FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-1837

CONSANDRA HARRIS,

Appellant,

v.

STEPHEN PLAPP,

Appellee.

On appeal from the Circuit Court for Duval County.
Marianne L. Aho, Judge.

November 23, 2022

LONG, J.

Consandra Harris lost a defamation trial below. She appeals three aspects of the judgment—whether she was entitled to qualified privilege, whether the damages award was supported by competent, substantial evidence, and whether Stephen Plapp's offer of judgment satisfied section 768.79, Florida Statutes. We affirm on the first two issues and reverse on the third.

I

Harris and Plapp both volunteered as swim meet officials. After a meet, Harris authored a three-page memorandum describing unfair treatment by superiors and dangerous conditions. Among other things, Harris said Plapp was "dangerously intoxicated" and complained that Plapp's behavior

was excused while hers was scrutinized. At the outset, we note the trial court found this statement was untrue and that finding is supported by competent, substantial evidence.

Harris attached her memo to an email she sent to Robert Thompson. Harris claimed Thompson was a mentor in the swim community. The content of the email suggests it was sent to obtain advice. Thompson then forwarded the email to several swim officials who all read the statement about Plapp. No other volunteer at the swim meet supported Harris' account, and Plapp's standing in the swim community was ultimately unaffected.

Plapp sued Harris for defamation. Plapp testified both to his mental anguish upon learning of the statement and to his efforts to clear his name. Harris presented two legal defenses. First, her statement was entitled to qualified privilege because it was made in the context of a mentor-mentee relationship and not intended to be seen by others. Second, Plapp suffered no reputational or other harm as a result of the statement.

After a bench trial, the court delivered a verdict in Plapp's favor. It found Harris' statements were not covered by qualified privilege and Plapp's mental anguish was sufficient for a compensatory damage award. It also found that regardless of actual reputational harm, a reputational damage award was appropriate because the statements made were of a nature that could have harmed Plapp's reputation. The trial court awarded $50,000 in damages—$25,000 each for mental and reputational harm.

Plapp then moved for an attorney's fee award under section 768.79. Plapp had offered to settle for $5,000 and a signed retraction and apology. Because the eventual award was substantially higher than the offer, Plapp argued he was entitled to attorney's fees. Harris argued section 768.79 did not apply to the offer because it was not limited to a "civil action for damages" under the statute. The trial court agreed with Plapp and found that he was entitled to fees.[*] Harris now appeals.

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[*] We note our jurisdiction to consider this issue. The notice to appeal was filed after the order granting entitlement to fees, but

II

Defamation, encompassing the torts libel and slander, is "a false and unprivileged publication of unfounded statements that injure a person." *Delacruz v. Peninsula State Bank*, 221 So. 2d 772, 775 (Fla. 2d DCA 1969). This case presents a claim of qualified or conditional privilege, two terms which refer to the same thing. The privilege has been defined broadly:

> A communication made in good faith on any subject matter by one having an interest therein, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which would otherwise be actionable, and though the duty is not a legal one but only a moral or social obligation.

Nodar v. Galbreath, 462 So. 2d 803, 809 (Fla. 1984) (citations omitted). The privilege exists at common law in recognition of the need to balance two interests: "the right of the individual, on one hand, to enjoy a reputation unimpaired by defamatory attacks, and, on the other hand, the necessity, in the public interest, of a free and full disclosure of facts." *Fridovich v. Fridovich*, 598 So. 2d 65, 68 (Fla. 1992) (citation omitted); *see also Leonard v. Wilson*, 8 So. 2d 12, 13 (Fla. 1942) (explaining qualified privilege "cannot be restricted to the utterances or writings of any particular class or group, but, on the contrary, may be invoked by all persons who publish defamatory matter without malice and in furtherance of

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before the final order setting the amount. The notice was therefore premature. But while an order granting entitlement without determining an amount is a nonfinal nonappealable order, the final order setting the amount was rendered during the pendency of this appeal. This vests jurisdiction in the Court to review the final order. Fla. R. App. P. 9.110(*l*). Harris moved to supplement the record with the final order. We grant the motion to supplement. Fla. R. App. P. 9.200(f) ("No proceeding shall be determined, because of an incomplete record, until an opportunity to supplement the record has been given.").

the welfare of society, generally, or of the legitimate interests of particular groups or individuals") (citation omitted).

Good faith is the bedrock of a claim of qualified privilege. Courts consider whether a defamatory statement was made in good faith under a totality of the circumstances test:

> In cases of qualifiedly privileged communications the law requires both an occasion of privilege and the use of that occasion in good faith. Whether the privilege is available as a defense may depend upon the circumstances of the particular case, the situation of the parties, the persons to whom, the circumstances under which, and the manner in which, the communication is made. A publication which in one case may be privileged, in another may not be. While ordinarily the question of privilege is determined by the occasion and not the language used and, hence, one may be privileged in imputing to another the commission of a crime, the privilege may depend not only upon the occasion that calls forth the publication but also upon the character of the communication itself.

Leonard, 8 So. 2d at 13–14 (citation omitted). Statements made in bad faith, sometimes called malice, do not receive protection. This is because the purpose of the qualified privilege is not served when the speaker is "motivated more by a desire to harm the person defamed than by a purpose to protect the personal or social interest giving rise to the privilege." *Nodar*, 462 So. 2d at 811.

