IN THE COURT OF APPEALS OF IOWA

No. 1-356 / 00-1272
Filed December 28, 2001

FILED

PATRICIA A. WINCKEL,
Plaintiff-Appellee,

vs.

VON MAUR, INC.,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, William R. Eads, Judge.

Von Maur, Inc. appeals from the district court's judgment awarding Patricia Winckel compensatory and punitive damages on claims for false imprisonment, defamation of character, and malicious prosecution. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Richard A. Davidson of Lane & Waterman, Davenport, for appellant.

Robert F. Wilson, Cedar Rapids, for appellee.

Heard by Huitink, P.J., and Miller and Hecht, JJ.

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HUITINK, P.J.

I. Background Facts and Proceedings.

Patricia Winckel sued Von Maur for false imprisonment, defamation of character, and malicious prosecution after a theft charge against her, based on Von Maur's shoplifting allegations, was dismissed by the Linn County Attorney's office. In addition to compensatory damages, Winckel demanded punitive damages, claiming the conduct of Von Maur's employees' was malicious.

Von Maur denied liability under any of Winckel's theories of recovery and denied that its employees' actions were malicious. According to Von Maur's version, Winckel was detained and accused of shoplifting because Terrie Bowers, a loss prevention officer, saw Winckel conceal merchandise in a Von Maur shopping bag and walk toward a store exit. Because Bowers had reasonable grounds to believe Winckel concealed merchandise in her shopping bag, Von Maur claimed it was statutorily immune from liability for false imprisonment. Von Maur also claimed it could not be liable for defaming Winckel because any statements accusing her of shoplifting were made in good faith only to, and in the presence of, store employees and law enforcement authorities. Additionally, Von Maur claimed it could not be liable for malicious prosecution because its employees' only actions were to notify the police of Winckel's alleged shoplifting and sign the required complaint form. Any decision to prosecute Winckel, Von Maur argued, was made by the county attorney's office.

The trial court, over Von Maur's objection, submitted all three of Winckel's theories of recovery to the jury. Von Maur's requested jury instruction explaining qualified privilege was rejected based on the trial court's determination that

statements accusing Winckel of shoplifting were not privileged as a matter of law. Winckel's claim for punitive damages was also submitted over Von Maur's objection.

The jury returned special verdicts awarding Winckel compensatory and punitive damages under each of the theories submitted. Von Maur's motions for judgment notwithstanding the verdict and a new trial were denied, and the court entered judgment in Winckel's favor for $65,000 in compensatory damages and $145,000 in punitive damages plus court costs.

On appeal Von Maur challenges the sufficiency of the evidence supporting submission of any of Winckel's theories of recovery to the jury. Von Maur argues that it, as a matter of law, was immune from liability for false imprisonment based on the undisputed facts in the record. Von Maur also contends any statements accusing Winckel of shoplifting were privileged and the district court should have instructed the jury accordingly. Van Maur further contends it cannot be liable for malicious prosecution for simply reporting this incident to the authorities. Lastly, Von Maur argues that an award of punitive damages was unjustified because the record fails to disclose that its employees' conduct was malicious.

II. Standard of Review.

Our review in this law action is for errors of law. Iowa R. App. P. 4.

III. False Imprisonment.

The elements of proof required to establish false imprisonment are (1) detention or restraint against a person's will, and (2) unlawfulness of the detention or restraint. *Nelson v. Winnebago Indus.*, 619 N.W.2d 385, 388 (Iowa 2000). Under Von Maur's argument, Winckel was not unlawfully detained by its

employees. Von Maur's argument is predicated on Iowa Code section 808.12(3) (1997). Section 808.12(3) provides:

> The detention or search under this section by a peace officer, person employed in a facility containing library materials, merchant, or merchant's employee does not render the person liable, in a criminal or civil action, for false arrest or false imprisonment provided the person conducting the search or detention had reasonable grounds to believe the person detained or searched had concealed or was attempting to conceal property as set forth in section 714.5.

