, 533 N.W.2d 51, 56 (Minn. App. 1995) (concluding that a public school teacher is a public official), *review denied* (Minn. July 27, 1995); *Britton*, 470 N.W.2d at 523-24 (concluding that a probation officer is a public official).

The district court concluded that O’Donnell is a public official. We agree. O’Donnell’s duties as a fire captain included taking command and control over firefighters and directing their efforts in emergency situations such as fires or car accidents—incidents in which citizens’ lives or property may be in danger. We conclude

that these responsibilities and duties are such that the public has an independent interest in reviewing his qualifications and performance, beyond its interest in the qualifications and performance of other firefighters or other government employees.

***B. Sufficiency of the Evidence***

O'Donnell argues that the district court erred in concluding that he had not presented sufficient evidence that some of the statements in the letter were defamatory. The City of Buffalo and Barfknecht contend that the statements made in the letter are protected statements of opinion and, therefore, not subject to factual determination. The issue of whether a statement is opinion or fact is a question of law, which we review *de novo*. *Lund v. Chicago & Nw. Transp. Co.*, 467 N.W.2d 366, 369 (Minn. App. 1991), *review denied* (Minn. June 19, 1991).

In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695 (1990), the United States Supreme Court considered whether statements of opinion are actionable. In that case, Milkovich, a former high school wrestling coach, brought a defamation action against a newspaper and its reporter for publishing an article that implied that Milkovich lied under oath in a judicial proceeding. *Id.* at 3-8, 110 S. Ct. at 2697-2700. The *Milkovich* Court concluded: “[W]here a statement of ‘opinion’ on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth.” *Id.* at 20, 110 S. Ct. at 2706-07. The Supreme Court reversed the dismissal of Milkovich’s claim, concluding that the connotation that he committed perjury is sufficiently factual to be susceptible of

being proven true or false. *Id.* at 21-23, 110 S. Ct. at 2707-08. Put another way, if it is plain that the speaker is expressing a subjective view, such as an interpretation, a theory, conjecture, or surmise, rather than objectively verifiable facts, the statement is not actionable. *Schlieman v. Gannett Minn. Broad.*, 637 N.W.2d 297, 308 (Minn. App. 2001), *review denied* (Minn. Mar. 19, 2002). In *Marchant Inv. & Mgmt. Co., Inc. v. St. Anthony West Neighborhood Org., Inc.*, 694 N.W.2d 92 (Minn. App. 2005), this court considered a defamation claim under *Milkovich*. We concluded that to determine whether a statement is actionable under *Milkovich*, consideration must be given to the broad context and content of the statement and whether the statement is sufficiently objective to be susceptible of being proved true or false. *Id.* at 96.

Here, the district court concluded that the following statements in the letter are actionable:

2. He has a habit of not following the Standard Operating Guides or Procedures that are mandatory in the department. Firefighters have had multiple truck response issues with him.

....

4. He lacks responsibility on a fire/rescue scene. Many Buffalo firefighters refuse to go in to (sic) any burning structures with Captain Jay O'Donnell because of his unsafe practices. He neglects some safety issues and has impulsive actions that impact the members around him.

We agree. The quoted portions of the letter are sufficiently factual to be proven true or false. Thus, we reject the City of Buffalo's and Barfknecht's argument that the statements are protected opinion and conclude that they are actionable.

O'Donnell next argues that the district court erred in concluding that he failed to present sufficient evidence of constitutional actual malice. On appeal, we analyze whether “the record could support a reasonable jury finding that the plaintiff has shown actual malice by clear and convincing evidence.” *Foley v. WCCO Television, Inc.*, 449 N.W.2d 497, 503 (Minn. App. 1989), *review denied* (Minn. Feb. 9, 1990). We view the evidence in the light most favorable to the party against whom summary judgment was granted. *Westrom v. Minn. Dep't of Labor & Indus.*, 686 N.W.2d 27, 32 (Minn. 2004).

Constitutional actual malice must be shown by clear and convincing evidence that the defendant made the statements either knowing that they were false or with reckless disregard for whether they were true. *See Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 257, 106 S. Ct. 2505, 2514-15 (1986). “Reckless disregard” requires a showing that the defendant made or published a statement “while subjectively believing that the statement is probably false,” *Chafoulias v. Peterson*, 668 N.W.2d 642, 655 (Minn. 2003), or that the defendant engaged in “purposeful avoidance of the truth,” *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 692, 109 S. Ct. 2678, 2698 (1989).

Here, we must examine two separate events, that is, the original publication of the letter by the six firefighters to Barfknecht, and the republication of the letter by Barfknecht to the city administrator, assistant fire chiefs, and the advisory fire board. Clearly, if the statements in the letter were not made with constitutional actual malice, it is unlikely that O'Donnell can prevail in his claim against the city and Barfknecht.

O'Donnell presented affidavits and his deposition testimony, which, if believed, provide sufficient evidence that the six firefighters had no factual basis for the actionable

statements and made the statements either with knowledge of, or with reckless disregard of, their falsity. Thus, O'Donnell presented sufficient evidence to proceed with his defamation claim against the six firefighters.

But it is uncontradicted that Barfknecht and the city administrator republished the letter in order to investigate the allegations. O'Donnell did not present any evidence indicating that Barfknecht republished the letter with knowledge that it contained defamatory statements.

O'Donnell speculates that Barfknecht republished the letter because he feared that O'Donnell wanted to take over his position as fire chief and, therefore, wanted to discredit him. But O'Donnell failed to present any evidence to support his theory. On this record, O'Donnell presented no evidence of constitutional actual malice against Barfknecht and the city and, therefore, those claims must be dismissed.

