STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0221

Marcus P. Desmonde,
Appellant,

vs.

Nystrom & Associates, Ltd.,
Respondent.

Filed August 25, 2009
Affirmed
Hudson, Judge

Ramsey County District Court
File No. 62-CV-08-1181

Patrick T. Tierney, Thomas E. McEllistrem, Collins, Buckley, Sauntry & Haugh, PLLP, W-1100 First National Bank Building, 332 Minnesota Street, St. Paul, Minnesota 55101 (for appellant)

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Considered and decided by Toussaint, Chief Judge; Shumaker, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

Appellant brought a complaint against respondent for defamation and interference with appellant's prospective business relationships. On appeal, appellant argues that the district court erred by granting summary judgment in favor of respondent on both claims.

Because the alleged defamatory statements were protected by qualified privilege, and because appellant's business-interference claim was barred, we affirm.

FACTS

Respondent Nystrom & Associates, Ltd., is a group of mental-health professionals who provide clinical services throughout Minnesota. Wendy Schimenek is the office manager at respondent's Duluth clinic. On December 22, 2006, a pharmacy in Eau Claire, Wisconsin, called Schimenek to clarify a prescription written by Dr. Kenneth Bromen, a licensed psychiatrist who provided services at the Duluth clinic. The prescription was submitted to the pharmacy by appellant Marcus P. Desmonde, a licensed psychologist and Bromen's colleague.

Schimenek notified the pharmacy that appellant was not a patient at the clinic and that Bromen was not working on December 21, 2006—the date noted on the prescription. A few minutes later, the pharmacy called back and asked to speak to Bromen. Schimenek explained that Bromen was not in the office and that he only worked for respondent one day per week. She also reiterated that there was no record that appellant was ever a patient at the clinic. Additionally, Schimenek explained that the medication on the prescription—a narcotic pain medication—was not a medication that respondent, as a mental health facility, or Bromen, as a psychiatrist, would prescribe.

After the second call from the pharmacy, Schimenek went into the medical offices at the clinic and found that Bromen's prescription pad was unsecured. There had been minor theft problems at the clinic so Schimenek called the clinic's cleaning services to see if they had an employee named Marcus Desmonde who could have taken a

prescription pad. Schimenek also left a message with the administrative coordinator for all of respondent's clinics, apprising her of the situation. Schimenek then called her husband—a Douglas County deputy sheriff—and told him that she planned to contact the police department about the prescription. He agreed with her plan to call the police. He also indicated that he did not know appellant.

Schimenek contacted the Duluth police department to report the situation. The police report states that the investigating officer was "dispatched to place a phone call to [Schimenek] at Nystrom and Associates in reference to a theft of several prescription pads." The report also states that "it was determined an unknown suspect had stolen at least one prescription pad and was attempting to forge prescriptions on the pad from Dr. Bromen," and that "one was forged in Eau Claire by [appellant]."

Schimenek then called the pharmacy to tell them that she contacted the police and she encouraged the pharmacy to do the same. The pharmacy reported the incident to the Eau Claire police department, and the Eau Claire police subsequently contacted Schimenek. Schimenek confirmed that there was no record that appellant was a patient at the Duluth clinic and that Bromen was not working on the date noted on the prescription.

The next day, appellant called Bromen and told him that he (appellant) was being investigated by police in connection with the prescription. Bromen then called the Eau Claire police and informed them that the prescription was legitimate. Appellant was suffering from lower back pain and had requested the prescription at an informal meeting with Bromen on December 20, 2006. Although Bromen issued the prescription on December 20, he mistakenly wrote the wrong date—December 21—on the prescription.

Bromen reported the same information to the Duluth police and both police departments closed their respective investigations.

As a licensed psychologist in both Minnesota and Wisconsin, appellant was required to report the investigations to each state's licensing board. Brian Nystrom—a licensed social worker and, according to appellant, respondent's president—also filed complaints with the Minnesota and Wisconsin licensing boards, detailing the events that gave rise to the investigations. Nystrom filed the complaints in good faith, believing that appellant's attempt to obtain a prescription without a medical evaluation was "conduct unbecoming of a psychologist." Nystrom also reported that appellant appeared to be seeking money from respondent and threatening litigation.

