STATE OF MINNESOTA

IN SUPREME COURT

A18-1171

Court of Appeals McKeig, J.

William DeRosa,

Appellant,

vs.

Filed: December 11, 2019
Office of Appellate Courts

Craig M. McKenzie,

Respondent.

John B. Williams, Williams Lopatto PLLC, Washington, D.C.; and

Courtney R. Sebo Savica, Wendland Utz, Ltd., Rochester, Minnesota, for appellant.

K. Jon Breyer, Leland P. Abide, Kutak Rock LLP, Minneapolis, Minnesota, for respondent.

S Y L L A B U S

1. A corporate officer who did not author a defamatory statement, but participated in the publication of the statement, may be held personally liable for defamation.

2. The pleadings provided sufficient notice to a corporate officer of the defamation claim against him in his personal capacity for his participation in the commission of a tort to survive a motion to dismiss for failure to state a claim upon which relief can be granted.

Reversed and remanded.

O P I N I O N

MCKEIG, Justice.

This appeal requires us to consider whether corporate officers may be personally liable for participating in the intentional tort of defamation. Appellant William DeRosa brought this defamation action against respondent Craig McKenzie, the chief executive officer of Dakota Plains Holdings, Inc. DeRosa's complaint alleges that McKenzie authorized, directed, and approved defamatory statements about DeRosa in a Dakota Plains press release more than a year after DeRosa left the Dakota Plains Board of Directors. We hold that a corporate officer who did not author a defamatory statement, but participated in the publication of the statement, may be held personally liable for defamation. Because we conclude DeRosa's complaint sufficiently alleges participation in the publication of a defamatory statement, the district court's dismissal of the complaint on the pleadings was erroneous. We therefore reverse the decision of the court of appeals and remand this matter to the district court to reinstate DeRosa's Second Amended Complaint and for further proceedings consistent with this opinion.

FACTS[1]

In 2014, Lone Star Value Management, a substantial equity owner of Dakota Plains, appointed William DeRosa to the Board of Directors of Dakota Plains. DeRosa's appointment was "poorly received" by Craig McKenzie, the chief executive officer and

[1] When reviewing a district court's grant of a motion to dismiss, "[w]e accept the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014).

chairman of Dakota Plains. Within two months of DeRosa's appointment, McKenzie accused DeRosa of "immaturity," and a "lack of understanding," and complained that DeRosa's insistence on proper board procedures was "becoming a distraction." In February 2015, McKenzie accused DeRosa of violating the bylaws of Dakota Plains by sharing confidential information about Dakota Plains with Lone Star. At Lone Star's request, DeRosa resigned the next day. Dakota Plains commenced a lawsuit against DeRosa in Nevada, accusing him of breaching his fiduciary duties to Dakota Plains.

Approximately one year later, while the Nevada action was still pending, Dakota Plains issued a press release at McKenzie's direction and with his approval. The press release stated:

> Mr. DeRosa . . . violated his fiduciary duties to all stockholders and committed unlawful acts by sharing material non-public information. Mr. DeRosa resigned from the Board because of this breach of fiduciary duty and will stand trial in court for his actions later this year.

There is no dispute that the press release was published. After publication, McKenzie republished the press release by authorizing the attachment of the press release to an 8-K filing with the Securities and Exchange Commission.

In response, DeRosa commenced an action against McKenzie in New Jersey for defamation and intentional infliction of emotional distress, which was dismissed for lack of personal jurisdiction. DeRosa then commenced an action against McKenzie in Minnesota, raising the same claims. The district court granted McKenzie's motion to

dismiss for failure to state a claim, but provided DeRosa an opportunity to file a second amended complaint within 20 days to cure the defects in the pleadings.[2]

The second amended complaint states that the action is brought against McKenzie "for his actions in directing and publishing [the] press release." It alleges McKenzie "authorized and approved the defamatory publication," "had control over the publication," and "authorize[d] the republication" of the press release by attaching it to an SEC filing. The second amended complaint alleges that the press release is false and "creates the false implication that Mr. DeRosa improperly [shared] confidential information," "is guilty of criminal conduct," and resigned in acknowledgment of his wrongdoing. The complaint alleges that McKenzie knew that the press release was untrue and that it was "made with bad faith and evil motive" to "disgrace, shame, and humiliat[e]" DeRosa.

Because the second amended complaint did not allege that McKenzie made or authored the defamatory statements in the press release, the district court dismissed the case with prejudice. The court of appeals affirmed, holding that liability can attach to an employee or officer for a corporation's defamatory speech only if he or she is its author. *DeRosa v. McKenzie*, No. A18-1171, 2019 WL 1105209 at *2 (Minn. App. Mar. 11, 2019). We granted DeRosa's petition for review.

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[2] The record reflects that an initial complaint was served on July 14, 2017. An amended complaint was served a few days later and filed in the Fourth Judicial District on July 20, 2017. The initial complaint is not included in the record. "A party may amend a pleading once as a matter of course . . . before a responsive pleading is served." Minn. R. Civ. P. 15.01. Subsequently, "a party may amend a pleading only by leave of court or by written consent of the adverse party." *Id.*

ANALYSIS

To provide a framework for our analysis, we begin with some general principles of defamation law. To prevail on a defamation claim, a plaintiff must show: (1) the defendant made a false and defamatory statement about the plaintiff; (2) the statement was an unprivileged publication to a third party; (3) the statement had a tendency to harm the plaintiff's reputation in the community; and (4) the defendant was at fault. *McGuire v. Bowlin*, 932 N.W.2d 819, 823 (Minn. 2019).

