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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 September 15, 2009
Affirmed
Schellhas, Judge**

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

Mitchell J. Brunfelt, Colosimo, Patchin, Kearney & Brunfelt, Ltd., 301 Chestnut Street, Virginia, MN 55792 (for respondent)

John Harper III, Benjamin J. Court, Krass Monroe, P.A., 8000 Norman Center Drive, Suite 1000, Bloomington, MN 55437 (for appellants)

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

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant Stacy Rasmussen argues that the district court erred in denying his motions for judgment as a matter of law (JMOL) in this defamation action. This court reversed the denial of JMOL, concluding that the evidence did not support a finding of

malice. Upon review, the supreme court reversed, explaining that the record evidence “could lead a reasonable jury to find that Rasmussen published the defamatory statements from ill will and in an effort to cause employment problems for Bahr, and that Rasmussen therefore acted with actual malice.” *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 922 (Minn. 2009). The supreme court held “that the district court did not err in denying respondent’s motions for JMOL as to Rasmussen’s actual malice.” *Id.* The supreme court noted that this court “did not resolve the other legal issues presented by respondents including whether the statements were protected statements of opinion, were true and therefore not defamatory, and were not defamatory per se.” *Id.* Accordingly, the supreme court remanded the defamation claim against Rasmussen to this court “for consideration of these issues.” *Id.* Upon consideration of these issues, we affirm the district court’s denial of Rasmussen’s motions for JMOL.

FACTS

The procedural history and pertinent facts, as noted by the supreme court, are:

The record reflects that Bahr and Rasmussen were employed as stores keepers at the Boise paper mill in International Falls, Minnesota, when the events at issue in this action occurred. Stores keepers are employed to handle stock in the warehouse at the Boise mill. Dobbs, who is Rasmussen’s uncle, was Bahr’s supervisor. This action arises from events that occurred at the Boise mill on September 27, 2001 and on October 18, 2001. Because these events form the basis of this action, we discuss them in some detail.

September 27, 2001

On the morning of September 27, 2001, three Boise stores keepers told Rasmussen that they had heard a rumor that Rasmussen had been involved in an extramarital affair

with another stores keeper, R.B. The stores keepers did not identify the source of the rumor, but they told Rasmussen that he was scheduled to work with the person who started it. Rasmussen then learned that he was scheduled to work that day in the West Warehouse, where Bahr worked. Rasmussen became agitated and paced up and down the loading ramp, apparently upset both by the rumor and by a special work assignment he received that day. Two of Rasmussen's co-workers heard him say, "I have to work with that lazy, fat f* * *er." The two co-workers understood the comment as a reference to Bahr. Rasmussen testified that he did not mean for his co-workers to hear the comment.

Later that morning, Rasmussen went to R.B.'s office to talk about the rumor. R.B. had already learned of it from the same stores keepers, who had told her that Bahr started the rumor. With Rasmussen in her office, R.B. telephoned the storeroom area where Bahr was working. Bahr answered the phone and denied starting the rumor, then passed the phone to another stores keeper, who also denied starting the rumor. That stores keeper passed the phone to a third stores keeper, J.P., who admitted to R.B. that he started the rumor. Rasmussen remained in R.B.'s office during the phone call and stayed several minutes afterward. Rasmussen testified that he did not know with whom R.B. spoke on the phone and that he did not learn the source of the rumor that day. According to Rasmussen, he learned that J.P. started the rumor "within a few weeks" of September 27, 2001.

Rasmussen testified that, later that morning, Bahr, J.P., and a third stores keeper confronted Rasmussen about the phone call. Rasmussen testified that he "felt threatened and harassed" by them, and said that he would be setting up a meeting with Jack Strongman, the Director of the Human Resources Department, about it. Rasmussen also said that he immediately reported the incident within the company to the Boise Controller, although he would have reported it to Dobbs if Dobbs had not been on vacation.

At trial, Bahr and J.P. testified about individual efforts to discuss the rumor incident with Rasmussen. Bahr testified that he tried to find out why Rasmussen was upset with him, but that Rasmussen would not talk to him, saying only that

there was going to be a meeting with Human Resources. Bahr said that he asked Rasmussen about the Human Resources meeting twice in the following weeks, but both times Rasmussen said that a meeting had not been set up and that he could not talk about it.