Appellant sued respondent for defamation, claiming that respondent deliberately published false statements about appellant when Schimenek told police that appellant broke into respondent's Duluth clinic, stole prescription pads, and forged a controlled-substance prescription. Appellant also claimed that Schimenek's statements interfered with his prospective business relationships.

Respondent moved the district court for summary judgment, arguing that Schimenek did not tell police that appellant stole prescription pads or that he forged the prescription. Instead, Schimenek merely reported the facts of the incident; therefore, Schimenek's statements were true. Respondent also asserted that Schimenek's statements were protected by qualified privilege. Respondent further argued that appellant's business-interference claim merged with his defamation claim because it was based on the same allegations as the defamation claim.

In response, appellant argued that Schimenek's statements were indeed false, given the context in which they were made and their implications. Appellant also claimed that the statements were not protected by qualified privilege because the statements were not based on reasonable or probable cause, and that even if they were privileged, the privilege was lost because respondent acted with actual malice. Appellant suggested that Nystrom's complaint to the licensing boards was proof that respondent acted with the intent to harm appellant. Additionally, appellant argued that he could maintain both a defamation claim and a business-interference claim against respondent.

The district court granted respondent's motion for summary judgment, finding that respondent did not make any defamatory statements about appellant. According to the district court, there was no evidence in the record that Schimenek directly accused appellant of stealing prescription pads or forging the prescription. Instead, "[t]he evidence only support[ed] the conclusion that an assumption was made by police and Ms. Schimenek that it was possible that a prescription pad was stolen and someone was trying to forge a prescription for narcotics."

In regard to the comments in the police report, the district court concluded that "[t]he reports contain[ed] no quotation marks which would be indicative that the statements were being made by Ms. Schimenek," and that Schimenek "cannot be held to have made an accusation about [appellant] simply because the police instituted an inquiry." The district court also held that even if Schimenek made the defamatory statements, she made them upon a reasonable suspicion of a possible theft and forgery; thus, the statements were privileged.

Additionally, the district court noted that Nystrom's complaints to the licensing boards were "insufficient evidence of any false or defamatory statements about [appellant]." Finally, the district court concluded that defamation was an essential element of appellant's business-interference claim, and because no defamation occurred, appellant's business-interference claim must also fail. This appeal follows.

D E C I S I O N

Appellant challenges the district court's grant of summary judgment in favor of respondent. Summary judgment is appropriate "when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citing Minn. R. Civ. P. 56.03). On appeal from summary judgment, we review the record to determine whether there is any genuine issue of material fact and whether, in granting summary judgment, the district court committed an error of law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We "view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio*, 504 N.W.2d at 761.

The moving party has the burden of showing the absence of a genuine issue of material fact. *Anderson v. State, Dep't of Natural Res.*, 693 N.W.2d 181, 191 (Minn. 2005). To defeat a summary-judgment motion, the nonmoving party cannot rely on denials or general averments, but must offer specific facts to show that there is a genuine issue of material fact for trial. Minn. R. Civ. P. 56.05; *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). No genuine issue of material fact exists "when the nonmoving

party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc.*, 566 N.W.2d at 71; *see also Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006) ("A party need not show *substantial evidence* to withstand summary judgment. Instead, summary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions.").

I

The district court held that there was no evidence in the record that respondent made defamatory statements about appellant. *See Weinberger v. Maplewood Review*, 668 N.W.2d 667, 673 (Minn. 2003) (stating that a plaintiff pursing a defamation claim must show, inter alia, that the defendant made a false and defamatory statement about the plaintiff). We disagree. In reaching its conclusion, the district court relied primarily on the fact that Schimenek—in an affidavit and in her deposition—specifically denied telling police that prescription pads had been stolen or that there was an attempt to forge a prescription. But in an additional written statement that Schimenek made after the incident, Schimenek said that she called police "to report a theft." Although this statement does not directly allege appellant's involvement in theft or forgery, the statement contradicts what Schimenek said in her affidavit and deposition, thereby creating a genuine issue of material fact regarding what Schimenek told police.

