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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1397**

Stephani Martinsen,
Appellant,

vs.

Kara Engleka,
Respondent.

**Filed April 30, 2018
Affirmed
Reilly, Judge**

Hennepin County District Court
File No. 27-CV-16-9582

Dennis Pelowski, Law Office of Dennis Paul Pelowski, Minneapolis, Minnesota (for appellant)

Kathryn Mrkonich Wilson, Emily A. McNee, Littler Mendelson, P.C., Minneapolis, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Halbrooks, Judge; and Reilly, Judge.

UNPUBLISHED OPINION

REILLY, Judge

Appellant challenges the district court's grant of summary judgment for respondent on appellant's defamation claim, arguing that there are genuine issues of material fact regarding whether respondent's statement was false and whether it was privileged.

Appellant also challenges the grant of summary judgment in favor of respondent on her tortious-interference-with-contract claim. We conclude that there are no genuine issues of material fact precluding summary judgment and that respondent is entitled to judgment as a matter of law. Accordingly, we affirm.

FACTS

While working for CVS as a pharmacist, appellant Stephani Martinsen founded her own pharmacy, Heartfelt Holistic Pharmacy (HHP), that mainly created compounded pharmaceuticals that CVS did not dispense. Although HHP's products were distinct from CVS products, they treated the same or similar conditions. HHP also sold compounded versions of fish oil and vitamin D. Respondent Kara Engleka, appellant's supervisor, discovered appellant's side-business and recommended appellant's discharge because appellant's conduct violated the company's conflict-of-interest policy. CVS followed respondent's recommendation and terminated appellant's employment.

Appellant commenced this action, alleging that respondent made defamatory statements in her report to other CVS managers and lawyers about the justifications for appellant's firing and tortiously interfered with appellant's employment contract. Respondent filed a motion for summary judgment, which the district court granted. The district court determined that there are no genuine issues of material fact and that respondent's statements were true and, alternatively, that the statements were privileged because they were made as part of an employment investigation and there was no actual malice. Additionally, the district court determined that respondent did not tortiously

interfere with appellant's employment contract because she was acting within the scope of her employment and did not act with actual malice.

This appeal followed.

DECISION

We review the grant of summary judgment de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). On appeal from summary judgment, we review the record to determine whether there is any genuine issue of material fact and whether the district court erred in its application of the law. *Dahlin v. Kroening*, 796 N.W.2d 503, 504-05 (Minn. 2011). A party must create more than just a "metaphysical doubt" as to a fact question in order to raise a genuine issue of material fact for trial. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). To create a fact issue, evidence must be "sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *Id.*

I. Appellant's defamation claim fails as a matter of law.

Appellant's defamation claim has four elements: (1) a statement of fact; (2) that is false; (3) that was communicated to someone other than appellant without privilege; and (4) that harmed appellant's reputation or lowered her estimation in the community. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980). Even if defamatory, a statement may be privileged if made on a proper occasion, for a proper purpose, and with probable cause, and if the privilege is not abused. *Id.* at 256-57. We review in turn the

district court's alternative holdings that respondent's statement was not false and that it was privileged.

A. There is no genuine issue of material fact regarding the truth of respondent's statement.

Truth is a complete defense against defamation. *Stuempges*, 297 N.W.2d at 255. “[T]rue statements, however disparaging, are not actionable.” *Id.* “If the statement is true in substance, minor inaccuracies of expression or detail are immaterial.” *McKee v. Laurion*, 825 N.W.2d 725, 730 (Minn. 2013) (citing *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991)). “A statement is substantially true if it would have the same effect on the mind of the reader or listener as that which the pleaded truth would have produced.” *Id.* Generally, the truth or falsity of a statement is a question for the jury, *Lewis v. Equitable Life Assur. Soc. of the U.S.*, 389 N.W.2d 876, 889 (Minn. 1986), but the burden remains on appellant to establish a successful defamation claim, *McKee*, 825 N.W.2d at 730. On summary judgment, that means she must raise a genuine issue of material fact concerning the falsity of respondent's statements. Minn. R. Civ. P. 56.05.

