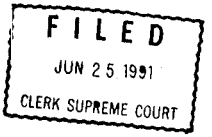
IN THE COURT OF APPEALS OF IOWA

No. 1-104 / 90-601



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HAROLD LEE SPENCER,

Appellee,

vs.

LYLE D. SPENCER,

Appellant.

Appeal from the Iowa District Court for Greene County, Ronald H. Schechtman, Judge.

Lyle appeals a district court judgment, following a jury verdict, awarding Harold $25,000 in compensatory and $35,000 in punitive damages for libel arising from several letters written by Lyle. **AFFIRMED.**

Victoria L. Herring, West Des Moines, for appellant.

Scott D. Hillstrom of Hillstrom & Bale, Ltd., Minneapolis, Minnesota and Gerald W. Magee, Jefferson, for appellee.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

DONIELSON, P.J.

This lawsuit follows a long history of disputes between brothers, Harold and Lyle Spencer. In the instant proceeding Harold, plaintiff-appellee, sued Lyle, defendant-appellant, for libel. A jury found for Harold, and Lyle was ordered to pay Harold $25,000 in actual damages and $35,000 in punitive damage. Lyle appeals. We affirm.

Harold and Lyle are two of the beneficiaries of a trust established by their father. The corpus of the trust is 640 acres of farmland in Greene County (farmed by grandsons of the trustor) and an additional 160 acres of farmland in Humboldt County (farmed by Lyle). The trust is filed in Greene County and administered under the supervision of the probate court there. Family relationships since the establishment of the trust have not been harmonious and the brothers have a history of inter-family litigation. E.g., In re Estate of Spencer, 232 N.W.2d 491 (Iowa 1975).

On June 3, 1988, in the probate court Harold filed objections to the trustee's 1987 annual report. Among other issues raised by the objections were: whether Lyle should pay cash rent as did the other two tenants; whether it was appropriate for the trust to pay for off-farm storage of Lyle's beans; and whether the three tenants were being treated equally with regard to chemical application costs. On June 6, 1988, Lyle, acting pro se, filed a "Response to Harold Spencer's Objections to the Annual

Report" ("Comes now Lyle D. Spencer and states to the Court: * * *"). A hearing date for argument on the matter was postponed.

Because there were now questions of whether the existing lease terms were appropriate, the trustee gave notice to terminate all three trust leases. The trustee and the tenants then began negotiating new leases. Eventually, the negotiations led to new five-year leases for all three tenants and the formal withdrawal of Harold's objections.

During the course of the lease negotiations and after Harold filed the objections, Lyle wrote several letters to the trustee's attorney. Lyle was of the opinion Harold's allegations in the probate proceeding had caused Lyle to lose the farm. The letters expressed Lyle's frustration with various procedures and contained responses to Harold's objections. In the letters, Lyle argued Harold had an agenda for removing Lyle from the trust farm. He made several statements to the effect that Harold was dishonest. The letters, according to notations on the letters, went to a number of persons either presently or previously interested in the trust, to legislators, and to a newspaper. Copies of the letters were also sent to the Greene County clerk of court.

Based on statements made in three letters (dated September 19, 1988, October 22, 1988, and October 29, 1988), Harold sued Lyle for libel. Lyle moved to dismiss

based on his contention the letters enjoyed an absolute privilege. That motion was denied. The trial court, on an adjudication of law points, determined certain portions of the letters were libelous per se. The case was tried to a jury. The trial court instructed the jury that the court had found certain portions of each letter libel per se which makes the letters actionable but not compensable until further proof was made. The trial court determined Lyle enjoyed a qualified privilege and submitted to the jury the issues of whether the qualified privilege had been abused or whether the statements were made with actual malice.

The jury answered special interrogatories finding there had been no abuse of the qualified privilege with regard to the September 19 letter -- nor evidence of actual malice. However, with regard to the October 22 and October 29 letters, the jury found Lyle had abused the qualified privilege and he had not established the truth of the statements. The jury returned a verdict awarding Harold $25,000 in compensatory damages and $35,000 in punitive damages. Lyle's posttrial motions were denied.