Similarly, the district court held that the accusatory statements in the police report could not be attributed to Schimenek because there were no quotation marks in the report to indicate that the statements were made by Schimenek. Although we agree that no particular statement in the police report can be attributed to Schimenek, we conclude that the report—when viewed in general and in the light most favorable to appellant—suggests that Schimenek told police officers that prescription pads were stolen from respondent's office.

For example, the police report states that the reporting officer "was dispatched to place a phone call to [Schimenek] . . . *in reference to a theft of several prescription pads*." (Emphasis added.) This language suggests that Schimenek—contrary to what she said in her affidavit and deposition—reported that prescription pads had been stolen. Also, the police report states that the officer "asked [Schimenek] how many prescription pads *she believed were missing*." (Emphasis added.) This language indicates that it was Schimenek—not the reporting officer—who reached the conclusion that the prescription pads were stolen. Accordingly, there is a genuine issue of material fact as to what Schimenek reported to police, which, in turn, creates a genuine issue of material fact as to whether Schimenek made defamatory statements about appellant. The district court, therefore, erred by holding that there was no evidence that respondent made defamatory statements about appellant.

We agree, however, with the district court's conclusion that even if Schimenek made the defamatory statements, the statements were protected by qualified privilege. "One who makes a defamatory statement will not be held liable if the statement is

published under circumstances that make it qualifiedly privileged and if the privilege is not abused." *Bol v. Cole*, 561 N.W.2d 143, 149 (Minn. 1997). For a defamatory statement to be protected by a qualified privilege, there must be "reasonable or probable grounds for believing in the validity of the statement, even though hindsight might show the statement to be false." *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 380 (Minn. 1990). A party may invoke the privilege if the party conducted an investigation and uncovered sufficient evidence to establish probable cause. *Id.*, 461 N.W.2d at 380; *see also Smits v. Wal-Mart Stores, Inc*., 525 N.W.2d 554, 557 (Minn. App. 1994) (concluding that reasonable grounds to believe a statement was valid did not exist where the party's investigation was "fruitless"), *review denied* (Minn. Feb. 14, 1995).

Here, Schimenek conducted an investigation that gave rise to concerns about the prescription's legitimacy. When the pharmacy called Schimenek to clarify the prescription, she checked respondent's patient database and discovered that appellant was not a patient at respondent's Duluth clinic. She then reviewed Bromen's work schedule, which indicated that Bromen was not in the office on the date noted on the prescription. Schimenek also went into the medical offices at the clinic and found that Bromen's prescription pad was unsecured. Additionally, Schimenek recognized that the prescription was for a narcotic pain medication—a type of medication that would not be prescribed by Bromen or respondent.

Further, as the district court noted, there were additional circumstances that raised suspicions about the prescription: the pharmacy where the prescription was being filled was three hours away from the Duluth clinic; the clinic recently had theft problems; and

it is common knowledge in the health care field that prescriptions are often forged by those seeking drugs. Given the results of Schimenek's investigation and the additional suspicious circumstances, Schimenek had reasonable grounds to believe that prescription pads may have been stolen from the Duluth clinic, and that appellant—who submitted the prescription to the pharmacy—may have been attempting to forge a prescription from the stolen pads.

Appellant argues that Schimenek did not conduct a reasonable investigation because she did not contact Bromen, whom appellant asserts "absolutely knew the truth." According to appellant, because Schimenek did not conduct a reasonable investigation, she did not have probable cause to make a statement to police about the incident. In support of his claim, appellant relies on several cases. *Wirig*, 461 N.W.2d at 380–81; *Smits*, 525 N.W.2d at 557; and *Cox v. Crown CoCo, Inc.*, 544 N.W.2d 490, 498 (Minn. App. 1996). But these three cases are factually distinguishable. In *Wirig* and *Cox*, the parties attempting to invoke qualified privilege did not conduct *any* investigation. *Wirig*, 461 N.W.2d at 380–81 ("We believe that an employer who takes no steps to investigate . . . lacks probable or reasonable grounds for making a potentially defamatory statement."); *Cox*, 544 N.W.2d at 498 (holding that there was no reasonable or probable ground to believe the validity of potentially defamatory statements where no investigation was conducted). Here, however, Schimenek took several steps to investigate the legitimacy of the prescription.

