

IN THE COURT OF APPEALS OF IOWA

No. 8-065 / 96-2072

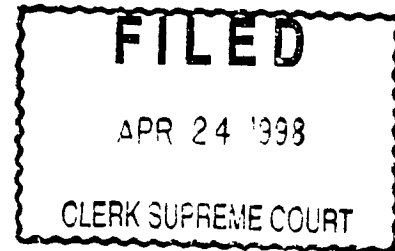
**QUAD-CITIES BASEMENT WATERPROOFING
AND HOME SERVICES, INC., MIKE FOX and
TIMOTHY GERETY,**

Plaintiffs-Appellees,

vs.

CITY OF CEDAR RAPIDS and GILBERT BOXA,

Defendants-Appellants.



Appeal from the Iowa District Court for Scott County, James R. Havercamp,
Judge.

Defendants appeal the judgment entered upon a jury verdict finding them liable
to plaintiffs for defamation. **AFFIRMED.**

Mohammad H. Sheronick, City Attorney, Cedar Rapids, for appellants.

Peter C. Riley of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellees.

Heard by Sackett, P.J., and Vogel and Mahan, JJ.

MAHAN, J.

Defendants City of Cedar Rapids and Gilbert Boxa appeal the jury's findings in favor of plaintiffs Quad Cities Basement Waterproofing and Home Services, Inc., Mike Fox, and Timothy Gerety ("QCB"). Defendants contend: (1) the district court erred when it granted QCB's motion to reconsider the transfer of the case to Linn County; (2) there was insufficient evidence to support the jury's findings of actual malice and causation of damages; and (3) the damages are excessive and unsupported by the evidence. We affirm.

QCB installed drainage and sump pump systems in the Cedar Rapids area under the name Cedar Rapids Basement Waterproofing. QCB obtained customers through advertisements and telemarketing. The work done by QCB usually involved the removal of a portion of the basement floor and the installation of a drain tile along the interior perimeter of the basement which would then drain into a sump pump well. The sump pump would then pump the water out of the basement.

The City contends it received complaints about the workmanship and conduct of QCB prompting the City to investigate. The City alleges it discovered QCB had failed to comply with the City's insurance certification of contractors. The City also maintains it learned of basement walls collapsing due to floors being broken and lateral support being compromised. Gilbert Boxa determined building permits were required for the work being done by QCB and other companies doing similar work. Boxa went to the *Cedar Rapids Gazette* to ask them to publish an article on the

subject. Boxa contends he went to the *Cedar Rapids Gazette* in order to reach the widest possible audience and inform as many people as possible about the new building permit requirement.

On July 9, 1993, an article appeared in the *Cedar Rapids Gazette* entitled “CR Changes Rules After Complaints on Waterproofing Firm.” The article contained a quote attributed to Boxa: “‘We’re going to do what we can to rectify the situation and shut them down.’ He said. ‘I’m going to do whatever I can to put them out of business.’” According to Boxa, the article misquoted what he said and he went immediately to the paper to correct the situation. Boxa contends he actually told the paper he was going to do what he could to rectify the situation or shut them down. On July 10, a follow-up article appeared clarifying Boxa’s position. “‘It’s not my intention to put anyone out of business,’ he said Friday, ‘I just want to get a handle on it. If they’re going to work in town, let’s do it to an acceptable fashion.’”

Following the articles, QCB lost several contracts in the Cedar Rapids area. Also, one of QCB’s competitors circulated the article in the Quad Cities. QCB alleges this led to a decline in sales in the Quad Cities area, the cancellation of contracts, and a loss of profits. Ultimately, QCB went out of business.

I. VENUE. Defendants allege the trial court erred in vacating the transfer to Linn County. We review for errors of law. Iowa R. App. P. 4.; *Becker v. Wright*, 540 N.W.2d 250, 253 (Iowa 1995). A decision to grant or deny a motion for change of venue rests in the sound discretion of the trial court. *Becker*, 540 N.W.2d at 253.

