

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1105**

Karen K. Osowski,
Respondent,

vs.

Edie Harer,
Appellant.

**Filed March 6, 2023
Affirmed
Slieter, Judge**

Cook County District Court
File No. 16-CV-20-106

Tyson Smith, Richard T. Furlong, III, Smith Law, PLLC, Grand Marais, Minnesota (for respondent)

Keith D. Johnson, Law Office of Keith D. Johnson, P.L.L.C., Roseville, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Slieter, Judge; and Smith, John, Judge.*

NONPRECEDENTIAL OPINION

SLIETER, Judge

Appellant seeks to overturn a jury verdict by challenging (1) the district court's denial of judgment as a matter of law based on qualified privilege and (2) the jury's award

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

of reputation damages. Because the jury found that appellant's defamatory statements were made with actual malice and a defendant does not have to prove reputation damages in a defamation *per se* claim, we affirm.

FACTS

This defamation case, commenced by respondent Karen K. Osowski, arises from statements appellant Edie Harer made to law enforcement several months after the death of Harer's father (decedent). Harer made statements which suggested that Osowski—Harer's stepmother and decedent's second wife—had killed decedent.

Osowski married decedent in July 2006. Harer did not attend the wedding. In 2013, decedent discovered a cloud on the title to his property and sought signatures on a corrective deed to remedy the problem. Harer and her siblings refused to execute the corrective deed and, as a result, decedent cleared title to his home through a quiet-title action. This led decedent to “cut off all communications with his children” and sign a will that disinherited his children.

Despite their disinheritance, Osowski maintained contact with decedent's children. This included an email in early September 2018 informing Harer that decedent's health was “getting worse by the day” and she was scheduling him for cancer testing. In mid-October, Osowski informed Harer that decedent “had been tested head to toe and all is good.”

On January 18, 2019, Osowski called 911 to report finding decedent dead in their home. A Cook County Sheriff's deputy responded to the call and investigated the death. Based on the deputy's description, the medical examiner declined to complete an autopsy

because the death appeared to be from natural causes, and the deputy agreed that nothing “looked suspicious.” Six days after her father’s death, Harer called the medical examiner, asked why an autopsy had not been performed, and asked for one to be completed. It was explained to her that an autopsy would be difficult and likely uninformative at that point because the body had been embalmed.

In February 2019, Osowski’s daughter informed Harer that decedent had updated his will in 2014. The updated will left decedent’s estate to Osowski. Approximately two weeks later, an attorney Osowski retained to represent her in an anticipated probate proceeding informed Harer that he was in the process of preparing a petition to probate the 2014 will. The next day, Harer petitioned to probate decedent’s 1994 will, which included Harer and her siblings as devisees. Osowski objected to probate of the 1994 will and counterpetitioned for probate of the 2014 will.

On June 4, 2019, one week before a scheduled probate hearing and after the probate court denied her request for a continuance, Harer contacted the Cook County Sheriff’s Office asking it to reopen the investigation into her father’s death. The same deputy who initially investigated the death was assigned to the case. Harer also asked the sheriff to seek a delay in the probate proceeding “due to an investigation into my father’s death.” The sheriff declined.

Harer obtained a transcript of the 911 call Osowski placed after discovering decedent’s body. In the call, the 911 operator asked if the death was “expected,” and Osowski replied that she “contemplated it because of his health.”

On June 6, 2019, the deputy called Harer and conducted a recorded interview. In this conversation, the deputy asked Harer to explain “why you think that [Osowski] murdered your dad.” Harer responded, “because . . . she said that he had an expected death” in the 911 call, but Harer believed decedent had been in good health. Harer further stated that Osowski “makes her own pills, so she has . . . ways that she could have easily put something in something” and suggested that someone could “put anti-freeze in something somebody drinks . . . and somebody . . . won’t even know you put it in.”

During the summer of 2019, Harer objected to Osowski’s counterpetition to probate the 2014 will and moved multiple times to continue hearings, citing the reopened investigation. In September 2019, Harer voluntarily dismissed her petition for probate of the 1994 will and objection to probate of the 2014 will. The district court subsequently probated the 2014 will.

In October 2019, the deputy issued a supplement to his initial investigation into decedent’s death. He concluded that there was no “foul play or [anything] suspicious in the death of [decedent].”