Lyle appeals the verdict rendered in Harold's favor. He contends the trial court erred in (1) failing to determine Lyle's statements were entitled to an absolute privilege, (2) finding sufficient evidence to support the jury's determination that Lyle abused his qualified privilege, (3) determining certain statements in Lyle's

letters were libelous per se, and (4) finding sufficient evidence to support the award of compensatory and punitive damages.

I. **Absolute Privilege.** Lyle first contends the trial court erred in denying his motion for directed verdict. He contends the letters were absolutely privileged communications because he was involved in a judicial proceeding, he was acting pro se, and the letters contained matters which were related to the judicial proceeding concerning his father's trust.

Libel in Iowa is the "malicious publication, expressed either in printing or in writing, or by signs and pictures, tending to injure the reputation of another person or to expose [the person] to public hatred, contempt, or ridicule or to injure [the person] in the maintenance of [the person's] business." Plendl v. Beuttler, 253 Iowa 259, 262, 111 N.W.2d 669, 670-71 (1961). Under certain circumstances libelous statements may be made and the maker protected from liability in an action for defamation.

> The law recognizes certain situations may arise in which a person, in order to protect [the person's] interests or the interests of others, must make statements about another which are indeed libelous. When this happens, the statement is said to be privileged, which simply means no liability attaches to its publication.

Vojak v. Jensen, 161 N.W.2d 100, 105 (Iowa 1968).

Privilege is an affirmative defense which must be pleaded and proved. Vinson v. Linn-Mar Community School Dist., 360 N.W.2d 108, 116 (Iowa 1984) Privileged

defamatory matters are divided into two general classes: (1) those that are absolutely privileged, and (2) those which are qualifiedly or conditionally privileged. Robinson v. Home Fire & Marine Ins. Co., 242 Iowa 1120, 1125, 49 N.W.2d 521, 524 (1951). An absolute privilege affords a complete defense. Mills v. Denny, 245 Iowa 584, 587, 63 N.W.2d 222, 227 (1954). A qualified privilege protects only statements made without actual malice. Vojak, 161 N.W.2d at 105.

Iowa recognizes that some communications are absolutely privileged. See Robinson, 242 Iowa 1120, 49 N.W.2d 521 (discussing general rules of privilege). However, the rule of absolute privilege is to be confined strictly to cases where the administration of justice requires complete immunity. Mills v. Denny, 245 Iowa 584, 588, 63 N.W.2d 222, 225 (1954).

> This rule should be and usually is confined strictly to cases in which the public service or the administration of justice require complete immunity, to legislatures in debate, judges and attorneys in the preparation and trial of cases, and in executive and military personnel within the duties of their offices. * * * [T]his class of privilege is and must be restricted to narrow and well-defined limits. The privilege spoken of is in reality an immunity provided, applicable only to recognized positions and occasions.
>
> Absolute immunity, it seems, should be confined to cases where there is supervision and control by other authorities, such as courts of justice, where proceedings are under the able and controlling influence of a learned judge, who may reprimand, fine and punish as well as expunge from records statements of those who exceed proper bounds, and who may themselves be disciplined when necessary.

Id., 245 Iowa at 588, 63 N.W.2d at 224-25.

It is the circumstance or the occasion upon which the language is used which is privileged. Robinson, 242 Iowa at 1126, 49 N.W.2d at 524. The court has the initial responsibility of determining whether or not there is a privilege, absolute or qualified, under the circumstance or occasion involved. Mills, 245 Iowa at 589, 63 N.W.2d at 225. Whether and to what extent a privilege will be applicable in a given case depends on the unique circumstances of that case and will be determined as a matter of law. Mills, 245 Iowa at 592, 63 N.W.2d at 227.

