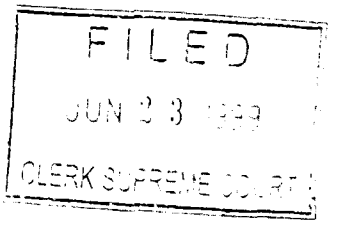
IN THE COURT OF APPEALS OF IOWA

No. 1999-79 (9-266) / 98-1114
Filed June 23, 1999

CHERYL BIRD,

Plaintiff-Appellant,



vs.

AETNA CASUALTY & SURETY CO.,

Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

Plaintiff appeals from the district court's judgment for defendant upon a directed verdict on plaintiff's libel claim. **AFFIRMED.**

Christopher D. Spaulding and Joseph L. Walsh, Des Moines, for appellant.

Steven P. Wandro and Sandra K. Lyons of Wandro & Associates, P.C., Des Moines, for appellee.

Heard by Sackett, C.J., and Vogel and Zimmer, JJ.

SACKETT, C.J.

Plaintiff-appellant Cheryl Bird sued defendant-appellee Aetna Casualty & Surety Co. contending Jan Hardcopf-Bickley, an alleged agent of defendant, libeled her in reporting she had a problem with alcohol. At the close of plaintiff's evidence, the district court sustained a motion for directed verdict made by defendant contending there was no evidence Hardcopf-Bickley was an agent of defendant or she was acting with real or apparent authority. Plaintiff on appeal contends the district court erred in sustaining the motion for directed verdict because (1) she introduced evidence to support a finding Hardcopf-Bickley was defendant's agent acting with real or apparent authority; (2) there was no evidence the alleged libel was protected by a qualified privilege; and (3) there was evidence the statement was a libelous statement made with actual malice. We affirm.

We review for correction of errors at law. Iowa R. App. P. 4; *Heick v. Bacon*, 561 N.W.2d 45, 47 (Iowa 1997). We review the evidence in the light most favorable to plaintiff. *See id.* If reasonable minds could differ on an issue of fact under the evidence presented, it should be submitted to the jury. *See id.* We view the evidence in the light most favorable to the party against whom the motion was made, taking into consideration every legitimate inference that may fairly and reasonably be made. *Bredberg v. Pepsico, Inc.*, 551 N.W.2d 321, 326 (Iowa 1996). The motion must stand or fall on the grounds raised in the motion for directed verdict. *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 538 (Iowa 1996). Our only inquiry is whether there is sufficient

evidence to justify submitting the case to the jury. *Bredberg*, 551 N.W.2d at 326. The motion should be denied if there is substantial evidence to support each element of plaintiff's claims. *Id.* Evidence is substantial when a reasonable mind would find the evidence presented adequate to reach the same findings. *Willey v. Riley*, 541 N.W.2d 521, 526 (Iowa 1995).

In 1994, plaintiff suffered a work-related injury while employed by Bunn-O-Matic. Bunn-O-Matic was insured for workers' compensation liability by defendant. Plaintiff reported the injury. She was treated and surgery was performed to correct the condition in April of 1995.

Hardcopf-Bickley, hired as an occupational therapist by Bunn-O-Matic, treated plaintiff for the injury sustained at Bunn-O-Matic. Later, Hardcopf-Bickley was engaged by defendant to serve as a medical case manager, and in such capacity she was involved with plaintiff's case.

On October 12, 1994, Hardcopf-Bickley wrote plaintiff's treating physician a letter addressing treatment for plaintiff's injury. In that letter, Hardcopf-Bickley made reference to reports of what plaintiff contends were problems with her alcohol use and job attendance. Actually, the letter did not talk of plaintiff's alcohol use; rather, it used the reference "ETOH." This reference is admitted to be a term indicating plaintiff had an alcohol problem. A copy of Hardcopf-Bickley's letter to the doctor was sent to Bunn-O-Matic's workers' compensation administrator. The administrator did nothing about the alleged claim plaintiff had an alcohol problem. Defendant did not receive a copy of the letter.

Plaintiff subsequently filed the action leading to this appeal contending she had been libeled by the statement in the letter that she had an alcohol problem. Defendant, in answer to plaintiff's petition, raised the affirmative defenses the information was protected by a privilege and it was not responsible for plaintiff's alleged damages.

At trial, plaintiff claimed she had no problem with alcohol and the reference in the letter she did caused her to become upset. Plaintiff also claimed Hardcopf-Bickley showed ill will to her in attempting to gather false information to attack her credibility and to save defendant money on plaintiff's claim. Plaintiff claims at the time Hardcopf-Bickley's conduct was controlled by defendant.