However, where venue is proper in more than one county, a court may not exercise discretion to say one of the counties is wrong for the purpose of a change in venue sought under Iowa Rule of Civil Procedure 175(a). *Slattery v. Iowa Dist. Court*, 442 N.W.2d 82, 84 (Iowa 1989).

Where an action is maintainable in any one of two or more counties and is properly brought in one of such counties, it is not removable to the other unless there exists some statutory ground for removal other than the bringing of suit in the wrong county.

Id.

We will reverse the trial court only upon a finding of an abuse of discretion. *Becker*, 540 N.W.2d at 253. We will not find an abuse of discretion unless such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Selestian*, 515 N.W.2d 356, 358 (Iowa App. 1994).

Personal actions must usually be brought in a county in which some of the defendants actually reside. Iowa Code § 616.17 (1995). However, section 616.18 has a recognized exception. *Becker*, 540 N.W.2d at 253.

Actions arising out of injuries to a person or damage to property may be brought in the county in which the defendant, or one of the defendants, is a resident or *in the county in which the injury or damage is sustained*.

Iowa Code § 616.18 (emphasis added). It is clear that section 616.3(2) is also an exception as it states actions against public officers, acting under color of the public office, must be brought in the county where the cause, or some part thereof, arose. *See Board of Trustees v. Board of Supervisors*, 228 Iowa 1095, 1101, 291 N.W. 141,

145 (1940) (the legislature saw fit to say nothing about the venue being in the county of the residence of such officials, but only in the county "where the cause or some part of thereof arose").

[Generally, u]nder the venue statutes a plaintiff bringing a cause of action in good faith is entitled to invoke the venue that accords with the allegations of the petition, regardless of the possibility that venue may fall with the suit on plaintiff's failure to maintain the merits of the suit.

92 C.J.S. *Venue* § 6 (1955). However, the party objecting that it has been sued in the wrong county has the burden of proving the essential facts submitted. *Id.* at § 74.

In its petition, filed in Scott County, QCB alleged Boxa made defamatory statements, published in the *Cedar Rapids Gazette*, that were widely circulated by QCB's competitors resulting in damages from interference with prospective and existing contracts in Scott County. Boxa and the City moved to change venue to Linn County pursuant to Iowa Rule of Civil Procedure 175. Defendants alleged: (1) Iowa Code section 616.3 provides that actions against public officers must be brought in the county where the cause arose, and Boxa was a public officer; (2) Iowa Code section 616.17 requires personal actions be brought in the county where the defendant actually resides; and (3) Iowa Code section 616.16 implies that actions against municipal corporations must be brought in the county in which the municipal corporation is situated. Defendants also filed a statement supporting their motion. In it, they alleged the statements attributed to Boxa were made in his scope of employment as the Director of Building and Zoning for the City of Cedar Rapids.

The trial court initially transferred venue to Linn County, pointing out QCB did not file a resistance to the motion. QCB filed a motion to reconsider, noting a resistance was timely filed prior to the court's ruling on the change of venue. In its resistance, QCB contended Boxa was not a public officer within the meaning of section 616.3(2).

Upon reconsideration, the trial court ruled:

In the present case, Plaintiffs allege that they have suffered economic loss in Scott County due to Defendants' alleged defamatory statements. Accordingly, unless Defendant Gilbert Boxa is a public officer within section 616.3(2) of the Code, venue is proper in Scott County.

.....
In order to establish that Scott County is the wrong county under Rule of Civil Procedure 175, Defendants must show that Boxa is a public officer within section 616.3(2). In light of [*State v. Taylor*, 260 Iowa 634, 144 N.W.2d 289 (Iowa 1966)], Defendants have failed to meet this burden.

The trial court then granted QCB's motion to reconsider and vacated the transfer to Linn County.