J.P. testified that he tried to “patch things up” with Rasmussen the same day he told R.B. he was the source of the rumor, but that Rasmussen would not talk to him. Bahr described to the jury that he saw J.P. trying to talk to Rasmussen and that, while he could not hear what they were saying, he saw Rasmussen “hollering” and waving his arms during the exchange. Another stores keeper described seeing the exchange between J.P. and Rasmussen, and she said that Rasmussen was “hollering,” but she could not hear about what.

October 18, 2001

On October 18, 2001, Bahr asked Rasmussen about the Human Resources meeting a third time, but Rasmussen said he had not heard back about it. Bahr told Rasmussen that Bahr had contacted Jack Strongman and knew that Rasmussen had not set up the meeting. According to Rasmussen, Bahr was seated on a forklift truck when he questioned Rasmussen about the Human Resources meeting, and Rasmussen stood on a ramp at least five feet away, at eye-level with Bahr. Rasmussen testified that Bahr told him that Bahr had caught Rasmussen in a lie and that Rasmussen could lose his job.

Bahr testified, however, that he told Rasmussen that he had seen Jack Strongman, who said there was no meeting set up. Bahr said that he told Rasmussen he believed that Rasmussen was calling Strongman a liar in saying that Rasmussen was waiting to hear back from Strongman about a meeting. Bahr explained at trial that Rasmussen responded by throwing up his arms, hollering, and screaming as he turned to go down the ramp. Bahr testified that during this encounter he spoke to Rasmussen in a “normal, everyday voice.” Another stores keeper, G.U., who stood 20 to 30 feet from Rasmussen and Bahr at the time, reported that he did not hear any voices raised during the Bahr/Rasmussen exchange.

Rasmussen telephoned Dobbs at approximately 10 a.m. that morning, October 18, 2001, to discuss the encounter he had with Bahr. Rasmussen told Dobbs that everywhere he went in the mill he was being confronted by Bahr. Dobbs' notes of the telephone call indicate that Rasmussen said that Bahr "had approached him . . . in a threatening manner," and that as a result of the encounter, Rasmussen "thought he could no longer do his job without constantly being intimidated and harassed." Dobbs told Rasmussen to stay where he was and that Dobbs would get back to Rasmussen.

Dobbs immediately called Barb Johnson, a Boise Human Resources Coordinator. Johnson instructed Dobbs to speak with Rasmussen again, to write down Rasmussen's information, and to report back to her with that information. Johnson did not instruct Dobbs to get information from Bahr about the incident. Dobbs then met with Rasmussen and took notes about Rasmussen's account of what happened that morning. During this meeting, Rasmussen repeated that Bahr approached him in a "threatening manner," and Rasmussen said that Bahr told him that "things were going to change" at the mill. Dobbs testified at trial that Rasmussen was "clearly agitated" and "upset" during the meeting. Dobbs then telephoned Johnson and related Rasmussen's account. Johnson instructed Dobbs to have Bahr escorted from the building and placed on "investigatory suspension." Johnson again did not instruct Dobbs to seek information from Bahr as to his side of the events, and Dobbs did not do so.

Dobbs followed up by escorting Bahr off the premises at approximately 11 a.m. on October 18, 2001. Bahr testified that when he asked Dobbs for a reason why he had to leave, Dobbs replied that he could not talk to Bahr. Dobbs testified that he told Bahr that the company received a complaint against him and he needed to send Bahr home. After being escorted from the Boise premises, Bahr visited his union representative to initiate a grievance against Boise. The union representative contacted Dobbs, who responded that he could not discuss why Bahr was escorted from the building.

Boise Investigation

That afternoon, at 2 p.m., Rasmussen and R.B. met with Betty Leen, another Boise Human Resources Coordinator, to file an informal harassment complaint against Bahr. According to Leen's notes, Rasmussen and R.B. made three allegations of misconduct: (1) Bahr started the rumor about Rasmussen having an affair with R.B.; (2) Bahr "yells and shouts and he is almost to the point of physical violence"; and (3) Bahr "will do as little as possible because he is mad at Boise." Because Rasmussen was "worried" that Bahr would "put something in it," Rasmussen told Leen that he checks his "lunch bucket" and his "garage at home."