In May 2020, Osowski sued Harer for defamation, alleging that Harer accused her of murder in statements to law enforcement and in public court documents, and these statements were defamatory *per se*.

The district court conducted a four-day jury trial, during which it denied Harer’s motion for judgment as a matter of law on qualified privilege. The jury was instructed as to the definition of qualified privilege and common-law malice.

The jury found that Harer made defamatory statements with malice and awarded Osowski compensatory damages of \$20,000 for reputational harm, \$100,000 for mental distress, \$20,000 for past embarrassment, \$20,000 for past humiliation, and \$1,000 for stipulated health-care expenses. Harer did not renew her motion for judgment as a matter of law or move for a new trial. *See* Minn. R. Civ. P. 50.02. Harer appeals.

DECISION

To establish common-law defamation, the plaintiff “must prove that the defendant made: (a) a false and defamatory statement about the plaintiff; (b) in an unprivileged publication to a third party; (c) that harmed the plaintiff’s reputation in the community.” *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 873 (Minn. 2019) (quotation omitted). Harer argues that the district court erred by allowing the jury to decide whether her communication was privileged and that Osowski did not prove reputation damages.

I. The district court did not err in denying judgment as a matter of law on qualified privilege.

“We review de novo a district court’s decision to deny a motion for judgment as a matter of law, applying the same standard used by the district court and viewing the evidence in the light most favorable to [the nonmoving party].” *Christie v. Est. of Christie*, 911 N.W.2d 833, 838 n.5 (Minn. 2018) (quotation omitted); *see also Kedrowski v. Lycoming Engines*, 933 N.W.2d 45, 54-55 (Minn. 2019). The district court may grant a motion for judgment as a matter of law if “a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.” Minn. R. Civ. P. 50.01(a). Reviewing courts make “an independent

determination of whether there [was] sufficient evidence to present an issue of fact for the jury.” *Jerry’s Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006).

“[S]tatements made in particular contexts or on certain occasions should be encouraged despite the risk that the statements might be defamatory.” *Minke v. City of Minneapolis*, 845 N.W.2d 179, 182 (Minn. 2014) (quotation omitted). “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). To qualify for the privilege, a statement “must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause.” *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 256-57 (Minn. 1980) (quoting *Hebner v. Great N. Ry. Co.*, 80 N.W. 1128, 1129 (Minn. 1899)). One of the proper occasions covered by qualified privilege is “a good faith report of suspected criminal activity to law enforcement officials.” *Smits v. Wal-Mart Stores, Inc.*, 525 N.W.2d 554, 557 (Minn. App. 1994), *rev. denied* (Minn. Feb. 14, 1995). “A qualified privilege is abused and therefore lost if the plaintiff demonstrates that the defendant acted with actual malice.”¹ *Lewis v. Equitable Life Assurance Soc’y of the U.S.*, 389 N.W.2d 876, 890 (Minn. 1986).

¹ The Minnesota Supreme Court has noted that the United States Supreme Court “has generated some confusion in the law of defamation” by using the term “actual malice” to describe the standard it articulated in *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964), for media defendants. *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 329 (Minn. 2000). The *Sullivan* standard “is proper only when a media defendant is

“While the initial determination of whether a communication is privileged is a question of law for the court to decide, the question of whether the privilege was abused is a jury question.” *Id.* If the jury finds that the privilege was abused because the statements were made with actual malice, any error in submitting the question of privilege to the jury is harmless. *Id.* But if “the evidence permits of more than one conclusion,” the existence of reasonable or probable grounds for making the defamatory statement becomes a question of fact for the jury. *Brooks v. Doherty, Rumble & Butler*, 481 N.W.2d 120, 125 (Minn. App. 1992) (quotation omitted), *rev. denied* (Minn. Apr. 29, 1992).

The district court denied Harer judgment as a matter of law for two reasons. First, it determined there were factual questions regarding the existence of reasonable or probable cause for the statements. Second, the district court determined that whether any privilege had been abused because Harer made the statements with actual malice was a question for the jury. Harer argues that the district court erred because “the facts are undisputed that Harer had a reasonable basis for making her statements to law enforcement [and] . . . there was no evidence of actual malice.”