Additionally, the investigation conducted in *Smits* was "fruitless" and uncovered no evidence of wrongdoing. 525 N.W.2d at 557 (concluding that where a store assistant

manager's investigation was "fruitless," the assistant manager "lacked reasonable grounds to believe the statements he made to the 911 operator were valid"). But here, Schimenek's investigation and the surrounding circumstances gave rise to concerns about a possible theft of prescription pads and an attempted prescription forgery. And although we acknowledge that it would have been reasonable for Schimenek to call Bromen, we cannot say that Schimenek's investigation was not also reasonable. Therefore, appellant's argument fails.

Appellant also contends that the question of whether probable cause existed was a question for the jury. To support his contention, appellant directs this court to a footnote from *Wirig* that states:

> Where evidence of reasonable or probable grounds for believing in the validity of the potentially defamatory statements is such that it permits of more than one conclusion regarding the existence of reasonable or probable cause, the question becomes one of fact for the jury. The court then factors that factual finding into its legal determination of whether an employer enjoys a qualified privilege for his statements.

461 N.W.2d at 380 n.4. Notwithstanding this language from *Wirig*, we are not persuaded by appellant's assertion. First, the supreme court has unequivocally held that the question of whether qualified privilege exists is a question of law for the court to decide, and appellant does not cite a single supreme court decision requiring the jury to determine whether the qualified-privilege factors are satisfied. *See Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 920 (Minn. 2009) (holding that "[t]he existence of the privilege is a matter of law for the court," and describing the district court's qualified-

privilege decision as a "legal determination"); *Bol*, 561 N.W.2d at 149 ("Whether a qualified privilege exists is a question of law for the court to decide."); *Lewis v. Equitable Life Assurance Soc'y of the U.S.*, 389 N.W.2d 876, 889 (Minn. 1986) ("Whether an occasion is a proper one upon which to recognize a privilege is a question of law for the court to determine."). Even in *Wirig*—the case upon which appellant relies—the questions of qualified privilege were decided by the district court, not the jury. 461 N.W.2d at 376.

Second, even if we were to agree with appellant's argument, the jury was not required to decide the question of qualified privilege in this case. Schimenek's investigation was thorough and raised significant concerns about a possible theft and prescription forgery, and we do not believe that the evidence in this case permits more than one conclusion regarding the existence of reasonable or probable cause. Further, there is no indication in the record that appellant ever asked the district court to submit the issue of probable cause to the jury. If appellant believed that the probable-cause issue was a question of fact in this case, it was his responsibility to request that the issue be submitted to the jury, and his failure to do so means that the issue became a question of fact for the district court to decide. *See Brooks v. Doherty, Rumble & Butler*, 481 N.W.2d 120, 125–26 (Minn. App. 1992) (holding that where the question of probable cause was not submitted to the jury, "the disputed evidence on respondents' knowledge, investigation and intent created a fact issue for the court to determine"), *review denied* (Minn. Apr. 29, 1992).

Accordingly, even if Schimenek alleged that appellant was attempting to forge a prescription from stolen prescription pads, there was probable cause for her to believe the validity of her allegations. Therefore, her statements are protected by qualified privilege. Appellant asserts that even if Schimenek's statements are privileged, there are genuine issues of material fact as to whether respondent acted with actual malice and, thus, abused the privilege. "A qualified privilege is abused and therefore lost if the plaintiff demonstrates that the defendant acted with actual malice." *Lewis*, 389 N.W.2d at 890. Actual malice is defined as actual ill will, or intent to causelessly and wantonly injure the plaintiff. *Frankson v. Design Space Int'l*, 394 N.W.2d 140, 144 (Minn. 1986). Malice may be proven by extrinsic evidence of personal ill feeling or by intrinsic evidence such as exaggerated language or extent of publication. *Id.*

Appellant argues that respondent acted with actual malice because Bromen—who wrote the prescription—knew that Schimenek's statements were false. Appellant claims that through the law of agency, Bromen's knowledge can be imputed to respondent, such that respondent acted with the knowledge that Schimenek's statements were false. But even if we assume that an agency relationship existed between Bromen and respondent, it was Schimenek, not Bromen, who made the allegedly defamatory statements. We decline to impute Bromen's knowledge to Schimenek, and then, in turn, impute her actions to respondent. *See Karnes v. Milo Beauty & Barber Supply Co.*, 441 N.W.2d 565, 568 (Minn. App. 1989) (stating that while an employee's actions may be imputed to a corporation, it would be difficult to impute one employee's feelings to another employee's actions), *review denied* (Minn. Aug. 15, 1989).