The defendants had the burden of proving the essential fact submitted, Boxa was a public official. In order to prove Boxa was a public official the defedants needed to prove the five essential elements that make a public employee a public office. They are:

- 1) The position must be created by the constitution or legislature or through authority conferred by the legislature. (2) A portion of the sovereign power of government must be delegated to that position. (3) The duties and powers must be defined, directly or impliedly, by the legislature or through legislative authority. (4) The duties must be performed independently and without control of a superior power other

than the law. (5) The position must have some permanency and continuity, and not be only temporary and occasional.

Taylor, 260 Iowa at 638, 144 N.W.2d at 293. Defendants attempted to rely solely on their contention plaintiffs, in their petition, had made an admission to Boxa being a public official. They made no other offer of proof, nor did they request an opportunity to present other proof.

We have reviewed the petition filed by QCB and, despite defendants contentions, fail to find such a reference by plaintiffs. QCB referred to Boxa as being "employed by the City of Cedar Rapids as the head of the Cedar Rapids Building Department." This does not rise to an admission Boxa is a city official.

We find the trial court correctly applied *Taylor* and determined defendants failed to meet their burden of proving why venue was inappropriate. Thus, the trial court did not abuse its discretion when it refused to transfer venue to Linn County under 616.3(2).

The trial court did not address section 616.16. QCB contends this section only applies where the district court convenes in more than one place in the county. Defendants admit this section is not truly applicable to this case. We find this statute is not applicable to this case.

For purposes of section 616.18, an injury is sustained where the events triggering the lawsuit occurred. *Becker*, 540 N.W.2d at 253. In *Becker*, James Becker was criminally charged in Benton County. *Id.* at 252. A related child-in-

need-of-assistance action was also brought in Benton County. *Id.* The criminal charges were later dismissed. *Id.* Becker and three others later filed a petition in Linn County alleging malicious prosecution. *Id.* Two members of the Benton County Sheriff's Department and Benton County were named as defendants. *Id.* Becker's girlfriend claimed she worked in Linn County and a newspaper article about the criminal action against Becker was circulated at her place of employment. *Id.* She also claimed she and her children had to go to Linn County to see their attorney and these trips disrupted her employment. *Id.* Becker asserted similar damages. *Id.* The supreme court determined:

Here, the events triggering the plaintiffs' lawsuit all occurred in Benton County. It was there that Jim Becker was arrested, that the criminal charges were filed, that a restraining order prohibiting him from having any contact with Rickels children was issued, and that the child-in-need-of-assistance action was filed. Any injury to plaintiffs' persons or damage to their property was sustained for purposes of section 616.18 in Benton County.

Id. at 253. The court further stated, "we do not believe the legislature intended to allow venue to lie in any county where collateral consequences related to the action complained of might be felt." *Id.* at 254.

We find, unlike *Becker*, the events giving rise to this case did not all occur in Linn County. In this case, QCB sustained actual injuries in Scott County, not collateral consequences. We find Scott County was an appropriate venue under Iowa Code section 616.18. Therefore, under the reasoning of *Slattery*, the trial court did

not have discretion to change venue under the rule 175 motion presented by defendants. *Slattery*, 442 N.W.2d at 84. The trial court did not abuse its discretion when it vacated the transfer to Linn County.

II. SUFFICIENCY OF THE EVIDENCE. A jury's findings of fact in a law action are binding on appeal if supported by substantial evidence. *Fox v. Interstate Power Co.*, 521 N.W.2d 762, 764 (Ct. App. 1994). Evidence is substantial if reasonable minds would find it adequate to reach the same conclusion. *Id.* Even if we might draw a contrary inference from the evidence, we may not substitute our view of the evidence for the jury's view. *Id.* We are obligated to view the evidence in the light most favorable to the jury verdict. *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 144 (Iowa 1996).

