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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1353**

LeRoy Bahr,
Respondent,

vs.

Boise Cascade Corporation
a/k/a Boise Paper Cascade Corporation, et al.,
Appellants.

**Filed August 5, 2008
Reversed and remanded
Schellhas, Judge**

Koochiching County District Court
File No. 36-C3-03-000561

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Considered and decided by Hudson, Presiding Judge; Schellhas, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellants challenge the district court's refusal to find that respondent's
defamation claims against appellants were not actionable as a matter of law. Because we

conclude that a qualified privilege applied to the allegedly defamatory statements and that insufficient evidence of malice existed for the jury to consider whether this qualified privilege had been overcome, we reverse and remand to the district court for consideration of appellants' costs and disbursements.

FACTS

This appeal arises from a denial of summary judgment and judgment as a matter of law (JMOL) in a defamation action. At the time of the incidents at issue, respondent LeRoy Bahr and appellant Stacey Rasmussen worked together as stores keepers for appellant Boise Cascade Corporation (Boise). Both employees were managed by Eural Dobbs, who is Rasmussen's uncle. On September 27, 2001, Rasmussen was overheard referring to Bahr as a "lazy, fat f--ker." Later that day, Rasmussen accused Bahr of spreading a rumor that Rasmussen had spent several hours in the office of another coworker, R.B., implying that Rasmussen and R.B. were involved in an extramarital affair. Rasmussen later learned that J.P., another Boise employee, was involved in spreading the rumor, not Bahr. When Bahr attempted to discuss the rumor-spreading allegation with Rasmussen, Rasmussen told Bahr that there would be a meeting involving Rasmussen, Bahr, and Boise's Human Resources Department Manager, Jack Strongman.

On October 16, 2001, Bahr spoke with Strongman and learned that Rasmussen had not spoken with Strongman about setting up a meeting. Two days later, Bahr confronted Rasmussen about Strongman's statement that Rasmussen had not spoken with him. After the confrontation, Rasmussen reported to Dobbs that Bahr had confronted him in a hostile and threatening manner. Bahr denied the accusation. Dobbs subsequently telephoned

Boise's Human Resources Department for assistance and followed its instructions to take a statement from Rasmussen and report his findings to Boise's Human Resources Department. A Boise Human Resources Coordinator, Barb Johnson, decided to require Bahr to leave the workplace. At Johnson's request, Dobbs escorted Bahr out of the workplace. The same day, another Boise Human Resources Coordinator, Betty Leen, interviewed Rasmussen and R.B about the incident. At that interview, Rasmussen alleged that Bahr "yells and shouts" at him and "is almost to the point of physical violence," and also that Bahr does "as little as possible" on the job and does not finish his work.

Boise human resources personnel began an investigation of the confrontation. Johnson and Leen interviewed other Boise employees as part of the investigation. During these interviews, the rumor incident and confrontation were discussed, as were aspects of Bahr's work habits. Some employees who were interviewed, including Rasmussen, accused Bahr of engaging in work slowdowns and encouraging others to do the same. Other employees stated that Bahr had never engaged in work slowdowns. Another employee, J.P., asserted that it was he who told others that Rasmussen had spent four hours in R.B.'s office. Yet another employee stated that he was "20 to 30 feet away" from Bahr and Rasmussen during the confrontation and that he did not hear any screaming or shouting.

On October 25, 2001, a Boise official met with Bahr, Bahr's union representative, Johnson, and Dobbs to discuss the incident again. The next day, Boise issued a disciplinary document, addressed from Dobbs to Bahr, stating that Bahr "had a

confrontation with [Rasmussen] that was very hostile and threatening in nature” and that Bahr had “committed a major infraction of Company Policy.” Boise presented its proposed disciplinary action that required Bahr to take three days off without pay and to sign a “last chance agreement.” Bahr refused to agree to the terms of the “last chance agreement” and challenged the disciplinary action through his union’s formal grievance process. After months of discussions with Bahr’s union, Boise dropped its proposed disciplinary action against Bahr and reinstated him in his job, where he eventually returned to work alongside Rasmussen.

On September 22, 2003, Bahr commenced a defamation lawsuit against Boise.