Further, appellant cites no authority for the proposition that *imputed* knowledge can constitute *actual* malice. The failure to identify legal authority for an argument waives consideration of that argument. *See Grigsby v. Grigsby*, 648 N.W.2d 716, 726 (Minn. App. 2002) (concluding that argument was waived in part because of failure to provide supporting legal authority), *review denied* (Minn. Oct. 15, 2002). Therefore, appellant's imputed-knowledge claim does not create a genuine issue of material fact as to whether the qualified privilege was abused.

Next, appellant contends that Schimenek acted causelessly because she did not conduct a reasonable investigation. But as we conclude above, Schimenek's investigation was thorough and raised significant concerns about a possible theft and prescription forgery, giving her probable cause to report the incident to police. Appellant also suggests that Schimenek excessively published her statements. But other than his mere assertion, appellant utterly fails to allege how Schimenek's publication was excessive. General averments are insufficient to establish a genuine issue of material fact. Minn. R. Civ. P. 56.05; *DLH, Inc.*, 566 N.W.2d at 69.

Appellant further suggests that Schimenek had questionable motives because Schimenek's husband—a Douglas County deputy sheriff—harbored animosity toward appellant as a result of appellant's unfavorable testimony in a trial involving the Douglas County Sheriff's Department. But this, too, is simply a general averment, as there is nothing in the record to support appellant's claim other than his own deposition statement. Moreover, the record clearly shows that when Schimenek called her husband, he told her that he did not know appellant.

Appellant also alleges that Schimenek's motives were questionable because some of the comments she made to her coemployees about the incident were inaccurate. But to establish actual malice, appellant must do more than simply list the inaccuracies in Schimenek's comments—he must show that the inaccuracies were the result of actual ill will or an intent to causelessly and wantonly injure appellant. Appellant offers no evidence that the alleged inaccuracies were spawn of ill will or the intent to wantonly injure appellant.

Finally, appellant suggests that respondent acted with the intent to harm appellant when Nystrom filed complaints with the Minnesota and Wisconsin licensing boards six months after the investigation was closed. But other than the mere fact that Nystrom made the complaints, appellant offers no evidence to suggest that the complaints were made out of actual malice. And the uncontroverted evidence shows that Nystrom filed the complaints in good faith, believing that appellant's conduct was "unbecoming of a psychologist." Therefore, appellant cannot show that there is a genuine issue of material fact as to whether the qualified privilege was abused.

The district court erred by holding that there was no evidence that respondent made defamatory statements about appellant. But the district court correctly concluded that Schimenek's statements were protected by qualified privilege. Because appellant cannot show that the qualified privilege was abused, we affirm the district court's grant of summary judgment to respondent on appellant's defamation claim.

II

The district court also granted summary judgment to respondent on appellant's business-interference claim, finding that defamation was an essential element of the claim, and because no defamation occurred, the business-interference claim must fail. Although it was error for the district court to conclude that no defamation occurred, the district court properly determined that appellant's business-interference claim was not viable. As the above analysis demonstrates, Schimenek's statements were protected by qualified privilege. As such, any claim based upon Schimenek's statements was barred. *See Mahoney & Hagberg v. Newgard*, 729 N.W.2d 302, 310 (Minn. 2007) (holding that privilege operates as a bar to all claims arising out of purported defamatory statements).

Appellant argues that his business-interference claim was "based on conduct that goes far beyond the false and defamatory statement." We disagree. In his complaint, the only facts that appellant alleged regarding his business-interference claim were the same facts that gave rise to his defamation claim—namely that Schimenek's statements were defamatory, and that the defamatory statements "interfered with [appellant's] ability to serve his existing clients, and prospective clients, as an expert witness." Because appellant's business-interference claim was based solely on Schimenek's statements, and because Schimenek's statements were protected by privilege, appellant's business-interference claim was barred and the district court properly granted summary judgment to respondent on the claim.

Affirmed.