The gist of a defamation action is the publication of written or oral statements that tend to injure another's reputation or good name. *Binner v. Ottumwa Community Sch. Dist.*, 549 N.W.2d 295, 300 (Iowa 1996). The trial court determined QCB had to prove actual malice to prevail in this case. Neither party challenges this determination. To prove actual malice, QCB had to prove the statements were made with knowledge they were false or they were made with a reckless disregard for their truth or falsity. *Id.* QCB also had to prove the statements were made with an intent to inflict harm through falsehood. *Id.* Actual malice must be proved by clear and convincing evidence. *Id.* Once these are proved, the person making the defamatory

statements is liable for damages resulting from the repetition of the statement if the repetition was reasonably foreseeable. *Huegerich v. IBP, Inc.*, 547 N.W.2d 216, 222 (Iowa 1996). A plaintiff is required to meet both the “but for” test of causation and the Restatement “substantial factor” test. *Hollingsworth v. Schminkey*, 553 N.W.2d 591, 597 (Iowa 1996).

Boxa and the City make several contentions regarding the lack of proof by QCB. Among their contentions are: (1) the article cannot be taken as proof of intent to harm QCB because QCB was not mentioned at all, the article uses the name Cedar Rapids Basement Waterproofing; (2) the statements are opinion, not factual claims; (3) there is no evidence Boxa knew his statements contained a falsehood, instead Boxa had a sincere belief Cedar Rapids Basement Waterproofing was doing substandard work; (4) Boxa’s actions after the July 9 article, including going to the paper to complain, show a misconception was created by the first article and Boxa wanted to clear it up; and (5) the July 9 article contained blatant factual errors undermining the contention Boxa was accurately quoted. Regarding causation of damages, Boxa and the City maintain there was no evidence of causation. They contend the article shows Cedar Rapids Basement Waterproofing had problems prior to the article. The remaining complaints object to the court’s admission of the evidence, not to the jury’s determination.

QCB contends it presented ample evidence to support the jury’s finding of actual malice and causation of damages. QCB alleges the *Cedar Rapids Gazette*

reported a number of falsehoods by Boxa and Sedlacek. Among the alleged falsehoods were: (1) there had been a number of complaints against QCB, but the City could only identify two people who had complained; (2) QCB's insurance had expired; and (3) QCB had performed a hatchet job and sold unneeded work. QCB contends Boxa's quote in the July 9 edition of the *Cedar Rapids Gazette* provided the jury with evidence he intended to harm QCB with his false statements. QCB maintains causation of damages was shown by: (1) eighty-seven canceled contracts; (2) use of the article by a competitor causing loss of business; and (3) telemarketers meeting with customer resistance. QCB argues the contentions about the admission of the evidence should not be addressed by this court because no authority has been cited and these issues have been raised inappropriately.

"Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue." Iowa R. App. P. 14(a)(3); *Genetzky v. Iowa State Univ.*, 480 N.W.2d 858, 861 (Iowa 1992). We find the arguments regarding the admission of evidence are waived.

When viewing the evidence in the light most favorable to the verdict, we find reasonable jurors could believe the evidence presented by QCB proved defendants defamed and caused harm to plaintiffs.

III. AMOUNT OF DAMAGES. In challenging the damages awarded by the jury as excessive, Boxa and the City again challenge the admission of evidence by the trial court. As no authority is cited for their contentions, we find the issue has been

waived. We will determine whether the damages are excessive based on the evidence as presented to the jury.

We must determine whether the jury was within its bounds in determining the natural and probable consequences of the statements justified the amount of the verdict. *Rees v. O'Malley*, 461 N.W.2d 833, 839 (Iowa 1990). In determining whether the evidence supports the verdict, we must view the evidence in the light most favorable to the jury's verdict. *Id.* If the jury's verdict is so flagrantly excessive that it is unfair and fails to do substantial justice, it is our duty to correct the error by granting a new trial or requiring a remittitur on pain of the grant of a new trial. *Id.* at 839-40. In making our determination, we must abide by the principle that each case depends upon its own facts, and precedents are of little value. *Id.* at 840.

Richard Schneider testified the value of QCB prior to its failure was between \$400,000 and \$450,000. We find the jury's award of \$405,380 is not so flagrantly excessive that it is unfair and fails to do substantial justice.

For these reasons, we affirm the decision of the trial court.

AFFIRMED.