III

A

We affirm the trial court's finding that Harris' statements did not enjoy qualified privilege. In doing so, we recognize the superior vantage point of the trial judge at the bench trial in this case. *Spears v. Albertson's, Inc.*, 848 So. 2d 1176, 1179 (Fla. 1st DCA 2003) ("Whether the privilege exists or has been exceeded creates a mixed question of law and fact which should be determined by the trier of fact."). After hearing from several witnesses that there

was never an indication Plapp was impaired and only a single witness (Harris) claiming otherwise, the trial court determined Harris "concocted" the story to serve her own interests. Specifically, the trial court found Harris invented the false statement to further her argument that she was being unfairly treated while others were favored. The memorandum itself, when seen in this light, supports this view of the evidence. Harris complained of "bias" because while she was being reprimanded, Plapp was allowed to continue officiating while impaired. We review a finding of bad faith for legally sufficient evidence and cannot "substitut[e] our judgment for that of the jury," or here that of the judge. *Nodar*, 462 So. 2d at 812. We affirm on this issue because there was legally sufficient evidence to support the trial court's finding.

B

We are also satisfied both aspects of the damage award were properly supported. The trial court accepted Plapp's testimony about his emotional distress. Harris concedes Plapp testified to his emotional harm but argues on appeal "the totality of Plapp's testimony" painted a different picture. This is an impermissible request to reweigh evidence. Competent, substantial evidence is again the limit of this Court's inquiry, and Plapp's testimony meets this standard. *See Pearce & Pearce, Inc. v. Kroh Bros. Dev. Co.*, 474 So. 2d 369, 371 (Fla. 1st DCA 1985).

Conversely, competent, substantial evidence of reputational harm did not need to be shown for the trial court to award monetary relief on that claim. Defamation is "an oddity of tort law" because "it allows recovery of purportedly compensatory damages without evidence of actual loss." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). "When the words published concerning a person tend to degrade him, bring him into ill repute, destroy confidence in his integrity, or cause other like injury, such language is actionable per se." *Axelrod v. Califano*, 357 So. 2d 1048, 1050 (Fla. 1st DCA 1978). Plapp does not seriously dispute the lack of evidence of reputational harm, but correctly notes Harris' statements were of a nature that tended to harm his reputation. That is enough. *Joopanenko v. Gavagan*, 67 So. 2d 434, 436 (Fla. 1953) ("In the case of words actionable per se their

injurious character is a fact of common notoriety established by the general consent of men and the court consequently takes judicial notice of it. They necessarily import damage and, therefore, in such cases general damages need not be pleaded or proved but are conclusively presumed to result and special damages need not be shown to sustain the action.").

C

On a markedly different issue, we turn our attention to attorney's fees and statutory construction. After winning the lawsuit below, Plapp moved the trial court to award him attorney's fees under section 768.79. Section 768.79 provides that if a plaintiff's settlement offer is rejected and the recovery is at least 25% greater than the offer, the plaintiff is entitled to reasonable attorney's fees. Plapp offered to settle for $5,000 and received a judgment of $50,000. But Plapp's settlement offer also required, and his complaint demanded, that Harris make a formal retraction and apology along with the monetary payment. Section 768.79 applies only to "civil action[s] for damages" and the supreme court has held that section 768.79 does not apply to actions "where a plaintiff seeks both monetary and nonmonetary relief." *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So. 3d 362, 375 (Fla. 2013).

Plapp argued below, and the trial court held, that because the real issue in this case was about money, section 768.79 applies. This is based on a misapplication of the "real issue" doctrine adopted by some Florida district courts. *See Palm Beach Polo Holdings, Inc. v. Equestrian Club Estates Prop. Owners Ass'n, Inc.*, 22 So. 3d 140, 144 (Fla. 4th DCA 2009). The real issue doctrine has been applied when an action, other than a straightforward civil damages action, is being used to obtain money damages. Other districts have applied this doctrine where, for example, a plaintiff brought a declaratory action but "the only issue was money" or there was an interpleader action but "the real issue there was entitlement to a real estate commission." *Id.* at 143–44; *see also Tower Hill Signature Ins. Co. v. Javellana*, 238 So. 3d 372, 377 (Fla. 3d DCA 2017); *Polk Cnty. v. Highlands-in-the-Woods, L.L.C.*, 227 So. 3d 161, 163 (Fla. 2d DCA 2017). But those cases are substantively different from this one; a civil damages action in

which acceptance of the offer would have required Harris to do something other than pay money.

Plapp abandons this argument on appeal, perhaps in recognition of its flaws, and advances a new argument—that his demand for a retraction and an apology was meritless and not a legally cognizable form of relief. He claims therefore it should not count as a part of the "civil action for damages" under section 768.79. But the supreme court has addressed and rejected this argument. *Diamond* "reject[ed] a possible exception under section 768.79 for equitable claims that lack serious merit" based on the statute's text. *Diamond*, 107 So. 3d at 375. Section 768.79 deals exclusively with money and "if the Legislature had intended that section 768.79 contain an exception where an equitable claim lacks serious merit, it would have explicitly provided for such an exception." *Id.* at 375; *see also In re Amendments to Florida Rule of Civil Procedure 1.442*, 345 So. 3d 845 (Fla. 2022) (incorporating this understanding into the rules of civil procedure). The supreme court has long held that section 768.79 must be strictly construed because it is "in derogation of the common law rule that each party is responsible for its own attorney's fees." *Diamond*, 107 So. 3d at 376.

Plapp's demand for a retraction and an apology was a live claim when Harris rejected the offer and the demand was expressly included in the settlement offer. The construction and context of section 768.79 is clear that it gives parties a choice about money—it favors settlement and disfavors those who pursue meritless claims or defenses and incur additional costs.

For these reasons we REVERSE the portion of the trial court's final judgment awarding Plapp attorney's fees. The judgment is otherwise AFFIRMED.

ROWE, C.J., and B.L. THOMAS, J., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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