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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1434**

Mark Molitor,
Appellant,

vs.

Stephanie Molitor,
Respondent.

**Filed April 24, 2017
Reversed and remanded
Jesson, Judge**

Dakota County District Court
File No. 19HA-CV-15-3213

Zorislav R. Leyderman, The Law Office of Zorislav R. Leyderman, Minneapolis, Minnesota (for appellant)

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Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

JESSON, Judge

Appellant Mark Molitor challenges the district court's grant of summary judgment in favor of respondent Stephanie Molitor, now known as Stephanie Saji, in this defamation action, which is based on Saji's statements to a physician regarding her concern that the

parties' child may have been sexually abused while in Molitor's care. Because genuine issues of material fact exist on whether Saji's statements were false and conveyed a defamatory meaning, and because the district court failed to address a defense of qualified privilege and whether actual malice exists to defeat such a privilege, we reverse and remand for further proceedings.

FACTS

Molitor and Saji were married in 2008, and their daughter was born in 2012. The parties separated in November 2013. About a week after the separation, when the child was staying with Molitor, he brought her to a well-child checkup. The child's physician reported that she was in good health.

The next day, Molitor turned the child over to Saji in a parenting exchange. According to Saji, the child was saying that her "butt hurt" and had a black stool. Saji performed an Internet search for these symptoms, which indicated that they could be related to sexual abuse. She called a sexual abuse hotline, reported the symptoms, and was advised to take the child to the emergency room.

At Fairview Ridges Hospital, Dr. Lucas Mailander examined the child. Mailander noted that Saji brought the child in with "concerns of sexual abuse." Saji told Mailander that the child had stayed at her father's home for the last four nights, even though she was supposed to stay for only one night, and that when Saji picked her up, she appeared unkempt and would not look at her mother. Saji also reported that the child had a black and tarry stool, was pulling at her backside and seemed uncomfortable, and was reluctant to wear a diaper. Saji stated that the child appeared more clingy than usual, but she believed

that this was because they had never been separated before for more than 48 hours. Saji told the doctor that Molitor had sexually abused her during the marriage and had once hit the child on the nose “like a dog,” but had not shown any other abusive behavior toward the child.

Mailander performed an exam, which showed normal findings and no signs of sexual abuse. He contacted the Midwest Children’s Resource Center, which did not recommend an immediate evaluation, but offered to follow up at Saji’s option. The child was then discharged.

The next month, Saji filed a petition to dissolve the parties’ marriage. In September 2015, nine months after the dissolution was final, Molitor commenced a district court action, claiming that Saji had made false statements that he had sexually abused the child, which constituted defamation per se because they were circulated to third parties and falsely accused him of committing a crime.

Saji moved for summary judgment, which Molitor opposed. After a hearing, the district court granted summary judgment in favor of Saji, stating that the record lacked any evidence to support the assertion that she had made false statements that Molitor had sexually abused the child. The district court determined that the information that Saji provided to the physician was factually correct and truthful, so that the statements were not actionable. The district court therefore did not reach Saji’s additional claim that the statements were protected by a qualified privilege. The district court also declined to consider Molitor’s additional argument that the statements constituted defamation by

implication, noting that this claim had not been alleged in the complaint, and it would not address a cause of action not pleaded and of which Saji lacked notice. This appeal follows.

D E C I S I O N

Summary judgment is proper if the pleadings, answers to interrogatories, depositions, and admissions on file, together with the affidavits submitted, demonstrate that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. Minn. R. Civ. P. 56.03. This court reviews the district court's grant of summary judgment de novo to determine whether any genuine issues of material fact exist and whether the district court erred in its application of the law. *Bol v. Cole*, 561 N.W.2d 143, 146 (Minn. 1997). This court examines the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Molitor argues that the district court erred by granting summary judgment in favor of Saji on his claim of defamation. Under Minnesota law, a statement is actionable as defamation if it is false, was communicated to a third party, and tended to harm the plaintiff's reputation or to lower that person in the estimation of the community. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980) (citing Restatement (Second) of Torts §§ 558-59 (1977)). A false statement that a person has committed a crime or sexual misconduct is defamatory per se. *Anderson v. Kammeier*, 262 N.W.2d 366, 372 (Minn. 1977); *Hammersten v. Reiling*, 262 Minn. 200, 206, 115 N.W.2d 259, 264 (1962). If a statement is defamatory per se, damages are presumed and may be recovered without