Lyle argues his communications were entitled to absolute immunity because he was acting as his own lawyer in a judicial proceeding. We disagree. It might be possible to conclude Lyle's letters were part of his preparation for the hearing on the objections to the annual report, although they appear to this court more related to the lease negotiations. Nonetheless, judicial control was completely lacking here. Copies of the letters were sent to the clerk of court but there is no way to know if a judge was ever aware of them. The probate court had no control over who would receive the letters. Justice here does not require that Lyle be given absolute immunity. The district court correctly concluded Lyle was not entitled to absolute immunity under these circumstances.

II. **Abuse of Qualified Privilege.** Lyle contends the trial court should have directed a verdict in his favor

because actual malice was not established. As stated previously, a qualified privilege protects only statements made without actual malice. Vojak, 161 N.W.2d at 105. However, the privilege may be lost if it is abused. Id. at 110.

> A qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest. The essential elements thereof are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.

Brown v. First National Bank of Mason City, 193 N.W.2d 547, 552 (Iowa 1972) (emphasis in original) (citation omitted). The qualified privilege is abused when defamatory words are published to persons whose knowledge of them is unnecessary to the protection of the interest in question. Robinson, 242 Iowa at 1133, 49 N.W.2d at 528. In the case before us, the district court concluded Lyle had a qualified privilege under the circumstances, but certain factual questions remained, i.e., whether Lyle had abused the privilege by publication to unnecessary parties. The trial court directed the jury:

> One, who upon an occasion giving rise to a qualified privilege, publishes defamatory matter concerning another abuses the privilege, if he:
> 1) does not act for the purpose of protecting the interest for the protection of which the privilege is given; or

2) knowingly publishes the defamatory matter to a person to whom its publication is not otherwise privileged; or

3) does not reasonably believe the matter to be necessary to accomplish the purpose for which the privilege is given.

* * *

Instruction No. 13.

The jury found Lyle had abused his privilege with regard to the letters written on October 22 and October 29. These findings are binding upon this court if supported by substantial evidence. Iowa R. App. P. 14(f)(1). There is substantial evidence in the record to support a finding that Lyle published copies of the letters to a bank that had not been involved with the trust for over three years.[1] Lyle admitted sending copies of the letters to a former tenant of one of the farms. There was also evidence presented from which the jury could infer Lyle sent copies of the letters to a newspaper and various legislators. None of these parties had any interest in the trust, in the objections to the annual report, or in the lease negotiations. We affirm the finding of abuse of privilege.

The jury also found that Lyle had failed to establish the truth of the libelous statements. This finding is also

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1. The letter sent to Brenton Bank, a former trustee, had the following inscription in Lyle's handwriting: "Hello. I realize you people no longer have any interest in the Spencer Trust. But, I have mentioned your name in this important letter + since its 'filed' I thought that as a curtesy [sic] you should know about it." Signed, Lyle S.

supported by substantial evidence and will not be disturbed by this court.

III. Libel Per Se. Lyle next argues that the trial court erred in finding several statements libelous per se. Because the jury found no abuse of privilege in the publication of the September 19 letter, we need only address those statements found in the letters of October 22 and October 29. The trial court found the following portions of the letters constituted libel per se:

Portions of the letter of October 22, 1988:

> "You know that the above first two demands in Harold's latest Petition are lies."
>
> "You know Harold cheated me as his hired man, cheated his landlady, skipped out on the Sheriff, & efforts to stricken [sic] his brothers from the land."

Portions of the letter of October 29, 1988:

> "Harold not only objected to me not paying cash rent, but also objected to me not storing beans at the farm and charging the Trust for chemical application: both of which were lies. I have yet to see any retraction concerning these lies."
>
> "Remember who we're dealing with, a man who tries to steal from his brother, a man who did steal from his landlady, hides from the sheriff, tries to stricken [sic] his brothers from their birthplace forever; the list is endless."
>
> "I never did plan to ask the trust for any re-payments [sic] until Harold started his last round of attacks on my farming operations; untruthful attacks."
>
> "For the sake of arguement [sic], lets [sic] say he'll stand behind his withdrawal of cash rent, what about the lies filed in court against me?"

