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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0223**

Gary H Burdorf, et al.,
Appellants,

vs.

Michael Miller,
Respondent.

**Filed August 26, 2024
Affirmed
Reyes, Judge**

Wright County District Court
File No. 86-CV-22-4456

Marshall H. Tanick, Meyer, Njus, Tanick, PA, Minneapolis, Minnesota; and

Michael J. Vanselow, Michael J. Vanselow Law Office, PLLC, Minnetonka, Minnesota
(for appellants)

Paul A. Rajkowski, Matthew W. Moehrle, RGP Law Ltd., St. Cloud, Minnesota (for
respondent)

Considered and decided by Reyes, Presiding Judge; Slieter, Judge; and Kirk, Judge.*

NONPRECEDENTIAL OPINION

REYES, Judge

Appellants assert that the district court erred by granting summary judgment on their
defamation claims to respondents after determining that (1) one of the three allegedly

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

defamatory statements was not defamatory as a matter of law and (2) the two other statements were protected by qualified privilege. Appellants also argue that, even if the second and third statements were protected, the district court erred by determining that they had not shown a genuine dispute of material fact as to common-law malice. We affirm.

FACTS

Appellants Gary H. Burdorf and Jeffrey Krueger sued respondent Michael Miller, alleging that he had made three defamatory statements about them. The facts, viewed in the light most favorable to appellants as the nonmoving parties, are as follows.

Burdorf, Krueger, and Miller were all involved with the Minnesota Association of Townships (MAT). MAT is a private nonprofit organization comprised of the majority of townships in Minnesota. MAT lobbies on behalf of townships and provides education to townships on how to run local governments. MAT is run by a board of 13 people, including a president, a vice-president, and a treasurer. The MAT board of directors hires an executive director to manage the organization. During the time period relevant to this lawsuit, Burdorf was the president of the MAT board, Krueger was the executive director, and Miller was a board member.

MAT is affiliated with a separate organization called the Minnesota Association of Townships Insurance Trust (MATIT), which provides insurance for townships. MATIT is overseen by a group of five trustees who are all members of the MAT board of directors. MATIT has no employees of its own; all of MATIT's work is performed by MAT employees.

The first allegedly defamatory statement arose from an email chain. A MAT employee who did work for MATIT sent an email to Miller, which stated:

Was just given a couple of invoices from MAT for MATIT to pay yesterday, pretty interesting! Do you as a board review the monthly expenses for MAT and MATIT? Like, actually see everything that we pay out in a month and to whom? A great source of frustration and ill feelings for me.

Miller responded, “We do not get to review MATIT[,] only MAT[.] The financial information and lack of complete transparency has been an issue for me for a long time. If I may ask what we’re [sic] they wanting you to pay?” The employee replied, “[The general counsel]’s MATIT expenses for Dec[.] 2021, and [Burdorf]’s expenses for Dec[.] 2021. I have to pay them, just seem[s] a bit ridiculous to me, but who am I, I know nothing! 😊 [sic]”

Miller then asked, “[w]hat are the totals for each one?” to which the employee responded, “[The general counsel] is 1630.37 and [Burdorf] is 2318.94. This is confidential and if I am caught sharing this I will be fired!”

Miller then sent the employee the first allegedly defamatory statement:

Who is this? I’ll find it on the check register that I’ll request at the upcoming meeting. We “MAT” ha[ve] no agreement with MATIT to pay any additional expenses. So having this request is really bad for those asking for the funds. *It’s like stealing or fraud of a nonprofit organization.* The board has no idea [t]hat commingling of funds from two different companies is wrong. You can’t just ask for money from one company just because!!!!!! Follow your instincts[.]”

(Emphasis added.)

The employee reached out to the MAT treasurer, who investigated the invoices. His investigation revealed the following. In 2021, MAT had several employment vacancies, including for positions that did work for MATIT. According to appellants, to ensure that MATIT could continue to process insurance claims, an arrangement was devised to have Burdorf and MAT's general counsel provide assistance on claim administration. Under the plan, Burdorf and the general counsel would track the amount of time they spent on MATIT work, and then reimbursement invoices would be prepared and submitted to the MATIT trustees for approval. Both Burdorf and the general counsel maintained their time sheets, and in January 2022, the invoices were created and submitted to a MAT employee who worked on MATIT matters. That employee was not aware of the arrangement between MAT and MATIT.

