

IN THE COURT OF APPEALS OF IOWA

No. 8-474 / 07-1858
Filed December 31, 2008

MICHELLE CLAY,
Plaintiff-Appellee,

vs.

HY-VEE, INC.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Karen Romano,
Judge.

Defendant appeals from a district court judgment entered in favor of
plaintiff on plaintiff's defamation claim. **REVERSED AND REMANDED.**

Kenneth R. Munro, Des Moines, for appellant.

Jeffrey M. Lipman of Lipman Law Firm, P.C., Des Moines, and Rick Olson,
Des Moines, for appellee.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

MAHAN, J.

Hy-Vee, Inc. appeals from a district court judgment entered in favor of Michelle Clay on her claim for defamation. Hy-Vee argues there was insufficient evidence to support the court's finding that Hy-Vee abused its qualified privilege. We reverse and remand.

Clay was mistakenly arrested for fraudulently obtaining a prescription drug after Hy-Vee employees reported their allegation to the police. The report was based upon Hy-Vee having filled a prescription refill that came from the office of Andra Kennedy, a physician's assistant, but erroneously noted by Hy-Vee as having been originally called in by Dr. Susan Kennedy. When Hy-Vee called Dr. Kennedy's office to confirm the prescription (after it had already been refilled), Dr. Kennedy's office—not surprisingly—denied having any knowledge of the prescription. Hy-Vee employees called the police, and Clay was erroneously arrested and charged.

The trial court, sitting without a jury, considered the defamation claim. The court found the allegation of criminal conduct was defamation per se, but noted that the report to law enforcement of suspected criminal activity by Hy-Vee personnel was qualifiedly privileged. Thus, the court was required to determine whether that privilege had been lost.

Hy-Vee argues that the court wrongly based its finding of abuse of privilege on mere carelessness.

The district court found: "Hy-Vee's careless application of their own policy and procedure is sufficient to permit the conclusion that Hy-Vee entertained

serious doubts as to the truth of the statements made to the Des Moines Police.”

The court then specifically found:

The facts show that this is a situation where Hy-Vee knowingly failed to follow its own policy and to try to make up for that failure tried to confirm the prescription after it was dispensed and in doing so called the wrong medical office, thus leading to the misinformation given to law enforcement. *The court finds that Hy-Vee acted in reckless disregard for the truth of the statement given to law enforcement.* Hy-Vee abused the qualified privilege and is liable for damages caused to Plaintiff.

(Emphasis added.)

Because this matter was tried at law, our review is for the correction of errors of law. Iowa R. App. P. 6.4; *State v. Johnson*, 744 N.W.2d 646, 648 (Iowa 2008). Findings of fact in a law action are binding on appeal if they are supported by substantial evidence. Iowa R. App. P. 6.14(6)(a); *Harrington v. University of N. Iowa*, 726 N.W.2d 363, 365 (Iowa 2007). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *Beal Bank v. Siems*, 670 N.W.2d 119, 125 (Iowa 2003).

A qualified privilege is lost when it is abused. *Barreca v. Nickolas*, 683 N.W.2d 11, 118 (Iowa 1984). “[T]o defeat a qualified privilege, a plaintiff must prove the defendant acted with knowing or reckless disregard of the truth of the statement.” *Id.* at 120. “There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. . . . [T]he actual malice standard require[s] a high degree of awareness of . . . probable falsity.” *Id.* at 123 (quoting *Caveman Adventures UN, Ltd. v. Press-Citizen Co.*, 633 N.W.2d 757, 762 (Iowa 2001)).

We agree with the district court that the

facts show that this is a situation where Hy-Vee knowingly failed to follow its own policy and to try to make up for that failure tried to confirm the prescription after it was dispensed and in doing so called the wrong medical office, thus leading to the misinformation given to law enforcement.

However, this in no way establishes that Hy-Vee “entertained serious doubts as to the truth of” its statement to law enforcement. *Id.*

Our supreme court has stated that a failure to investigate, standing alone, ordinarily will not establish a knowing or reckless disregard for the truth. *Id.* Here, Hy-Vee did investigate its statement, but it did so negligently. Nonetheless, that is not evidence that its statement to law enforcement was made with a “high degree of awareness of . . . probable falsity” as enunciated in *Barreca. Id.*

We conclude the district court’s finding of abuse of privilege is not supported by substantial evidence. We therefore reverse and remand for entry of judgment consistent with this opinion.

REVERSED AND REMANDED.