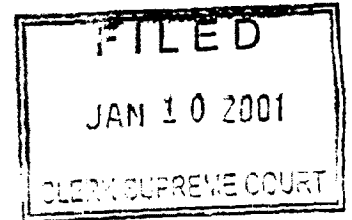


IN THE COURT OF APPEALS OF IOWA

No. 0-617 / 99-1881
Filed January 10, 2001



HOWARD BRADBERRY,
Appellant,

vs.

DUBUQUE COUNTY, IOWA, and KEN RUNDE, Individually,
Appellees.

Appeal from the Iowa District Court for Dubuque County, John Bauercamper, Judge.

Plaintiff appeals following a trial on his defamation and negligence action against Dubuque County and one of its sheriff's deputies in which the jury returned a defense verdict on the defamation count and found for the plaintiff on the negligence count, but determined he had suffered no damages. He contends the court abused its discretion in allowing the defendants to amend their answer to include the defense of qualified immunity. **AFFIRMED.**

Curt Krull of Roehrick, Hulting, Krull & Blumberg, P.C., Des Moines, for appellant.

Todd L. Stevenson and Les V. Reddick of Kane, Norby & Reddick, P.C., Dubuque, for appellees-Dubuque County and Ken Runde.

Heard by Streit, P.J., and Vogel and Hecht, JJ.

VOGEL, J.

Howard Bradbery appeals following a trial on his defamation and negligence actions against Dubuque County and one of its deputy sheriffs, Ken Runde. He contends the court abused its discretion in allowing the defendants to amend their answer, after the close of the evidence, to include the defense of qualified immunity. We affirm.

Background facts. Beginning in September of 1995, TCI of Iowa, Inc. (TCI) televised a short program called Crime Watch. It was part of a 24-hour series of public service announcements, which included such matters as church bake sales, pets available through the Humane Society and a variety of commercial advertisements. The Crime Watch portion of the broadcast focused on pertinent information regarding individuals wanted by local law enforcement. In August of 1996, Deputy Ken Runde provided information on Bradbery to TCI, which stated Bradbery was wanted by the Sheriff's Department for failing to serve his full sentence on a prior conviction. TCI subsequently broadcast the information. Bradbery claimed his sentence had been completed and Runde had erroneously and negligently provided misinformation to TCI.

In March of 1994, Bradbery was sentenced on an OWI conviction to serve a sentence of 180 days at the Elm Street Residential Facility. The judgment entry ordered Bradbery to "see that Elm Street certifies days to Dubuque Co. jail." Although Bradbery did complete his sentence and was released by a court order, he did not certify his time served and the Dubuque county sheriff's office continued to have the mittimus on file. Before providing Bradbery's name based

on the mittimus in the file, Sergeant Riddinger called the clerk of court's office to verify whether the mittimus was still active. It was not until the clerk of court had confirmed the mittimus was active, apparently overlooking the release order, that Runde included Bradbery in the Crime Watch listing for that month.

Bradbery filed suit against Dubuque County, Ken Runde individually, and TCI¹. The various actions alleged defamation, false light and invasion of privacy. The jury returned a verdict in favor of Dubuque County on the defamation claim, based on the defense of qualified immunity. On the negligence claim, the jury found Bradbery to be 49% at fault and Dubuque County and Runde to be 51% at fault but found Bradbery had not suffered any damages. Bradbery filed a motion for new trial, which the trial court overruled. Bradbery now appeals, alleging the trial court erred in denying his motion for new trial, failing to properly instruct the jury and allowing defendants to amend their answer to assert a defense of qualified immunity.

Scope of review. We review a ruling on a motion for new trial for an abuse of discretion. *Kuta v. Newberg*, 600 N.W.2d 280, 284 (Iowa 1999). If a jury verdict is not supported by sufficient evidence and the verdict fails to effectuate substantial justice, a new trial may be ordered. *Thompson v. Rozeboom*, 272 N.W.2d 444, 446 (Iowa 1978). The allowance of an amendment to a pleading is the rule and denial the exception, unless the amendment will substantially change the issue. *Allison-Kesley Ag Center, Inc. v. Hildebrand*, 485 N.W.2d 841, 845 (Iowa 1992) (citation omitted). A trial court has considerable

¹ All allegations against TCI were dismissed on its motion for summary judgment.

discretion as to whether a motion to amend should be granted or denied and we will reverse only where a clear abuse of discretion is shown. *Id.*

Motion for new trial. The jury rendered its verdict on October 22, 1999. Twelve days later, on November 3, Bradbery filed his motion for a new trial. Iowa Rule of Civil Procedure 247 requires a motion for new trial to be filed within ten days after the filing of the verdict unless the court, for good cause shown, extends the time. Bradbery's motion was untimely with no request to the trial court for additional time. As such, we find he has waived his right to a new trial.

