Rel: June 30, 2023

Corr: July 17, 2023

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2022-2023

SC-2022-0867

Luxottica of America, Inc., Jeremiah Andrews, Jr., and Anthony Pfleger

v.

Jackie Lee Bruce

Appeal from Montgomery Circuit Court
(CV-21-901027)

SELLERS, Justice.

Luxottica of America, Inc., Jeremiah Andrews, Jr., and Anthony Pfleger appeal from a judgment of the Montgomery Circuit Court entered after a nonjury trial in favor of plaintiff Jackie Lee Bruce on Bruce's

claims alleging that Andrews and Pfleger, who are employees of Luxottica, defamed him and publicly placed him in a false light by accusing him of shoplifting. We reverse the trial court's judgment.

Facts and Procedural History

Andrews is the manager of the "Sunglass Hut" store at a shopping center in Montgomery ("the store"). Luxottica owns the store. Andrews was working at the store on August 18, 2021, at approximately 7:30 p.m. when Bruce entered the store. Another man, who was known by Andrews to have recently shoplifted from the store ("the shoplifter"), entered the store immediately behind Bruce. According to Andrews, within the past two weeks, the shoplifter had come into the store multiple times, both alone and with accomplices, and had stolen merchandise. Thus, Andrews claimed, he suspected that Bruce was acting as the shoplifter's accomplice on this particular occasion.

Andrews suggested to the shoplifter that he knew the shoplifter had stolen from the store in the past, and he asked the shoplifter if he was going to steal again. According to Andrews, at that point Bruce "walked up" to Andrews and made him "feel a little uncomfortable." Surveillance video shows that Bruce walked around inside the store for approximately

seven minutes while holding his cellular telephone to his ear. Bruce's telephone records and trial testimony, however, suggest that he used his telephone during that time for only 22 seconds. Thus, it appears that he may have been pretending to talk on his phone for several minutes. Bruce also picked up two pairs of sunglasses and put them back on their shelves without looking at their prices.

Bruce exited the store and, according to Andrews, paced back and forth several times, which made Andrews suspect that Bruce was acting as a "lookout." Surveillance video shows Bruce walking back and forth five or six times before walking away from the store. Bruce explained his pacing as simple indecision about whether to visit another store or to instead leave the shopping center. Shortly after Bruce walked away, the shoplifter left the store with sunglasses without paying for them, which Andrews witnessed.[1]

Andrews claimed that he saw Bruce and the shoplifter enter the same vehicle and start to drive away. Andrews then exited the store in an attempt to obtain the vehicle's license-plate number, but he was

[1]Testimony during the trial suggested that, for safety reasons, store associates are trained not to pursue shoplifters.

unsuccessful. Bruce, however, testified that a friend named Orlando had driven Bruce to and from the shopping center in a different vehicle, and he denied knowing the shoplifter or seeing him steal sunglasses.[2]

Andrews reported the incident to Montgomery police and to defendant Pfleger, who is a former police officer and is a current asset-protection manager for Luxottica responsible for investigating shoplifting. According to Pfleger, Andrews claimed to have seen Bruce and the shoplifter leave in the same vehicle.[3]

Pfleger took Andrews's statement and viewed the surveillance video from inside the store. According to Pfleger, he believed that there

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[2]Orlando did not testify.

[3]Pfleger testified that he would not have accused Bruce of shoplifting if he thought Bruce had not left in a vehicle with the shoplifter. For his part, Bruce points to evidence indicating that Andrews did not document in writing his assertion that Bruce and the shoplifter had left in the same vehicle until after this action had been commenced, and he claims that the defendants "fabricated" that evidence to bolster their shoplifting allegations against Bruce. Pfleger, however, testified that he and Andrews had had conversations about Bruce and the getaway vehicle before it was documented in writing that Andrews had witnessed Bruce and the shoplifter leave in the same vehicle, and Andrews stated that he did not initially put that he had witnessed them leave in the same vehicle in writing because he had already documented that the shoplifter and Bruce were "together." Andrews maintained during the trial that he still believed that Bruce and the shoplifter had left in the same vehicle.

was probable cause to believe that Bruce had committed a felony. After attempting without success to obtain the assistance of Montgomery police, Pfleger contacted Central Alabama Crimestoppers ("Crimestoppers"), which is a nonprofit organization that collects and publishes information regarding criminal activity in an effort to identify suspects.