Because the jury’s finding of actual malice results in a loss of any privilege Harer may have had, we need not consider whether there was a factual question regarding the existence of reasonable or probable cause for her statements, and we address only her argument that “there was no evidence of actual malice.” *See Lewis*, 389 N.W.2d at 890.

involved,” *Stuempges*, 297 N.W.2d at 258, and Harer does not claim to be a media defendant. Therefore, we apply the common-law standard.

Common-law actual malice requires the plaintiff to prove “that the defendant made the statement from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff.” *Stuempges*, 297 N.W.2d at 257 (quotation omitted).

The jury was presented evidence that Harer had been estranged from her father for several years, partly due to her refusal to execute the corrective deed as he requested. Harer inquired about an autopsy a few days after her father’s death, but she proceeded with his burial and did not express any suspicions about his death until over four months later, when she contacted the sheriff’s office. When she spoke with the deputy, she was in the midst of a probate dispute with Osowski, whom she suggested may have killed decedent. Harer cited the reopened investigation in her objection to probate of decedent’s 2014 will and in multiple requests to continue hearings, suggesting that Osowski might be barred from benefiting from decedent’s estate “pending the conclusion of the criminal investigation.”

These facts, viewed in the light most favorable to Osowski, present a legally sufficient evidentiary basis for the jury to conclude that Harer made her statements with ill will or an improper motive. *See Christie*, 911 N.W.2d at 838 n.5; *see also Jerry’s Enters.*, 711 N.W.2d at 816. Therefore, the district court did not err in denying judgment as a matter of law on qualified immunity.

II. Osowski was not required to present evidence of reputation damages.

Harer argues that Osowski was not entitled to recover reputation damages because “[t]here simply was no evidence of reputational damages asserted or proven by Osowski.”

Generally, to recover reputation damages, a plaintiff must prove reputational harm because defamation is based on injury to one’s reputation. *Maethner*, 929 N.W.2d at 874.

But “defamation per se is actionable without any proof of actual damages” because such statements “are virtually certain to cause serious injury to reputation, and . . . this kind of injury is extremely difficult to prove.” *Id.* at 874, 875 (quotations omitted). A statement accusing another of committing a crime is defamatory *per se*. See *Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1, 9 n.1 (Minn. 1984); see also *Anderson v. Kammeier*, 262 N.W.2d 366, 371-72 (Minn. 1977).

But, to avoid offending the First Amendment, “a private plaintiff may not recover presumed damages for defamatory statements involving a matter of public concern unless the plaintiff can establish actual malice.” *Maethner*, 929 N.W.2d at 878-79. Thus, when determining the availability of presumed damages, “the dispositive inquiry is whether the matter at issue is one of public concern.” *Id.* at 877. We review *de novo* whether a statement involves a matter of public concern. *Johnson v. Freborg*, 978 N.W.2d 911, 919 (Minn. App. 2022), *rev. granted* (Minn. Oct. 18, 2022).

“Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” *Id.* (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)). To determine whether statements regard a matter of public concern, courts consider the “content, form, and context of that speech.” *Id.* (quoting *Snyder*, 562 U.S. at 453); see also *Maethner*, 929 N.W.2d at 880 (same). “No single factor is dispositive; rather, courts should evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.” *Maethner*, 929 N.W.2d at 881 (quotations omitted). “[T]he

determination of whether speech involves a matter of public or private concern is based on a totality of the circumstances.” *Id.*

Harer’s statements led the deputy to believe she was accusing Osowski of murder. Harer stated that she suspected Osowski because Osowski told the 911 operator that she expected the death, but Harer believed decedent to have been in good health. Harer also suggested that antifreeze could have been used to kill decedent. During trial, Harer admitted that the 911 operator asked if the death was expected, and Osowski simply responded in the affirmative.

These statements were made during a private telephone interview, which the record indicates Harer intended to be private because she asked the sheriff if she should inform the probate court “that there has been a criminal investigation started” for fear that it would “tip off” Osowski. Furthermore, Osowski and Harer’s prior relationship and the disputed probate proceeding, which Harer attempted to stall based on the investigation her own statements reopened, suggest that the statements were “intended to mask an attack . . . over a private matter.” *Snyder*, 562 U.S. at 455.

Based on the totality of the circumstances, Harer’s statements dealt not with a matter of public concern, but with a private conflict between her and Osowski. *See Maethner*, 929 N.W.2d at 881. Thus, Osowski is entitled to presumed reputation damages, and it was not error for the jury to award her reputation damages.

Affirmed.