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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-47**

Joseph Huonder,
Appellant,

vs.

Specialty Mfg. Co., et al.,
Respondents.

**Filed July 13, 2010
Affirmed
Collins, Judge***

Ramsey County District Court
File No. 62-CV-08-12063

Eric D. Satre, Jones, Satre & Weimer, P.L.L.C., Bloomington, Minnesota (for appellant)

Thomas E. Marshall, Jackson Lewis LLP, Minneapolis, Minnesota (for respondents)

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and
Collins, Judge.

UNPUBLISHED OPINION

COLLINS, Judge

Appellant Joseph Huonder challenges summary judgment on his defamation claim
in favor of respondents Specialty Manufacturing Company and TMI Plastics (collectively

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals
by appointment pursuant to Minn. Const. art. VI, § 10.

SMC). Because the district court properly determined that the statements at issue were subject to a qualified privilege, we affirm.

FACTS

Joseph Huonder began working for SMC in 1998. Huonder was paid through paper paychecks and on or about November 3, 2006, he received a paycheck in the amount of \$545.63 and numbered 031181. SMC discovered in November or December that its bank, Bremer Bank, cleared two checks in the amount of \$545.63 and numbered 031181. Bremer Bank initially credited SMC for the amount of the duplicate check, but reversed the credit when it discovered copies of two separately endorsed and cashed checks numbered 031181. One check was endorsed by Huonder and the proceeds were paid to him. The other check bore an endorsement and had been cashed by Huonder's adult daughter at her personal bank.

Upon learning that both checks had been endorsed and cashed and that the bank was reversing the credit, SMC questioned Huonder about the checks. Huonder initially denied knowing about any assignment of the check to his daughter. The fraud department of Bremer Bank sent an "Affidavit of Forgery/Alteration/Distribution" to SMC to be signed by Huonder. Huonder did so after responding "yes" to the statements "I have not authorized any person to sign my name or signature to sign their name" and "what appears to be my name or signature was not written by me . . . as endorser." Bremer Bank attempted to retrieve the funds from Huonder's daughter's bank, which then produced a letter it had received from Huonder wherein he states that the check had been signed by his wife, cashed by his daughter, and the cash given to his wife.

Huonder's letter concludes by stating that his daughter is not responsible for the check. When SMC received the copy of this letter, SMC officials determined that Huonder had violated a company code of conduct requiring him to be honest in dealings with the company.

Huonder was terminated in a meeting with his supervisor and SMC's Chief Financial Officer (CFO). Huonder alleges that in the meeting the CFO told him that he violated company policy and that he could either be fired or he could be jailed for committing a felony. Huonder asserts he told the CFO that the check was not forged but he was terminated anyway. The CFO's notes about the investigation were placed in Huonder's personnel file and stated that Huonder was terminated for violations of the company code of conduct "regarding the check forgery."

Huonder sued SMC for defamation, claiming that his future job prospects had been harmed because he had been falsely accused of a felony and violating the company code of conduct. Huonder disputes that there was a check forgery and argues that there are reasonable explanations for his inconsistent statements. Huonder gave deposition testimony that he was in the hospital in late October 2006 and his wife picked up two paychecks from SMC. Huonder testified that he knew his daughter was going to cash the second check but that he did not remember this at the time he was initially questioned by SMC. Huonder contends he was entitled to both checks, one for wages and the other for unused vacation.

SMC moved for summary judgment, which the district court granted after concluding that the statements at issue attributed to SMC were subject to a qualified

privilege and, in the alternative, that Huonder's defamation claim failed for lack of publication. This appeal followed.

DECISION

When reviewing a grant of summary judgment, this court determines whether there are genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "We view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). Whether a genuine issue of material fact exists and whether the district court erred in its application of the law are reviewed de novo. *Id.* at 77.