Pfleger gave Crimestoppers' executive director Tony Garrett photographs of the shoplifter, Bruce, and the shoplifter's other alleged accomplices so that Crimestoppers could make the information public in an attempt to identify the suspects. In addition to photographs of the shoplifter and his alleged accomplices, including Bruce, Pfleger provided Crimestoppers with a written synopsis of multiple incidents at the store, which stated that the man in the photograph -- who was later identified as Bruce -- "acts as a distraction" and that he and the shoplifter are "observed [in the photograph] communicating within the location."[4]

[4]Pfleger testified that Andrews had told him that Bruce and the shoplifter had communicated with one another. During the trial, however, Andrews testified that the shoplifter and Bruce had not orally communicated at any point during the incident. Bruce denied during the trial that he had communicated in any way with the shoplifter.

Crimestoppers posted photographs and information about the incidents on its Facebook social-media page, which, at that time, had approximately 34,000 followers. Although Pfleger provided the above-referenced materials to Crimestoppers, he did not draft the final version of the Crimestoppers post and did not review that post before it was made public. Although Garrett testified that most of the information that went into the post was obtained from Pfleger and that Pfleger had described the individuals in the referenced photographs as a group of thieves working together, there are some differences between the written materials that Pfleger gave to Crimestoppers and the Facebook post that Crimestoppers publicized. Specifically, the Crimestoppers post stated that the people in the photographs targeted "multiple" franchise stores in Alabama and that they were sought in connection with thefts totaling more than $15,000 at one retail franchise. Pfleger's materials make no mention of thefts at locations other than the "Sunglass Hut" store, which totaled a little less than $13,000, not more than $15,000, and Pfleger denied making those allegations to Garrett.[5]

[5]It is unclear where the $15,000 figure came from. As for allegations of thefts from other retail stores, Garrett suggested that those allegations were levied by representatives of stores such as Wal-Mart,

For his part, Bruce notes that Andrews did not photograph the shoplifter or the vehicle in which he was riding and did not call the police while the shoplifter was in the store. In fact, Bruce's counsel suggested during the trial that Andrews himself was the shoplifter's accomplice. As for Pfleger, Bruce claims that the only step he took to verify Andrews's version of events was to view the surveillance video.

Bruce denied knowing or ever seeing the shoplifter at any time before the incident in question, and he denied witnessing him steal anything. He also denied that he did anything to distract Andrews from the shoplifter's actions. As for Andrews's allegation that Bruce left in a vehicle with the shoplifter, Bruce points out that Andrews initially described the person he saw leave with the shoplifter as being 5 feet 9 inches tall and weighing 170 pounds, while Bruce is 6 feet 2 inches tall and weighs 225 pounds. Bruce denied being involved in any illegal

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who apparently recognized the shoplifter from the surveillance footage after Pfleger posted it on a website called "GroupMe." Pfleger and Garrett described the GroupMe site as "closed" and accessible only by law-enforcement officials and other retail-loss-prevention personnel working for various retailers. The GroupMe post is not in the record.

activity and claimed that all he did was browse merchandise at a sunglasses store, looking for a gift for his fiancée.

Bruce's counsel demanded that the Crimestoppers post be removed, but the defendants did not promptly cause that to happen. Accordingly, Bruce commenced this action, alleging defamation and invasion of privacy by publicly placing Bruce in a false light.[6]

After a nonjury trial, the trial court entered a judgment in favor of Bruce, awarding him $100,000 in compensatory damages and $300,000 in punitive damages. The trial court denied the defendants' timely postjudgment motion requesting a judgment as a matter of law in their favor, a new trial, an amended judgment, or a remittitur. This appeal followed.[7]

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[6]In his complaint, Bruce also raised claims alleging negligence and wantonness, but he represents in his brief to this Court that he "did not try the case on simple negligence or wantonness, only defamation and false light." Bruce's brief at 1 n.2.