Bahr’s complaint stated, in part:

On or about October 18, 2001, Rasmussen communicated to Dobbs a false and defamatory statement that [Bahr] had harassed him and had confronted him in a nature that was hostile and threatening. Dobbs, acting in his individual capacity and acting within the course and scope of his duties as a management level employee of Boise, then communicated or republished these false and defamatory statements to other parties. Other management level employees of Boise then communicated or republished these false and defamatory statements to additional parties.

In their summary judgment motions, appellants argued that Bahr’s allegations, if true, could not constitute defamation per se as a matter of law and that communications that occurred during the investigation were privileged. The district court denied these motions, and the matter proceeded to trial on January 16, 2007. After Bahr rested his case, Boise, Rasmussen, and Dobbs brought a motion for JMOL, resubmitting the arguments in their summary judgment motion. The district court denied their motions.

After Boise, Rasmussen and Dobbs rested their case, they resubmitted their motion for JMOL, which the district court denied.

On January 19, 2007, the jury, without being instructed on privilege, returned a special verdict form indicating that Boise and Rasmussen made statements constituting defamation per se and that those statements were made with malice. The jury awarded Bahr damages of \$27,200 against Boise and \$1,000 against Rasmussen, but determined that Dobbs made no statements constituting defamation per se and was therefore not liable. Boise and Dobbs again moved for JMOL. The district court denied the motions and entered final judgment against Boise and Rasmussen, along with interest, costs, and disbursements of \$8,515.70. In this appeal, Boise and Rasmussen assert that the district court erred in denying their motions for summary judgment and JMOL on the grounds that Bahr never specified the statements that he alleged were defamatory and that any allegedly defamatory statements were (1) protected by a qualified privilege; (2) protected statements of opinion; (3) true and therefore not defamatory; and (4) not defamatory per se.

D E C I S I O N

The standards for review of a denial of summary judgment and JMOL are the same. *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 545 n.9 (Minn. 2001); *see also Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 n.1 (Minn. App. 2007) (stating that Minn. R. Civ. P. 50.02 characterizes a motion for judgment notwithstanding the verdict (JNOV) as a motion for JMOL, but does not change the standard of review). “On appeal from denial of summary judgment, this court must determine whether any

genuine issues of material fact exist and whether the district court erred in applying the law.” *Zank v. Larson*, 552 N.W.2d 719, 721 (Minn. 1996). Evidence must be viewed “in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). “All doubts and factual inferences must be resolved against the moving party.” *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981). An appellate court should have “only a limited role” in reviewing jury verdicts. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 256 (Minn. 1980). This court will not overturn a jury’s verdict unless “it is manifestly and palpably contrary to the evidence” as viewed “in the light most favorable to the prevailing party.” *Id.* (quotation omitted).

In this case, the jury found that Boise and Rasmussen published statements that constituted defamation per se against Bahr. A plaintiff proves a claim of defamation by showing that the defendants (1) made a false and defamatory statement about the plaintiff; (2) in an unprivileged communication to a third party; and (3) harmed the plaintiff’s reputation in the community by making the defamatory statement. *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 673 (Minn. 2003). Defamation that affects a plaintiff in his or her business, trade, or profession is defamation per se and is actionable without proof of actual damages. *Stuempges*, 297 N.W.2d at 255. A party has no liability for defamation, however, when the circumstances subject the statements to a qualified privilege, such as when statements are made “between employees and employers . . . in good faith and for a legitimate purpose.” *Karnes v. Milo Beauty & Barber Supply Co.*, 441 N.W.2d 565, 568 (Minn. App. 1989) (quotation omitted), *review*

denied (Minn. Aug. 15, 1989). But when the plaintiff, by proving actual malice, can show that a qualified privilege was abused, the privilege can be overcome. *Id.*

Specificity

Boise and Rasmussen argue that Bahr was required to include in his complaint the specific words that he alleges were defamatory. A claim for defamation “must be pled with a certain degree of specificity,” including “who made the allegedly libelous statements, to whom they were made, and where.” *Pope v. ESA Servs., Inc.*, 406 F.3d 1001, 1011 (8th Cir. 2005) (quotations omitted). Here, Bahr alleges in his complaint that on October 18, 2001, Rasmussen “communicated to Dobbs a false and defamatory statement that” Bahr had confronted him in a threatening manner. Further, Bahr alleges that “[o]ther management level employees of Boise then communicated or republished these false and defamatory statements to additional parties.” Whether Bahr’s complaint meets the minimum requirements stated in *Pope* is a close call. But because Bahr was not a party to most of the alleged communications, Bahr likely could not have been more specific as to the language of the alleged statements until discovery was undertaken.