> "My first order of business will be to file a petition against Harold Spencer for damages when he filed false court documents against my farming operation and for causing unrest in the family Trust."

As stated previously, libel in Iowa is the malicious publication expressed in writing which tends to injure the reputation of another person or to expose that person to public hatred, contempt, or ridicule. Certain statements are libelous per se,

> which means they are actionable in and of themselves without proof of malice, falsity or damage. In actions based on language not libelous per se, all of these elements must be proved * * * before recovery can be had, but when a statement is libelous per se they are presumed from the nature of the language used.

Vojak, 161 N.W.2d at 104. Words are libelous per se if they are of such a nature, whether true or not, that the court can presume as a matter of law that their publication will have a libelous effect. Haas v. Evening Democrat Co., 252 Iowa 517, 522, 107 N.W.2d 444, 447 (1961).

An attack on the integrity and moral character of a party is libelous per se. Shaw Cleaners & Dyers, Inc. v. Des Moines Dress Club, 215 Iowa 1130, 1137, 245 N.W. 231, 234 (1932). It is therefore libel per se to make a published statement accusing a person of being a liar. Prewitt v. Wilson, 128 Iowa 198, 203, 103 N.W. 365, 367 (1905). When language used is unambiguous, the issue of whether the publication is defamatory per se is for the court. Vinson, 360 N.W.2d at 116. Many of the statements found libelous per se by the trial court included

accusations that Harold was a liar. The trial court was right in instructing the jury that these accusations were libelous per se. The other statements accused Harold of "cheating" or filing false court documents. We find no meaningful distinction between accusing a person of being a liar and accusing a person of cheating. Nor do we find any distinction between accusations of lying and filing false documents. We therefore conclude the trial court was right in instructing the jury that these accusations were libel per se.

We reject Lyle's contention that the statements were ambiguous or capable of more than one meaning.

IV. Damages. Finally, Lyle contends the damages awarded ($25,000 compensatory and $35,000 punitive) were excessive.

In reviewing damages awards this court does not invade the province of the jury. We will not alter a verdict unless it is flagrantly excessive, is so out of reason as to shock the conscience, is the result of passion or prejudice, or is lacking in evidentiary support. Carter v. Wiese Corp., 360 N.W.2d 122, 133 (Iowa App. 1984) (citation omitted).

When a publication is libelous per se general damages are presumed and special damages need not be shown. Vojak, 161 N.W.2d at 107. Statements found to be libel per se are "actionable in and of themselves without proof of * * * damage." Vinson, 360 N.W.2d at 115 (emphasis added).

When a qualified privilege has been lost by abuse, its protective cloak is also lost. See Robinson, 242 Iowa at 1133, 49 N.W.2d at 528; cf. Vojak, 161 N.W.2d at 107 ("Once the jury finds actual malice * * * the protective cloak of the privilege is lost."). The plaintiff is again accorded the presumption that damage resulted from the publication. Vojak, 161 N.W.2d at 107.

A. Compensatory Damages. Even in cases of libel per se, damages cannot be awarded based upon the writings alone and no other evidence. Kelly v. Iowa State Educ. Ass'n, 372 N.W.2d 288, 300 (Iowa App. 1985) Recovery is for the damages that are the natural and probable consequences of the libel. Id. (citing Brown v. First National Bank of Mason City, 193 N.W.2d at 555). Here the jury was presented with evidence upon which the consequences of the libel could be judged. Harold presented evidence that he had a good reputation in the community before the letters were published. Following the publications, persons heard rumors of the allegations and persons in other communities received copies of those allegations. He also presented evidence of emotional distress, depression, inability to sleep, and inability to concentrate. Substantial evidence supports the award of compensatory damages. The amount was not so flagrantly excessive as to require a reversal. We also find the award was not a result of passion or prejudice. We affirm.

B. Punitive Damages. The jury found that Harold had proven by a preponderance of clear, convincing, and satisfactory evidence that Lyle's conduct constituted willful and wanton disregard for the rights of another and that the conduct was directed specifically at Harold. Lyle contends the punitive damages awarded should be set aside because Harold did not prove actual malice and because the award was excessive.