[7]After the trial court denied the defendants' postjudgment motion, it purported to enter another order setting out various findings. That order, however, was void for lack of jurisdiction. See Southeast Env't Infrastructure, L.L.C. v. Rivers, 12 So. 3d 32, 49 (Ala. 2008) (holding that, after the trial court entered an order denying the defendant's postjudgment request for a new trial, a judgment as a matter of law in its favor, or a remittitur, the trial court lost jurisdiction over the action).

Discussion

Claims Against Andrews Based on Intracompany Communications

To prove his defamation claim, Bruce must establish, among other things, that the defendants made an untrue statement about Bruce to a third party. McCaig v. Talladega Publ'g Co., 544 So. 2d 875, 877 (Ala. 1989). Similarly, to prove his invasion-of-privacy/false-light claim, Bruce must establish that the defendants placed him in a false light publicly. Schifano v. Greene Cnty. Greyhound Park, Inc., 624 So. 2d 178, 180 (Ala. 1993). With respect to Andrews specifically, Bruce did not present sufficient evidence establishing those elements.

In Nelson v. Lapeyrouse Grain Corp., 534 So. 2d 1085 (Ala. 1988), this Court discussed what it referred to as the "McDaniel/Burney rule" regarding allegedly defamatory statements made by one employee of a corporation to another employee of that same corporation. See generally McDaniel v. Crescent Motors, Inc., 249 Ala. 330, 31 So. 2d 343 (1947); and Burney v. Southern Ry. Co., 276 Ala. 637, 165 So. 2d 726 (1964). The Court in Nelson noted that, because a corporation can act only though its agents, communications between those agents within the line and scope of their duties are considered communications by the corporation itself

and therefore do not constitute publications to a third party. In other words, the corporation, through its agents, "'"is but communicating with itself."'" 534 So. 2d at 1094 (citations omitted). See also Reynolds Metals Co. v. Mays, 547 So. 2d 518, 524 (Ala. 1989) ("This Court has adopted the rule that there is no publication by a corporation in the case of a communication by one corporate employee to another corporate employee, in the course of transacting the corporation's business and in the line of their duty as employees of the corporation, about a fellow corporate employee."). The McDaniel/Burney rule has been applied to insulate legal entities and their employees from liability based on communications amongst those employees. Burks v. Pickwick Hotel, 607 So. 2d 187, 190 (Ala. 1992). The allegedly defamatory statements made by Andrews, upon which Bruce bases his claims, were made to another employee of Luxottica, namely, Pfleger, within the line and scope of those individuals' duties as employees. Accordingly, under the McDaniel/Burney rule, Andrews did not publish any statements, true or untrue, to a third party or to the public and therefore cannot be held liable for defamation or false-light invasion of privacy. Thus, the

judgment against Andrews is due to be reversed and the claims against him dismissed.[8]

Claims Against Pfleger and Qualified Privilege

Qualified privilege is an affirmative defense to defamation and invasion-of-privacy claims. Butler v. Town of Argo, 871 So. 2d 1, 26 n.25 (Ala. 2003).[9] The privilege has been described as follows:

> "'"Where a party makes a communication, and such communication is prompted by duty owed either to the public or to a third party, or the communication is one in which the party has an interest, and it is made to another having a corresponding interest, the communication is privileged.... The duty under which the party is privileged to make the communication need not be one having the force of legal obligation, but it is sufficient if it is ... moral in its nature.... ."'"

[8]The record suggests that, in addition to speaking with Pfleger about the incident, Andrews reported the theft to Montgomery police and to the security department at the shopping center. The parties, however, do not point to any details regarding exactly what Andrews told police or shopping-center security. Accordingly, it is not possible to conclude that Andrews can be held liable for defamation or false-light invasion of privacy based on statements he made to police or to shopping-center security, even assuming that Andrews did not enjoy a legal privilege to speak to police officers or shopping-center security officers about the shoplifting incident without risking liability for defamation or invasion of privacy. See generally Mead Corp. v. Hicks, 448 So. 2d 308, 313 (Ala. 1983) ("An employee enjoys a qualified privilege in reporting suspected thefts of his employer's property.").