Iowa Code section 714.5 provides in pertinent part:

> The fact that a person has concealed . . . unpurchased property of a store or other mercantile establishment, either on the premises or outside the premises, is material evidence of intent to deprive the owner, and the finding of . . . unpurchased property concealed upon the person or among the belongings of the person, is material evidence of intent to deprive and, if the person conceals or causes to be concealed . . . unpurchased property, upon the person or among the belongings of another, the finding of the concealed . . . property is also material evidence of intent to deprive on the part of the person concealing the . . . goods.

The issue of the existence of reasonable grounds for detention by a merchant is generally a question of fact for the jury. *Lenstra v. Menard, Inc.*, 511 N.W.2d 410, 412-13 (Iowa Ct. App. 1993). However, if the material facts on the issue of reasonable grounds for detention are undisputed, the issue becomes a question of law for the court. *Children v. Burton*, 331 N.W.2d 673, 681 (Iowa 1983) (finding question of probable cause in civil false arrest action was question of law when pertinent facts are not in dispute).

We previously stated:

> It is improper for either the district court or this court to decide whether reasonable grounds existed to believe [plaintiff] had concealed or was attempting to conceal property as set forth in Iowa Code section 714.5. Determination of that issue is for the fact finder. There is no test in the law, other than the trial court or this

> court assuming the role of fact finder, to determine that fact as a matter of law.

Lenstra, 511 N.W.2d at 412-13.

Terrie Bowers testified that her decision to detain Winckel was based on several factors. These included the fact Winckel carried merchandise from one department to another without paying for those items in the appropriate department. She also cited Winckel's unspecified but suspicious use of her handbag, refusal of assistance from sales clerks, and placement of unpurchased merchandise in her shopping bag. Bowers testified she stopped Winckel because she thought Winckel was about to leave the store. The record also indicates Von Maur's store policies permitted customers to carry unpurchased merchandise in Von Maur shopping bags furnished for that purpose. Winckel testified that she told the clerk who gave her the shopping bag that the merchandise placed in her shopping bag was not paid for. Contrary to Bowers' testimony, Winckel claimed she was not leaving the store but was sitting on a couch in the store when Bowers detained her. Because this evidence includes disputed issues of fact on the issue of reasonable grounds, the district court properly declined to find Von Maur's employees had reasonable grounds, as a matter of law, to believe Winckel concealed merchandise in her shopping bag. Von Maur's entitlement to immunity under section 808.12(3) was therefore properly submitted for the jury's consideration.

Because Von Maur did not object at trial to the content of jury instruction nineteen defining reasonable belief, any issue concerning its propriety has not

been preserved for our review. *See Boham v. City of Sioux City*, 567 N.W.2d 431, 437-38 (Iowa 1997).

We affirm on this issue.

IV. Defamation.

Defamation is the invasion of another's interest in reputation or good name. *See Johnson v. Nickerson*, 542 N.W.2d 506, 510 (Iowa 1996). It consists of the twin torts of libel and slander—the former being written and the latter being oral. *Id.* To establish a prima facie case in any defamation action, a plaintiff must show the defendant (1) published a statement that was (2) defamatory (3) of and concerning the plaintiff. *Taggart v. Drake Univ.*, 549 N.W.2d 796, 802 (Iowa 1996).

Whether the defendant's statements could be reasonably understood as defamatory is a matter of law for the court to decide. *Brown v. First Nat'l Bank of Mason City*, 193 N.W.2d 547, 553 (Iowa 1972). If the words used are unambiguous, the court decides as a matter of law whether they are actionable. *Vinson v. Linn-Mar Cmty. Sch. Dist.*, 360 N.W.2d 108, 116 (Iowa 1984). Words susceptible of different meanings and whether they were understood as defamatory are jury questions. *Kiner v. Reliance Ins. Co.*, 463 N.W.2d 9, 14 (Iowa 1990).