We note that, consistent with the representations in Miller's email, there is no written agreement confirming this arrangement between MAT and MATIT in the record.

The treasurer found that no checks were issued, no money transferred hands, and no money was intended to transfer hands.¹ The treasurer provided a report on his findings to the MAT board at a board meeting, which Miller attended.

In the spring of 2022, Burdorf sent an email to the MAT treasurer, providing feedback on how the treasurer interacted with MAT staff. The treasurer took offense to the email and read it aloud at a later MAT board meeting. After the treasurer read the

¹ We note that, even when viewed in the light most favorable to appellants, the treasurer's finding that there was no intent to transfer funds is inconsistent with Krueger's own description of the arrangement: "MATIT would need to reimburse MAT."

email, either Burdorf or a different board member criticized how the treasurer had handled the situation.² That person stated that, instead of reading the email to the MAT board, if they were the treasurer, they would have had the “b-lls” to confront Burdorf directly. Burdorf admitted to telling the treasurer, “I thought you would have been man enough to come to me and talk to me rather than send it . . . to all the board members.”

Miller filed a complaint with the board based on the conduct at that meeting as well as the reimbursement invoices. At the time, MAT had a policy detailing the investigation process for complaints by board members against other board members.³ Under the policy, if a complaint were to be filed against the president, the first vice-president would investigate the complaint. Following this policy, Miller sent an email to the first vice-president of the MAT board on May 20. In his complaint, Miller wrote the second allegedly defamatory statement: “Mr. Burdorf, during the meeting questioned [the treasurer]’s sexuality when Mr. Burdorf stated, ‘Are you not man enough’ followed a few minutes later by a reference to [the treasurer]’s ‘Genital parts’. [sic] Both comments are considered Sexual Harassment, 363A.03[.]” Miller also mentioned the MATIT invoices in the email, writing in the third allegedly defamatory statement that “it’s clear that Mr. Burdorf and Mr. Krueger attempted to Swindle, Steal or defraud and [sic] insurance company sanctioned by the State of Minnesota for the benefit of Minnesota townships” and that these were

² There is a factual dispute as to whether it was Burdorf or the other board member who made the comment.

³ This policy was designed to provide a consistent process for investigating allegations against a board member for a violation of any MAT bylaw, board policy, or other misconduct. The policy was rescinded by a six-to-five vote of the MAT board on June 16, 2022.

“crimes.” About two weeks later, Miller sent an updated version of his complaint to the first vice-president. His updated complaint revised only the third allegedly defamatory statement by adding “MATIT” to name the “insurance company.”⁴

Appellants sued Miller, alleging that his emails to the employee and the first vice-president constituted defamation. Following discovery, all parties moved for summary judgment. The district court granted Miller’s motion for summary judgment and denied appellants’ motion. This appeal follows.

DECISION

Appellants argue that the district court erred by determining that Miller’s email to the employee was not defamation as a matter of law and that qualified privilege protected Miller’s email to the first vice-president. We address each issue in turn.

On appeal from a grant of summary judgment, appellate courts “conduct a de novo review to determine whether there are any genuine issues of material fact and whether the district court erred in its application of the law to the facts.” *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 874 (Minn. 2019) (quotation omitted). To make that determination, appellate courts “view the evidence in the light most favorable to the nonmoving party and resolve all doubts and factual inferences against the moving parties.” *Id.* (Quotation omitted).

⁴ The first vice-president conducted an investigation into the allegations made, but the MAT board dismissed the complaint by a six-to-five vote on June 16, 2022, before any determinations were reached.

To establish a defamation claim, the plaintiff must prove three elements: 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.” *Id.* at 873.