With this framework in mind, we turn to the issues raised here. First, we address whether personal liability can attach to a corporate officer for participating in the publication of a defamatory statement not authored by the officer. Second, we address whether DeRosa satisfied the pleading requirements necessary to survive a motion to dismiss on this claim.

I.

We first address whether personal liability attaches to a corporate officer for participating in the publication of a defamatory statement not authored by the officer. The application or extension of our common law is a question of law that we review de novo. *Soderberg v. Anderson*, 922 N.W.2d 200, 203 (Minn. 2019).

"It is the universal rule that an officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefor . . . ." *Ellingson v. World Amusement Serv. Ass'n*, 222 N.W. 335, 339 (Minn. 1928). We have long recognized that actions other than authoring a defamatory statement may constitute taking part in the commission of the tort. *See, e.g.*, *Frankson v. Design Space Int'l*, 394 N.W.2d

140, 144 (Minn. 1986) (concluding that intra-corporate preparation of a defamatory termination letter and distribution of that letter to a personnel file constituted publication sufficient for a defamation action); *McKenzie v. Wm. J. Burns Int'l Detective Agency*, 183 N.W. 516, 517 (Minn. 1921) (concluding that in-house statements were publications, though subject to privilege); *Hebner v. Great N. Ry. Co.*, 80 N.W. 1128, 1129–30 (Minn. 1899) (same). Neither party presents us with a substantial or compelling reason to create an exception to the universal rule as it applies to the law of defamation. We decline to do so now.

The court of appeals correctly concluded that Minnesota law does not recognize "reverse-vicarious liability." A corporate officer cannot be held personally liable for a company's defamatory acts by virtue of job title alone. 19 C.J.S. *Corporations* § 630 (2019). DeRosa is not pursuing a new theory of tort liability, however.[3] DeRosa alleges that McKenzie, as a corporate officer, personally took part in the commission of a tort by directing, authorizing, and approving a defamatory press release. According to the

[3] Although DeRosa advanced vicarious liability claims against McKenzie in his second amended complaint, DeRosa conceded that he was no longer pursuing those claims. *Compare* Sec. Am. Compl. ¶ 11 ("Mr. McKenzie approved the press release, and thus had control over the defamatory content of the publication. Under Minnesota law, Mr. McKenzie is directly and vicariously liable for the publication."), *with* Appellant's Br. 22 ("Mr. McKenzie is personally liable for his tortious acts, not under agency principles or vicarious liability, but because of his participation in the publication of the defamatory material.").

universal rule, if DeRosa's allegations are true, McKenzie may be held personally liable for his participation.[4]

II.

Next, we address whether DeRosa's second amended complaint sufficiently pleaded a defamation claim to survive a motion to dismiss for failure to state a claim. When a case is dismissed for failure to state a claim, we review whether the complaint sets forth a legally sufficient claim for relief de novo. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). We accept the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party. *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014).

"Minnesota is a notice-pleading state and 'does not require absolute specificity in pleading, but rather requires only information sufficient to fairly notify the opposing party of the claim against it.' " *Id.* at 604–05 (quoting *Hansen v. Robert Half Int'l, Inc.*, 813 N.W.2d 906, 917–18 (Minn. 2012)). "Under our law, the pleading of broad general statements that may be conclusory is permitted." *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). "[A] pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *N. States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963).

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[4] The common law recognizes privileges, both absolute and qualified, that operate to defeat a defamation claim. *Harlow v. State Dep't of Human Servs.*, 883 N.W.2d 561, 569 (Minn. 2016). Whether a privilege applies to McKenzie that defeats liability is not before us.

Here, DeRosa's second amended complaint alleges that the action is brought against McKenzie "for his actions in directing and publishing [a defamatory] press release." It alleges that McKenzie "authorized and approved the defamatory publication," "had control over the publication," and "authorize[d] the republication" of the press release by attaching it to an SEC filing. The complaint quotes the allegedly defamatory language from the press release and alleges that McKenzie knew that the statements were untrue. DeRosa's pleadings sufficiently allege that McKenzie personally participated in the commission of the tort of defamation for his claim to proceed. *See Walsh*, 851 N.W.2d at 605 ("The focus is on the 'incident' rather than on the specific facts of the incident.").

Because DeRosa's second amended complaint provides sufficient notice to McKenzie of the claims against him, and because it does not appear with certainty that DeRosa will be unable to factually support his claims and request for relief, the district court erred in granting McKenzie's motion to dismiss.[5]

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals and remand the case to the district court with directions to reinstate the Second Amended Complaint and for further proceedings consistent with this opinion.

Reversed and remanded.

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[5] The district court dismissed DeRosa's claim for intentional infliction of emotional distress, concluding that the claim could not survive independent of the defamation claim. Because the district court erred in dismissing DeRosa's defamation claim, the intentional-infliction claim must also be reinstated.