At the close of plaintiff's case, both parties moved for a directed verdict. Plaintiff claimed the statement she had an alcohol problem constituted libel per se. The district court agreed with plaintiff the statement was libel per se. However, the district court sustained defendant's motion concluding though the statement regarding plaintiff's alcohol problem was libel per se, it was protected by a qualified privilege and plaintiff failed to introduce evidence to support a finding of actual malice as was necessary to overcome that privilege. The district court also concluded plaintiff had not introduced such evidence as would support a finding Hardcopf-Bickley was either an employee or agent of defendant at the time of the challenged acts.

Plaintiff first contends she presented sufficient evidence which, if believed, would support a finding Hardcopf-Bickley was an agent of defendant. Defendant contends the only finding the evidence supports is Hardcopf-Bickley was an independent contractor.

Where the nature and extent of an authority are to be determined or implied from the facts and circumstances, the questions as to the nature and extent of the agent's authority and whether the particular act in controversy was within the scope of his authority are usually questions of fact for the jury, guided by proper instructions from the court. *See Wright v. Iowa Power & Light Co.*, 223 Iowa 1192, 1195-96, 274 N.W. 892, 894 (1937).

A fundamental principle of agency law is that whatever an agent does, within the scope of his or her actual authority, binds the principal. *Dillon v. City of Davenport*, 366 N.W.2d 918, 924 (Iowa 1985). In addition, all acts and contracts of an agent which are within the apparent scope of authority conferred on him or her are also binding upon the principal. *FS Credit Corp. v. Troy Elevator, Inc.*, 397 N.W.2d 735, 740 (Iowa 1986).

Apparent authority is authority which, although not actually granted, has been knowingly permitted by the principal or which the principal holds the agent out as possessing. *Id.* Apparent authority must be determined by what the principal does, rather than by any acts of the agent. *Magnusson Agency v. Public Entity Nat'l Co.-Midwest*, 560 N.W.2d 20, 26 (Iowa 1997); *Waukon Auto Supply v. Farmers & Merchants Sav. Bank*, 440 N.W.2d 844, 847 (Iowa 1989).

We agree with plaintiff there was evidence to support a finding of agency.

Plaintiff next contends the statement was not privileged. Plaintiff makes a claim she was libeled. Libel is one of the twin torts of defamation defined as the

invasion of another's interest in reputation or good name. *See Johnson v. Nickerson*, 542 N.W.2d 506, 510 (Iowa 1996). Plaintiff contends her claim flows from a written statement; consequently, her claim is based on libel, not slander, which is based on oral statements. *Id.* To establish a prima facie case in any defamatory action, a plaintiff must show defendant (1) published a statement that (2) was defamatory and (3) of and concerning plaintiff. *See id.*

There are two types of privileged communications -- those that are absolutely privileged and those that are qualifiedly or conditionally privileged. *See Vojak v. Jensen*, 161 N.W.2d 100, 105 (Iowa 1968). Absolute privilege affords a complete defense under any circumstances, even if actual malice is shown, while qualified privilege provides immunity in some, but not all, instances. *Id.*

Qualified privilege is at issue here. Qualified privilege is an affirmative defense that must be pled and proven. *Vinson v. Linn-Mar Community Sch. Dist.*, 360 N.W.2d 108, 116 (Iowa 1984). Qualified privilege attaches to communications made (1) in good faith, (2) concerning a subject matter in which the speaker has an interest, right, duty, or obligation, and (3) to a listener who has a corresponding interest, right, duty, or obligation in the subject matter of the communication. *See Brown v. First Nat'l Bank*, 193 N.W.2d 547, 552 (Iowa 1972).

Qualified privilege applies to publications without regard to whether they are defamatory per se, but it protects only those statements made without actual malice. *Vinson*, 360 N.W.2d at 116. A publication loses the privilege if there is proof of

actual malice. *Id.* A finding of actual malice turns on the motive for the communication and requires proof that the statement was made with ill will or wrongful motive. *Id.* at 117. Actual malice occurs when a statement is made with knowledge it is false or with reckless disregard for its truth or falsity. *Jones v. Palmer Communications, Inc.*, 440 N.W.2d 884, 894 (Iowa 1989); *McCarney v. Des Moines Register & Tribune Co.*, 239 N.W.2d 152, 156 (Iowa 1976).