In Jones v. Palmer Communications, Inc., 440 N.W.2d 884, 900 (Iowa 1989), our supreme court found that where the controversy leading to a libel action involving the media is a matter of public concern the plaintiff must demonstrate actual malice to receive an award of punitive damages. This holding is not controlling in the case before us; no media is involved, no public figures are involved, and no issue of public concern is involved.

Nor was actual malice necessary to overcome the privilege accorded Lyle. The jury determined Lyle abused that privilege and he therefore lost its protection. Cf. Vinson, 360 N.W.2d at 117 (failure to instruct jury on qualified privilege was not prejudicial error where jury instructed punitive damages were not to be awarded unless plaintiff proved actual malice).

Punitive damages are never available as a matter of right, but under certain circumstances may be allowed in the jury's discretion to punish the defendant and to discourage others from similar wrongful conduct. McCarthy

v. J.P. Cullen & Son Corp., 199 N.W.2d 362, 368 (Iowa 1972); see also Iowa Code Chapter 668A (1989) (punitive damages not available unless conduct of defendant constituted willful and wanton disregard for the rights or safety of another). No punitive damages are permitted unless actual and substantial compensatory damages are first shown. McCarthy, 199 N.W.2d at 368. The amount of punitive damages must generally be proportionate to the actual damages. Id.

We conclude the award was supported by evidence of willful and wanton conduct on Lyle's part. Additionally, the punitive award of $35,000 is reasonably proportional to the compensatory award of $25,000. We refuse to set aside the award of punitive damages.

For all the reasons stated, the judgment is affirmed.

AFFIRMED.

Schlegel, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I would dismiss. I would find the letters Lyle wrote were an absolutely privileged communication because they were related to a judicial proceeding, Lyle's and Harold's father's trust. The trust of long-term running was established by his father's will.

Neither a lawyer nor a party is liable in Iowa for defamation in statements that have some relation to issues in judicial proceeding. Beck v. Kapalis, 302 N.W.2d 90, 97 (Iowa 1981); Brody v. Ruby, 267 N.W.2d 902, 907 (Iowa 1978). Only some relevance need be shown. Sinnett v. Albert, 188 Neb. 176, 178, 195 N.W.2d 506, 508 (1972).

The three letters were relevant to the trust which was a legal proceeding. The only real question is whether there was material in the letters that was not relevant to the proceedings and whether they were disseminated in such a manner that the privilege did not apply.

The trust followed the parties parents' estates and a feud between these brothers of long-term running. The letters related to the family feud and Lyle's contention the trustee should watch Harold because Lyle found him to be dishonest based on past dealings. They are relevant to the trustee proceedings and Harold's objections.

Harold contends even if the other allegations are not libelous, Lyle's allegations he was dishonest twenty-five years ago are. The burden of showing the proceedings did

not have some relationship to judicial proceedings is on Harold. He must show the challenged letters were not genuinely a part of the proceeding. See In re IBP Confidential Bus. Documents Litig, 797 F.2d 632, 641 (8th Cir. 1986). There is a relationship between Harold's honesty in filing the objections and Harold's earlier honesty. The communication enjoyed an absolute privilege. See Mathis v. Kennedy, 243 Minn. 219, 227, 67 N.W.2d 413, 419 (1954) (alleged defamatory statements that an earlier guardian had been living in adultery with her ward made by current guardian during probate proceedings to oppose final report of earlier guardian who claimed to be wife of ward and thus entitled to money were within scope of inquiry thus absolutely privileged).

Harold argues the communications lose their privilege because of the persons to whom they were mailed. All persons except the two newspapers and legislators had or now have a relationship to the trust. Harold has not shown the letter actually went to the legislators and newspapers. However, even if they did, the mailings did not cause the privilege to be lost. Lyle complained also about the fairness of the system. The legislators and newspapers were individuals and entities whose support and influence may contribute to an improvement of the system. See IBP 797 F.2d at 641.