[9]Qualified privilege used to be referred to as "conditional" privilege. Butler v. Town of Argo, 871 So. 2d 1, 25 n.24 (Ala. 2003).

Ex parte Blue Cross & Blue Shield of Alabama, 773 So. 2d 475, 478-79 (Ala. 2000) (quoting Berry v. City of New York Ins. Co., 210 Ala. 369, 371, 98 So. 290, 292 (1923)); see also id. at 479 ("'Where the defendant acted in the discharge of any public or private duty, whether legal or moral, which the ordinary exigencies of society, or his own private interest, or even that of another, called upon him to perform, the law simply ... gives protection to the defendant....'" (quoting Alabama Pattern Jury Instructions: Civil 23.12 (2d ed. 1993))). The privilege is referred to as "qualified" because it is defeated by the existence of malice on the part of the defendant. Nelson, 534 So. 2d at 1095. Although the question whether a defendant has established that an allegedly defamatory statement comes within the scope of qualified privilege is one of law for the courts, this Court also has said that the existence of malice is typically a question for the trier of fact. Id. at 1094.

In Nelson, supra, this Court held that a supervisor of a corporation in the business of buying and reselling grain was entitled to a summary judgment based on qualified privilege in a defamation case brought by a former employee of the corporation, whom the supervisor had accused in the presence of a nonemployee polygraph operator of stealing grain. The

communication was afforded qualified privilege because the supervisor "had a strong interest in determining who among his employees bore the responsibility for the grain shortage" and "[t]he polygraph test operator had a corresponding interest in receiving pertinent information concerning the theft … in order to administer the test competently." 534 So. 2d at 1094. Conversely, another employee of the company was not entitled to assert the privilege with respect to his accusation regarding the former employee to a customer of the grain corporation because the customer did not share a sufficient interest in the theft investigation.

Pfleger's role with Luxottica is to investigate shoplifting. His communication to Crimestoppers of his belief that the man in the photograph -- who was later identified as Bruce -- had been involved in a shoplifting incident was prompted by a duty owed to Luxottica to investigate and hopefully solve crimes committed against Luxottica. In addition, Crimestoppers' mission is also the investigation of crimes. According to Garrett, who is a former Montgomery police lieutenant, Crimestoppers "assist[s] law enforcement with their need for collecting information from the public." Garrett started the Crimestoppers program while he was still a police officer. Most of the information

regarding criminal activity that Crimestoppers publishes originates from law enforcement. It is clear to this Court that Pfleger's duties to Luxottica, as well as a corresponding interest he shared with Crimestoppers, were sufficient to trigger the prima facie applicability of qualified privilege with respect to Pfleger's representations. Cf. Tidwell v. Winn-Dixie, Inc., 502 So. 2d 747, 748 (Ala. 1987) (holding that a retailer's report of shoplifting to police was protected by qualified privilege); Kirby v. Williamson Oil Co., 510 So. 2d 176 (Ala. 1987) (holding that a company's security officer enjoyed a qualified privilege to speak to police about suspicions that a particular person was involved in a robbery of one of the company's stores). See also Restatement (Second) of Torts § 594 (Am. L. Inst. 1977) ("An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the publisher, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.").