In order to succeed on a claim of defamation, the plaintiff must show that (1) the defendants made a false and defamatory statement about the plaintiff; (2) the defendants made the defamatory statements in an unprivileged communication to a third party; and (3) the defamatory statement harmed the plaintiff's reputation in the community. *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 673 (Minn. 2003). In order to be protected by a qualified privilege, there must be a proper occasion and purpose for the words and the speaker must have reasonable or probable grounds for believing in the validity of the statement, even though hindsight might show the statement to be false. *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 380 (Minn. 1990). The party seeking the protection of the privilege carries the burden of proving the elements of the privilege. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 257 (Minn. 1980). Generally "statements made in the course of an employer's investigation into employee misconduct

are protected by the qualified privilege.” *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 923 (Minn. 2009). The privilege extends to such inquiries because “the employer has an important interest in protecting itself and the public against dishonest or otherwise harmful employees.” *Id.* (quotation omitted). Whether a qualified privilege exists is a question of law, reviewed de novo. *Bol v. Cole*, 561 N.W.2d 143, 149 (Minn. 1997).

The district court concluded that the statements at issue attributed to SMC were made on a proper occasion, that Huonder had put forth no evidence of improper motive, and that the statements were therefore protected by a qualified privilege. Huonder argues that the privilege is unavailable to SMC because the company failed to investigate whether or not appellant was entitled to the two checks. Huonder cites *Wirig*, 461 N.W.2d at 380, in support of his claim that SMC’s failure to fully investigate his entitlement to the second check precludes a finding that the statements are subject to the privilege. The supreme court in *Wirig* stated:

In all cases where we have determined that probable cause existed, the evidence showed that investigative steps had been taken, including personal questioning of the affected employee, in an effort to ascertain the accuracy of statements made about the employee’s conduct. In each case the results of the investigations provided sufficient evidence of probable cause.

Id.

Huonder is correct that there must be probable cause to support the statements and that, generally, probable cause is to be derived from information acquired in an investigation. Here, though it is undisputed that SMC and the respective banks did engage in an investigation, Huonder takes issue with the scope of their investigation and

SMC's alleged failure to investigate whether he was entitled to two checks for that week. But Huonder ignores the facts that it was based on the information that he, himself, provided that the focus of the investigation was on a perceived forgery and not until the very end of the investigation did he assert his belief that he was entitled to both checks.

The investigation conducted by SMC and the respective banks showed without dispute that (1) two checks bearing the same number were endorsed and cashed; (2) Huonder signed a statement provided by Bremer Bank indicating that he did not give anyone permission to endorse one of the checks; (3) Huonder wrote a letter to his daughter's bank indicating that he had permitted another person to endorse the check; and (4) Huonder told SMC that he had forgotten about permitting another person to endorse the check until after he was confronted about it. The investigation amply supports SMC's reasonable belief that Huonder violated the company's code of conduct. Further, the "Affidavit of Forgery/Alteration/Distribution" that Huonder signed facially indicated that a felony-level check forgery had been committed. *See* Minn. Stat. § 609.631, subd. 4(3)(a) (2008) (making check forgery of over \$250 punishable by not more than five years imprisonment). When SMC learned that Huonder had told his daughter's bank that he gave permission for his wife to endorse the check, SMC officials knew that this was in direct contradiction to the statement that Huonder had signed for Bremer Bank. While the inconsistency between these statements alone does not prove the elements of forgery, the inconsistent statements, generated in the course of a forgery investigation, gave SMC a reasonable basis to believe that Huonder had been involved in a forgery. We conclude that the district court did not err in determining that the alleged defamatory statements

attributed to SMC during Huonder's termination meeting were subject to a qualified privilege.

A qualified privilege can be defeated by showing that the privilege was abused because the defamatory statement was made with malice. *Bol*, 561 N.W.2d at 150. The definition of malice requires "actual ill-will or a design causelessly and wantonly to injure plaintiff." *Id.* (quoting *McBride v. Sears, Roebuck & Co.*, 306 Minn. 93, 98, 235 N.W.2d 371, 375 (1975)). The burden of proving malice is on the claimant, and malice cannot be imputed from the fact that the statement was false. *Id.* But Huonder has presented nothing to support a claim of malice other than his bare assertion that the alleged defamatory statements were false and taking issue with the adequacy of SMC's investigation preceding the alleged publication, with which we disagree. Huonder thus failed to raise a genuine issue of fact regarding whether the alleged defamatory statements were made with malice.

Because we conclude summary judgment was proper on the bases that the statements at issue attributed to SMC were subject to a qualified privilege and that Huonder has presented nothing creating a fact issue on his claim of malice, it is unnecessary to address the issue of publication.

Affirmed.