Because Minnesota law generally requires defamation plaintiffs to establish verbatim the allegedly defamatory statement, we only consider the three statements alleged verbatim in the appellants’ amended complaint. *See Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 326-27 (Minn. 2000).

I. The district court did not err by determining that Miller’s email to the MAT employee was not defamation as a matter of law.

Appellants contend that Miller’s statement in the email to the MAT employee meets all three elements of the defamation claim. We do not agree.

The first element is whether Miller’s statement was “false” and whether it was “about” Burdorf and Krueger. *Maethner*, 929 N.W.2d at 873. In the email, Miller stated that “having this request is really bad for those asking for the funds. *It’s like stealing or fraud of a nonprofit organization.*” (Emphasis added.) First, this statement is not false because it does not claim that appellants engaged in “stealing or fraud,” it merely states that, if the funds were transferred directly to someone, it would be akin to “stealing or fraud.” Second, the statement is not “about” Burdorf and Krueger. Neither Burdorf nor Krueger is identified in the message. Indeed, Miller started his email by asking, “Who is this? I’ll find it on the check register that I’ll request at the upcoming meeting.” We conclude that the district court did not err by determining that the statement Miller made

in his email to the employee was not defamation as a matter of law because it was not a “false and defamatory statement about” Burdorf and Krueger. Because the first element of a defamation claim is not met, we do not consider the other elements.

II. The district court did not err by determining that qualified privilege protected the email from Miller to the first vice-president.

Appellants argue that qualified privilege did not apply to the email from Miller to the first vice-president and that, even if it did, Miller had acted with common-law malice. We are not persuaded.

A. Qualified privilege protects Miller’s statement.

Even if appellants had shown that Miller made a false and defamatory statement, “the common law recognizes privileges, both absolute and qualified, that operate to defeat a defamation claim.” *Maethner*, 929 N.W.2d at 873. Statements are protected under qualified privilege if “made in good faith, on a proper occasion, with a proper motive, and upon reasonable or probable cause.” *Larson v. Gannett Co.*, 940 N.W.2d 120, 131 (Minn. 2020). Whether privilege exists is a question of law which we review de novo. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 920 (Minn. 2009).

The Minnesota Supreme Court has concluded that qualified privilege protects statements made in a variety of circumstances, including statements made during an employer’s investigation into employee misconduct, *Bahr*, 766 N.W.2d at 923; an employer’s good-faith statement about the character of a former employee when called for a reference, *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 257 (Minn. 1980); and statements about the reasons for an employee’s discharge. *Lewis v. Equitable Life*

Assurance Soc’y, 389 N.W.2d 876, 889-90 (Minn. 1986). In short, “[q]ualified privilege applies when a court determines that statements made in particular contexts or on certain occasions should be encouraged despite the risk that the statement might be defamatory.” *Bol v. Cole*, 561 N.W.2d 143, 149 (Minn. 1997) (quotation omitted).

Bahr is most apposite to the statements Miller made in his email to the first vice-president. In *Bahr*, the supreme court concluded that the qualified privilege “extends to investigations of employee misconduct because the employer has an important interest in protecting itself and the public against dishonest or otherwise harmful employees.” 766 N.W.2d at 923 (quotation omitted). Similarly, a board member owes a fiduciary duty to the board and has “an important interest in protecting [the board] and the public against dishonest or otherwise harmful [board members].” *See id.*

Both of the allegedly defamatory statements made by Miller in his email to the first vice-president meet all of the requirements to be protected by qualified privilege. First, Miller made the statements in good faith. He stated that he believed that Burdorf’s statement during the meeting amounted to sexual harassment. And even though he had been at the meeting at which the MAT treasurer had presented his finding that no funds had transferred hands, Miller stated that “[b]ecause of the number of board members involved [in] this investigation, it should be conducted by an outside agency.” Miller’s statements were made in good faith because he requested an independent investigation into Burdorf’s comments at the meeting and into the reimbursement invoices from MAT.

Second, Miller made his statements on a proper occasion. Miller followed the requirements of the reporting policy by filing his report with the proper official and by only sending his report to that individual.