Based on the complaint, Boise began an investigation of the allegations against Bahr. On October 19, 2001, Betty Leen met with Bahr and the union representative as part of the investigation. According to Leen's notes, Bahr "denie[d] everything," and said that Rasmussen has been angry because he had to "do stock in the West Warehouse" (where Bahr works). Bahr also said that Dobbs harasses Bahr.

In addition to interviewing Bahr, Leen spoke with two other stores keepers that day as part of the investigation. After she completed these interviews, Betty Leen gave her notes to Barb Johnson, who continued the investigation.

On October 22, 2001, Johnson met with Rasmussen. The union representative was also present. Rasmussen described the October 18 encounter with Bahr, stating that Bahr was "yelling" and "threaten[ed] saying [you're] in deep shit!" and "you're going to get your day!" About the affair rumor, Rasmussen stated that both J.P. and Bahr were the source. He also said that he was "afraid of [Bahr] planting something" in his lunch or garage "now that [Rasmussen has] stepped up for [himself]." Rasmussen also said that Bahr does not want other employees to work faster than Bahr does and that Bahr "has said to slow down work."

Johnson also interviewed three other stores keepers who worked with Rasmussen and Bahr. She interviewed J.P. via telephone on October 22, 2001, and he confirmed that he

was the source of the affair rumor. She also interviewed J.S., a Boise stores keeper who voluntarily went to Johnson to support Rasmussen. J.S. said that he believed Rasmussen, that he also had had difficult encounters with Bahr, and that Bahr had said “not to work so fast.”

On October 23, 2001, Johnson interviewed the third stores keeper, and she said that Bahr had never said anything to her about slowing down the work.

On October 25, 2001, Barb Johnson interviewed Bahr. Dobbs and the union representative were also present. Bahr described the October 18 encounter with Rasmussen and denied threatening him in any way. Johnson asked Bahr about the specific allegations Rasmussen had made, and Bahr denied any misconduct.

At the end of the interview, Johnson and Dobbs conferred privately and a decision was made that Bahr would be suspended for three days and asked to sign a “last-chance agreement.” Bahr testified that Johnson and Dobbs were gone for only a short time, and that when they returned to the room, they told him about the discipline. Bahr’s theory at trial was that Boise had decided to discipline him even before Boise sought his side of the story. Boise denied this and Johnson testified that a preliminary decision was made to discipline Bahr but that it was dependent on what Boise learned from him.

The “last-chance agreement” required Bahr’s signature as an indication that he accepted the discipline. Under the “last-chance agreement,” Bahr would have had to acknowledge Rasmussen’s allegations of harassment and agree that, if he committed one more violation of company policy, he could be terminated. Bahr told the company representatives that he would not sign the “last-chance agreement,” and Boise subsequently withdrew it, but the three-day suspension remained in place.

On November 14, 2001, Bahr filed a grievance concerning the three-day suspension that was settled on May 27, 2003. The settlement included that all incidents and

reports were erased from Bahr's record and Bahr was refunded his lost pay from the suspension.

Defamation Action

Bahr filed the present defamation lawsuit in September 2003. In his complaint, Bahr alleged that, on October 18, 2001, Rasmussen "communicated to Dobbs a false and defamatory statement." Bahr further alleged that both Dobbs and other "management level employees of Boise" communicated these statements to "additional parties." Respondents moved for summary judgment, which the district court denied. During trial, respondents moved under Minn. R. Civ. P. 50.01 for JMOL at the close of Bahr's case in chief, arguing that a qualified privilege applied to the statements at issue and that Bahr had not shown malice sufficient to defeat the privilege. The district court denied this motion. At the close of the evidence, respondents again moved under Minn. R. Civ. P. 50.01 for JMOL on the same grounds. The court again denied the motion and found sufficient evidence to create a fact question for the jury as to the existence of actual malice.