Amended answer. The trial court allowed Dubuque County and Runde to amend their answer after the close of the evidence to include a qualified immunity defense. Bradbery alleges this was an abuse of discretion based on three grounds; 1) it was untimely, 2) it substantially changed the issues and 3) it did not conform to proof. Bradbery has failed to preserve error as to the timeliness and substantial change to the issues by failing to make these specific objections at the time of the motion. *Peters v. Burlington Northern R.R. Co.*, 492 N.W.2d 399, 401 (Iowa 1992). An issue must be raised and decided by the trial court before it may be raised and decided on appeal. *Id.*

Bradbery did make a timely objection to the defendant's motion to add the defense of qualified immunity, asserting the elements had not been proven and, hence, the amendment did not conform to the proof. The motion to amend was made at the close of the evidence, with no additional evidence presented by Dubuque County or Runde to establish or prove the qualified immunity defense. Iowa Rule of Civil Procedure 119 allows the pleading to be amended, "as may be

necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; . . . “ The rule is to be liberally construed, allowing the trial court broad discretion in allowing late amendments to the pleadings. *In re Marriage of Titterington*, 488 N.W.2d 176, 180-81 (Iowa App. 1992). If a party objects to the amendment, one remedy is to ask for a continuance or to reopen the record to allow for the taking of additional evidence. *Smith v. Village Enterprises, Inc.*, 208 N.W.2d 35, 38 (Iowa 1973). Bradbery claims he was not prepared to rebut this defense as he was not on notice of the defense during the trial. However, he cannot now claim he was prejudiced by the allowance of the amendment when he failed to request the trial court continue the case or allow him to re-open the record to rebut the qualified immunity defense. *Id.*

Bradbery further contends the evidence does not support the defense, based on the facts in evidence. Jury instruction no. 21 contained the elements of the qualified immunity defense.

The defendants claim that their statements were privileged.

The defendants must prove all of the following things for the statements made:

1. They were made in good faith;
2. To a person or organization having an interest in the subject matter of the statement;
3. The statements were limited in scope to their purpose;
4. Made on an appropriate occasion;
5. The statements were made in a proper manner to proper parties.

If the defendants have proved all of these propositions, then plaintiff cannot recover on his claim for libel and slander. If the defendants have failed to prove either of these propositions, the defendants have not proved their defense, and you will consider whether plaintiff is entitled to recover damages as provided by other instructions.

The supreme court has previously held defense of qualified immunity or privilege:

[m]ay attach to certain statements made by a lower-ranking government official which are necessary to the performance of official duties. This qualified privilege does not provide a complete defense, rather, the plaintiff is required to demonstrate actual malice on the part of the public official. This qualified privilege can be defeated if it is abused. Excessive publication of otherwise privileged material will act to remove the protection afforded by this privilege.

It is for the court to decide as a matter of law whether the qualified privilege is available for a particular statement. The court must consider the relation of the statements to the duties of the public official and the underlying purpose of the qualified privilege, see Restatement (Second) of Torts § 603 (1977). In determining whether the publication of the statement was excessive, the court must find a "valid interest on the part of the general public which necessitated or justified" the broadcast. The challenged statements must be considered in the complete context of statements made by the public official. To apply this privilege to a media defendant, it will be necessary to view the challenged statements in the context of the entire broadcast.

Jones v. Palmer Communications, Inc., 440 N.W.2d 884, 892 (Iowa 1989)