Third, Miller made his statements with a proper motive. Miller opened his email to the first vice-president by stating, “It gives me no pleasure in what I’m bring[ing] forward to you. As an elected official it is my obligation . . . to report a crime or perceived crime.” He expressed a motive to fulfil his fiduciary duty to report a crime or perceived crime.

Fourth, Miller had reasonable cause to make his statements. Miller attended the MAT board meeting at which he heard a board member question the treasurer’s manhood. And Miller believed that, notwithstanding the report from the MAT treasurer, an independent investigation was required to ensure that no financial fraud occurred in the organization.

We conclude that the district court did not err by determining that Miller’s email to the first vice-president showed that he was making his statements “in good faith, on a proper occasion, with a proper motive, and upon reasonable or probable cause.” *Larson*, 940 N.W.2d at 131.

B. There is no genuine dispute of material fact as to common-law malice.

Appellants contend that there is a dispute of material fact regarding whether they can prove common-law malice.

Although malice is usually a question of fact, on review from a grant of summary judgment, appellate courts analyze whether the evidence submitted raises any genuine issues of material fact. *Bol*, 561 N.W.2d at 150.

“A qualified privilege is overcome if the plaintiff demonstrates that the defendant made the statement with malice.” *Maethner*, 929 N.W.2d at 873. “Malice under the common law means that the defendant made the statement from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff.” *Id.* (Quotation omitted). It cannot be implied from the statement itself or from the fact that the statement was false. *Bol*, 561 N.W.2d at 150. “Malice can be shown by extrinsic evidence of personal spite, as well as by intrinsic evidence such as the exaggerated language of the libel, the character of the language used, the mode and extent of publication, and other matters in excess of the privilege.” *Id.* (Quotation omitted).

There is no intrinsic evidence that Miller acted with actual malice. Neither of the allegedly defamatory statements that Miller made in his email to the first vice-president showed malice. Miller stated that “Mr. Burdorf, during the meeting questioned [the treasurer]’s sexuality when Mr. Burdorf stated, ‘Are you not man enough’ followed a few minutes later by a reference to [the treasurer]’s ‘Genital parts’. [sic] Both comments are considered Sexual Harassment, 363A.03[.]” He also stated that Burdorf and Krueger “attempted to Swindle, Steal or defraud and [sic] insurance company sanctioned by the State of Minnesota for the benefit of Minnesota townships” and that these were “crimes.” Both of these statements do not use exaggerated language, were made in private letters sent solely to the individual on the board authorized to accept complaints and were directly about Miller’s request for an investigation. The statements themselves contain no evidence that Miller acted with common-law malice.

Appellants have not presented evidence that shows a genuine dispute of material fact on “extrinsic evidence of personal spite.” In their brief, appellants point to Miller’s rocky relationship with the MAT board, exaggerated language he used in other circumstances, and his difficult relationship with Krueger. But these do not affect Miller’s obligation, as a fiduciary member of a board of directors, to file a report in the manner prescribed by policy when he observed potential sexual harassment and when he had concerns about fraud. Although appellants rely heavily on the internal investigation and finding by MAT’s treasurer that no fraud had occurred, Miller was a fiduciary member of the board seeking to have an investigation by outside counsel to maintain the board’s integrity. There is no genuine dispute of material fact on common-law malice.

We conclude that, even if Miller’s statements in his email to the first vice-president were defamatory, the district court did not err by granting summary judgment to Miller because the statements were protected by qualified privilege, and appellants have not shown a genuine dispute of material fact as to common-law malice.⁵

Affirmed.

⁵ Appellants also argue that the district court erred by determining that, even if qualified privilege did not protect Miller’s email to the first vice-president, appellants were public officials under the standard in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and they therefore were required to show that Miller made his statements with “actual malice” to sustain their defamation claim. We do not reach this issue because we conclude that the statements were protected by qualified privilege. In addition, we do not reach appellants’ argument that the district court abused its discretion by denying their motion to seek punitive damages because we affirm the district court’s grant of summary judgment to Miller.