proof of actual harm to the plaintiff's reputation. *Schlieman v. Gannett Minn. Broad., Inc.*, 637 N.W.2d 297, 307 (Minn. App. 2001), *review denied* (Minn. Mar. 19, 2002)..

Molitor argues that he presented genuine issues of material fact concerning whether Saji made false statements to the physician and whether they carried a defamatory meaning. He also alleges that the statements tended to harm his reputation in the community. In its order granting summary judgment, the district court stated that the record referenced only Saji's direct observations about the child's symptoms and that Molitor had presented no evidence that these statements were false. Molitor argues, however, that Saji's statements to the physician, taken both individually and in context, falsely accused him of sexual misconduct. We examine the substance of Saji's statements to review whether they present material issues of fact regarding a defamatory meaning and truth or falsity. We then address whether a qualified privilege applies to those statements.

I. The complaint sufficiently alleges factual statements that, taken in context, raise genuine issues of material fact as to whether they carry a defamatory meaning and are false.

To be actionable in defamation, the defendant's statements must be false statements of fact that are capable of conveying a defamatory meaning. *Jadwin v. Minneapolis Star & Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986). Whether a statement is defamatory depends on how ordinary people would interpret its language in light of the circumstances. *Gadach v. Benton Cnty. Co-Op. Ass'n*, 236 Minn. 507, 510, 53 N.W.2d 230, 232 (1952); *see Utecht v. Shopko Dep't Store*, 324 N.W.2d 652, 653 (Minn. 1982) (noting that a publication may either be defamatory on its face or "carry a defamatory meaning only by reason of extrinsic circumstances"). "Context is critical to meaning

because a false statement that is defamatory on its face may not be defamatory when read in context, and a statement that is not defamatory on its face may, in fact, be defamatory when read in context.” *Schlieman*, 637 N.W.2d at 304.

Whether a statement is capable of conveying a defamatory meaning presents a question of law, which we review de novo. *Id.* at 307. If words are capable of a defamatory meaning, a jury then must decide whether they were actually defamatory. *LeDoux v. Nw. Publ’g, Inc.*, 521 N.W.2d 59, 68 (Minn. App. 1994), *review denied* (Minn. Nov. 16, 1994).

We conclude that, taken in context, as reflected in the medical record created at the emergency-room visit, Saji made statements that are capable of a defamatory meaning. The medical record begins with the phrase that the child “presents with mother due to concerns of sexual abuse.” It states that Saji reported that Molitor had “lightly hit [the child] on the nose ‘like a dog’”; had “kept her for the last 4 nights” when she was only supposed to stay for one night; and had returned her “unkempt.” Saji stated that once at home, the child was “more clingy than usual”, had a “dark and tarry” bowel movement, and kept “pulling at her backside.” The physician ends the medical record by noting that “[Saji] was concerned that the patient may have been abused in some way.”

Collectively and in context, Saji’s detailed statements to the physician about the child’s unusual behavior and condition immediately after returning from Molitor’s home could reasonably convey the implication that he may have abused the child during her stay with him. Saji argues that she never directly accused Molitor of sexually abusing the child. But the medical record reflects that she told the physician that Molitor had been sexually abusive of her during the parties’ marriage and that she brought the child in “due to

concerns of sexual abuse” after a stay with Molitor. Therefore, a jury question exists as to whether these statements actually conveyed a defamatory meaning, and the district court erred by concluding that Molitor failed to present the existence of a genuine issue of material fact on this issue.¹ See *Schlieman*, 637 N.W.2d at 304.