### ***C. Privilege***

But even if O'Donnell presented sufficient evidence to go forward with his defamation claim against the City of Buffalo and Barfknecht, they argue that it is barred by the affirmative defenses of absolute and qualified privilege. Although it is not necessary for us to reach the defense of qualified privilege, we do so to provide guidance to the district court. Whether there is sufficient evidence to establish a qualified or absolute privilege in a defamation action is a question of law, which we review *de novo*. *Lewis v. Equitable Life Assurance Soc'y of the U.S.*, 389 N.W.2d 876, 890 (Minn. 1986); *Buchanan v. Minn. State Dep't of Health*, 573 N.W.2d 733, 736 (Minn. App. 1998), *review denied* (Minn. Apr. 30, 1998).

Minnesota law affords a qualified privilege from liability for the publication of an untrue statement when the communication was made “upon a proper occasion, from a proper motive, and [] based upon reasonable or probable cause.” *Kuechle v. Life’s Companion P.C.A., Inc.*, 653 N.W.2d 214, 220 (Minn. App. 2002), *review dismissed* (Minn. Jan. 21, 2003). Generally, statements made during the course of an employer’s investigation into misconduct satisfy each of these requirements and, therefore, are privileged. *Id.*

Essentially, O’Donnell argues that Barfknecht’s republication of the letter was not for a proper motive and, therefore, qualified privilege does not apply. Qualified privilege may be defeated by a showing of common law malice. *Stuempges v. Park, Davis & Co.*, 297 N.W.2d 252, 257 (Minn. 1980). Common law malice is generally a question of fact. *Id.* But if the evidence of malice is not sufficient to present a “jury question” we will dismiss as a matter of law. *Frankson v. Design Space Int’l*, 394 N.W.2d 140, 144-45 (Minn. 1986).

Common law malice is different from constitutional actual malice under *New York Times*. Common law malice requires evidence that the defamatory statement was made “from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff.” *Stuempges*, 297 N.W.2d at 257 (quoting *McKenzie v. William J. Burns Int’l Detective Agency, Inc.*, 149 Minn. 311, 312, 183 N.W. 516, 517 (1921)). If a defamatory statement has been found to be conditionally privileged, “the law does not imply malice from the communication itself, nor from its falsity . . . if this were not so, qualified privilege would be a mirage.” *Bauer v. State*, 511 N.W.2d 447, 450-51 (Minn.

1994) (quotation omitted). Thus, common law malice may be shown by ill will and improper motive, but there must be concrete, factual evidence to support it. *Id.* at 451.

The district court concluded that Barfknecht's republication of the letter to the city administrator, the assistant fire chiefs, and the advisory fire board is qualifiedly privileged. O'Donnell concedes that Barfknecht properly republished the letter to the city administrator, but argues that the republication of the letter to the assistant fire chiefs and the advisory fire board was for an improper motive. Specifically, O'Donnell relies on testimony from Barfknecht's brother that Barfknecht perceived O'Donnell as a threat to his elected fire chief position. We disagree.

Essentially, O'Donnell offers an alternative theory of Barfknecht's motives in republishing the letter. But O'Donnell's speculation is unsupported by any concrete, factual evidence of common law malice. More importantly, O'Donnell has failed to present any evidence that Barfknecht knew or had reason to know that the statements in the letter were false. On this record, the district court did not err in concluding that O'Donnell's claims against the City of Buffalo and Barfknecht are barred by the doctrine of qualified privilege.

## II.

O'Donnell argues that the district court erred in dismissing his claim against the six firefighters for failure to state a claim (*O'Donnell II*). On appeal, we review a district court's rule 12 dismissal de novo. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003).

When the district court considers matters outside the pleadings, a motion to dismiss is converted to a motion for summary judgment and the legal issue is whether there are any genuine issues of material fact that preclude summary judgment. *Carlson v. Lilyerd*, 449 N.W.2d 185, 187 (Minn. App. 1989), *review denied* (Minn. Mar. 8, 1990); Minn. R. Civ. P. 12.02. Here, the six firefighters submitted affidavits and the district court's findings in O'Donnell's claim against the City of Buffalo and Barfknecht (*O'Donnell I*), and the district court considered these materials and did not exclude them. Accordingly, we review the judgment of dismissal to determine whether genuine issues of material fact remain for trial and whether the district court erred in applying the law. *See State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

Clearly, the six firefighters did not publish the letter under circumstances that would give rise to the defenses of either absolute or qualified privilege. Thus, the crux of the issue is whether O'Donnell presented sufficient evidence of constitutional actual malice as opposed to common law malice. But we have previously concluded that O'Donnell has presented sufficient evidence that the six firefighters made the statements in paragraphs two and four of the letter with constitutional actual malice. Thus, O'Donnell has presented sufficient evidence to establish a *prima facie* case of defamation against the six firefighters.

Finally, the six firefighters argue that O'Donnell's claims against them are barred by the doctrine of *res judicata*. Specifically, they argue that a final judgment was entered in *O'Donnell I*, which included the district court's denial of O'Donnell's motion to amend his complaint to add the six firefighters and, therefore, O'Donnell is barred from

relitigating the defamation claim against them in *O'Donnell II*. See *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004) (stating “[a] judgment on the merits constitutes an absolute bar to a second suit for the same cause of action, and is conclusive between parties and privies” (quotation omitted)). The district court, however, did not rule on the six firefighters’ res judicata argument and, therefore, we decline to reach it. See *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Therefore, we remand the defamation claim against the six firefighters to the district court. But we observe that our determination in I. B., *supra*, that O’Donnell presented a prima facie case against the six firefighters in *O’Donnell I*, appears to eliminate the potential bar of res judicata.

**Affirmed in part, reversed in part, and remanded.**