As noted, acting with malice is not protected by qualified privilege. It was Bruce's burden to prove that Pfleger acted with malice. Nelson,

534 So. 2d at 1095. The sort of malice required to defeat the privilege in this case is referred to as "common law actual malice." Id. Common-law actual malice indicates a specific intent to injure. Wiggins v. Mallard, 905 So. 2d 776, 784 (Ala. 2004). It is established by "'evidence of "previous ill will, hostility, threats, rivalry, other actions, former libels or slanders, and the like … or … violence of the defendant's language, [and] the mode and extent of publication, and the like." Kenny v. Gurley, 208 Ala. 623, 626, 95 So. 34, 37 (1923).'" Nelson, 534 So. 2d at 1095 (quoting Webster v. Byrd, 494 So. 2d 31, 36 (Ala. 1986)). It can also be shown "by proof of 'the recklessness of the publication and prior information regarding its falsity.'" Wiggins, 905 So. 2d at 788 (citation omitted).

In Dolgencorp, LLC v. Spence, 224 So. 3d 173 (Ala. 2016), upon which the defendants rely, a customer of a Dollar General store sued Dolgencorp, LLC, the owner of the store, after its employee accused the customer of shoplifting. That accusation was made to a police officer, and, thus, the plaintiff conceded that qualified privilege would apply unless the employee acted with malice. The plaintiff asserted that she had produced substantial evidence of common-law actual malice, pointing to the employee's failure to review surveillance video of the

shoplifting incident and her failure to allow the plaintiff to pay for the items after the accusation, as required by the company's standard operating procedures. This Court, however, disagreed, noting that the employee had not viewed the surveillance video because she had believed that she had personally witnessed the plaintiff place merchandise in her purse and zip it closed. Accordingly, the Court held that the trial court had erred in submitting the defamation claim to the jury.

In the present case, Pfleger did review the surveillance video from the store. He also testified that he had asked the head of security of the shopping center if there was any video footage of the parking lot and had been told that there was not.[10]

We agree with Pfleger. There was no evidence indicating that Pfleger knew that Bruce was in fact not involved in the theft, that Pfleger recklessly failed to investigate the matter sufficiently, that Pfleger had any previous ill will or hostility toward Bruce, that Pfleger threatened

[10]While examining Pfleger during the trial, Bruce's counsel criticized him for not asking the owner of another store in the shopping center if he or she had surveillance footage of the parking lot. Bruce's counsel suggested that such footage exists and shows that Bruce did not leave with the shoplifter. It does not appear, however, that any such video footage was entered into evidence.

Bruce or used violent language against him, that Pfleger slandered Bruce previously, or that Pfleger went beyond what was reasonably necessary in communicating with Crimestoppers. Accordingly, Bruce did not establish malice as an exception to qualified privilege.[11]

Finally, Bruce suggests in his brief that, because the allegations against him were of a criminal nature, malice is "presumed." He asserts specifically that "some examples of situations where privileges do not apply because of malice include … where [the defendant] published a libelous per se statement." Bruce's brief at 56. To the extent that Bruce is suggesting that, because he was accused of a crime, he did not have the burden of demonstrating common-law actual malice in order to avoid a qualified-privilege defense, that suggestion conflicts with Nelson, supra.

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[11]Bruce speculates that Andrews fabricated his allegation that Bruce had left in a vehicle with the shoplifter in order to bolster his shoplifting allegations against Bruce and that Andrews's claim that Bruce had intimidated him shows that Andrews acted with malice toward Bruce. We disagree. Bruce testified that he had never met Andrews, that there had been no hostility, threats, rivalries, or previous defamations by Andrews, and that Bruce had no idea what would motivate Andrews to allegedly lie about Bruce's actions. In any event, because we have already concluded that, under the McDaniel/Burney rule, Andrews did not publicize any allegations regarding Bruce, any alleged ill will on his part toward Bruce is not relevant.

Conclusion

Andrews cannot be held liable because, under the McDaniel/Burney rule, he did not publicize any statements about Bruce. And, because Pfleger enjoys a qualified-privilege defense, he too cannot be held liable. Finally, the only basis for Luxottica's possible liability is vicarious liability for Andrews's and Pfleger's actions. Because those parties are not liable, neither is Luxottica. See Alfa Life Ins. Corp. v. Jackson, 906 So. 2d 143, 154 (Ala. 2005). Accordingly, we reverse the trial court's judgment and remand the matter.[12]

REVERSED AND REMANDED.