The jury found in favor of Bahr against Boise and Rasmussen, but determined that Dobbs had not made any defamatory statements. After trial, respondents renewed their motion for JMOL under Minn. R. Civ. P. 50.02 on the same grounds as the earlier motions. After a hearing, the district court denied the motion. Respondents appealed, and the court of appeals reversed. *Bahr*, 2008 WL 2966433, at *6. The court of appeals held that the district court erred in submitting to the jury the question of actual malice as to both respondents, Rasmussen and Boise. *Id.* We granted Bahr's petition for review.

Bahr, 766 N.W.2d at 913-17 (alteration in original) (footnotes omitted).

DECISION

An appellate court reviews de novo a district court's denial of a motion for JMOL.

Id. at 919 & n.10. We apply the same standard employed by the district court." *Id.* at

919. “If reasonable jurors could differ on the conclusions to be drawn from the record, [JMOL] is not appropriate.” *Id.* “[W]e view the evidence in the light most favorable to the prevailing party, which in this case is Bahr.” *Id.*

“To establish a defamation claim, a plaintiff must prove three elements: (1) the defamatory statement is communicated to someone other than the plaintiff, (2) the statement is false, and (3) the statement tends to harm the plaintiff’s reputation and to lower the plaintiff in the estimation in the community.” *Id.* at 919-20 (quotation omitted).

On remand, we consider the legal issues presented by Rasmussen, including whether Rasmussen’s statements were (1) protected statements of opinion or true and therefore not defamatory and (2) defamatory per se.

Protected Statements of Opinion or True Statements

“Only statements that present or imply the existence of fact that can be proven true or false are actionable under state defamation law.” *Marchant Inv. & Mgmt. Co. v. St. Anthony W. Neighborhood Org., Inc.*, 694 N.W.2d 92, 95 (Minn. App. 2005) (quotation omitted). “Thus, if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.” *Id.* at 95-96 (quotation omitted). And, “[t]ruth . . . is a complete defense, and true statements, however disparaging, are not actionable.” *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980).

Although Rasmussen argues that he was merely expressing his opinion when he reported to Boise Human Resources that he felt he was harassed by Bahr, according to Leen's notes, Rasmussen and R.B. also alleged that Bahr started the rumor that Rasmussen was having an affair with a co-worker and that Bahr will do "as little as possible" at work. These allegations are provable factual statements and are thus potentially actionable as defamatory. The question in this appeal is whether reasonable jurors could draw different conclusions based on the evidence. *See Bahr*, 766 N.W.2d at 919. Here, reasonable jurors could draw different conclusions regarding whether the statements at issue were, in fact, false. We therefore reject Rasmussen's argument that JMOL should have been granted on the grounds that Rasmussen's allegedly defamatory statements were either protected statements of opinion or true statements.

Defamation Per Se

On appeal, Rasmussen argues that the allegedly defamatory statements did not constitute defamation per se. "If the defamation affects the plaintiff in his business, trade, profession, office or calling, it is defamation per se and thus actionable without any proof of actual damages." *Id.* at 920 (quotation omitted). The statement must be particularly harmful to plaintiff in his business, and general disparagement is not enough. *High v. Supreme Lodge of the World, Loyal Order of Moose*, 214 Minn. 164, 167, 7 N.W.2d 675, 678 (1943) (stating that comments directed at an individual as a person and without regard to his profession are not defamatory per se). Statements that are defamatory per se are actionable without proof of damages, as damages are presumed. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987).

Here, “[i]n a special verdict form, the jury found that Rasmussen made statements that were defamatory per se.” *Bahr*, 766 N.W.2d at 920. The question on appeal is whether reasonable jurors could draw different conclusions from the evidence. *See id.* at 919. In viewing the evidence in the light most favorable to Bahr, the record contains sufficient evidence for reasonable jurors to draw different conclusions about whether Rasmussen falsely accused Bahr of doing “as little as possible” on the job and not finishing his work and whether these allegations were particularly harmful to Bahr as a stores keeper. We conclude that the district court did not err when it denied JMOL to Rasmussen.

Affirmed.