Moreover, even if Bahr’s complaint was sufficiently specific, the fact that Boise and Rasmussen did not address this defect until their last motion for JMOL is fatal to their argument. A defect in pleading is waived by voluntarily litigating the question at trial. *Keene v. Masterman*, 66 Minn. 72, 73, 68 N.W. 771, 771 (1896). The record does not show that Boise or Rasmussen moved to dismiss Bahr’s claim or that Boise or Rasmussen raised the issue as an objection during the trial. Although Boise and Rasmussen individually moved for summary judgment, they argued in their motions that

the statements were privileged and not defamatory per se; neither motion addressed a lack of specificity in the complaint. Nor did Boise's or Rasmussen's first motion for JMOL raise the issue of specificity. On the contrary, Boise's and Rasmussen's arguments in their first motion for JMOL imply that they were aware of which statements Bahr alleged were defamatory.

Finally, in their last motion for JMOL, Boise and Rasmussen claimed that Bahr "failed to articulate or identify any specific statements he claims are defamatory." Boise and Rasmussen now argue that Bahr's failure to do so did not simply render his complaint defective, but should dispose of his case as a whole. Boise and Rasmussen cite *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 794 (Minn. App. 1998), *review denied* (Minn. Dec. 15, 1988), and *Bebo v. Delander*, 632 N.W.2d 732, 739 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001), for the principle that the exact, specific defamatory language must be set forth in a complaint, and that paraphrasing of defamatory language in a complaint is insufficient. But both *Special Force Ministries* and *Bebo* were summary-judgment cases and had not been fully tried to a jury unlike the case now before us. Furthermore, *Special Force Ministries* relied on *Am. Book Co. v. Kingdom Pub. Co.*, 71 Minn. 363, 366, 73 N.W. 1089, 1090 (1898), in which a libel plaintiff failed to specifically allege what portions of a publicly available pamphlet were defamatory. Likewise, in *Special Force Ministries*, the defamatory statements were publicly broadcast and "were readily available to" the plaintiffs. 584 N.W.2d at 794. Here, the record does not show that the exact statements at issue were available to Bahr before discovery was conducted; thus, the rule from *Special Force Ministries* that a

defamation pleading must include the exact defamatory statements does not apply to the facts in this case.

Boise and Rasmussen also claim that Bahr failed to provide specific evidence of defamatory statements during trial, arguing that Bahr's exhibits contain "mere characterizations of the harassment incident, opinions offered by persons interviewed as part of the investigation, paraphrasing of other statements and commonplace discussion of work-related conflicts," and not statements that could form the basis of a defamation claim. Only statements can constitute defamation. *Bolton v. Dep't of Human Servs.*, 540 N.W.2d 523, 525 (Minn. 1995). But the exhibits Bahr introduced at trial do include factual statements made by Rasmussen and Boise personnel that Bahr could argue were false and defamatory towards him. Ultimately, appellants fail to show that Bahr did not adequately specify the statements he claims were defamatory.

Privilege

Boise and Rasmussen also argue that the statements at issue were subject to a qualified privilege and therefore not actionable as a matter of law. There are two types of privilege that prevent statements from becoming subject to defamation claims: absolute privilege and qualified or conditional privilege. *Matthis v. Kennedy*, 243 Minn. 219, 223, 67 N.W.2d 413, 416 (1954). Whether a privilege exists is "a question of law for the court." *LeBaron v. Minn. Bd. of Pub. Defense*, 499 N.W.2d 39, 41 (Minn. App. 1993), *review denied* (Minn. June 9, 1993). 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.* Such a privilege, however, can be defeated by actual malice, which can be shown with evidence of intent to cause harm through falsehood. *Beatty v. Ellings*, 285 Minn. 293, 301-02, 173 N.W.2d 12, 17-18 (1969).