The statement plaintiff finds objectionable arose out of an evaluation of her worker's compensation claim. Hardcopf-Bickley was responsible in part for conveying her knowledge of plaintiff for the purpose of evaluation of plaintiff's claim. Furthermore, the allegedly libelous communication was made not by specifying plaintiff had a problem with alcohol use, but rather only by the use of a term not readily ascertainable. The communication was a qualified privilege. By virtue of the qualified privilege, the employer who is evaluating or investigating an employee in good faith and within the bounds of the employment relationship is protected from the threat of defamation suits. *See Taggart v. Drake Univ.*, 549 N.W.2d 796, 803 (Iowa 1996). Such was the case here.

Because defendant has proven its affirmative defense of qualified privilege, plaintiff is required to prove the statements made by Hardcopf-Bickley were made with ill will or wrongful motive. *Vinson*, 360 N.W.2d at 117; *Kelly v. Iowa State Educ. Ass'n*, 372 N.W.2d 288, 296-97 (Iowa App. 1985).

While plaintiff contends there is evidence of ill will or wrongful motive, we find none. It is plaintiff's position Hardcopf-Bickley was trying to destroy plaintiff's credibility and minimize the injuries and keep plaintiff from an orthopaedic surgeon to save defendant money. Yet, the focal question is whether Hardcopf-Bickley's acts were in good faith and not with an evil intent to plaintiff. While there is nothing in the record to support Hardcopf-Bickley's assessment plaintiff has a problem with alcohol, we need to decide whether there was evidence in the record to support a finding she harbored some specific "intent to inflict harm through falsehood" as is required under the law. *See Taggart*, 549 N.W.2d at 804; *see also McCarney*, 239 N.W.2d at 156.

Hardcopf-Bickley testified she had received reports plaintiff had alcohol and job attendance problems and she had seen plaintiff with very bloodshot eyes several times. She further testified she thought the job attendance and alcohol issues needed to be in the letter because she felt them relevant to plaintiff's treatment with her physician. Defendant advances this was in accord with Hardcopf-Bickley's job as an occupational therapist referring an employee for medical treatment. Plaintiff admitted she had bloodshot eyes, but contended they were the result of allergies. Plaintiff's evidence did not reach the level necessary to show malice or ill will. The district court was correct in sustaining the motion for directed verdict.

AFFIRMED.

No. 98-1114. [1999-79 (9-266)] BIRD v. AETNA CASUALTY & SURETY

Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge. **AFFIRMED.** Heard by Sackett, C.J., and Vogel and Zimmer, JJ. Opinion by Sackett, C.J. (8 pages $3.20)

Plaintiff sued defendant contending Jan Hardcopf-Bickley, an alleged agent of defendant, libeled her. The district court sustained a motion for directed verdict made by defendant. Plaintiff on appeal contends the district court erred in sustaining the motion because (1) she introduced evidence to support a finding Hardcopf-Bickley was defendant's agent; (2) there was no evidence the alleged libel was protected by a qualified privilege; and (3) there was evidence the statement was made with actual malice. We affirm. Plaintiff suffered a work-related injury while employed by Bunn-O-Matic, insured for workers' compensation liability by defendant. Plaintiff was treated. Hardcopf-Bickley, hired as an occupational therapist by Bunn-O-Matic, treated plaintiff for the injury. Later, Hardcopf-Bickley was engaged by defendant to serve as a medical case manager. Hardcopf-Bickley wrote plaintiff's physician a letter. The

No. 98-1114. [1999-79 (9-266)] BIRD v. AETNA CASUALTY & SURETY (continued)

letter used the reference "ETOH," admitted to be a term indicating plaintiff had an alcohol problem. A copy of Hardcopf-Bickley's letter was sent to Bunn-O-Matic's workers' compensation administrator. Plaintiff filed the action contending she had been libeled by the statement in the letter. Defendant raised the affirmative defenses the information was protected by a privilege. The district court agreed with plaintiff the statement was libel per se. However, the district court sustained defendant's motion concluding though the statement regarding plaintiff's alcohol problem was libel per se, it was protected by a qualified privilege and plaintiff failed to introduce evidence to support a finding of actual malice to overcome that privilege. The district court also concluded plaintiff had not introduced such evidence as would support a finding Hardcopf-Bickley was an agent of defendant. Plaintiff contends she presented sufficient evidence Hardcopf-Bickley was an agent of defendant. We agree. Plaintiff next contends the statement was not privileged. The statement arose out of an evaluation of her worker's compensation claim. Hardcopf-Bickley was responsible for conveying her knowledge for the purpose of evaluation of plaintiff's claim. The communication was a qualified privilege. Because defendant has proven its affirmative defense of qualified privilege, plaintiff is required to prove the statements made by Hardcopf-Bickley were made with ill will or wrongful motive. Plaintiff contends there is evidence of ill will or wrongful motive. We find none. The district court was correct in sustaining the motion for directed verdict.