Saji further argues that her statements to the physician do not carry a defamatory meaning because they are “pure opinion,” which is protected from defamation claims by the First Amendment. *McKee v. Laurion*, 825 N.W.2d 725, 733 (Minn. 2013). Generally, only statements of fact that can be proven true or false are actionable as defamatory. *Lund v. Chicago & Nw. Transp. Co.*, 467 N.W.2d 366, 369 (Minn. App. 1991), *review denied* (Minn. June 19, 1991). If a statement cannot be reasonably interpreted as stating facts and cannot be proven true or false, it qualifies as a statement of pure opinion. Thus, calling someone a “real tool” amounts to a statement of opinion, which cannot be the basis for a

¹ We note Molitor’s additional argument that the district court erred by failing to address a theory of defamation by implication, which was not pleaded specifically in the complaint. In 1990, the Minnesota Supreme Court articulated the principle that if a defendant juxtaposes facts, implying a defamatory connection between them, or omits facts to create a defamatory implication, he may be held responsible for that implication, unless it qualifies as an opinion, even though the specific facts are correct. *Diesen v. Hessburg*, 455 N.W.2d 446, 450 (Minn. 1990). In *Diesen*, the supreme court held that a public-official defamation plaintiff could not base a defamation action on true statements that carried allegedly false implications. *Id.* at 451-52. This court has recognized, however, that “*Diesen* does not modify the general principle that courts must interpret the defamatory-meaning element of a defamation action in light of the context surrounding the alleged defamatory statements.” *Schlieman*, 637 N.W.2d at 304. Although Saji argues that defamation by implication is a separate cause of action, which must be particularly alleged, we agree with Molitor that defamation by implication is a theory, which need not be specifically pleaded. And we note that, even if we were to address a theory of defamation by implication, based on our contextual analysis of the allegedly defamatory statements, we would reach the same result. See *id.*

defamation claim. *McKee*, 825 N.W.2d at 733. In contrast, a statement that implies the existence of a certain kind of reprehensible conduct, such as that a person is “dishonest,” is actionable in defamation. *Weissman v. Sri Lanka Curry House, Inc.*, 469 N.W.2d 471, 473 (Minn. App. 1991). Here, because Saji’s statements can be reasonably interpreted as to convey that Molitor committed sexual abuse, they are not protected expressions of opinion. *See id.* Thus, they may be actionable to support his claim of defamation per se. *Anderson*, 262 N.W.2d at 372.

We next examine the issue of falsity. The plaintiff in a defamation action must show that the allegedly defamatory statement is false. *Stuempges*, 297 N.W.2d at 255. A statement is false if it is substantially inaccurate; if a statement is true in substance, minor inaccuracies of detail or expression are immaterial. *McKee*, 825 N.W.2d at 730. As a general rule, in a defamation action, the truth or falsity of a statement presents a question for the jury to resolve. *Id.*

The district court determined that Saji’s statements, taken individually, were true and that the record did not present a material factual issue on the issue of truth or falsity. But in an affidavit, Molitor challenged the substantial truth of Saji’s statements, alleging that she made false accusations to further her attempt to gain custody of the child. He alleged that the week before the child’s emergency-room visit, Saji had told him that she would do “whatever it takes” to remove him from the child’s life. He alleged, in contrast to Saji’s statement to the physician, that he had not kept the child for longer than scheduled. He produced evidence showing that the day before the emergency-room visit, he had taken the child for a scheduled 15-month well-child visit, which showed that she was in good

health. And he alleged that Saji had unexpectedly failed to attend that appointment, which, he believed, allowed her to fabricate a reason to take the child to the emergency room the next day.

At this summary-judgment stage, we must review the evidence in the light most favorable to Molitor, the party against whom summary judgment was granted. *Fabio*, 504 N.W.2d at 761. Taken as a whole and in context, Saji's statements were capable of conveying the defamatory meaning that Molitor had sexually abused the child. Molitor's affidavit disputes this general allegation, as well as several other statements in the medical report, such as the status of the child's health based on the well-child visit on the previous day. We therefore disagree with the district court and conclude that Molitor has presented a genuine issue of material fact as to the truth or falsity of Saji's statements to the emergency-room physician.