Statements that are slander per se are actionable without proof of malice, falsity, or actual harm. *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 139 (Iowa 1996). Statements that attack integrity and moral character are slanderous per se. *Lara v. Thomas*, 512 N.W.2d 777, 785 (Iowa 1994). Other slanderous per se statements include charges of criminal conduct and slanderous imputations

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affecting a person's trade or profession. *Lara*, 512 N.W.2d at 785; *Rees v. O'Malley*, 461 N.W.2d 833, 835 (Iowa 1990).

Communications, which are otherwise defamatory, are not actionable if they are privileged. *Vojak v. Jensen*, 161 N.W.2d 100, 105 (Iowa 1968). The elements of a qualified privilege are: (1) the statement was made in good faith; (2) the defendant had an interest to uphold; (3) the scope of the statement was limited to the identified interest; and (4) the statement was published on a proper occasion, in a proper manner, and to proper parties only. *Theisen v. Covenant Med. Ctr.*, ___ N.W.2d ___ (Iowa 2001). A qualified privilege applies to statements that are defamatory per se but only protects those made without actual malice. *Vinson*, 360 N.W.2d at 116. Actual malice includes statements made with knowledge that they are false or with a reckless disregard for their truth or falsity. *Taggart*, 549 N.W.2d at 804; *Carr v. Bankers Trust Co.*, 546 N.W.2d 901, 904 (Iowa 1996); *Marks v. Estate of Hartgerink*, 528 N.W.2d 539, 546 (Iowa 1995).

Ordinarily, the availability of the privilege is for the court to decide as a matter of law. *Brown*, 193 N.W.2d at 552. Issues of fact defeating the privilege are for the jury to decide. *Higgins v. Gordon Jewelry Corp.*, 433 N.W.2d 306, 309 (Iowa Ct. App. 1988).

Von Maur claims it was entitled to a qualified privilege jury instruction on Winckel's defamation claim. More specifically, Von Maur argues Bowers had a right to report the apprehension of a suspected shoplifter to the police and that her accusatory statements were made only to the authorities and other Van Maur employees who had a corresponding interest in Winckel's circumstances.

Our standard of review concerning alleged error with respect to jury instructions is for correction of errors at law. Iowa R. App. P. 4; *Duncan v. City of Cedar Rapids*, 560 N.W.2d 320, 325 (Iowa 1997). Error in giving or refusing to give a particular instruction does not warrant reversal unless the error is prejudicial to the party. *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994).

In its ruling on Von Maur's motion for judgment notwithstanding the verdict the trial court concluded, as a matter of law, that "Defendant's agent did not have a qualified privilege in communicating these charges against Plaintiff to the police and others." Even if we were to find this conclusion erroneous and determine the court should have instructed the jury on this issue as requested, we cannot say Von Maur was prejudiced by this omission.

The record indicates the trial court instructed the jury that Winckel needed to prove Von Maur defamed her with malice before she could recover punitive damages. Instruction number twenty-five stated:

> To award punitive damages for libel and slander the plaintiff must prove malice. The defendant made statements with malice if the statements were made knowing they were false, or with reckless disregard if the statements were true or false.

Contrary to Von Maur's argument, the court's definition of malice was sufficient to implicate the actual malice necessary to overcome Von Maur's qualified privilege claim. *See Taggart*, 549 N.W.2d at 804; *Carr*, 546 N.W.2d at 904; *Marks,* 528 N.W.2d at 546. Because the resulting damage award necessitated a finding of actual malice, we believe any error in refusing to give a qualified privilege instruction was not prejudicial. *See Vinson*, 360 N.W.2d at 117 (jury award of

punitive damages indicates finding of actual malice sufficient to overcome privilege). We affirm on this issue.

V. Malicious Prosecution.

The required elements of proof to sustain a malicious prosecution claim include:

> (1) a previous prosecution; (2) instigation of that prosecution by the defendant; (3) termination of the prosecution by acquittal or discharge of the plaintiff; (4) want of probable cause; (5) malice on the part of the defendant for bringing the prosecution; and (6) damage to the plaintiff.