Appellant asserts that respondent's statement that appellant's business “clearly competes with CVS Pharmacy for patients” was false.¹ Appellant argues here, as she did in district court, that HHP did not compete with CVS because HHP sold different products than those available at CVS. The district court was not convinced, and noted that, even

¹ Before the district court, appellant pleaded two defamatory statements, but she has preserved argument as to only one of those statements on appeal. See *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (holding that issues not briefed are waived).

though the two businesses' products might be different, they treated the same conditions, which showed that HHP clearly competed with CVS for customers.

In determining that there was no genuine issue of material fact regarding truth, the district court highlighted a specific drug sold by HHP, sublingual sildenafil. The drug is used to treat erectile dysfunction, but is distinct from Viagra, which is sold by CVS, because it is not administered in pill form. Rather, it is administered by placing a tablet under the tongue. The district court determined that, because the two drugs treat the same condition, HHP clearly competes with CVS for patients.

Appellant argues that pharmacies do not treat patients; doctors treat patients, and pharmacies simply fill prescriptions created by doctors. Appellant seems to argue that HHP does not compete with CVS because the doctor decides what prescriptions to prescribe, not the pharmacist. Under this reasoning, if a doctor prescribes medications that are fillable at HHP and not CVS, HHP has done nothing to detract from CVS's business, because it was the doctor's decision to prescribe the medication. Appellant also argues that HHP was not competing with CVS because Minnesota law limits the types of products HHP and CVS can legally sell. CVS is licensed under Minnesota law as a synthetic pharmacy, and HHP is licensed as a compounding pharmacy. Synthetic pharmacies sell pills that are mass marketed and are legally distinct from customized powders sold by compounding pharmacies.

Notwithstanding these distinctions, both HHP and CVS offer drugs that treat the same conditions. And although a patient cannot receive prescription drugs from either HHP or CVS without a doctor writing a prescription, a patient might ask their doctor to

change their prescription such that their prescriptions could be transferred from a conventional pharmacy like CVS to a compounding pharmacy like HHP. HHP's sale of compounded pharmaceuticals constitutes competition because those pharmaceuticals serve to treat substantially the same conditions in a pharmaceutical patient as the synthetic pharmaceuticals sold by CVS. Additionally, HHP sells nonprescription products like vitamin D supplements and fish oil that CVS also sells. Accordingly, we reject the argument that HHP did not compete with CVS because its products are distinct and, absent a genuine issue of material fact regarding truth, conclude that respondent's statement was true as a matter of law.

B. Respondent's statement is privileged as a matter of law.

A statement is subject to a conditional privilege and thus immune from a defamation claim if it is "made upon a proper occasion, from a proper motive, [and] based upon reasonable or probable cause." *Stuempges*, 297 N.W.2d at 256-57 (citation omitted). "Whether an occasion is a proper one upon which to recognize a privilege is a question of law." *Wilson v. Weight Watchers of Upper Midwest, Inc.*, 474 N.W.2d 380, 383 (Minn. App. 1991), *pet. for rev. denied* (Minn. Oct. 16, 1991). To determine whether reasonable grounds existed for a statement, this court examines the facts supporting the alleged defamatory statement. *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 380 (Minn. 1990). Public policy is also a factor in establishing conditional privilege. *Wilson*, 474 N.W.2d at 384. The initial determination of whether a statement is privileged is a question of law subject to de novo review. *Kuelbs v. Williams*, 609 N.W.2d 10, 16 (Minn. App. 2000), *review denied* (Minn. June 27, 2000).

“[O]nce a defendant has demonstrated the existence of a conditional privilege, the burden shifts to plaintiff to prove that the privilege has been abused” *Stuempges*, 297 N.W.2d at 257. The privilege is abused when statements are made with actual malice. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 920 (Minn. 2009). “Although malice is generally a question of fact, summary judgment is appropriate if the plaintiff fails to raise a genuine issue of material fact regarding malice.” *Kuelbs*, 609 N.W.2d at 16 (citation omitted).

Appellant asserts that respondent’s statement was not privileged because it was not based on reasonable cause and there is a genuine issue of material fact as to whether respondent acted with actual malice. We address each argument in turn.