II. Issues of whether a qualified privilege protects Saji's statements to the physician, and whether actual malice defeats that privilege, are properly addressed by the district court.

Our examination of the elements of defamation does not, however, end the inquiry. Even if a plaintiff has sufficiently alleged material factual issues on the elements of defamation, a defamation action may be defeated on the ground that the defendant is entitled to a qualified privilege for his or her remarks.² *Bol*, 561 N.W.2d at 149. Because

² Courts also recognize a defense of absolute privilege, which applies only in limited circumstances, such as to statements of government officials in certain contexts. *Zutz v. Nelson*, 788 N.W.2d 58, 62 (Minn. 2010). Absolute privilege grants immunity even for intentionally false statements coupled with malice, while qualified privilege applies only if the privilege is not abused and defamatory statements are published in good faith and without malice. *Id.*

the district court determined that no genuine issue of material fact existed on whether Saji's statements were defamatory, it did not reach the issue of whether a qualified privilege protected those statements.

The policy behind the assertion of privileges in defamation actions recognizes that the end to be gained by permitting defamatory statements in certain circumstances outweighs the harm that may be done to another's reputation. *Zutz v. Nelson*, 788 N.W.2d 58, 61-62 (Minn. 2010). A qualified privilege applies when a court determines that statements made in certain contexts should be encouraged, despite a risk that the statements might be defamatory. *Bol*, 561 N.W.2d at 149. To be protected by a qualified privilege, the statement must be "made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause." *Stuempges*, 297 N.W.2d at 256-57 (quotation omitted). Thus, appellate courts have held that a qualified privilege applied to reports of child abuse made to a psychologist, *Bol*, 561 N.W.2d at 145, and to a physician's notations regarding concerns of child abuse by a parent. *Strauss v. Thorne*, 490 N.W.2d 908, 911-12 (Minn. App. 1992), *review denied* (Minn. Dec. 15, 1992). Whether a qualified privilege applies presents a question of law for the court. *Bol*, 561 N.W.2d at 149.

Here, the parties dispute whether the statements were made "upon a proper occasion, [and] from a proper motive." *Stuempges*, 297 N.W.2d at 256-57. Because the district court did not rule on the issue of privilege, it is appropriate to remand this matter to the district court for an examination of whether a qualified privilege applies to Saji's remarks. *See Bol*, 561 N.W.2d at 149; *see also Taylor v. LSI Corp. of Am.*, 796 N.W.2d

153, 157 (Minn. 2011) (remanding for district court to address additional issue when district court erred by granting summary judgment on different ground).

We further note that, even if the district court determines as a matter of law that a qualified privilege exists, it must then address whether there is any issue of fact regarding whether the statements were published with actual malice, which will defeat the privilege. *See Strauss*, 490 N.W.2d at 912. Minnesota common law defines actual malice as made from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff. *Frankson v. Design Space Int'l*, 394 N.W.2d 140, 144 (Minn. 1986).³ Whether a qualified privilege has been defeated through abuse, meaning that the defendant has acted with actual malice, generally presents a question of fact for the jury, but it may be determined at summary judgment if the record is insufficient to create a material factual issue. *Id.*; *see Bol*, 561 N.W.2d at 143.

We therefore remand to the district court for further proceedings to address the issue of a qualified privilege and, if a privilege is determined to exist, whether a jury question remains on actual malice. In its review, the district court may wish to reopen the record to receive additional evidence, such as information from the parties' dissolution, and other material, at the court's discretion.

Reversed and remanded.

³ Common law malice differs from the standard of constitutional malice applicable to public-figure plaintiffs, which requires proof that the defendant published the statements with knowledge that they were false or with reckless disregard for their truth or falsity. *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 481 n.5 (Minn. 1985) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 726 (1964)).