Parker, C.J., and Shaw, Wise, Bryan, Mendheim, Stewart, and Mitchell, JJ., concur.

Cook, J., concurs specially, with opinion.

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[12]Because we dispose of this appeal based on the above-stated rationale, it is unnecessary to discuss the defendants' other arguments, including their suggestion that they simply cannot be held liable based on the Crimestoppers' post because that post was not a verbatim reproduction of exactly the same information that Pfleger had provided to Crimestoppers.

COOK, Justice (concurring specially).

I concur fully with the main opinion; however, I write separately to discuss the application of the qualified-privilege defense in the present case.[13]

In their brief on appeal, Luxottica of America, Inc., Jeremiah Andrews, Jr., and Anthony Pfleger cite Miller v. Central Ohio Crime Stoppers, Inc., No. 07AP-669, Mar. 20, 2008 (Ohio Ct. App. 2008) (not published in Ohio Appellate Reports or North Eastern Reporter), in support of their contention that the act of reporting an alleged crime to Central Alabama Crimestoppers should be subject to a qualified-privilege defense. In Miller, the question was whether the publication of a "most wanted" list by Central Ohio Crime Stoppers, Inc., itself was subject to a qualified privilege. The Ohio Court of Appeals explained the purpose of a qualified privilege as follows:

> "A privileged communication is one that, except for the occasion on which or the circumstances under which it is made, would be defamatory and actionable. Costanzo v. Gaul (1980), 62 Ohio St. 2d 106, 108. While the publication of the dismissed warrant for plaintiff's arrest arguably is defamatory per se, actual malice will not be presumed if a

[13]I view the question whether a qualified privilege existed as a determinative issue in this appeal, and I directly questioned both sides during oral argument regarding why it would, or would not, apply.

> qualified privilege applies. Hahn v. Kotten (1975), 43 Ohio St. 2d 237, 244. Instead, the burden falls upon plaintiff to prove actual malice.
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> > "The qualified privilege thus 'does not change the actionable quality of the words published, but merely rebuts the inference of malice that is imputed in the absence of privilege, and makes a showing of falsity and actual malice essential to the right of recovery.' Hahn, supra, at 244."

In other words, absent the qualified privilege, the court would presume malice if the alleged wrongful statements concerned things like criminal activity.

The Ohio Court of Appeals then explained that Crime Stoppers could avail itself of the qualified privilege even though it was not a governmental organization because its purpose is a public purpose to reduce crime. Specifically, that court noted that courts in Ohio "have not limited the public interest qualified privilege to the communications of public organizations" and explained:

> "Crime Stoppers similarly is entitled to a qualified privilege for its release of information to the public. Plaintiff presented no evidence Crime Stoppers lacked good faith in publishing the 'Most Wanted' list, and nothing in the record indicates an improper purpose motivated Crime Stoppers to release the information. Crime Stoppers possessed a proper interest anchored in its desire to assist the police in reducing crime. The publication was limited to that interest and was made on a proper occasion in the manner designed to serve that interest."

(Citing Thompson v. Webb, 136 Ohio App. 3d 79, 84, 735 N.E.2d 975, 979 (1999), and Patio World v. Better Business Bureau, Inc., 43 Ohio App. 3d 6, 538 N.E.2d 1098 (1989) (applying the qualified privilege to the Better Business Bureau for its release of information to the public in order to promote the public interest of protecting consumers) (emphasis added).) Although the defendants cited this case, Bruce does not discuss this case.

Although the present case involved the question of statements made by Pfleger to Crimestoppers rather than statements made by Crimestoppers alone, I nevertheless believe that the same logic applies here. As the main opinion notes, the evidence is undisputed that Pfleger reported the information to Crimestoppers because Crimestoppers' mission is to assist with the investigation of crimes by collecting information from the public. Like in Miller, here there is nothing to suggest that Pfleger lacked good faith or had an improper purpose for reporting the information at issue. Therefore, I believe that Miller supports the reasoning of the main opinion that Pfleger enjoys a qualified-privilege defense in the present case.