1. Respondent’s statement was based on reasonable cause.

Appellant asserts that respondent lacked reasonable cause for her statement because of alleged inadequacies in CVS’s investigation into HHP. The record indicates that respondent started an investigation into HHP based on statements in appellant’s 2015 performance review describing how appellant was running an independent pharmacy. Respondent interviewed appellant and visited HHP’s website as part of her investigation. During the investigation, respondent discovered evidence suggesting that appellant had a conflict of interest with CVS because she had competed with CVS through HHP. Appellant claims that the investigation was insufficient to provide reasonable cause for respondent’s statement because respondent was biased, acted in a retaliatory fashion, controlled the entire investigation, and because the investigation was incomplete.

a. Prior disciplinary investigations did not indicate bias.

In 2013, respondent investigated appellant for bringing her child to the pharmacy against company policy. Appellant admitted bringing her child to the pharmacy, and appellant did not take issue with respondent's investigation. In 2015, CVS investigated appellant for being unavailable to customers. The investigation was prompted by a customer's complaint to a store employee that appellant was unavailable to help them. CVS's loss prevention department (LP) then investigated the complaint. Evidence gathered by LP showed that appellant was unavailable to customers for long periods of time, and, supported by evidence gathered by LP, respondent delivered a final written warning on the issue. Respondent's history of giving appellant written warnings for her conduct at work was in accordance with CVS policies.

b. There is no evidence that respondent intended to punish appellant for informing against CVS to the government.

Appellant expresses suspicions that CVS targeted her for disciplinary action due to her informing against CVS to the government. Appellant claims that respondent personally punished her in response to the report. But appellant offers no evidence that respondent knew about the lawsuit or that she acted in retaliation to it. The only evidence appellant offers to show that respondent acted with an improper purpose are her own suspicions. These constitute a mere "metaphysical doubt" and are not enough to raise a genuine issue of material fact. *DLH*, 566 N.W.2d at 71.

c. Respondent did not control the entire investigation.

Appellant argues that respondent's investigation cannot support the application of privilege because she controlled all corners of the investigation—supervisor, accuser, investigator, and decision-maker. Appellant cites no authority for this assertion. Nonetheless, a brief review of the record shows respondent was not in charge of the entire investigation as appellant claims. Respondent began the investigation, but she was not the only participant in the investigation. At one point, appellant was interviewed by a group of CVS employees. Respondent was not the final decision-maker for appellant's termination. HR recommended appellant's discharge based on respondent's investigation, and the decision was reviewed by nine members of CVS management.

d. Respondent's investigation was sufficient.

Appellant claims that respondent's investigation was insufficient, and therefore lacking reasonable cause, because she could have interviewed appellant's managers, but chose not to. Respondent interviewed appellant and looked at HHP's website. During respondent's conversation with appellant, appellant admitted to selling products that treat the same conditions as products sold by CVS and dietary supplements. Respondent's investigation was sufficient, because respondent gathered relevant evidence from appellant herself, and that evidence was incriminating. Respondent had no need to corroborate the information, as it was offered by appellant herself.

“The party resisting summary judgment must do more than rest on mere averments.” *DLH*, 566 N.W.2d at 71. Here, appellant rests on mere averments, as she provides no

support for her claims of bias beyond her own personal suspicions. Respondent's statements are conditionally privileged and possessed a proper motive.

2. There is no genuine issue of material fact regarding malice.

“Actual malice requires a showing that the defamatory statements are made . . . from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff.” *Bahr*, 766 N.W.2d at 920 (citation and quotations omitted). Malice may be proved by extrinsic evidence like personal ill feeling. *Friedell v. Blakely Printing Co.*, 163 Minn. 226, 231, 203 N.W. 974, 976 (1925). Malice may also be proved by intrinsic evidence like exaggerated language and the extent of publication of the statements. *Id.*

Appellant offers four examples of how she claims that respondent's disciplinary actions show how respondent acted with actual malice in relation to appellant's discharge. *See Bahr*, 766 N.W.2d at 922 (relying on evidence of past conduct to show malice). First, appellant argues that the customer complaints used to justify the investigations did not exist and attacks the credibility of fellow employees who provided information to LP. Appellant does not provide evidence to support these assertions, and we are unable to independently identify competent evidence in the record. Accordingly, appellant's argument fails.

Second, appellant argues that respondent acted with actual malice because CVS no longer possesses records and video footage supporting past disciplinary investigations. Appellant claims that the absence of such evidence shows that the investigation leading to appellant's discharge also lacked supporting evidence and was supported only by respondent's malice. Nothing in the record suggests that the prior investigations lacked evidentiary support, the record simply shows that CVS is unable to present the evidence

now. And CVS's failure to retain loss prevention reports and security videos related to previous disciplinary investigations is not probative of whether respondent acted with actual malice.