(citations omitted), *overruled on other grounds by Schlegel v. Ottumwa Courier, a Div. of Lee Enterprises, Inc.*, 585 N.W.2d 217, 224 (Iowa 1998). The purpose of the qualified immunity defense is to allow government employees to perform their job duties and protect the public interests by disseminating information that would otherwise be considered defamatory. 50 Am. Jur. 2d Libel and Slander § 530, at 832 (1995). The jury could have found the following facts in the evidence

presented, which support the defense of qualified immunity. Runde testified his records showed an active mittimus for Bradbery on the 180-day sentence. This was verified with the clerk of court's office. In delivering this information to TCI to broadcast, Runde was acting within the duties of his office, which include protecting the public. Further, the record indicates the statements were made in a proper manner, considering the type of information conveyed to the public. Brian Zeman, a TCI Sales Manager, testified that the relevant programming was sixty minutes of community information, which repeated each hour. The Crime Watch segment ran for five minutes during each sixty minutes of information, repeating twenty-four times each day. The Crime Watch information published on air was taken verbatim from the information provided by the sheriff's office. This program was intended to help protect the community from people wanted by the police for various reasons. The information was widespread but the range was no larger than was reasonable, given the broadcast area it was viewed in. We find the information given by Runde to TCI for broadcast was not excessive due to the valid public interest in the dissemination of the information.

In order to invalidate the qualified immunity defense, Bradbery must have shown by clear and convincing evidence that Runde acted with actual malice or with knowledge of the falsity of the information or a reckless disregard for the truth. The evidence did not support such a finding, as Runde was neither aware of the misinformation nor did he intentionally publish the false information.

Jury instructions. Bradbery argues the trial court erred in its instructions to the jury. We consider only the objections to the instructions that were properly

raised in the district court proceedings. *Moser v. Stallings*, 387 N.W.2d 599, 603-04 (Iowa 1986).

Bradbery requested an instruction stating malice in a defamation case can be established by proving "knowledge of falsity or reckless disregard for the truth." *Blessum v. Howard County Bd. of Sup'rs.*, 295 N.W.2d 836, 843 (Iowa 1980). The trial court denied the inclusion of this definition and stayed with the definition contained in instruction 2100.5 from the Iowa Civil Jury Instructions. The jury was instructed:

"Actual malice" – definition. The defendants made statements with actual malice if the statements were made with ill-will or wrongful motive.

Bradbery now asserts because the qualified immunity defense can only be defeated if actual malice is proven, the case law definition he offered of actual malice should have been given to the jury. He now claims there was evidence in the record that would support a finding that Runde should have known, with minimal investigation, the information he gave to TCI regarding Bradbery was false. However, Bradbery did not request a jury instruction that proving actual malice would overcome the qualified immunity defense. His request was to supplant the short definitional instruction on actual malice intended to aid the jury in another instruction, no. 19, the libel/slander claim. That language instructed the jury that Bradbery must prove, "The plaintiff's reputation was damaged. If the statements were made with actual malice, damage to his reputation is presumed." His argument on appeal is not the same as asserted before the trial court and therefore, error was not preserved on this issue.

Finally, Bradbery claims the trial court erred by refusing to issue jury instructions on the claims of defamation per quod, false light and invasion of privacy. False light is an alternate claim; Bradbery may recover under either defamation or false light but not both causes of action. See *Berry v. National Broadcasting Co.*, 480 F.2d 428, 431 (8th Cir. 1973), *cert. dismissed*, 418 U.S. 911, 94 S. Ct. 3203, 41 L. Ed. 2d 1157 (1974). On this issue, the supreme court has previously maintained:

"[f]alse light" cases are subject to the same constitutional restraints as defamation cases. It is unreasonable to allow a party to evade the standards surrounding defamation law because the plaintiff has pled an alternative theory. In an action such as this, both parties are subject to the restraints of the law of defamation, even if a "false light" action has been pled.

Jones, 440 N.W.2d at 894 (citations omitted).

To recover on a claim of defamation per quod, the plaintiff must prove damage elements in addition to a per se defamation claim. *Johnson v. Nickerson*, 542 N.W.2d 506, 510 (Iowa 1996). Bradbery requested the following jury instruction:

The plaintiff must prove all of the following propositions:

1. The defendant made written or printed or oral statements concerning the plaintiff.
2. The statements were false.
3. The defendant made the statements with malice.
4. The defendant communicated the statements to someone other than the plaintiff.
5. The statements tended to injure the reputation of the plaintiff, expose the plaintiff to public hatred, contempt or ridicule, injure the plaintiff in his efforts to maintain his business.

6. The statements caused damage to the plaintiff.

7. The amount of damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proven all of these propositions, the plaintiff is entitled to damages in some amount.

Because the libel and slander claim was a defendants' verdict, Bradbery cannot claim that he was prejudiced by the failure to include an instruction which would have required him to prove libel and slander plus the additional requirements under a per quod theory.

Therefore, we find the trial court did not err in refusing to submit the requested jury instructions. Accordingly, we affirm.

AFFIRMED.