Wilson v. Hayes, 464 N.W.2d 250, 259 (Iowa 1990). Von Maur asserts Winckel failed to offer substantial evidence showing that it instigated a criminal prosecution against her. A person may procure the institution of criminal proceedings (1) by inducing a third person, either a private person or a public prosecutor to initiate them, or (2) by prevailing upon a public official to institute them by filing an information. *Lukecart v. Swift & Co.*, 256 Iowa 1268, 1281, 130 N.W.2d 716, 723 (1964); Restatement (Second) of Torts § 653 cmt. d, p. 407-08 (1976). The making of the accusation, however, does not constitute a procurement of the proceedings "if it is left to the uncontrolled choice of the third person to bring the proceedings or not as he may see fit." *Lukecart*, 256 Iowa at 1281, 130 N.W.2d at 724.

The Restatement also provides:

> When a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rule stated in this Section even though the information proves to be false and his belief was one that a reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the

> prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.

Restatement (Second) of Torts § 653 cmt. g, p. 409 (1976). On the other hand, if an informer provides false information that causes criminal proceedings, the informer may be liable under a theory of malicious prosecution. *Rasmussen Buick-GMC, Inc. v. Roach*, 314 N.W.2d 374, 377 (Iowa 1982). Also, if it appears a person's desire to have the proceedings initiated, expressed by direction, request, or pressure, is the determining factor in the official's decision to commence prosecution, the person may be liable for malicious prosecution. *Id.*

The record indicates Von Maur's employees contacted the police and reported their belief that Winckel was shoplifting merchandise at its store. The record also indicates police officers questioned Winckel before taking her into custody. Additionally, an assistant county attorney testified that the ultimate charging decision rested with that office, not with the complaining witness.

Based on these facts, we determine there was insufficient evidence to find Von Maur induced the filing of criminal charges or prevailed upon a public official to file such charges against Winckel. Because Winckel failed to present sufficient evidence of this element of malicious prosecution, the district court erred by denying Von Maur's motion for directed verdict on this issue. We reverse the district court judgment awarding Winckel compensatory and punitive damages for malicious prosecution.

VI. Punitive Damages.

In *McClure v. Walgreen Co.*, 613 N.W.2d 225 (Iowa 2000), our supreme court made the following observations:

> Punitive damages serve "as a form of punishment and to deter others from conduct which is sufficiently egregious to call for the remedy." *Coster v. Crookham*, 468 N.W.2d 802, 810 (Iowa 1991). Mere negligent conduct is not sufficient to support a claim for punitive damages. *Beeman v. Manville Corp. Asbestos Disease Compensation Fund*, 496 N.W.2d 247, 256 (Iowa 1993). Such damages are appropriate only when actual or legal malice is shown. *Schultz v. Security Nat'l Bank*, 583 N.W.2d 886, 888 (Iowa 1998). Actual malice is characterized by such factors as personal spite, hatred, or ill will. *Id.* Legal malice is shown by wrongful conduct committed or continued with a willful or reckless disregard for another's rights. *Id.*

McClure, 613 N.W.2d at 230-31.

Von Maur's challenge to the trial court's submission of this issue to the jury is premised on its claimed right to detain Winckel and its qualified privilege to accuse her of criminal conduct under these circumstances. We have, however, already determined that the existence of either presented substantial factual questions suitable for the jury's consideration. When the earlier-described reasonable grounds evidence, as well as Winckel's testimony claiming Bowers called her a liar and implied that she had shoplifted elsewhere, is viewed in the light most favorable to Winckel, we believe a reasonable juror could find Bowers acted maliciously. The trial court did not err by submitting the punitive damage issue to the jury.

The judgment of the district court is affirmed in part, and reversed in part, and remanded for entry of judgment in conformity with our opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.