Third, appellant claims the past investigation into appellant's use of a space heater and a blanket in the pharmacy was a pretext for CVS to investigate her for drug diversion. While there was some evidence that CVS sought to limit personal property in the pharmacy in order to prevent employee drug diversion generally, there is no evidence that respondent used that initiative to improperly target appellant.

Fourth, appellant argues that respondent intentionally omitted the fact that appellant had previously informed CVS managers about HHP. Appellant argues that the omission was specifically designed to make appellant look more secretive and untrustworthy. Contrary to appellant's argument, respondent did document appellant's disclosures. First, respondent documented appellant's request that respondent check with various managers about their tacit approval of HHP as part of her investigation report to CVS. Second, each manager appellant reportedly told about HHP has since been disciplined for failing to disclose the existence of HHP to respondent and others. The facts indicate that respondent did not fail to consider appellant's prior disclosures of HHP.

The evidence shows that each of respondent's investigations into appellant's workplace conduct was triggered by complaints from customers or other employees. That the instigating event for each investigation came from an outside source, and not respondent's own supposed vendetta, indicates a proper purpose and a lack of malice.

Appellant has failed to allege facts that rise above “a metaphysical doubt” that respondent acted with actual malice. *DLH*, 566 N.W.2d at 71.

Appellant also claims that malice is demonstrated by respondent’s knowledge that her statements were false. Knowledge of falsity is not an element but may be probative under the common-law standard. *Bahr*, 766 N.W.2d at 922. Appellant claims that respondent must have known her statements were false because she was an experienced pharmacist and was intimately aware of the difference between a compounding pharmacy like HHP and a synthetic pharmacy like CVS. Appellant’s argument assumes that compounding pharmacies and commercial pharmacies could never compete with one another, because they are prohibited by law from selling the same products, an argument we’ve already rejected. We likewise reject the assertion that respondent’s experience as a pharmacist indicates that she knew her statement to be false.²

II. Appellant’s tortious-interference claim fails as a matter of law.

A claim for tortious interference requires proof of: (1) the existence of a contract; (2) the alleged wrongdoer’s knowledge of the contract; (3) intentional procurement of its breach; (4) without justification; and (5) damages. *Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn. 1994) (citation and quotations omitted). In Minnesota, a discharged employee may

² Appellant also argues that respondent knew her statement to be false when she described how appellant “can compound almost any medication including making a sublingual Viagra tablet.” Appellant argues that HHP could not synthesize Viagra, because Viagra can only be synthesized by a synthetic pharmacy like CVS. The statement appellant quotes above was not alleged to be defamatory, so whether respondent had knowledge of that statement’s falsity is not relevant to the actual-malice analysis.

not sue the supervisor who fired her, because, if acting in good faith, the supervisor simply acts in furtherance of their employer's best interests. *Nordling v. N. States Power Co.*, 478 N.W.2d 498, 505 (Minn. 1991); *Furlev Sales & Assoc., Inc. v. N. Am. Auto. Warehouse, Inc.*, 325 N.W.2d 20, 26 (Minn. 1982). "The general rule is that a party cannot interfere with its own contract." *Nordling*, 478 N.W.2d at 505. In the employment context, a supervisor is immune from liability for tortious interference if they acted within the scope of their employment, because they are essentially party to the contract. *Id.* An employer acts outside of the scope of their employment if they act with bad faith or malice. *Id.* at 506-07.

Respondent was acting within the scope of her employment at CVS: she was investigating appellant's alleged violation of company policy. Appellant argues that respondent acted with actual malice and cites the same facts to support her argument as she cited in support of her arguments regarding falsity. To briefly summarize those arguments, appellant claims: respondent persisted in investigating her for disciplinary actions in the face of exculpatory evidence; respondent falsely accused her of drug diversion without justification; and respondent targeted appellant as retaliation for appellant's lawsuit against CVS. As discussed above, each of respondent's actions fell within her duties as an employee of CVS. Appellant fails to identify specific evidence to the contrary. Because respondent was acting within the scope of her employment to CVS, appellant's tortious-interference claim fails as a matter of law.

Affirmed.