Bahr does not dispute that a qualified privilege applies here, but argues that the existence of malice overcomes the privilege. The plaintiff has the burden to show that the privilege has been abused. *Lewis v. Equitable Life Assur. Soc. of the U.S.*, 389 N.W.2d 876, 890 (Minn. 1986). The issue of whether a communication is privileged is a question of law, while the question of whether malice overcomes the privilege is generally a jury question. *Id.* But a reviewing court must still consider whether the evidence in the record presents a genuine issue of material fact to the jury and reasonably supports the jury's finding. *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998). Where the evidence does not support the jury's finding of actual malice, reversal is appropriate.

“Malice cannot be implied from the statement itself or from the fact that the statement was false.” *Bol v. Cole*, 561 N.W.2d 143, 150 (Minn. 1997). But malice can be proven by extrinsic evidence of ill feeling, or intrinsic evidence such as exaggerated language, “the character of the language used, the mode and extent of publication, and other matters in excess of the privilege.” *Id.* (quotation omitted). In *Karnes*, the plaintiff

argued in part that ill will between her and her supervisor proved that a qualified privilege that would otherwise protect defamatory statements was overcome by malice. 441 N.W.2d at 568. This court observed, however, that it was the accounting manager, and not the plaintiff's supervisor, who authored the statements that the plaintiff alleged were defamatory. *Id.* "While an employee's actions may be imputed to a corporation, it would be difficult to impute one employee's feelings . . . to another's . . . actions." *Id.* Here, Bahr provides extensive evidence that his supervisor, Dobbs, harbored ill will against him. But even assuming ill feelings existed between the two, we discern no basis for imputing Dobbs' ill feelings to Boise. As in *Karnes*, Bahr's supervisor, Dobbs, did not author the allegedly defamatory statements.

Bahr also offers as extrinsic evidence of ill will the fact that Leen and Johnson questioned Boise employees about Bahr's work habits, which were not directly relevant to the harassment investigation. But the issue of Bahr's work habits was raised in the interview Leen held with Rasmussen and R.B. prior to the investigation. An employer has an important interest in protecting itself against employees whose conduct harms its operations, *McBride v. Sears, Roebuck & Co.*, 306 Minn. 93, 97, 235 N.W.2d 371, 374 (1975), and we conclude that Boise's inclusion of Bahr's work habits in its investigation is not extrinsic evidence of malice.

We also conclude that there was insufficient evidence to support a showing of malice on Rasmussen's part. Bahr offers Rasmussen's comment that Bahr was a "lazy, fat f--ker" as extrinsic evidence of Rasmussen's ill will towards him. But a mere "personality conflict, where the parties simply . . . trade insults" does not necessarily

suffice to show malice. *Bauer v. State*, 511 N.W.2d 447, 451 (Minn. 1994). Bahr also offers the “fabricated and exaggerated” nature of Rasmussen’s behavior and accounts of the incident as intrinsic evidence of malice. But the fact that defamatory statements may have been fabricated and exaggerated does not support a showing of malice. *Bol*, 561 N.W.2d at 150. While “exaggerated *language*” can prove malice, *id.* (emphasis added), Bahr provides no examples of such language

We conclude that the jury’s finding of malice is contrary to the evidence and that Bahr’s claims are therefore barred by privilege. Thus, we conclude that Boise and Rasmussen are entitled to JMOL and we reverse the judgment for Bahr. *See Stuempges*, 297 N.W.2d at 256 (stating that a jury’s verdict may be set aside if it is “manifestly and palpably contrary” to the evidence). Because we reverse on these grounds, we do not reach any other claims related to the trial or verdict. Because we reverse the judgment for Bahr, we also reverse the district court’s award of costs and disbursements in favor of Bahr, as the prevailing party. Now that Boise and Rasmussen have prevailed in this action, we remand to the district court for consideration of their costs and disbursements.

Reversed and remanded.